

IN THE COURT OF APPEAL OF LESOTHO

**C of A (CIV) NO. 19/2022
CIV/APN/253/2022**

HELD AT MASERU

In the matter between

**LESOTHO NATIONAL GENERAL INSURANCE
COMPANY LTD**

APPELLANT

And

RHYTHM & STEALTH (PTY) LTD

RESPONDENTS

CORAM: K.E. MOSITO P
P. MUSONDA AJA
M.H. CHINHENGO AJA

HEARD: 11 OCTOBER 2022

DELIVERED: 11 NOVEMBER 2022

SUMMARY

Appellant being insurer of a motor vehicle; insured vehicle involved in a collision with a third party vehicle.

Third party having sent its vehicle to respondent for assessment of extent of damage and respondent charging for assessing damage and for storage while vehicle at its premises; Appellant indemnifying owner of vehicle and keen to retrieve vehicle from respondent and providing security bond for third party charges;

Respondent refusing to release vehicle and continuing to charge storage costs but not instituting action to recover same;

On application to High Court for release of vehicle against provision of security, court dismissing application finding that an agreement existed justifying assessment and storage charges and accordingly respondent entitled to retain vehicle until all his charges are paid;

On appeal High Court decision set aside on grounds that no agreement on assessment and storage existed between appellant and respondent; that respondent had to prove its unliquidated claim against owner of vehicle; and that respondent not entitled to retain vehicle and continue to charge storage charges in circumstances where security for its costs provided;

Appeal upheld with costs

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] The appellant is the largest insurance company in Lesotho. In the ordinary course of its business, it insured a Toyota Yaris motor vehicle. That vehicle was involved in a road traffic accident on 27 April 2020 with a Toyota Fortuner motor vehicle belonging to Lesotho Council of NGO's ("LCN").

[2] On 27 May 2020, the LCN made a demand to the appellant's insured for the repair or replacement of its motor vehicle, the

Toyota Fortuner. The insured referred the claim to the appellant. On 29 July 2020, the appellant received a letter from a firm of legal practitioners acting for a company known as Car Circuit (Pty) Ltd (Car Circuit) alleging that Car Circuit had assessed the damage to the Toyota Fortuner and kept it in storage at its premises. The cost of assessment was M4 800.00, and the cost of storage was M48 100.00. After the appellant requested for invoices supporting the claim on 12 August 2020, they were duly furnished, not by Car Circuit but by the respondent on or about 8 September 2020. The invoice for the assessment and storage was now in the total sum of M80 200.00.

[3] The appellant or its insured had not entered into any agreement with the respondent for the assessment or storage of the Toyota Fortuner. LCN confirmed, through an affidavit by its executive director, Seabata Motsamai, that it also had not entered into any agreement with the respondent.

Demand for release of vehicle and court proceedings

[4] The appellant demanded the release of the vehicle by the respondent. When the demand was rebuffed, the appellant instituted urgent motion proceedings in the High Court seeking the release of a Toyota Fortuner motor vehicle against the provision of a security bond in the sum of M80 200.00 to cover the costs that the respondent claimed arose from the assessment and storage of the motor vehicle.

[5] The respondent raised several preliminary issues which, if accepted by the court, would have resulted either in the deferment of the proceedings or the dismissal of the claim. It averred that the appellant was not entitled to bring the proceedings on urgency because it had made demand for the release of the vehicle on or about 31 July 2020 and only instituted urgent proceedings almost a year later. That was an abuse of court process. The appellant's allegation that there was no agreement between it and LCN on the one hand and the respondent on the other, constituted a material dispute of fact that did not sit well with motion proceedings. That was so because the Toyota Fortuner was towed into the respondent's workshop by LCN employee who gave instructions that the damage to the motor vehicle should be assessed. At no time before the appellant's demand for the release of the vehicle had LCN, owner of the vehicle, claimed it to be missing. The appellant was being dishonest by hiding the fact that it had written two letters proposing or making an offer to settle the matter, which offer was rejected. The appellant had deliberately failed to join LCN as a party to the proceedings knowing fully well that LCN was an interested party and had brought the motor vehicle to the workshop. The appellant had failed to establish a cause of action to claim the vehicle more so after asserting that it had no agreement with the respondent and that it was not even the insurer of the motor vehicle. Finally, the appellant had no authority from LCN to claim the motor vehicle or any basis for demanding the surrender of the vehicle to itself: it had failed to establish that it had the necessary standing in the matter, *locus standi in judicio*.

