REPUBLIC OF NAMIBIA

CASE NO. A 164/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WARTHOG LOGISTICS	**1ST APPLICANT**
FREDERICK JACOBUS PETRUS CARSTENS	**2ND APPLICANT**

and

AUTO TECH TRUCK & COACH CC	**1ST RESPONDENT**
RAINIER ARANGIES	**2ND RESPONDENT**

CORAM: DAMASEB, JP

HEARD ON: 12TH JULY 2011

RELEASED ON: 15th JULY 2011

REASONS

DAMASEB, JP: [1] The applicants approached this Court on an urgent basis seeking a *mandament van spolie*. After hearing oral argument on 12 July 2011, I granted an order in the following terms:

1. Condoning the applicant's non-compliance with the forms and service as provided for in the Rules and authorizing the applicants to bring this application on an urgent basis as contemplated in Rule 6(12) of the Rules of Court.

2. That the respondents be ordered to forthwith restore to the applicants their peaceful and undisturbed possession of the motor vehicles, to wit:

   2.1 a Freightliner truck with registration number CFG28602; and
   2.2 a box body semi-trailer with VIN number AAPV0120350387378

   ante omnia failing which the Deputy Sheriff of the above Honourable Court is hereby authorized and directed to attach and hand over to the applicants the aforesaid motor vehicles.

3. The respondents are ordered to pay the costs of the application.'

[2] I said then that my reasons would follow. What follow are the reasons.

[3] The following facts are fare common cause: The applicants are the owners and, until the alleged date of forceful dispossession, *bona fide possessor* of freightliner truck CFG28602, and a box body semi-trailer AAPVO12035038737 ('the subject vehicles'). It is also common cause that on 21st June 2011 at Tsumeb, the respondents took possession of the subject vehicles while under the control of the driver of the applicants, one Bartlett.

[3] ***The Issue Defined***

The issue calling for decision in this case is whether on 21 June 2011 the respondent forcefully – without the applicant's permission or consent – took possession of the subject vehicles.

[4] The respondents' case is that on 21 June 2011, the applicants' driver, acting as agent of the applicants, delivered the subject vehicles to the respondents for repair and that as a consequence of effecting repairs thereon, they had acquired an improvement lien over the subject vehicles to the extent of their invoice in the amount of N$47 819.89 that they are entitled to payment of the same before they can release the said vehicles. In support the respondents rely on a document written by the driver, Bartlett, as evidence of (i) their having come lawfully in possession of the vehicles and (ii) the mandate received to effect repairs to the vehicles in question. That note, written at the local police station in Tsumeb, reads as follows:

> "I am a truck driver for Warthog Logistics. On 21/06/2011 my truck broke down. I stopped at Auto Tech Truck and Coach for repairs on 21/06/2011 at 06h00 in the morning when Auto Tech Truck and Coach opened I gave instruction to repair the truck after I slept the previous night in front of the workshop."

[5] The applicant's critical averments in support of the *mandament* are as follows:

> "On or about 20 June 2011 and at Tsumeb the respondents wrongfully and unlawfully deprived me of my peaceful and undisturbed possession of the

> aforesaid vehicles by forcefully removing same from a driver who is in the employ of the first applicant and who utilized the vehicles within the course and scope of his employment with the first applicant…Thereafter the second respondent took the aforesaid vehicles to his place of business Tsumeb were I have learnt the vehicles are currently parked. Immediately upon having been notified of the respondents' actions the first applicant's financial manaqer, Dawid de la Guerre contacted one Celeste Enslin who is employed or affiliated with the respondents. She indicated that the vehicles were taken by the respondents and will be retained until such time as the outstanding balance of the repairs and recovery recovery of the Scania vehicle is settled in full. It became clear to me that the respondents had taken the vehicles for the purpose of having leverage in order to force the first applicant to make certain payments to him in terms of the agreement between the parties …'

[6] The background to the above allegation is that in May 2011 the 1st respondent repaired a Scania truck of the 1st applicant. In respect of those repairs the applicants still remain indebted to the 1st respondent as the remainder of the debt will only be paid - as agreed - at the end of August 2011. The applicants' version is that the respondents took possession of the subject vehicles in order to put pressure on the applicants to pay off *that* debt while the applicants are not in default yet. They maintain that they never authorized the respondents' taking possession of the subject vehicles or their doing repairs thereon. They also maintain that not only was Bartlett coerced in authoring RA1, but that he had no authority to contract with the respondents to do any repairs to the subject vehicles.

