IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

HELD AT MASERU **CCA/0025/2020**

In the matter between:

THABO CLIVE ABEDNEGO NTLATSANG	**APPLICANT**

AND

NTŠELISENG MOTLOLI T/A MOTLOLI CATERING	**1ST RESPONDENT**
ADV. BORENAHABOKHETHOE SEKONYELA	**2ND RESPONDENT**
ATTORNEY K.D. MABULU T/A K.D. MABULU &CO.	**3RD RESPONDENT**
LUGY'S INVESTMENT PTY LTD	**4TH RESPONDENT**
MAIROON ADAMS	**5TH RESPONDENT**
DEPUTY SHERIFF LEQHAOE	**6TH RESPONDENT**

Neutral Citation: Thabo Ntlatsang v Ntšeliseng Motloli t/a Motloli Catering & 5 Others [2023] LSHC 75 Comm. (04TH MAY 2023)

CORAM: **MOKHESI J**

HEARD: **23RD FEBRUARY 2023**

DELIVERED: **04TH MAY 2023**

SUMMARY

CIVIL PRACTICE AND LAW OF PROPERTY: *Proceedings for contempt of court order- The requisites thereof-Law of property-What the respondent need to prove on resisting the owner's claim for his property where it was kept in storage on the basis of an agreement with a third party without consent of the owner-In order to be successful, the requisites of negotiorum gestio must be present.*

ANNOTATIONS

Books

Badenhorst et al **Silberberg and Schoeman's The Law of Property 5ed (Butterworths) (2006)**

LAWSA Second Edition Vol. 17

Cases

Fakie N.O v CC II Systems (Pty) LTD 2006 (4) SA 326 (SCA)

Nedbank Limited v Sheriff of the High Court Roodeport and Another: in Re: Nedbank Limited v Willows and Another (2009/121) [2014 ZAGPJHC 155

Rhoode v De Kock and Another 2013 (3) SA 123 (SCA)

JUDGMENT

[1] **Introduction**

This is an application for contempt of court lodged by the owner of the vehicle which was ordered to be returned to him by the court on 17 March 2022. The vehicle is in possession of a third party who had kept in store on the strength of an agreement between it and the deputy sheriff of this court pending finalization of litigation between the applicant and the 1st respondent. The third-party possessor of the vehicle resists releasing the vehicle on the basis that it has a lien over it, after keeping it safe for the duration of the parties' litigation.

[2] **Factual Background**

As stated in the preceding paragraph, this application is a sequel to an application which was disposed of by this court in favour of the applicant against the 1st respondent. In that application I had ordered that the application was dismissed and that the vehicle – Toyota Hilux – be returned to the applicant, who had joined the proceedings as an intervening party to claim the vehicle which had been attached to found jurisdiction in a matter involving the 1st respondent and one Pontšo Ntseuoa. The matter initially served before Chaka-Makhooane J., who, after entertaining the interlocutory application by the applicant claiming the vehicle as his, made an order that the vehicle be released on payment of M80,000.00 to found jurisdiction and as security for costs. The applicant paid the stated amount in order to secure the release of the vehicle.

[3] The vehicle was not released to the applicant despite the order of court, but was instead removed from the High Court premises by the 6th respondent (deputy sheriff) and kept at the premises of the 4th and 5th respondent while various interlocutory applications were lodged by the 1st respondent against its release. It was kept in storage by these respondents. In the meantime, Chaka-Makhooane J passed on and the main matter which I had referred to earlier, served before me. Judgment was handed down on the 17 March 2022 dismissing the main application and, consequently, made an order for the release of the vehicle mentioned in the preceding paragraphs. The 1st respondent was dissatisfied with this outcome and lodged an appeal which was dismissed during the second session of that court. Consequent to this unsuccessful appeal, the applicant sought the release of the vehicle but was unsuccessful on account of the reason stated in the preceding paragraphs, thereby prompting the lodging of the instant matter.

[4] **The Merits**

I must at the outset, state that no case of contempt of this court's order has been made out against the 1st, 2nd, 3rd and 6th respondents. The vehicle in issue is in the hands of the 5th respondent. It is this respondent who resisting to release the vehicle on account of what she considers to be a lien for storage. In her answering affidavit, the 5th respondent, in her capacity as the director of the 4th respondent, states that the 4th respondent is an entity which operates storage facility in Maseru Central business district and that some of its clients are the deputy sheriffs of the High Court who often bring movables for storage whenever there are storage challenges at the High Court premises.