[6] On the substance of the claim, the respondent clarified that the respondent is one and the same entity as Car Circuit, the latter being the respondent's trading name. It stated that LCN had brought the Toyota Fortuner motor vehicle to its workshop on 13 May 2021 for assessment of damage it had sustained in the collision. The appellant was therefore not in a position to assert that no agreement to assess the damage and store the vehicle was reached between respondent and LCN. Respondent had in fact brought to the attention of one Nyakane, who had demanded release of the vehicle on behalf of the appellant, that it (respondent) had a verbal agreement with LCN. Because of threats of physical harm made by the said Nyakane to deponent of respondent's affidavit, respondent instructed its lawyers to make demand to the appellant for assessment and storage costs.

[7] The response to the demand was a written request for invoices on the storage and assessment costs mentioned in the letter of demand. The respondent took this request to be an acknowledgement of debt.¹ Respondent also relied on two letters dated 10 May and 10 June 2021 in which the appellant proposed to settle the storage costs in the sum of M13 474.08 and M18 500.00, respectively despite that the letters specifically stated that the "offer is made without prejudice of rights ..., without admitting liability and solely in an attempt to settle the matter."

¹ See letter by appellant to respondent's legal practitioner dated 12 August 2020, which reads-

"Regarding your letter dated 29 July 29, 2020, may we have invoices to storage fees and assessment fee as stipulated in your letter of demand."

[8] The respondent states that it rejected both proposals. It further accused the appellant of failing to disclose, in the founding affidavit, the existence of the two letters referenced above and stated that in any event the security bond did not cover storage charges beyond 8 September 2020. As such it could not release the vehicle, which was 'surety' for payment of the storage costs. Seabata Motsamai knew where the vehicle. That is why he did not report the vehicle as missing to the police or anyone else. The vehicle had been towed to the respondent's workshop by an employee of LCN, Vusi Matsoso.

[9] The appellant's replying affidavit objects to the production in evidence of the letters of May and June, written on a without prejudice basis, on the ground that they are inadmissible. It prayed the court to strike out averments in the answering affidavit seeking reliance on the without prejudice communication. The appellant explained in its replying affidavit that the urgency with which it instituted its claim arose from the fact that the storage charges continued to escalate at M650.00 per day. It also explained the basis of its application. It was aimed at limiting the appellant's potential liability and secure for the respondent the amount of its claim. For this reason, the appellant averred that any disputed facts were not germane to the application before court and could have to be dealt with when the parties become ceased with the substantive claim. In response to the contention that it had no standing to institute the proceedings, appellant stated that it was the insurer of the vehicle with which the Toyota Fortuner collided and that as evidence by a letter dated 28 July

2020 (Annexure R1) it had indemnified LCN against loss of the vehicle. It denied that the invoices were an acknowledgement of debt. To the contrary, they were no more than mere information supplied upon request.

[10] The appellant took the view that if, as respondent states, it had an agreement with LCN, then it is to LCN that it must look for payment of its costs. Appellant persisted with its claim for the release to it of the motor vehicle.

Decision of High Court

[11] It seems to me that the learned judge in the High Court did not have a good appreciation of the facts that I have, going by the affidavits on record, outlined above. For instance, the judge commences the judgment by stating:

“[1] In this matter, two motor vehicles got involved in a collision on the 27th April 2020. It was a Toyota Yaris ... and a Toyota Fortuner.... The former vehicle belonged to the Lesotho Council of NGO’s (LNC). The applicant was at all material times the insurer of the Toyota Yaris.”

[12] And in a more convoluted manner, the learned judge says:

“[4] ... On the 27th May 2020 after the collision of the said vehicles, the Lesotho Council of NGO’s (LNC) made a demand for repair or replacement of its vehicle to the Applicant’s insured vehicle. After the insured vehicle received the demand letter, it forwarded the same to the Applicant to handle LNC’s claim.”

[13] The Toyota Yaris motor vehicle and not the Toyota Fortuner was the vehicle insured by the appellant and it was not the vehicle owned by LNC. The demand for the repair or replacement costs could not conceivably be sent to a vehicle nor could an insured vehicle receive a demand. This way of narrating the facts of a matter leaves a lot to be desired. It raises a doubt in a reader's mind whether the judge properly understood the facts of the matter before him.

[14] Be that as it may, the learned judge first considered the appellant's preliminary objection to the production of the letters written on a without prejudice basis. Relying on the decision in *Naidoo v Maine & Trade Insurance Co Ltd*² he correctly decided that the letters were in admissible and ordered that the paragraphs in the answering affidavit dealing the letters and the letters themselves be struck off from that answering affidavit. The rationale for excluding from evidence without prejudice communication was well articulated at 677B-D in *Naidoo*:

"[Such correspondence, once objected to its being adduced in evidence, was wholly inadmissible. The rationale for the rule is public policy: parties are to be encouraged to avoid litigation and all the expenses (nowadays, very high), delays, hostility, and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without fear that, if the negotiations fail, any admissions made by them during such negotiations will be used against them in the ensuing litigation.]"

