REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 96/2015

In the matter between:

BLAAUW'S TRANSPORT (PTY) LTD **APPLICANT**

And

AUTO TRUCK & COACH CC **FIRST RESPONDENT**

THE DEPUTY SHERIFF FOR TSUMEB **SECOND RESPONDENT**

Neutral citation: *Blaauws Transport (Pty) Ltd v Auto Truck and Coach CC* (A 96-2015) [2015] NAHCMD 268 (12 November 2015)

Coram: PARKER AJ

Heard: **29 September 2015**

Delivered: **12 November 2015**

Flynote: Lien – In what cases – First respondent claiming creditor-debtor lien or, and in addition, salvage lien for salvage work done and not paid – Respondent relying on oral agreement – Court held that lien *ex contractu* being the offspring of contract can only arise in conformity with and not in contradiction to the contract – Court found that in instant case terms of the contract do not provide that respondent will have a lien over vehicles it removed after the collision of the applicant's vehicles

with other vehicles – Consequently, court found that respondent cannot retain vehicles on basis of a lien *ex contractu* – Court found respondent has rather a salvage lien over the vehicles – Court having discretion to deprive lien holder of possession of the thing and to substitute security for the lien – In exercise of such discretion court ought to have regard to what is equitable under all the circumstances.

Summary: Lien – In what cases – First respondent claiming creditor-debtor lien or, and in addition, salvage lien for salvage work done and not paid – Respondent relying on oral agreement – Court held that lien *ex contractu* being the offspring of contract can only arise in conformity with and not in contradiction to the contract – Court found that in instant case terms of the contract do not provide that respondent will have a lien over vehicles it removed after the collision of the applicant's vehicles with other vehicles – Consequently, court found that respondent cannot retain vehicles on basis of a lien *ex contractu* – Court found respondent has rather a salvage lien over the vehicles – Court having discretion to deprive lien holder of possession of the thing and to substitute security for the lien – Applicant tenders security in the form of Bank guarantee in an amount covering the amount charged (though genuinely and bona fide disputed) and interest thereon and legal costs – Court found that security is adequate, reasonable and bona fide – Court found that it serves well the selfish interest of the first respondent to resist substitution of security for the lien because the first respondent gains N$600 per day in respect of storage charges on top of the disputed amount – Court concluded that since the amount charged is genuinely and bona fide disputed the applicant has the right under 12(1) of the Namibian Constitution to have that dispute determined by the court – Consequently, court found that it is equitable to deprive the first respondent of possession and to substitute security for the lien.

ORDER

(a) The first respondent must not later than 16h00 on 16 November 2015 release from its possession and return to the applicant, the applicant's truck and trailer, more particularly:

(i) an Iveco Stralis truck tractor with vehicle register number: [R…….], vehicle identification number (VIN): [W…….], engine number: [W…….] and license number: [N…….];

(ii) an Afrit Flat Deck with vehicle register number: [S……..], license number: [N…….] and vehicle identification number (VIN): [A…….]; and

(iii) an Afrit Flat Deck with vehicle register number: [S…….], license number [N1…….] and vehicle identification number (VIN): [A……..].

(b) Subparagraph (a) is subject to the delivery by the applicant to the first respondent a bank guarantee in the amount of N$300,000 (Three hundred thousand Namibia Dollars) as security for the first respondent's alleged claim in the amount of N$101,200 (One hundred and one thousand two hundred Namibia Dollars), and for interest thereon and legal costs.

(c) The first respondent is ordered to institute action against the applicant within 30 days from the date of this order, failing which the applicant will be entitled to approach the court for appropriate relief in respect of the guarantee furnished in favour of the first respondent.

(d) Failing compliance by the first respondent with paragraph (a), the second respondent is ordered to take all necessary steps required to ensure compliance with para (a).

(e) The First respondent is ordered to pay the applicant's costs of this application, including costs of one instructing counsel and two instructed counsel.