The onus

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

The evidence

[8] The second applicant deposed to the founding affidavit on behalf of the applicants and relies on e-mail correspondence between the parties as proof that the respondents unlawfully took possession of the subject vehicles to exact payment of a debt not yet due. The e-mail in question occurred on 21 June 2011, the very day the subject vehicles came in the possession of the respondents. The first e-mail (at 8: 16 AM on 21 June) was sent by one Celeste Enslin of the respondents to one Dawie de la Guerre of the applicants referring him to the "FINAL ACCOUNT TO BE SETTLED" and that the "Truck will be released as soon as funds are REFLECTING AND CLEARED in our bank account." In answering this e-mail, de la Guerrre states in his e-mail (at 9: 37 on 21 June) that the debt in question was subject to 'a repayment period of 3 months (1 June 2011 to 31 August 2011). 'In it the author makes no reference to the subject

[1] The burden of proof, of course, often lies upon the defendant , as for instance, where he pleads payment in answer to the plaintiff's claim (*Pillay v Krishna and another*, 1946 AD 946), and in the cases covered by the maxim: *Agere is videtur, qui exceptione utitur; nam reusin exceptione actor est* : he who avails himself of an exception is considered a plaintiff; for in respect of his exception a defendant is a plaintiff.

vehicles detained by the respondents that very morning. From the answer to that e-mail letter it however becomes clear that the two people had spoken about the subject vehicles earlier: Celeste's answer to de la Guerre (at 10: 30) is in the following terms):

> "Repayment of three months is NOT R50 000.00 per month! The FULL amount as on today's final account SHALL APPEAR IN MY ACCOUNT AND BE CLEARED BEFORE THE VEHICLE WILL LEAVE!!! ''

[9] Based on the above correspondence the applicants allege that the respondents had "*taken the law into their own hands and are, in fact, executing without judgment''*.

[10] Carsten's avers that they next approached a legal practitioner who, on 28 June 2011, wrote a letter of demand to the respondents demanding the return of the vehicles by no later than 29 June failing which urgent relief will be sought. Apparently, upon receiving this letter the respondents engaged the services of legal practitioner Mr Roets who, it appears, had a discussion with the applicant's legal practitioner. The latter then wrote a letter to Mr Roets on 29 June recording a discussion between the two stating:

> "The above, as well as our telecon on even date refer. We confirm acting on behalf of Warthog Logistics CC, as well as Mr Frederick Carstens …In light of our aforementioned conversation, during which you disclosed your client's intention of bringing an application to found jurisdiction over the vehicles …, we hereby advise that our clients consent to the jurisdiction of the High Court of Namibia for

> purposes of such application. Furthermore, our clients agree that all processes therein may be served upon our offices in light thereof that our clients do not have offices within the Republic of Namibia."

[11] On 30 June 2011 the 2nd applicant deposed to an affidavit to initiate the present proceedings which were served on the respondents on 1 July 2011.

[12] The respondents' answering affidavit is deposed to by the 2nd respondent. He states in respect of the applicants' allegation that the subject vehicles were forcefully detained that:

> 'The aforesaid truck and trailer experienced a breakdown on the 21st of June 2011 whereupon the first respondent was approached by the driver of the truck and trailer to assist him with the necessary repairs. I respectfully refer to a statement of the driver dated 30 June 2011 annexed hereto marked "RA1", confirming the circumstances that occurred as a result of the breakdown so experienced. Pursuant to the aforesaid repairs were effected to the truck and trailer in question as per the driver's instructions at the workshop of the first respondent. This was done on the premise of an oral agreement concluded between the first respondent and the first applicant, the latter duly represented by the said Mr Bartlett, in terms of which the first respondent was employed to render such repair services to the truck and trailer in question against payment of the services and repairs so effected to same. Subsequently and pursuant to such an agreement an invoice in the sum of R47 819-89 was rendered for payment of the repairs and services so effected to the truck and trailer. Although the first respondent immediately commenced with repairs to the truck and trailer upon their arrival, the repairs could only be completed by late last week, since the first respondent was awaiting the arrival of parts from South Africa. Further it has since transpired that the trailer is also under attachment at the behest of Namibian Police Force inter alia for the reason that they have discovered that