[5] The 5th respondent states the following in her answering affidavit:

> *"2.3 We often enter into agreements with the sheriffs as the custodians of the properties attached or held in terms of the rules of Court. The sheriffs always come back, pay our storage fees, take possession of the property and be on their merry way. We trust that the sheriffs have the requisite authority to contract with us due to their official standing as agents of the Honourable Court. They are often armed with an order of Court from which we are able to tell that they have the requisite authority.*
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> *2.4 On the 24th October 2020 the 6th RESPONDENT as usual came to our place of business armed with Court processes and in possession of a Toyota Hilux bearing the particulars listed in the main. We were informed yet again as usual that we were to store the vehicle until such time that the deputy-sheriff in case No. CCA/0025/2020 would return for the vehicle.*
>
> *2.5 The Deputy-sheriff signed an agreement with us in terms of which we would charge M150.00 per day of storage. The said agreement is herein attached and marked annexure "LI1"."*

[6] **Contempt of Court principles**

The proceedings for Contempt of Court orders serve to vindicate the authority of the court, as disobedience of court orders undermines the authority of the courts. It is in the public interest that the orders of court are obeyed even if one may feel hard done by them and lodge appeal thereafter. In the oft–quoted decision of **Fakie N.O v CC II Systems (Pty) LTD 2006**

(4) SA 326 (SCA), the court stated the test for contempt in the following terms, at paras. 9 -10:

> *"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fade'. A deliberate disregard is not enough, since the non–complier may genuinely, albeit mistakenly believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even refusal to comply that is objectively unreasonable may be bona fide (through unreasonableness could evidence lack of good faith).*
>
> *[10] These requirements – that the refusal to obey should be both willful and mala fide, and that unreasonable non–compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."*

[7] From this formulation of the applicable test it is evident that the 4th and 5th respondents cannot be held to be in contempt of court. While it is true that these respondents were aware of the order of this court ordering the release of the vehicle, it is a fact that they were not party to those proceedings from which the said order flew. When they saw the order directing them to release the vehicle, in their mind, they were holding it until they were paid their storage fees by the 6th respondent. They have deliberately disobeyed this

court's order, but as we have seen, deliberate disregard is not enough because they honestly believe that they are entitled to hold on to it as they have a storage lien over it. I, therefore, find that the respondents are not in contempt of court.

[8] Having found that the 4th and 5th respondents are not in contempt of the order of this court, the question that needs to be answered is whether this conclusion spells an end to this matter. The answer is certainly in the negative. The reason why the conclusion that the respondents are not in contempt should not be the end of this matter is based on the fact that there is a court order in place which should be obeyed. It should be recalled that contempt proceedings are special in that on top of ensuring that a successful litigant enjoys the fruits of his success, importantly, it is aimed at vindicating the rule of law. While the order of this court continues to be disobeyed it is the responsibility of this court to ensure that its authority is vindicated and one way of doing so is by using coercive order- as against punitive order- because the respondents have not been found guilty of Contempt. The latter will only follow if the former is not effective in bringing about compliance.

[9] In **Fakie N.O v CC II Systems** case Heher JA writing minority judgment at paragraph 74, said the following about coercive order:

> *"[74] The following are, I would suggest, the identifying characteristics of a coercive order:*
>
> *1. The sentence may be avoided by the respondent after its imposition by appropriate compliance with the terms of the original (breached)*

> *order ad factum praestandum together with any other terms of the committal order which call for compliance. Such avoidance may require purging a default, an apology or an undertaking to desist from future offensive conduct.*
>
> *2. Such an order is made for the benefit of the applicant in order to bring about compliance with the breached order previously made in his favour.*
>
> *3. Such an order bears no relationship to the respondent's degree of fault in breaching the original order or to the contumacy of the respondent thereafter or to the amount involved in the dispute between the parties.*
>
> *4. Such an order is made primarily to ensure the effectiveness of the original order and only incidentally vindicates the authority of the court."*

[10] Notwithstanding the fact that the 4th and 5th respondents may feel entitled to exercise what they consider to be a lien over the vehicle, this court has already issued a court order which must be obeyed. Were the respondents to be allowed to disobey it on account of what they consider the exercise of their right of retention then the authority of this court would be severely undermined. This court cannot sit idle and indifferent when its authority is being undermined. The court had already ordered that the vehicle be released. If the respondents feel aggrieved by that decision, they are free to challenge it on appeal and not to willfully disobey it.

[11] Assuming, without conceding, that I am wrong in concluding that the 4th and 5th respondents should obey the order of this court regardless of the justification they may have for holding on to the vehicle. It is apposite, therefore, to consider the basis of the respondent's defiance. They argue that they have storage over the vehicle. Liens are in general divided into enrichment liens and debtor - creditor liens. Enrichment liens are real rights which may take the form of either improvement or salvage liens depending on whether they relate to useful or necessary expenses (Badenhorst et al **Silberberg and Schoeman's The Law of Property 5ed (**Butterworths) (2006) at page 412 para. 17.5.1.)

[12] Enrichment liens are real rights which ensure to the benefit of a person irrespective of the existence of a prior contractual relationship between the lienholder and the owner of property. Enrichment liens may take the form of either salvage or improvement liens depending on whether they relate to useful or necessary expenses. Badenhorst et al **Silberberg and Schoeman's The Law of Property (2006) (**ibid). The present matter concerns salvage lien because the 4th and 5th respondents allege that they protected the applicant's vehicle against loss or damage on the basis of the agreement they had with the deputy sheriff of this court.

