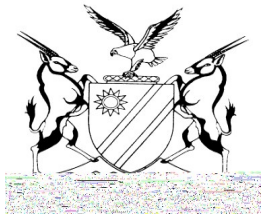

CASE NO.: A 159/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SLABBERT BURGER TRANSPORT (PTY) LTD **APPLICANT**

And

AUTO TECH TRUCK AND COACH CC **RESPONDENT**

CORAM: **MILLER, AJ**

Heard on: 24 July 2012

Delivered on: 10 August 2012

JUDGMENT

MILLER, AJ.: [1] This matter was heard by me on 24 July 2012, as one of urgency. The applicant in its Notice of Motion seeks the following relief:

"

1. Condoning the applicant's failure to comply with the Rules of this Honourable Court relating to forms, service and time periods and permitting this matter to be heard as one of urgency in accordance with the provisions of Rule 6 (12)(a).

2. The respondent be ordered to forthwith restore to the applicant its peaceful and undisturbed possession of the vehicles, to wit-

2. A Volvo mechanical horse, with registration number 256 SBHGP, and

3. Two interlink trailer combinations with registration number 221 BLGP and 222SBLGP respectively.

1. The respondent be ordered to pay the costs of this application, including those costs occasioned by the employment of one instructing and one instructed counsel.

2. Further and/or alternative relief."

[2] At the conclusion of the hearing I issued the following orders:

"

IT IS ORDERED THAT:

4. The applicant's failure to comply with the Rules of this Honourable Court relating to forms, service and time periods and permitting this matter to be heard as one of urgency in accordance with the provisions of Rule 6 (12) (a) is hereby condoned.

5. The relief claimed in paragraph 1.2(b) in the Notice of Motion is granted.

6. Judgment on the remaining relief is reserved until 13 August 2012 at 10h00."

[3] Paragraph 2 of the order was made by agreement between the parties.

[4] What remains for determination are prayers 1.2(a) and 1.3.

[5] The matter has its origin in a motor collision which occurred at about 21h00, on the evening of 05 July 2012. The collision occurred on a stretch of road between the town of Tsumeb and Oshivelo. The applicant's mechanical horse with registration number 265 SBH GP, become damaged in the collision to the extent that the driver thereof was unable to continue his journey.

[6] Consequently, the mechanical horse and the two trailers it was hauling to which I shall refer to as "the vehicle" remained at the scene of the collision with the driver of the vehicle in attendance. Whether or not it was stationary in a position which partially obstructed the road or not is in dispute between the applicant and the respondent.

[7] On the version of the applicant the vehicle came to a standstill at the side of the road causing no obstruction. The respondent claims that the vehicle was partially obstructing the road thus constituting a danger to other road users. I shall return to this issue at an appropriate time to the extent that it is necessary to resolve it.

[8] It is not in dispute that at some later stage during the course of the evening employees of the respondent arrived on the scene, and removed the applicant's vehicle to the respondent's business premises in Tsumeb where they remained.

[9] Efforts on the part of the applicant to secure the release of the vehicle were resisted by the respondent, who claimed that it removed the vehicles on the instructions and at the request of the applicant's driver. Consequently so the respondent reasoned it had acquired a right of retention and was prepared to release the vehicle upon payment of the towing costs and storage fees. The stance adopted by the respondent appears from an e-mail the respondent send to the applicant on 17 July 2012. I will refer only to certain excerpts from it; in the form it was drafted.

> *"It is real simple: Your client failed to cover the recovery cost and services which was tendered.*

Also verify yourself of the terms "retention" before jumping to conclusions or imposing threats which you can not apply. This create expectations with your client which may have dire consequences. Come back to business ethics, and comply with the industries demand, settle what you owe, and collect and go!!

On evening of 5 July 2012, we was dispatched to town in accident involved truck of S- your client."

"The next day he called my assistant and informed him that a truck is on the way and close by to collect trailer and truck. Upon this my assistant replied that he must provide proof that the tow-in account was settled and we need to see funds reflecting on our account before any item may be released."

"This was after another company was called out to the scene, which could not do the job for they didn't possess the proper equipment in size and ability for the job."

"Bottom line; We was dispatched as per protocol, tendered a service, excellent so, with the drivers consent, and other parties on the scene, and nobody objected at that time. Even the next morning Bruwer told me nothing that they did not approve or required the service, and ask that I can submit the account to him for payment."