² 1978 (3) SA 666 (A) at 674A-B

[15] The respondent's defence that the appellant had admitted liability based on the without prejudice letters having been struck, the respondent was left limping on its averment that there was an agreement between LNC and itself that the assessment and storage costs would have to be paid. The learned judge concluded that such an agreement had been entered into. He reasoned thus:

“[14] While the applicant disputes the existence of any agreement between the parties, significantly, in their answering affidavit, at paragraph 4, respondent indicated that the vehicle was brought by one Vusi Matsoso to the workshop on the 19th May 2020, and this averment was not denied or rebutted by the applicant. It is therefore clear that there is a dispute of fact in this case, namely the existence of an agreement. Applicant denies [there] ever [being] any agreement between the parties, while on the other hand, respondent insisted the existence of such.”

[16] The learned judge applied the *Plascon-Evans* rule as accepted in *MMC Construction Co (Pty) Ltd v Southern Lesotho Construction (Pty) Ltd & Others*³ and concluded:

“[20] The facts are clear enough to show that there had been an agreement even though such was not reduced to writing. While the parties might not have made a written agreement, it would have been naturally understood that the payment of assessment of damages (sic) as well as storage costs would be due upon completion of the assessment.”

[17] He accordingly dismissed the appellant's claim with costs.

³ ((CIV) 1/2005) [2005] LSCA5 (20 April 2005)

Appeal grounds

[18] The appellant was aggrieved by the decision of the court and challenged it on the following grounds: (a) that the court erred in coming to the conclusion that an agreement came into existence between the appellant and the respondent in respect of the assessment of damages to the Toyota Fortuner and for its storage; (b) that the court erred in finding that it was the appellant that brought the motor vehicle to the respondent and not the LCN; and (c) that the court erred in ignoring the version of the respondent that respondent had a verbal agreement with LCN and not the appellant.

Argument on appeal

[19] In argument before us, appellant accepted, as it had done in its affidavits, that the motor vehicle was taken to the respondent's workshop by LCN on 19 May 2020. Its counsel however submitted that respondent does not dispute that when the motor vehicle was taken to its premises by LCN, the appellant was not present and therefore could not have become a party to the alleged agreement. Yet the respondent in some way attributes to the appellant that the agreement in existence came into existence between it and the appellant. He submitted that in any event the respondent did not allege that the verbal agreement between it and LCN stated that storage costs would be charged or how much that storage would cost per day. As such the terms of the agreement were not disclosed. Respondent failed to establish any nexus between the

agreement it allegedly had with LCN and the appellant. Counsel concludes on this aspect of his written submissions:

“[17] The bottom line is that the respondent does not have any contractual claim to the rate of M650.00 storage costs per day or M4 800.00 for costs of assessment. These amounts could only be claimed on the basis of a contractual agreement to the extent that the respondent was purporting to exercise the creditor and debtor lien. It had not effected any improvements on the vehicle.”

[20] In so submitting counsel was inviting this Court to make a finding on the merits of the respondent’s claim for assessment and storage charges. I refrain from making any such determination or even hazarding a view on the issue. That is a matter on which the respondent would have to satisfy the court should it make a claim for assessment and storage costs in the appropriate court. It is a matter touching on the merits of any such claim. Additionally, it must be recalled the issue that was before the High Court was simply whether the claimant, as an insurer that had met LCN’s damages claim, was entitled, upon tendering security, to have the motor vehicle released to it. As correctly submitted by appellant’s, the existence or otherwise of the agreement was relevant only as a prerequisite for a determination whether the respondent was exercising a creditor and debtor lien, and the court only had to decide whether such a lien should be substituted by the provision of security by the appellant in the amount tendered. The court was consequently required to exercise its discretion whether the motor vehicle could be released against a tender of security. In this

instance, so it was submitted, the court failed to exercise its discretion judicially in the circumstances.

[21] Counsel referred to the South African case, *Zeda Financing (Pty) Ltd v Dutoit t/a AMCO Dienstasie*⁴, in which the facts were similar to the present case. In *Zeda* the applicant demanded the release of a vehicle and tendered an amount due for storage as determined by the respondent together with a bank guarantee to cover that amount to be paid upon the respondent obtaining judgment in its favour. When the respondent had refused to release the motor vehicle and the court considered the dispute, it stated that the respondent who had a right of retention of the vehicle was obliged to restore the vehicle if sound security was tendered. In exercising its discretion, the court had to consider what in all the circumstances was equitable. The court stated that the relief sought by the applicant in such a case was not to be granted as of right but in the exercise of discretion by the court. The court recognized that the respondent would in any case have to bring an action for recovery of the amount it alleges is due to it and further that the opposition to the release of the motor vehicle cannot be used to force the applicant for its release to pay the full amount claimed on the claimant's calculation of such amount.