> there has been tampering with the vin and chassis numbers. I respectfully refer to the notice of attachment emanating from the Namibian Police Force dated 30 June 2011, annexed here to marked "RA3". Hence, it follows that the applicants should have joined the Namibian Police in these proceedings insofar as the trailer is concerned and in any event will not be able to obtain the release thereof pending such attachment. By reason of the aforesaid I am advised and respectfully submit that the first respondent has an improvement/repairs lien in and respect to the truck and trailer pending payment of the invoice as aforesaid. By virtue of same the first respondent is entitled to retain possession of the said truck and trailer until proper payment has been received for the full amount of the invoice.'

[13] This deponent denies forcefully dispossessing the driver of the truck and relies on RA1 as proof that it was received voluntarily. To deal with the e-mail correspondence of 21 June the deponent states:

> "Safe for admitting that one Celeste Enslin spoke to Dawid de la Guerre, I respectfully point out that the account that had to be settled was that reflected in "RA2" and not the account pertaining to the previous arrangement. As stated above, the account remains outstanding. I respectfully refer to her confirmatory affidavit annexed here to marked "RA5".

[14] The implication is very clear: Carstens and Celeste Enslin are here suggesting that in the latter's email of 21 June she referred to 'RA1' and not to the unpaid account in respect of the Scania.

Analysis

[15] Where there are disputed facts I must accept the version of the respondents unless such version is so farfetched or inherently so improbable that it can be rejected on the papers. I have come to the conclusion that the respondents' version that the subject vehicles were given to them voluntarily by the respondents's driver for repairs and that they, having effected the repairs, acquired an improvement lien over the subject vehicles is farfetched and stands to be rejected on the papers. I set out below the facts and circumstances that led me to that conclusion.

[16] There is no reply to the applicants' legal practitioner's letters - both to the respondents directly or to Mr Roets acting for them. In the letter of demand (of 28 June) the applicants' lawyers make clear that the subject vehicles were wrongfully retained by the respondents and that the applicants wanted them back immediately and that failing such return they hold instructions to approach court for relief. In the letter to Mr Roets (of 29 June) the applicants' lawyers record that what Mr Roets conveyed is that the subject vehicles were being kept in order to seek relief founding jurisdiction. The implication being that the respondents' lawyers made no reference either to the alleged lawful manner in which the respondents came in possession of the subject vehicles, or that they were being kept on account of an improvement lien. In the latter respect, what is clear is that the letter records a conversation between two lawyers acting for the parties and that Mr Roets, acting for the respondents, in such conversation made no

reference to the fact that the subject vehicles are being retained by his clients on account of an improvement lien. So, we are here faced with a situation where not only did Enslin Celeste in the email messages of 21 June not make reference to an improvement lien or the respondents having come in possession of the subject vehicles at the behest of an agent of the applicant, but that, even as late as 29 June (just a day before the applicant's founding affidavit is deposed), when a legal practitioner engaged by the respondents discusses the subject vehicles, those two critical averments are not relied on.

[17] Two principles of the common law are implicated in that regard: the first is a vicarious admission (by conduct) by Mr Roets and Celest Enslin that the respondents did not receive the trucks from Bartlett lawfully nor that Bartlett had surrendered the vehicles to the respondents for repair.as is observed by Zeffert and Paizes, *The South African Law of Evidence, 2nd Ed at p 493:* "when a person, A, Makes a statement(or performs Conduct) that is contrary to his or her interests, it is, as a general rule, admissible against that person as an admission'' The second is that an adverse inference may be drawn by a Court where a person fails to mention the existence of a fact counting in his favour or fails to deny an adverse allegation against them when a reasonable person would expect them to have done either of those things. The principle was summed up by Miller JA in *McWilliams v First Consolidated Holdings (Pty) Ltd*: 1982 (2) SA 1 (AG) at 10 E-F as follows:

> '...in general, when according to ordinary commercial practice and human expectation firm repudiation of . . . an assertion would be the norm if it was not accepted as correct a party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or .it least will he, an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute.'