"Also be inform them that all items is subject to a storage charge of NAD200,00 per day until the account is settled and the items removed. All additional movement with equipment will charge on subsequent and applicable rate."

[10] To this the respondent raises a further two points on the papers. The first of these is a submission made by Mr. Mouton, who appears for the respondent, that the applicant was no longer in peaceful and undisturbed possession of the vehicle consequent upon the collision: As a further string to its bow, it was argued that the respondent was on the facts a *negotiurom gestio*. Both submissions have as their common springboard, the allegation made by the respondent that as a result of the collision, the vehicle of the applicant constituted a danger to other road users of the road. As I indicated this fact is denied by applicant. The probabilities favour in version of the applicant. It appears from the papers that prior to the respondent arriving on the scene, members of the Namibian Police had attended the scene, and having done so departed and instructed the driver of the vehicle to come to the police station the next day. It strikes me as improbable that they would have done that if the vehicle had indeed constituted a danger. On this issue I find in favour of the applicant.

[11] A finding in favour of the respondent will in any event not have made any difference. The mere allegation of fact that the vehicle partially obstructed the road, without more, does not mean that the applicant lost undisturbed control and peaceful possession of the vehicle. It would have been more inclined to consider that the applicant lost peaceful possession if the evidence established for instance that the police had taken control of the scene and the vehicle in view of the danger the vehicle's position on the road posed. There is, however nothing to that effect on the evidence.

[12] The allegations relating to *negotiurom gestio* are an afterthought. The respondent's e-mail I referred to earlier does not seek to rely on such a principle. Nor do the facts support it. If as was contended, the respondent was a *negotiurom gestor* intent to protecting the applicant's vehicle which obstructed the road, the question remains why it became necessary, not only to remove the danger, but instead to tow the vehicle some 40 kilometres to the safety of the respondent's premises.

[13] I find that this defence likewise must be dismissed.

[14] It remains to consider whether the respondent has a right of retention. The respondent bears the onus of proof. In ***Warthog Logistics v Autotech Truck and Coach CC 2011 TDR 0872 (Nm), Damaseb JP*** held the following:

> "The applicant bears the legal and evidential onus, on balance of probabilities to (1) establish that it was in peaceful and undisturbed enjoyment of the subject vehicles and that (ii) same was forcefully removed by the respondent. The respondent bear the legal and evidential onus in respect of the improvement lien they rely on to justify the retention of the subject vehicles."

[15] It is the respondent's case on this score that it was instructed to render its services. In paragraph 16.3 of the answering affidavit it puts its case as follows:

> "It is in any event submitted that the driver of the applicant's truck at the time requested specialized equipment to have his truck and trailers removed as the breakdown then present at the scene of the accident i.e. Auto Worx Panelbeating & Breakdown CC and more specifically a certain Herman Carstens was unable to perform such specialized duties and services at the time."

[16] The respondent's case is less clear where Mr. Arangies states the following:

> "The respondent avers that the Applicant or some entity on its behalf, being the driver of the Applicant's truck at the time and a certain Mr. Herman Carstens from Auto Worx Panelbeating & Breakdown CC who was at the scene of the collision at the time, requested the Respondent on the 5th of July 2012 to assist and to tow the Volvo mechanical horse bearing registration letters and numbers 221SBLGP along with two trailers bearing letters and numbers 221SBLGP and 222SBLGP from the scene of the accident to the yard of the respondent in Tsumeb."

[17] There is a sharp conflict of fact on this issue. The driver of the vehicle denies having requested or instructed the respondent to render the services. The applicant points out that it was standing policy to the knowledge of the driver that he could not give any such instructions. In addition there is evidence that the applicant's Mr. Moerat, had given instructions to the driver that the latter should stay with the vehicle at the roadside until the next morning.

[18] On the papers and the probabilities I consequently am of the view that the respondent fails to discharge the onus and in the result I make the following additional orders:

7. I grant prayer 1.2 (a) of the Notice of Motion.

8. The respondent is ordered to pay the applicant's costs on the basis of one instructing and one instructed counsel.

_____

MILLER, AJ

ON BEHALF OF THE APPLICANT: Mr. Schickerling

INSTRUCTED BY: Francois, Erasmus & Partners

ON BEHALF OF THE RESPONDENTS: Mr. Mouton

INSTRUCTED BY: Meuller Legal Practitioners