



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2021/52108

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES:  
NO  
(3) REVISED.

In the matter between:

RENASA INSURANCE COMPANY LIMITED

Applicant

and

B AND L TOWING 24 HR ASSIST (PTY) LTD

Respondent

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**JUDGMENT**

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FRANCIS J

1 The applicant brought an application to order the respondent to return a 2015 Mercedes Benz E250 CGI Coupe with registration number HV 31 LB GP and chassis number WDD2073362F25987 (the vehicle) alternatively ordering the sheriff to attach and remove and hand the vehicle to the applicant. In the alternative the applicant sought an order for the return of the vehicle and in the

further alternative that the sheriff attach and remove the vehicle to the applicant against security provided by the applicant in the form of R64 000 held in trust by the applicant's attorney further alternatively such form of security that the registrar may direct which security is provided pending the outcome of the action to be instituted by the respondent against the applicant (the replacement security). The replacement security shall lapse should the respondent fail to institute an action in respect of the amount claimed against the applicant within thirty days of date of this order.

2. The application was opposed by the respondent on the grounds that it is entitled to retain the vehicle based on a debtor/creditor lien and on an enrichment lien. Further that the respondent has a right of retention by virtue of a salvage lien over the vehicle. Further that the court should consider all the facts in this application when exercising its discretion as far as the provision of security is concerned and should not exercise its discretion in favour of the applicant.
3. The applicant is an insurance underwriter and *inter alia* underwrote an insurance policy taken out by Dumisani July Zwane (the insured) and became the owner of the vehicle after it was written off.
4. On 22 September 2021, the insured was involved in a sole motor vehicle accident and he was the driver of the vehicle which was as a result thereof damaged beyond repair.

5. One of the respondent's towing vehicles attended the accident scene and the insured entered into a towing agreement with the respondent to *inter alia* provide professional services in terms of clause 4 of the agreement. In terms of the agreement the insured agreed to be held liable for all of the related costs of services associated therewith and in the amounts set out in the agreement.
  
6. In terms of the agreement signed by the insured, he agreed to pay the following costs for services rendered by the respondent:
  - 6.1 Towing fee of R8 000.00;
  - 6.2 Administration fee of R2 000.00;
  - 6.3 Recovery fee of R1 500.00 (vehicle plunged into a ditch, and had to be recovered by the respondent);
  - 6.4 Second tow costs of R1 500.00;
  - 6.5 Security fee of R750.00 per day; and
  - 6.6 Storage fee of R750.00 per day.
  
7. The vehicle was towed from the accident scene to Renew-It Panel Beaters in terms of the agreement. It is the respondent's case that Renew-It Panel Beaters refused to accept delivery of the vehicle since it was a write-off or damaged beyond repair. The respondent informed the insured of same and advised the insured that a second towing will take place and the vehicle would be towed to the respondent's storage premises at 3 Boerboel Place, Austen View, Midrand. This is disputed by the applicant which had pointed out that there is no confirmatory affidavit on the part of the towing driver that deals with the agreement that he had concluded with the insured driver.

8. The applicant was aware that the vehicle had been towed to Renew-It Panel Beaters which had refused to take the vehicle because it was a write-off or total loss on 23 September 2021 which was one day after the accident.
9. A dispute arose between the applicant about the exact nature of the charges that the respondent was seeking from the applicant before the vehicle could be released to the applicant.
10. After the parties had reached a deadlock the applicant brought this application.
11. The court is required to decide the following issues:
  - 11.1 whether the respondent is entitled to retain the applicant's vehicle based upon a debtor/creditor's lien and enrichment lien;
  - 11.2 whether the court should exercise its discretion in favour of the applicant and replacing the respondent's security;
  - 11.3 whether the applicant has tendered sufficient security.
12. The applicant's case is that the purpose of this application is to obtain from the respondent the vehicle against replacement of the respondent's alleged lien by alternate security. It has approached the court on the basis of the *rei vindication* in that it is the owner of the vehicle and that the replacement security that it had provided is sufficient.

13. The respondent opposes the relief sought by the applicant on the grounds that it has a lien over the vehicle as a result of an agreement between it and the insured. That agreement was not concluded with the applicant. The replacement security that the applicant has provided is not sufficient and that the court should not grant the applicant the relief that it is seeking.
14. It is common cause that the applicant is the owner of the vehicle and that the respondent is in possession thereof.
15. It is trite that both a debtor/creditor and salvage lien is part of our law and that a salvage or improvement lien may be enforced against the world whereas a debtor/creditor lien can only be enforced against the party to the contract.
16. This court has a discretion in the event of the applicant being mistaken in relation to the lien and the respondent's entitlement to retain the vehicle as security, to replace such security. This substitution of security also relates to enrichment liens.
17. It is trite that in terms of a debtor/creditor lien a creditor may retain the item but may enforce same only as against the creditor. The lien may be utilised to recover the contract price only. To enforce such a debtor/creditor lien, the respondent would have to show that it has complied with the agreement and that it is entitled to claim in terms of the agreement between itself and the insured.