[18] There is no mention in the e-mail between Enslin and de la Guerre of the respondent having been given the trucks for repair. This is such a significant fact that it is reasonable to expect that the respondent would have mentioned it at the earliest opportunity at which the suggestion was made by the applicant that the respondents are in illegal possession of the subject vehicles. The fact that the subjects of spoliation were being kept as a lien, is not just another reason for the retention of the subject vehicles, it is *the* reason for its retention. It is far-fetched that Enslin would not have mentioned that fact at the very first opportunity that presented itself. Not only that, even the respondent's legal practitioner makes no mention of the reason for the retention, in response to the letter of demand.

[19] I remind myself that the respondents seek to retain both the truck and the trailer. Not only do the respondents not give any explanation of the nature of the breakdown and the nature of the repairs they were asked by Bartlett to fix, but 'RA1' only makes reference to repairs to the truck - not the trailer. On what basis do the respondents seek to justify a lien over the trailer? The police document to which the respondents refer is not only hearsay, but it does not prove the assertion the respondents make that the trailer was detained by the police because its VIN number was interfered with. The document (dated 30 June)

provided as proof of that allegation states that in the opinion of the official who prepared it the Trailer Cy 334545's 'general condition' 'is not roadworthy' and that the vehicle 'may only continue to be used …after repair to the testing station'. As can be seen, the date of 30 June falls within the period in which the trailer was in the possession of the respondent. Absent an explanation why it became necessary for the respondents to invite the police to inspect the trailer to make such a determination, it adds credence to the applicants' version that the respondents were determined to find some reason to justify not having to release the trailer and to place pressure on the applicants to pay off the portion of the debt which was not due and payable. Similarly, the RA1 note in which Bartlett confirms the alleged instructions for the repair of the truck was authored on 30 June 2011, the very day on which the police's detention document was done.

[20] The unambiguous references in the 21 June email by Enslin Celeste that the vehicles will only be released if the debts outstanding in respect of the May repairs are paid, compared to her clearly untruthful allegation under oath that 'RA1' is the unpaid invoice she referred to in her email of 21 June 2011, in my view strengthens the applicant's version that the lien claimed by the respondents is a farce. In view of the exchange of letters between the parties, it is clear that the respondents knew the nature of the proceedings that were intended. The allegations proferred in support of the lien are therefore farfetched and stand to be rejected on the papers.

[21] It is not said what repairs had as at 21 June 2011 been effected. The only thing that is said is that the parts were being awaited. What I find curious it that the respondents knew on 21 June 2011 that the applicants wanted the trucks released, i.e. the day on which they took possession of them. It is not explained in the papers on what basis they continued beyond 21 June to order parts for repairs which – it must have been clear on 21 June – the owners of the vehicles did not want done. Even assuming that Bartlett had voluntarily surrendered the vehicles as alleged, would the exchanges of 21 June not have put them on notice that the applicants had not consented to the repairs of the trucks? Why proceed, as alleged, to order parts in respect of vehicles that the applicants want restored immediately?

[22] All these circumstances in my view add considerable weight to the applicant's version that the note by Bartlett was not voluntary and that the lien sought to be justified by means of RA1 is a ruse.

[23] I am satisfied that the applicants established that it is more likely than not that the respondents had embarked upon a stratagem to create a basis for retaining possession of the subject vehicles when they realized that they were in law not entitled to retain the vehicles as 'security' for the payment of the debt owing to them as a consequence of effecting repairs to the applicants' Scania in May.

[24] Even if I were to find, as suggested by Mr Strydom, that on account of the paucity of elaboration by Bartlett as to the circumstances in which the truck and trailer were taken from him, the applicants had failed to demonstrate the forceful removal of the subject vehicles by the respondent, it was still incumbent upon the respondents to establish their lien on a balance of probabilities. The absence of proof of forceful removal of the subject vehicles does not necessarily translate to proof of the existence of the respondents' lien. The subject vehicles are the property of the applicants and were in their possession at the material time and the applicants would be entitled to possession thereof even if they failed to proof that on the 21st of June 2011 same were forcefully removed by the respondents. The only circumstance in which the respondents would be entitled to retain property which – it is common cause – is not theirs but that of the applicants, would be if they had some right in law to retain it: in this case the alleged lien. The evidence in the form of the e-mail correspondence between the parties, the letters of demand and the respondent's answer thereto by a legal practitioner, and the knowledge by the respondents that the applicants had already as at 21st June demanded back possession of the subject vehicles, all point the conclusion that the respondents had failed to demonstrate the presence of a lien in respect of the subject vehicles.