JUDGMENT

PARKER AJ:

[1] The applicant instituted motion proceedings, and prayed for the relief set out in the notice of motion. The issues on the merits for determination are (a) whether the first respondent has a lien, and if it has, the type of lien, over the applicant's motor vehicles, being a truck tractor, an Afrit Deck and an Afrit Flat Deck, hereinafter referred to as 'the vehicles'; and (b) whether the court has discretion to substitute the lien (if it is proved) with security tendered by the applicant. Mr Heathcote SC (with him Mr Jacobs) represents the applicant. Mr Barnard represents the respondents.

[2] The application revolves around wrecks of damaged vehicles whose salvaging and removal were of grave concern because they posed extreme danger to other users of the road on which the vehicles remained. The applicant is the owner of the vehicles involved. The first respondent is the close corporation that carried out the salvaging and removal of the wrecked vehicles.

[3] At the outset I shall consider the applicant's delay in filing its replying affidavit and the application to condone it. In doing so I have distilled from *Telecom Namibia Limited v Nangolo and Others* (LC 33/2009) [2012] NALC 15 (25 May 2012), para 5, principles guiding the granting of condonation applications.

[4] In my opinion, the foundational requirements which an applicant must satisfy in order to succeed is that the applicant ought to give a satisfactory explanation for the delay; the applicant should satisfy the court that there is sufficient cause to warrant the grant of condonation; and he or she must demonstrate good prospects of success on the merits; except that where there has been flagrant and gross disregard of the rules, prospects of success should not be considered.

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[5] In the instant case, the applicant has given a satisfactory explanation for the delay, and more important, I do not think the delay attracts the epithet ‘wilful’. The late filing of the replying affidavit is, therefore, condoned. In any case, considering the evidence so far, bar the replying affidavit, there are good prospects of success on the merits, as I shall demonstrate shortly.

[6] But there is more: there is the first respondent’s rearguard action. The first respondent contends that subrule (9), read with subrule (10), of the rules of court has not been complied with. Mr Barnard relies on *Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (12 March 2015) for support. As I see it, *Mukata* is distinguishable. There, no attempt whatsoever was made to comply with rule 32(9) and (10). And that was not surprising: applicant’s counsel’s unyielding position was that rule 32(9) and (10) do not apply to interlocutory proceedings; it rather applied to only applications for directions from a managing judge; and so, counsel simply disregarded rule 32(9) and (10). The applicant in this proceeding has not simply disregarded rule 32(9).

[7] The facts of the present case show that there was communication between applicant’s legal practitioners and those of the first respondent pursuant to complying with rule 32(9) of the rules. And from the communication it was clear to counsel on both sides of suit that the first respondent would not abandon its position on the late filing of a replying affidavit. That, as I understand it, is Mr Heathcote’s submission. The submission has merit, I should say. On that score I find that in the instant proceeding, subrule (9) was complied with as Mr Heathcote submitted: real steps were taken in line with rule 32(9) of the rules. What was not complied with is subrule (10).

[8] In that regard, it must be remembered that rule 32(9) and (10) are there for a purpose. It is to prevent a situation where a party rushes to court, praying the court for an interim order in respect of some interlocutory matter, whose grant the other party would have informed that party that it would not oppose if it had been consulted prior to the launching of the interlocutory application. In sum, rule (9) and (10) conduce to the attainment of the overriding objectives of the rules (see rule 1(3)*(c)*)

as they seek to obviate wasted time and unnecessary legal costs. In the instant case it should have been clear to the parties' legal representatives and the court that on the papers the parties tried, as rule 32(9) expects them to do, to resolve their dispute concerning the late filing of the replying affidavit. And so, at commencement of the hearing the court was aware that the issue of late filing of papers would be argued.

[9] For these reasons, I am not prepared to refuse to hear the condonation application inasmuch as it is only a rule 39(10) certificate that has not been filed. The late filing of the replying affidavit is condoned; and so, the replying papers form part of the applicant's papers now before the court. I hasten to add that even in the absence of the replying affidavit, and considering the founding papers and the answering papers only, the case of the applicant is not weakened, as I proceed to demonstrate. That appears to be also Mr Heathcote's submission.