18. For the respondent to succeed in its claim under a debtor/creditor lien and in terms of the agreement it must show that it has done what was required to do in terms of the agreement. If the respondent fails to show that it has complied with the agreement, it is not entitled to claim the contract sum.
  
19. In terms of such agreement, the respondent was obliged to tow the vehicle to Renew-It Panel Beaters. Accordingly, in terms of the agreement and having regard to the terms thereof, the respondent was obliged to have towed the vehicle to Renew-It Panel Beaters. However, I do not deem it necessary to express any views on this issue since this is a matter that will have to be dealt with in an action to be instituted by the respondent against the applicant. A further issue that will arise is whether the respondent can succeed with this type of a lien since it is clear that the applicant did not contract with the respondent nor was it acting as the agent of the insured.
  
20. A salvage or improvement lien is a lien which the possessor of an item may exercise as against someone else until he has been paid for his real expenses and labour but only to the maximum by which the owner has been enriched.
  
21. For the respondent to succeed with a salvage or improvement lien, the respondent must show:
  - 21.1 that it is in lawful possession of the object;
  - 21.2 that it obtained the possession of the item in a lawful manner;
  - 21.3 that it incurred expenses necessary for the salvation or useful

improvement of the item;

21.4 that it incurred expenses on the item and that the owner thereof was unjustly enriched;

21.5 its actual expenses and the enrichment of the applicant;

21.6 the applicant's enrichment was unjustified and that there was no contractual arrangement between the parties.

22. The applicant contended that the court should exercise its discretion in the present instance having regard to the fact that it is clear that the respondent is abusing its entitlement to retain to attempt to increase its claim as against the applicant in circumstances where the applicant has tendered replacement security and where there is a dispute in relation to the quantum of the respondent's claim. It contended further that there is certainly no basis upon which the respondent should be entitled to retain the item and to allege that its claim is increasing whilst it retains same for its own benefit. This so it was contended was purely an abuse. The respondent continued to increase its claim despite the fact that it was now holding the vehicle for its own benefit and that it did not want to part with the vehicle for replacement security as it was of the view that the debt increased daily, which was of course fallacious.

23. Since the respondent holds for its own account and stores the vehicle as a result of the fact that it alleges that it has security there over, the question that will arise which I do not have to decide is whether it is still entitled to such storage as it is not storing the vehicle for the benefit of the applicant but for its

own benefit.

24. The issue of the salvage or improvement lien will have to be dealt with fully in the action proceedings to be instituted by the respondent against the applicant. It becomes unnecessary for me to deal with the arguments raised by the applicant that the respondent has given no evidence in relation thereto that the applicant has been enriched in any manner or form nor the extent of the applicant's alleged enrichment and relies purely on its debtor/creditor lien and whether the vehicle had been obtained lawfully by the respondent. A further issue that will arise is what rates are applicable where the vehicle is insured at the time that it was towed away.
25. There is clearly a dispute of fact in this application. I deem it necessary not to express any views in this matter since I am mindful that an action will have to be instituted by the respondent where the issues that arises in this application will have to be determined by the trial court.
26. One of the issues that needs to be determined is the question whether the insured driver agreed after the vehicle had been towed to Renew-it Panel Beaters in Sandton for it to be towed further to the respondent's premises. The agreement itself provides that any further towing had to be authorised in writing and whether any such written authority was given to tow the vehicle to the respondent's premises. A further issue that will have to be decided is whether the storage charges that the respondent was charging was agreed to and reasonable. A further issue that will have to be dealt with is under what



circumstances the insured had signed the delivery note and whether he was advised what the rates set out in the agreement.

27. This is clearly a matter that requires me to use my discretion and to order the respondent to institute an action where all the issues that arises will be dealt with. I am therefore not inclined to grant the applicant the relief that it is seeking or to dismiss the application as requested by the respondent.
28. Both parties sought punitive costs order against each other. The issue of costs will be costs in the action that the respondent must institute against the applicant.
29. In the circumstances the following order is made:
  - 29.1 The respondent is to deliver to the applicant the 2015 Mercedes Benz E250 CGI Coupe with registration number HV 31 LB GP and chassis number WDD2073362F25987 against the security provided by the applicant in the form of R64 000.00 held in trust by the applicant's attorney pending the outcome of an action to be instituted by the respondent against the applicant (the replacement security).
  - 29.2 The respondent is to institute action against the applicant for the disputed towing and/or storage charges within 30 days of date of this order.
  - 29.3 The replacement security shall lapse should the respondent fail to

institute an action in respect of the amount claimed against the applicant within 30 days from date of this order.

29.4 Costs are costs in the action to be instituted by the respondent.

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FRANCIS J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION

FOR APPLICANT : J G DOBIE INSTRUCTED BY GERRIE NEL  
INCORPORATED

FOR RESPONDENT : F MAJA OF MAJA ATTORNEYS

DATE OF HEARING : 12 APRIL 2023

DATE OF JUDGMENT : 1 DECEMBER 2023

*This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 12h00 on 1 December 2023.*