[22] Respondent's counsel argued the appeal on three issues that he believed were germane to this case, namely, whether there was an agreement regarding the assessment and storage of the motor vehicle between the appellant and the respondent or between the

⁴ 1992 (4) SA 157

LCN and the respondent; whether it was the appellant or LCN that took the motor vehicle to the respondent's workshop and whether the respondent was entitled to payment of assessment and storage costs.

[23] In approaching the matter in this way the respondent's counsel was pre-occupying himself with issues that were not in contention or the substance of the matter before the High Court. He failed to appreciate that the issue about the existence of the agreement between LCN and the respondent was a matter for another day. Whatever the agreement may have been regarding the assessment and storage charges that was a matter to be dealt with when and if the respondent pursued its claim in that regard. The issue of any agreement between the appellant and the respondent was clearly resolved by the affidavits: it was commonly understood that no agreement existed between the parties. It was common cause that the Toyota Fortuner was taken to the respondent's workshop by a representative of LCN. The respondent's entitlement to payment of assessment and storage costs was a matter, as is readily apparent, determinable upon the respondent making its claim for those costs. The issue before the High Court could not have been more clearly set out as done by the appellant. In its notice of motion, it clearly stated the relief sought as being the release of the Toyota Fortuner against the provision of security of M80 200.00.

Conclusion

[24] The relief sought by the appellant was predicated on several factors. The appellant had or had agreed to indemnify its insured in relation to the claim lodged against the insured by LCN. That indemnification could potentially cover the cost of assessment and storage if that were proved to be due to the respondent. In essence the appellant had, after indemnifying its insured acquired a right to the motor vehicle by subrogation. It became entitled to take the motor vehicle into its custody and deal with it as it saw fit. Storage charges at the rate of M650.00 continued to accumulate to the potential prejudice of the appellant. By providing security the appellant had assured the respondent that should it be found that it was entitled to payment that would present no difficulty to the appellant. Further assurance was given by stating that appellant, as the largest insurance company in the country had the capacity to meet any claim as the respondent was able to prove. It was not necessary for the respondent to retain possession of the motor vehicle to prove its claim for payment of assessment and storage costs. What the appellant was seeking to avert or forestall was the continued escalation of the storage costs. The respondent had failed in its duty to sue for and prove the costs claimed and the retention of the motor vehicle was no more than a stratagem to force the payment of the costs without proof that they were legitimately raised. The respondent's defences that the appellant had no title to claim the release of the motor vehicle and that the security provided was not sufficient could not have stood in the way of the appellant's relief. There was simply no impediment to

the exercise of its discretion by the High Court in favour of granting the relief sought by the appellant.

[25] I observe that the learned judge *a quo* did not consider that the matter before him called for a judicial exercise of discretion. That explains why he pre-occupied himself with the question of the existence or otherwise of an agreement in relation to the assessment and storage costs. He erred in not only failing to appreciate the issue before him but also in not recognising that he was being called upon to exercise his discretion. At the end of the hearing of the appeal counsel for the respondent conceded that that the court below should have exercised its discretion in favour of the appellant and respondent should release the motor vehicle. Although he proposed that each party should bear its own costs, he was unable to argue further for such an order of costs.

[26] This is one of those matters which falls in a category of cases in which this Court is in as good a position as the court of first instance to exercise discretion. See *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd*⁵. Much more so because the learned judge *a quo* did not exercise his discretion as required of him. This Court can therefore exercise its own discretion and substitute it for that which should have been decided at first instance. This is not a case where this Court has first having to find that the court of first instance did not act judicially. There are sufficient reasons for this Court to do so. For the reasons stated in paragraph 24 above and in exercise of its discretion this Court that

⁵ 1989(4) SA 31(T) at 35I – 36H

the relief sought by the appellant should have been granted by the court *a quo*.

[27] The order of this Court is accordingly the following:

1. The appeal is upheld with costs to be paid by the respondent.

2. The order of the High Court striking out the letters written by the appellant to the respondent is upheld.

3. The High Court order dismissing the appellant's application with costs is set aside and substituted with the following -

"The application succeeds. The respondent shall pay the costs of suit."



MH CHINHENGO
ACTING JUSTICE OF APPEAL

I agree



KE MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree



P MUSONDA
ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV M L TAKA
FOR RESPONDENT: ADV B B SEKATLE