



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1093/2012

In the matter between:

**SWAZI SKY BLUE INVESTMENTS
(PTY) LIMITED**

Applicant

And

SAFMARINE SWAZILAND (PTY) LIMITED

Respondent

Neutral citation: *Swazi Sky Blue Investments (Pty) Limited v Safmarine Swaziland (Pty) Limited (1093/2012) [2015] SZHC 143 (04th September 2015)*

Coram: M. Dlamini J.

Heard: 7th August 2015

Delivered: 04th September, 2015

Summary: The applicant, by means of motion proceedings prays for an order to compel respondent to release a number of motor vehicles. Respondent opposes the application on the basis that he holds a lien over the motor vehicle for storage costs due by applicant.

Pleadings

[1] The applicant averred in its founding affidavit:

“5. In around the 14th June 2011 the Respondent, without a court order and / or Applicant’s consent, detained seven motor vehicles belonging to Applicant, which motor vehicles are hereunder described.

- a) MAKE; HYUNDAI GETZ
ENGINE NO.: G4ED5111298
CHASSIS NO.: KMHBU31BR5U110576
REGISTRATION NO.: SFVV359D
- b) MAKE; HYUNDAI TUCSON
ENGINE NO.: G4GC4134534
CHASSIS NO.: KMHJN81BR5U084576
REGISTRATION NO.: SFQ3550Z
- c) MAKE; FORD MONDEO
ENGINE NO.: 4C00930
CHASSIS NO.: WF04XXGBB44C00930
REGISTRATION NO.: SFP7999S
- d) MAKE; HYUNDAI GETZ
ENGINE NO.: G4ED4017887
CHASSIS NO.: KMHBU31BR5U097842
REGISTRATION NO.: SFV508R
- e) MAKE; BMW
ENGINE NO.: A346G729N42B20A
CHASSIS NO.: WBAAZ72040NG09563
REGISTRATION NO.: SCQ1131Z

f) MAKE; NISSAN URVAN
ENGINE NO.: TD27655652
CHASSIS NO.: JNIMC4E24Z0605386
REGISTRATION NO.: GR8184Y

g) MAKE; DAIHATSU
ENGINE NO.: 6442551
CHASSIS NO.: JDAS200VOO1000496
REGISTRATION NO.: GR8982K

6. *The said unlawful detention of the motor vehicles do date persists.*

AD BRIEF BACKGROUND

7. *In around the 12th June, 2011 the Respondent mistakenly released five (5) motor vehicles to one Fred Asiamah a separate and distinct person who has no relationship with Applicant when the said Freddy had not paid the requisite fees before such release.*

7. *Consequent to such mistaken release the Respondent then detained Applicant's motor vehicles as mentioned in paragraph 5 above, and Applicant was advised that such detention will persist until Freddy paid the amounts demanded by Respondent.*

8. *In around September 2011 I paid the said amounts and Applicant went to request the release of its motor vehicles and it is then that payment of the sum of E194 000-00 (One Hundred and Ninety Four Thousand Emalangeni) was demanded by the Respondent claiming that same represented the container's storage costs calculated from the date of the unlawful detention of the said motor vehicles.*

AD PRESENT APPLICATION

9.1 *In the circumstances, it is clear that the Respondent wants to be unjustly enriched at the expense of the Applicant."*

[2] Respondent answered:

"5.1 *Prior to responding to this paragraph, I deem it appropriate to set out very briefly the relationship between the Applicant and the Respondent. The Respondent is an international shipping company (termed "the carrier") who transports cargo primarily by sea and rail from one country to another.*