[10] On the papers, I make the following factual findings relevant for our present purposes and arrive at the conclusions thereanent. The applicant is the owner of the truck and the trailer ('the vehicles'). The first respondent carried out the salvaging and removal of the wrecked vehicles. The first respondent has refused, since the day of the collision on 6 April 2015 to restore possession of those vehicles to the applicant. It matters tuppence as to how the Mr Arangies (of the first respondent) was called to the scene of the collision; neither is it of any moment that it was in the wee hours of that day, ie 6 April 2015, that Mr Arangies went upon the scene of the collision.

[11] As Mr Heathcote submitted, the onus is on the respondent to establish the reason why it should not restore possession of the vehicles to their owner, the applicant. In its attempt to discharge the onus, the first respondent avers, upon advice from its legal practitioners, that -

'Arising from the above, I am advised by my legal representatives that the first respondent has a debtor/creditor lien over the truck tractor and flat deck vehicles contemplated by paragraph 2 of the applicant's notice of motion. Such lien arises from the

agreement of mandate referred to earlier in my affidavit. In addition, and/or in the alternative to the above, the first respondent also has a salvage lien over the truck and vehicles of the applicant.'

[12] It is, therefore, to the issue of lien that I now direct the enquiry. On the main the first respondent says the lien it relies on is a debtor/creditor lien; and the 'lien arises from the agreement of mandate referred to in the founding affidavit. And it is that 'there was an express oral agreement, of mandate between the applicant and the first respondent'.

[13] I now proceed to decide whether there is a debtor/creditor lien based on a contract, as the first respondent contends. In this regard one must not lose sight of the fact that a lien *ex contractu* being the offspring of contract can only arise in conformity with and not in contradiction to that.

[14] This proposition of law leads me to the examination of what the first respondent states, in appreciable detail, in the founding affidavit are the terms of the contract. They are these:

'I therefore contend that there was an express oral agreement, alternatively a tacit agreement of mandate between the applicant and the first respondent:

(a) that the latter should perform all work, services, and whatever was required for purposes of disentangling the two vehicles at the scene of the accident;

(b) and thereafter had to proceed with rigging, lifting and pulling apart the two trucks, and to hook the truck and trailers of Blaauw's Transport to my own truck to tow the vehicles to Tsumeb;

(c) and thereafter to safeguard the vehicles at the premises of the first respondent; and

(d) for which services the first respondent would be compensated firstly, at its prevailing after hours rates and fees for salvaging, and secondly, its customary rates for safeguarding the vehicles.'

[15] I accept Mr Heathcote's submission to the effect that the alleged agreement – and I use 'alleged' advisedly as will become apparent shortly – which the respondent relies on does not contain any term, not even in a subdued form, that the first respondent will have a lien over the vehicles, even if an oral agreement were adjudged to exist. Based on this reason alone I reject the first respondent's contention that he holds a debtor/creditor lien over the vehicles.

[16] But that does not end the matter. The first respondent has a second string to its bow. The deponent says in para 37 of the answering affidavit that he has been advised by his legal representatives that '[I]n addition, and/or in the alternative to the above (ie the debtor/creditor lien) the first respondent also has a salvage lien over the vehicles'. It is, therefore, to the issue of whether such a lien exists that I now direct the enquiry.

[17] While accepting Mr Heathcote's erudite and insightful submission that if there is no unjustified enrichment proven, as is in the instant case, there is no lien, that is, a right of retention. That may be so, but it would not conduce to the fair and reasonable determination of this matter if the principle of unjustified enrichment is allowed to befog what really represents the true position of the applicant. On the papers I find that the applicant, who has at all material times been represented by legal representatives, and has not been acting as a lay litigant representing itself, does not deny that a salvage lien exists over the vehicles, and it has always being prepared to pay what was due to the first respondent, as Mr Barnard submitted. The only fly in the ointment is that it has also always been the applicant's contention that the amount charged by the first respondent for service rendered is exorbitant, that is, 'grossly excessive' (*Concise Oxford Dictionary*, 11th ed), and, therefore, unreasonable. In sum, it bona fide disputes the amount charged.

