

**REPORTABLE**

**CASE NO. 7816/2007**

**IN THE HIGH COURT OF SOUTH AFRICA  
DURBAN AND COAST LOCAL DIVISION**

In the matter between

**SUNDRASEN NAIDOO**

Applicant

and

**SANBONANI EXPRESS FREIGHT**

First Respondent

**STRENGTH TRANSPORT**

Second Respondent

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Delivered :  
19 February 2008

**J U D G M E N T**

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**LEVINSOHN DJP :**

[1] In this opposed motion the applicant seeks an order directing the first respondent to deliver to him certain goods which are being held at the first respondent's business premises.

[2] In his founding affidavit the applicant testifies that 2006 he contracted with the second respondent to transport certain goods

consisting of clothing from Durban to Johannesburg. On 26<sup>th</sup> June 2007 he instructed the second respondent to uplift a consignment of goods from an entity called Jural Clothing Industrials and deliver these to him in Germiston. The applicant puts up the waybill in support of the foregoing allegation. Similarly on 28<sup>th</sup> June 2007 the second respondent received an instruction to uplift certain goods from an entity R. A. Kader CC in Durban and here too the waybill is put up in support of that transaction.

- [3] On 28<sup>th</sup> June 2007 he made enquiries as to the whereabouts of his goods and was told by the owner of the second respondent, one Jason Pillay, that these would be delivered shortly. By 2<sup>nd</sup> July 2007 the second respondent had not delivered these goods. Thereafter the applicant learned from the second respondent that the goods aforesaid were being held in

Phoenix, Durban, by the first respondent.

[4] When the applicant contacted the first respondent he was told by one Ahmed that these goods were indeed in the first respondent's possession and would be held until the second respondent discharged an indebtedness to the first respondent. The first respondent was adamant that he would hold on to the goods notwithstanding that the applicant was the owner thereof.

[5] One Jason Pillay on behalf of the second respondent has deposed to an affidavit in which he confirms the allegations made by the applicant.

[6] Abdur Rahman Kader and Ganasan Moodley deposed to affidavits in support of the applicant's allegations that he is the owner of the goods in question.

[7] One Ahmed deposed to an affidavit on behalf of the first respondent. Apart from submitting that the citation of the first respondent was defective the deponent goes on to assert that the first respondent concluded an agreement with the second respondent in terms of which the first respondent would provide transport and related services to the second respondent. In terms of this agreement the first respondent was to have uplifted goods at

dates and places designated by the second respondent and deliver them according them to the second respondent's instructions and "to store them pending payment at which time the goods would have been delivered". The deponent goes on to make the following allegation : -

"7.3 The goods were accordingly stored and insured to safeguard them pending payment from the Second Respondent;

7.4 Needless to say, the Second Respondent has not effected payment;"

[8] In the premises the first respondent's deponent submits that the first respondent has a lien over the goods.

[9] With this brief outline of the salient background facts in this application I turn at the outset to the point *in limine*. In my opinion this point is without substance and highly technical. The first respondent is a close corporation called "Sanbonani Express Freight CC". It has been cited as "Sanbonani Express Freight". It trades under that name save that the word "Freight" is omitted. In terms of Rule 14 the applicant was entitled to cite the first respondent by its firm's name. It did so. I am satisfied that no prejudice whatsoever will be suffered by the first respondent if an order for the amendment of the citation is made and such will hereby issue.

[10] I turn now to the merits of the application. Firstly it is established on these papers that the applicant is the owner of the goods which are in the possession of the first respondent. Secondly there is clearly no privity of contract between the applicant and the first respondent. It is the second respondent that contracted with the first

respondent. The first respondent on the instructions of the second respondent took possession of the goods. It then decided to detain those goods in order to exact payment from the second respondent. That to my mind appears to be the most probable explanation for the first respondent's actions.

[11] The first respondent recognises in these proceedings that absent a contractual relationship between it and the applicant it cannot claim a lien on the basis of a debtor and creditor relationship. Its case perforce must be founded on the existence of a salvage lien. The principles of law are summarized in **The Law of South Africa**, Volume 15, page 31, paragraph 50 : -

“Where a person has incurred expenditure on property in pursuance of a contractual obligation existing between himself and the person enjoying a possessory right over the property, his right of retention against the latter is termed a debtor and creditor lien. In the absence of such an agreement, a person who has spent money or done work on another person's property generally has a right of retention over that property, operating against the entire world. His right may be either a real lien, a salvage and improvement lien, or an enrichment lien. A lien enables the retentor to keep the property in question in his possession until he has been compensated for his expenditure on that property.”

[12] A salvage lien is a real right which does not arise from an agreement. It is founded on the principle that no person may enrich himself/herself at the expense of another. In

***Brooklyn House Furnishers Ltd v Knoetse & Sons***

1970 (3) SA 264 at 271, BOTHA JA said : -

“Waar daar geen verryking vir die eienaar van die saak is nie, kan geen sodanige retensiereg tot stand kom nie.”