- 5.2 *The transportation is done in accordance with international shipping law and subject to the customs regulations in the respective countries that goods are being shipped into.*
- 5.3 *In the instant application, the motor vehicles referred to in this paragraph were shipped by Singapore Motors (Pte) Ltd utilizing the services of the Respondent to the Applicant Swazi Sky Blue Investments (Pty) Limited (termed the Consignee).*
- 5.6 *Upon arrival at its final destination, before the carrier can release any consignment, that consignment must be cleared by the customs department of that particular country and, most importantly, the original bill of lading must be produced to the carrier in order to obtain release of the cargo.*
- 5.7 *Although errors occur from time to time, General Shipping Law dictates that goods consigned from one party to another can only be released upon production of the original bill of lading to the carrier.*
- 5.9 *The vehicles set out and described in this paragraph were shipped by Yap Yong Sen Star Auto in Singapore to the Applicant in Swaziland in terms of bills of lading number 862310080 a copy of which is annexed hereto marked "B" and bill of lading number 862354922 a copy of which is annexed hereto marked "C".*
- 5.10 *The three vehicles contained in shipment number 862310080 (container number MSKU8254136) arrived in Swaziland on the 8th June 2011.*
- 5.11 *Prior to the arrival of this shipment, and in particular on the 3rd of June 2011 a shipment in respect of bill of lading number 862343353 – container number MSKU9805608 was inadvertently released to the Applicant without the permission of an original bill of lading. When this was discovered, the Applicant was contacted and requested to return the original bill of lading, failing which no further shipment would be released to the Applicant.*
- 5.13 *One month later, on the 5th of July 2011 the vehicles container in shipment / bill of lading number 862354922 (container number PONU8162359) arrived in Swaziland.*
- 5.16 *On the 8th of July 2011, the bills of lading in respect of shipment number 862310080 (annexure "B") were submitted to the Respondent's office in Singapore. At this stage, the cargo had been contained for a period of*

(24) twenty four days due to the failure of the Applicant to produce this documentation. However, inspite of the production of the original bill of lading in respect of this shipment, the custom documentation was still not submitted and therefore the Respondent could not release the shipment into the possession of the Applicant.

5.17 *On the 29th of September 2011 more than three months after the goods had been inadvertently released, the Applicant then surrendered the original bills of landing in respect of shipment number 862343353 to the Respondent's office in Singapore.*

5.19 *The Respondent therefore has exercised a lien over the cargo as it in law entitled to do until such time as the Applicant has paid the detention costs in respect of the said cargo for shipment number 862310080."*

No replying affidavit was filed.

Adjudication

[2] The applicant's Counsel argued vigorously that its cause of action was based on spoliation. The respondent on the other hand disputed spoliation.

Issue

[3] Is this a case of spoliation? Whether the answer is positive or not, in the interest of justice, the end result should be whether respondent is entitled to hold a lien over the goods in the face of the circumstances of this case.

[4] I consider that the averments in the answering affidavit are not in issue for the reason that there was no replying affidavit.

Mandament van spolie

[5] This is a Roman-Dutch law principle, with its origin from common law viz., a bishop who had been dethroned from his see could demand to be restored or *status quo ante* be maintained before the deliberation on the merits of his case. **C. G. Van der Merwe** in the **Law of Things** paragraph 75 states of the principle:

“The essence of the mandament van spolie is to be found in the maxim spoliatus ante omnia restituendus est – the person who has been deprived of his possession must first be restored to his former position before the merits of the case can be considered” (see also Niwo Bonino v De Lange 1906 TS 120 at 122)

[6] **Ota JA in Mormond Electrical Contractors (Pty) Ltd and Shifa Investments (Pty) Ltd, Civil Appeal No.20/2014** stated as the rationale behind the principle:

“It is thus laudable remedy geared towards maintaining the public peace order and security in society, by discouraging self-help activity in order to gain possession of property. Therefore, if a person without due process dispossess another person of property, the court, without enquiring into the dispute, will summarily grant an order for restoration of possession to the applicant.”

[7] The elements on *mandament van spolie* are as follows:

- a) Peaceful and undisturbed possession of the thing;
- b) Unlawful deprivation of such possession [see **C.G. Van der Merwe** para 78 *supra*]

[8] Applying the above elements *in casu*, it is clear from the applicant's founding affidavit that the listed motor vehicles were never at any point in his possession. In as much as that he enjoys the right of ownership over them by virtue of having purchased them from overseas, at all material times, the said motor vehicles never reached his hands or control. The said merchandise were shipped by the respondent from Singapore and have always been in respondent's possession. In the circumstances of the case it cannot therefore be said that the applicant was ever in possession of the motor vehicles. For this reason, the *causa* upon which applicant relies is misconceived.