[18] Standing in favour of the applicant in the exercise of the court's discretion, which I shall consider in due course, is that the applicant has not really refused to pay for the salvage of his vehicles by the first respondent. As I see it, what the applicant has been trying to tell the first respondent all along is this: I dispute the amount charged because it is exorbitant and, therefore, unreasonable. All the same, I am prepared to tender security in the form of a Bank guarantee in return for the vehicles which I need for the performance of work I have contracted to carry out. I do not see any *mala fides* in that; no matter from what angle one looks at it.

[19] But this overture, the first respondent has sternly given a rebuff to; very unreasonably, and in bad faith, I should say. And, significantly, the first respondent says he does so on the advice of his legal representatives. He states the following in the answering affidavit:

> '38. I am advised by me legal representatives that there is no obligation upon the first respondent to forego or abandon its lien when a guarantee for the payment of the sum claimed is offered.
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> 39. I am similarly advised that there is strong authority supporting the contention that the holder of a lien is entitled to enforce same at all times, unless there are exceptional circumstances, such as the *mala fides* of the creditor, precluding him/it from doing so. I deny that the actions of the first respondent were tainted by any bad faith.
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> 40. Since the decision of the court would involve a discretion to make an order which is fair and equitable under the circumstances, if such a discretion can be exercised at all, I refer to the facts set out below demonstrating the lack of good faith, or more pertinently, the bad faith of the applicant in having set out the purported facts of the application in his supporting affidavit.'

[20] It is to para 38 that I now turn my attention. The advice is not entirely correct, I should say. When a challenge of the exorbitance and unreasonability of the amounts charged are raised, that in turn raises a dispute between the applicant and the first

respondent (ie the parties). And barring amicable resolution of the dispute by the parties themselves outside the surrounds of the court, the applicant has a basic human right guaranteed to it by the Namibian Constitution to have that dispute determined by the court. I am pretty sure the first respondent's legal representatives did not advise the first respondent on this rudimentary aspect of an individual right to fair trial in our Constitution.

[21] For these reasons, I accept Mr Heathcote's submission that the applicant wants its obligations and the respondent's concomitant rights to be determined by the court. I also accept counsel's submission that there is nothing *mala fides* about that, as the first respondent appears to think. See *Standard Bank Namibia Ltd v Namupolo and Another* I 2500/2008 [2012] NAHCMD 26 (15 February 2012). Pursuing one's constitutionally guaranteed right in the court cannot be *mala fides*: *ubi ius ibi remidium*. It must also be remembered that a lien never constitutes a cause of action, but that it is a defence against the owner's *rei vindicatio*. See M Wiese, 'the Legal Nature of a Lien in South African Law', *P.E.R*, 2014 Vol 17 No. 6, para 4.2.1, relying on *Brooklyn House Furnishers v Knoetze and Sons* 1970 (3) SA 264 (A).

[22] In all this, see, for instance, the item called 'Agreed Repair Order' in the invoice (dated 8 April 2015) to which Mr Heathcote drew the court's attention. I find that there is not a phantom of evidence on the papers tending to prove that the first respondent did carry out repairs to the vehicles, and yet the applicant is asked to pay the amount without any questions asked, just because the first respondent says so.

[23] This finding buttresses the finding I made previously that there is a genuine and bona fide dispute between the parties respecting the amounts charged. It also supports this conclusion: To give judicial blessing to the first respondent's insistence (upon the advice of its legal representatives) on retaining the vehicles until the applicant has paid the genuinely disputed amount and to accept the first respondent's contention (also on the advice of its legal representatives) that it is under 'no obligation to forgo or abandon its lien when a guarantee for the payment of

the sum claimed is offered', would be not only unjust and unreasonably but it would also be offensive of article 12(1) of the Namibian Constitution.