[25] As regards Mr Strydom's suggestion in argument that the Court retains a discretion to release the subject of spoliation subject to payment of security into Court pending the filing and determination of an action for the recovery of the

amount in respect of the which the lien is held, I agree with the submission made by Ms Van Der Westhuizen that the Court can only do so if it is satisfied that the respondents had proved a lien in respect of the subject vehicles. The case relied on by Mr Strydom, *Lamontville African Transport Co. (Pty) Ltd v Mtshali 1953(1) SA 90* clearly demonstrates that (i) the improvement lien claimed must be established and that (ii) the lien claimed must have a relationship to the item in respect of which the lien is claimed. Not only do the respondents fail to establish just what it is they were mandated to repair on the truck, but they failed t show the link between the alleged lien and the trailer. The jurisdictional fact for the exercise of my discretion has therefore not been established and nothing more needs to said in regard to the suggestion made by Mr Strydom.

[26] I have therefore come to the conclusion that the applicants demonstrated on a balance of probabilities (i) that they were in peaceful and undisturbed enjoyment of the subject vehicles on the 21 June 2011, and (ii) that the respondents – without any just cause for doing so – took possession of the subject vehicles and that the applicants are therefore entitled to the relief they seek.

[27] Although the notice of motion sought a special costs order, the applicants did not traverse that by way of evidence in the affidavits to enable the respondents to deal therewith. The issue was also not elaborated on in argument

for me to test the basis on which it was being sought. I accordingly did not consider it appropriate to grant such an order.

[28] I declined Mr Strydom's request that I strand the matter down and allow the respondents to file a fourth set of papers to deal with paragraph 3.3 and 3.4 of the applicants replying affidavit. It is trite law that the court may exercise its discretion in granting leave for a fourth set of papers to be filed only in 'exceptional circumstances' or in 'special circumstances' or if the 'court considers such a course advisable'.[2] The concerned paragraphs read as follows:

'3.3 I therefore respectfully submit that the invoice (RA2 to the answering affidavit) which is incidentally also dated 30 June 2011, is no more that a fabrication by the respondents in order t justify their unlawful detention of the vehicle in question

3.4 I also respectfully submit that annexure RA1 to the answering affidavits was written by Mr. Bartlet on instruction of Ms Enslin as it was indicated to him by both the second applicant and Ms Enslin that he needed to do this in order to avoid being deported from the Republic of Namibia as his was overstaying hi visa due to the retention of the vehicles by the respondents. As Mr. Bartlet felt intimidated (due to the Namibian Police and Mr. Arangies' presence) he wrote and signed the document as indicated to him by Ms Enslin…."

The applicants had as early as 21 June 2011 conveyed to the respondents that the latter were unlawfully detaining the subject vehicles: they say as much in their founding papers. It is clear from the applicants' papers that they did not know

[2] See *Kasiyamhuru v Minister of Home Affairs 1998 (3) SA 166 (W);* Herbstein and Van Winsen. 2009, *The Civil Practice of the High Courts and Supreme Courts of Appeal in South Africa*, 5th Edition, p 433.

until the answering papers were filed that the respondents relied on a lien for repairs allegedly done. The denial for the existence of a lien is, in my view, an aversion that RA1 is not genuine and that Bartlet had not voluntarily surrendered the subject vehicles to the respondents. The applicants therefore do not in paragraph 3.3 and 3.4 raise any new matter that the respondents could not have been expected to anticipate. For that reason, I find no special circumstance that would justify the respondents' basis to file a fourth set of papers.

[29] It is for these reasons that I made the order earlier referred to.

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DAMASEB, JP

ON BEHALF OF THE APPLICANTS: Mrs C E Van der Westzhuizen

Instructed by: **Engling, Stritter & Partners**

ON BEHALF OF THE RESPONDENTS: Mr A Strydom

Instructed By: **Chris Roets Legal Practitioners**