Lien

[9] In summary the respondent's case is that the motor vehicles under shipment 862343353 (43353) arrived on 3rd of June 2011. These motor vehicles were released to applicant erroneously as applicant had failed to submit pertinent documents such as bill of landing to the respondent. Respondent contends that as a shipping agent, he is duty bound by law to have these documents for purposes of clearance with relevant government authority. Several attempts by respondent to have applicant file the said documents proved futile.

[10] On the 8th of June 2011 another shipment of three (3) motor vehicles arrived for applicant. This was under 862310080 (10080). Respondent decided to detain the said motor vehicles as an attempt to compel applicant to produce the documents in respect of shipment 43353.

[11] The question for determination is whether in the face of the above circumstances the respondent has a right to exercise a lien. It is trite that

the term lien refers to the right of retention or as it were a legally recognized ability to withhold by a lien holder as per his personal right against the owner. Put precisely:

“Did respondent have right to retain the merchandise under (10080) pending production of the bill of lading?”

[12] Our law knows of two classes of lien, viz. enrichment (improvement) lien and debtor /creditor lien. Defining the two lien **Mthiyane DP**, sitting with **Lewis Mhlantla, Saldulker JJA** and **Mathopo AJA** in **Pheiffer v Van Wyk and Others (267/13) [2014] ZA SCA 87 (30 May 2014)** at page 3 wisely pointed:

*“[10] To successfully raise of a lien (enrichment lien it must be alleged and proved that (a) the person has possession of the object;
(b) that the expenses incurred were necessary for the salvage of the property or that it was useful for the improvement of the object (improvement lien).*

[11] The possessor of the property who has a debtor/creditor lien is not required to relinquish possession until such time as the full contractual amount is paid to him.”

[13] The learned Justices continue to stipulate:

“A debtor/creditor lien is not a form of real security. It is based upon a contract and extends to all expenditure which the lien holder has incurred upon the property in terms of a contract express or implied with another party. A lien holder may retain the property as against the contracting party (but not against the third parties) until he has been compensated for the work and costs incurred. This lien does not exist apart from the contract and can be a defence to any vindicatory action.

[12] A real lien (an enrichment lien) is afforded a person who has expended money or labour on another’s property without any prior contractual relationship between the parties. The lien holder is entitled to retain

possession until his enrichment claim has been met. It is an established principle of our law that the owner of the property subject to a right of retention may defeat the lien by furnishing adequate security for the payment of the debt.”

[14] Applying the above to the case *in casu*, it is clear that the respondent, although inadvertently relinquished possession of the thing, that is, shipment 43353. By so doing, they lost the right of retention. They could not claim this right under a different object (*viz.* 10080). If I am wrong in this regard, there is another reason why the defence stands to fail. The defence of lien, whether falling under enrichment debtor / creditor relationship, presupposes a pecuniary obligation. *In casu*, no storage fees were incurred in respect of shipment 43353. However, as appears at paragraph 5.16 of respondent’s answer, it is my considered view that there is a right to retention in so far as shipment 10080 for the reason that by the time the necessary documents to release the merchandise were submitted, respondent had incurred storage cost equivalent to twenty four (24) days and for a further period ending on 20th October 2011 as per paragraph 5.18. This position also applies in respect of shipment 862354922 which, according to respondent, applicant has failed to furnish the necessary documents.

[15] In the final analysis, the following orders are entered:

1. Applicant’s application is dismissed.

2. Applicant ordered to pay costs.

**M. DLAMINI
JUDGE**

For Applicant: S. Jele of Mabila Attorneys

For Respondent: K. Simelane of Cloete / Henwood - Associated