[24] I now consider paras 39 and 40 of the founding affidavit because they are related; and I look at the conditional clause 'if such a discretion can be exercised at all' in para 40 specifically. I should, with the greatest deference to the first respondent, say that this farce of advice, which the first respondent says he received from his legal representatives, would have been extremely comical, if the stakes were not tragically high; stakes which have a bearing on the court's common law inherent power and its constitutional powers under at 82 of the Constitution.

[25] *Sandton Square Finance (Pty) Ltd and Others v Vigliotti and Another* 1997 (1) SA 826 (W), which I accept as good law, tells us that the court has discretion to substitute security for a lien and it is considered as a method of achieving justice between the parties, and, furthermore, to substitute security for such a lien would not be meaningless. I see no good reason why these principles should not apply with equal force to a salvage lien. At 831D-F De Villiers J relies on *Voet* 16.2.21 (*Gane's* Translation):

'But is one who has a right of retention held liable to restore the thing to his opponent whenever the latter tenders sound security for the refund of expenses or the payment of wages? It appears that that ought to be left to the discretion of a circumspect judge according as it shall have become clear from circumstances either that he who ought to restore is deliberately aiming at holding back possession of the thing too long under cover of expenses or wages; or on the other hand that the person owing the expenses has it in mind to recover the thing under security, and then by a lengthy and pettifogging protraction of the suit to make the following up of the expenses, wages and the like a difficult matter for his opponent.'

De Villiers J continued at 831I to 832A:

'Although some of the cases *Voet* mentions include debtor and creditor liens, others, to my mind, refer to improvement liens. His reference to possessors in good and bad faith

who hold back the things possessed in order to procure expenses incurred, in my view, clearly relates to improvement liens. *Voet* 16.2.21 was referred to with approval in *Ford v Reed Bros* 1922 TPD 266 at 272–3 where Mason J said the following:

"The apparent hardship of giving a lien for continuous keep in such cases as these is much mitigated, if not obviated, by the rule that the owner can obtain his property upon giving security according to the discretion of the court, which is to see that the owner is not kept unreasonably out of his property, nor the claimant for expenses harassed by prolonged and unnecessary litigation." '

[26] From the authorities it is clear, as Mr Heathcote submitted, that the essential content of a lien was for the lien holder to retain physical control of the owner's property as an object of security. Counsel relies for support on Francois du Bois, et al. *Wille's Principles of South African Law*, 9 ed, p 1081. In this regard, it has been held that the juridical nature of the possession of the retentor was that he or she exercised possession for security. (*Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd* 1997 (1) SA 646 (c))

[27] Accordingly, I reject as bad law any proposition of law that holds that where a lien exists payment alone can release the thing retained, which the first respondent is so enamoured with, being one of the pieces of legal advice it received from its legal representatives.

[28] The court has discretion to substitute a lien with security according to the circumstances of the case. And in the exercise of its discretion, the court ought to consider important factors; such as these: (a) Is the lien holder 'deliberately aiming at holding back possession of the thing too long under cover of expenses or wages? (b) On the other hand, is it that the owner has it in his or her mind to recover the thing under security, and then by a lengthy and pettifogging protraction of the suit to make it difficult for the lien holder to recover his expenses or wages (*Vigliotti*, loc. cit.)? In sum, on the authorities, I hold that the court has discretion to deprive the lien holder

of possession of the thing and to substitute security for such lien; and in that regard, the court should consider what is equitable under all the circumstances of the case.

[29] In the instant case, it serves well the selfish interest of the first respondent (the lien holder) to hold back possession of the vehicles because the first respondent makes, on top of the amount charged for the salvage a whopping N$600 per day from the applicant in storage charges alone, albeit, as I have said *ad nauseam*, the amount charged is genuinely and bona fide disputed. It, therefore, serves undeservedly the first respondent well to refuse a substitution of the lien with security.

[30] In this regard, it is important to note that the security the applicant tenders is in the form of a Bank guarantee for the amount charged (though disputed), and also interest thereon and legal costs. Significantly, the security tendered is not in the form of a post-dated cheque or other negotiable instrument that can easily be stopped or dishonoured.