[13] The question whether a person has a salvage lien arises when that person has protected another person's property against loss or damage without the owner's express authorization to do so (*negotiorum gestor*)(see Badenhorst et al **Silberberg and Schoeman's The Law of Property (2006) (**ibid at p.413 para.17.5.2) . Salvage is based on the owner's enrichment and in this case the owner would be enriched if the alleged lienholder has incurred

expenditure to prevent the property from decreasing in value. The requisites of *negotiorum gestio* are stated by DH Van Zyl J. in **LAWSA Second Edition Vol. 17** p. 20-37 as follows:

> *"(a) The affairs managed by the gestor must have been those of another.* ***Turkstra v Massyn [1959] 1 ALL SA 263 (T), 1959 (1) SA 40 (T) p. 47***
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> *(b) The dominus must have been ignorant of the fact that he or her affairs were being managed.* ***Turskstra v. Massyn [1959] 1 ALL SA 263 (T), 1959 (1) SA 40 (T) p.47.*** *North West Arts Council v. Sekhabi [1996] 3 ALL SA 361 (b). A Dominus who is aware of the management of her or his affairs and does nothing about it is regarded as having authorized it tacitly.*
>
> ***(c)*** *The intention to manage the affairs of another is perhaps the most significant requisite for a claim based on negotiorum gestio. This intention includes the intention to claim reimbursement for expenses necessary or usefully incurred by the gestor.* ***Odendaal v Van Oudtshoorn [1968] 3 ALL SA 482 (T), 1968 (3) SA 433 (T) p.437 Maritime Motors (Pty) LTD v Von Steiger 2001 (2) SA 584 (SE)***
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> *(d) The management of the dominus affairs should have been conducted in a reasonable way (utiliter coeptum), at least at the commencement of the gestio. The result of this rule is that a claim will arise even if the gestio is ultimately unsuccessful. A gestor who employed an unreasonable method does not have a claim for disbursements."*

[14] It will be observed that the 4th and 5th respondents are relying on the money they are entitled to in terms of the agreement they have with the 6th respondent. They claim to be owed M150.00 per day from the time they kept the vehicle in storage, and this amount, they say, is the basis of their right to retain the vehicle until it is paid. However, that amount is irrelevant for purposes of claiming necessary expenses. Failure to proof that they incurred necessary expenses in preserving the vehicle will show that the applicant has not been enriched and therefore the respondents have no right of lien over his property. It should be recalled that a claim for necessary expenses relates to reimbursement for "expenditure of money or material on the preservation of the property. He has no claim for his own labour". **Rhoode v De Kock and Another 2013 (3) SA 123 (SCA)** at para.14)

[15] In my judgment, the 4th and 5th respondents have failed to show that the applicant will be enriched if the vehicle is returned to him without payment. They have failed to prove that they incurred necessary expenditure in storing the applicant's vehicle. It should be stated, however, that this conclusion does not leave the respondents remediless as they can still proceed against the 6th respondent (deputy sheriff) in seeking to recover the monies owed in terms of the contract because the deputy sheriff was not acting on behalf of this court when he concluded the agreement for storage, as the respondents seemed to think he was. The following salutary remarks should always be borne in mind as expressed in **Nedbank Limited v Sheriff of the High Court Roodeport and Another: in Re: Nedbank Limited v Willows and Another (2009/121) [2014 ZAGPJHC 155** at para.9 when the court said:

"The position of the sheriff was considered in several decisions where it was held that, in performing his functions, dispossessing property in pursuance of a sale in execution the sheriff does not act as the agent of anybody but as an executive of the law. When, as part of the process, the sheriff commits himself to contractual terms, he does so suo nomine by virtue of his statutory authority, he becomes bound to the terms of the contract in his own name (authorities omitted)."

[16] **Costs**

The respondents have had substantial success in resisting the application for contempt, but they have on the other hand failed to prove that the applicant will be enriched or that they have a lien over the vehicle. These considerations should be reflected in the order of costs to be made by this court.

[17] In the result the following order is made:

(a) The 4th and 5th respondents are directed to release the vehicle in issue within two days of being served with this court order.

(b) Failure by the 4th and 5th respondents to release the vehicle will entitle the applicant on affidavit to notify the court of such refusal or failure to comply.

(c) On being notified of the failure or refusal to obey this court's order, this court will trigger its punitive powers accordingly.

(d) Each party is to bear its own costs.

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MOKHESI J.

For the Applicant:	**Adv. L.D. Molapo Instructed by P. Masoabi Attorneys**
For the 1st, 2nd, 3rd Respondents:	**Adv. T. Tšabeha instructed by K.D Mabulu and Co. Attorneys**
For the 4th and 5th Respondents:	**Mr R.G Makara from Makara and Monethi Inc.**