[13] The learned judge in the ***Brooklyn House Furnishers Ltd*** case went on to say at 271 F:-

“Verryking vind nie slegs plaas waar daar 'n vermeerdering van bates is nie, maar ook waar daar 'n nievermindering van bates is waar vermindering andersins waarskynlik sou plaasgevind het. .... Appellant sou dus, vir die ontstaan van 'n bewaringsretensiereg, verryk gewees het, indien respondent se arbeid en uitgawes aan die meubels nodig was vir hul behoud en beskerming.”

[14] As indicated in the quoted passage above the first respondent claims the existence of a salvage lien. It asserts that the goods were “stored and insured to safeguard them pending payment from the second respondent.” There is a strong probability that the first respondent would have been aware that these goods do not belong to the second respondent but to the

latter's customer. A transport operator would also be aware that the goods in question ought to be transported expeditiously. There would thus be no need to store the goods for any length of time.

[15] Be that as it may however in my opinion the first respondent has a real difficulty in this case and that is at the level of establishing that the owner of the goods being the applicant *in casu* was unjustly enriched at its expense. Quite evidently the first respondent's legal advisers realising that the first respondent can only succeed if it established a salvage lien, simply made the bald allegations about insurance and storage which I have already referred to. There is not a tittle of evidence to establish what the first respondent expended on the storage and the costs of the alleged insurance. As mentioned above the ultimate inquiry is that of enrichment and it behoves a litigant who alleges unjust enrichment to establish it. This principle has been laid down in the case law going back many years. In ***King's Hall Motor Co v Wickens & McNichol*** 1931 NPD 37 at 44, HAWTHORN AJ (as he then was) in relation to a case involving a lien which has some similarities to the present case, said the following : -

"Thus I am concerned only with a salvage lien for necessary expenses. The latter are expenses without which the thing would either depreciate or perish. (D.50.16.79). It is clear from the *United Building Society* case that a salvage lien rests upon the equitable principle that no one

shall be enriched at the expense of another, so that, summing up the essentials, the person claiming a salvage lien for necessary expenses must show that he was put to expense and that the owner was enriched thereby in that but for the expense the thing would have depreciated or perished.

I now consider whether the respondents proved these essentials. In *Abelman v Weeber*, [1928] T.P.D., 398, it was held that the person claiming a salvage lien for useful expenses must prove the actual amount expended. In my opinion that is clearly the case also in respect of a salvage lien for necessary expenses because there is no difference in principle between the two kinds of expenses. The respondents did not prove that they were put to any expense whatever. They did not even attempt to do so. The first essential, therefore, is lacking."

[16] In dealing with the issue of depreciation in

the ***King's Hall Motor Co*** case the learned judge

said the following : -

"The next essential which the respondents had to prove was that the appellant was enriched in the sense that the car was saved from depreciation.

No evidence whatever was led on this point and I decline to infer from the circumstances that the car was saved from depreciation. ....In my opinion necessary expenses covered by a lien must be necessary in the ordinary sense of the word

and the circumstances of the case. The respondents failed to prove that it was necessary to garage the car at all. ....”.

[17] A similar situation presents itself in the instant case. The first respondent has in my view not led any evidence whatsoever to demonstrate the quantum of the unjust enrichment. Not only is there no indication of the place where the goods were stored and the costs of storage, the costs of insurance and moreover why it would have been in the interests of the owner of the goods to store them in the first place. In my view the first respondent has signally failed to prove the existence of a salvage lien.

[18] In my opinion therefore the application has to succeed and the following order will issue : -

(a) The Sheriff of the above Honourable

Court or his deputy be and is hereby

ordered to attach, seize and hand over

to the applicant the consignment of

288 cos. Striped kenzo 7 panel shirts

contained in 8 boxes/cartons, addressed to the applicant from R. A. Kader, 504 ladies T.R. belted skirts contained in 14 boxes/cartons addressed to the applicant from R. A. Kader, and 466 ladies bias cut blouses with embroidery and 142 ladies cord panel skirts addressed to "Desmond" "JKJ Investments" contained in 11 boxes/cartons from Jural Clothing Industries currently at the premises of the first respondent situated at 138/140 Aberdare Drive, Phoenix Industrial Park or wherever same may be found.

(b) The first respondent is directed to pay the costs of the application such costs to include all reserved costs.

**DATE OF JUDGMENT :** 19 FEBRUARY 2008

**DATE OF HEARING :** 4 DECEMBER 2007

**COUNSEL FOR APPLICANT :** MR P. BEZUIDENHOUT

**INSTRUCTED BY :** THASNEEM PARUK & ASSOCIATES  
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DURBAN