[31] It is with firm confidence that I find that the security tendered is adequate, and reasonable; and what is more, I find that it is tendered in good faith, not least because, it covers not only the disputed amount of N$101,200, but also interest and legal costs.

[32] Looking at the evidence on the papers in its entirety, I have no doubt in my mind that the first respondent is keeping the vehicles for the purpose of having unwholesome and underserved leverage in order to force the applicant to pay the amount charged when the account is clearly inflated to cover, for example, the unjustifiable item relating to ‘agreed repair’; hence the applicant’s right to have the dispute determined by the court. After all, as I have found previously, the first respondent is extracting (and I use the word ‘extracting’ advisedly) N$600 per day from the applicant; and so, indubitably, it serves first respondent’s *mala fide* interest to insist – without yielding – on its retention of the vehicles.

[33] In virtue of the aforegoing reasoning and considerations, the conclusion is inescapable that in the circumstances, the first respondent is deliberately aiming at holding back possession of the vehicles too long under cover of expenses and wages. (See *Sandton Square Finance (Pty) Ltd v Vigliotti* at 831E-F.) With the greatest deference to the first respondent, the first respondent's conduct and attitude answer loudly to extortion: they are tantamount to 'executing without judgment' (*Warthog Logistics and Another v Auto Tech Truck and Coach CC and Another* (A 164/2011) [2011] NAHCMD 211 (15 July 2011), where the selfsame first respondent was also the first respondent there), and yet, as I have held previously, the juridical nature of the possession of the rententor (eg a lien holder) was that he or she exercised possession for security. (*Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd* 1997 (1) SA 646 (c))

[34] Based on these reasons, I find that the applicant has made out a case for the grant of the relief sought; and so, I should exercise my discretion in favour of granting the relief sought: it is equitable to deprive the first respondent of possession of the applicant's vehicles and to substitute security for the lien the first respondent holds. It achieves justice between the parties on the facts and in the circumstances of the case.

[35] In virtue of the view I have taken of this application, the law and the rules of court, as set out in the aforegoing reasoning and conclusions, I think it serves no purpose to consider the first respondent's application to strike out any other matters of interest. What I have said above are dispositive of the application.

[36] One last word; on the facts and in the circumstances of the case, I find that the first respondent was ill advised and he acted mala fide in resisting the application. And, therefore, if the applicant had asked for costs on the scale as between attorney (legal practitioner) and client I would have given it due consideration.

[37] In the result, I make the following order:

(a) The first respondent must not later than 16h00 on 16 November 2015 release from its possession and return to the applicant, the applicant's truck and trailer, more particularly:

(i) an Iveco Stralis truck tractor with vehicle register number: [R…….], vehicle identification number (VIN): [WJ……..], engine number: [W……..] and license number: [N…….];

(ii) an Afrit Flat Deck with vehicle register number: [S…….], license number: [N…….] and vehicle identification number (VIN): [A…….]; and

(iii) an Afrit Flat Deck with vehicle register number: [S…….], license number [N……..] and vehicle identification number (VIN): [A…….].

(b) Subparagraph (a) is subject to the delivery by the applicant to the first respondent a bank guarantee in the amount of N$300,000 (Three hundred thousand Namibia Dollars) as security for the first respondent's alleged claim in the amount of N$101,200 (One hundred and one thousand two hundred Namibia Dollars), and for interest thereon and legal costs.

(c) The first respondent is ordered to institute action against the applicant within 30 days from the date of this order, failing which the applicant will be entitled to approach the court for appropriate relief in respect of the guarantee furnished in favour of the first respondent.

(d) Failing compliance by the first respondent with paragraph (a), the second respondent is ordered to take all necessary steps required to ensure compliance with para (a).

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(e) The First respondent is ordered to pay the applicant's costs of this application, including costs of one instructing counsel and two instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANT :	R Heathcote SC (assisted by S J Jacobs) Instructed by Van der Merwe-Greeff Andima Inc., Windhoek
FIRST RESPONDENT:	T A Barnard Instructed by Mueller Legal Practitioners, Windhoek
SECOND RESPONDENT:	No appearance