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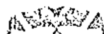

INTHE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA &R77/2015
Heard on: 02/05/2017
Delivered on:26/05/2017

In the matter between:

BG BOJOSINYANE & ASSOCIATES — Appellant/Defendant

And

SHERIFF: JH VAN STADEN — Respondent/Plaintiff

Coram: Kgomo JP et Williams J et Mamosebo J

JUDGMENT

Order

1. The appeal is upheld.
2. The Magistrate's judgment and order are set aside.
3. Each party is ordered to pay his own costs including the costs of the appeal.

storage costs. I cannot agree with this contention. An implied term usually arises by operation of law. In *Bertelsmann v Per* 1996(2) SA 375 TPD at 382-383, where the issue was whether the liability of an attorney for counsel's fees was implied as a matter of law, it was held that it would depend on the existence of a professional practice or trade usage which would have to be established by evidence. *In casu* no evidence was led to the existence of such professional practice or trade usage between an attorney and the sheriff and in addition no such implied term was pleaded. In any event such implied term would be contrary to the general principle as enunciated in *Diplock v Webb 1910 CPD* 198 at 202 as follows:

"Now, under ordinary circumstances, unless some special liability is incurred by the attorney in his transactions with the Messenger, the attorney renders himself in no respect liable for the costs which his client is condemned to pay. That is laid down in the case of Maybery v Mansfield (9c.B.754), and the principle of that judgment may be accepted by this Court. It amounts to this: that, under ordinary circumstances a messenger acts as an officer of the Court, and not as a servant of the attorney who issues the writ; that as an officer of the Court he is entitled to certain costs, and those are costs which must be paid by the client for whom the attorney acted. That is the general principle, and I can find nothing in this particular case which would take the case from under that principle. The attorney entered into no contractual relation with the Messenger, and he did no more that is usually done by parties to a suit i.e., to assist the Messenger in discovering the whereabouts of property belonging to a judgment debtor."

(own emphasis)

47. Had Mr Jankowits meant to argue that it was a tacit term of the agreement that the appellant be liable for the storage costs, the

[31] In ***Oceana Leasing Services (Pty) Ltd v BG Motors (Pty) Ltd*** 1980 (3) SA 267 (WLD) at 273C Melamet J remarked:

"A pledge of property, without the consent of the owner, is not binding on the owner thereof: Wille The Law of Mortgage and Pledge in South Africa 2nd ed at 27; Roos v Ross & Co 1917 CPD 303 at 306 - 307."

Van Zyl J in ***Trust Bank van Afrika BPK v Van der Walt N.O*** 1972 (3) SA 166 (KPA) at 170F - H enunciated the following as translated in the unreported judgment by Ndlovu J in ***Absa Bank Limited v Robin's Mobile & Fleet Maintenance*** CC Case No 11956/2011 delivered on 05 April 2011:

"There is no agreement to pay storage. Storage can, therefore, not be claimed ex contractu. If it is claimable it must be on the ground of enrichment. The applicant is not enriched by the storage of the lorry. Respondent had a claim against the applicant for the repair of the lorry and he held the lorry as security for the payment of those repairs. After completion of the repairs the respondent could immediately have claimed the amount due from applicant and if applicant failed to pay, the respondent could have sued him for the amount due. The debtor is not enriched by costs incurred by the creditor as a result of his omission to claim, just as interest on an outstanding amount of money cannot be claimed. Storage cannot be claimed in these circumstances. If respondent foresaw storage as a result of late payment he should have stipulated for that."

[32] Sonnekus and Neels Sakereg Vonnisbundel at 768 classify a lien as a form of self- help that has been sanctioned by law with the effect that it encroaches on the entitlement of owners. Thus this

form of "self-help" should only be allowed in certain well-defined instances. Van Reenen J also pointed out in ***Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd t/a Weider Health & Fitness Centre*** 1997 (1) SA 646 (CPD) at 652C - D:

"*On my understanding of the authorities the essential content of* a *ius retentionis in South African law* is *the right on the part of* a *retentor to retain physical control of another's property* as a *means of securing payment by the owner thereof- to the extent that he* has *been enriched - of money or labour expended thereon by the retentor. Brooklyn House Furnishers (Pty) Ltd v Knoetze and* Sons *1970 (3) SA 264 (A) at 270E.*"

[33] It is common cause that the sheriff, Mr Van Staden, though placed in possession of the Warrant of Execution, did not attach the trailer. Procedurally, it is a requirement that the sheriff ought to demand payment of the judgment debt from the Execution Debtor before attaching the property. Since the Execution Debtor was in a different area of jurisdiction, Kimberley, the legal process had to be carried out by the Kimberley sheriff, which did not happen.

[34] The following can be abstracted from the Magistrate's judgment:

34.1 The Magistrate found that the sheriff had attached the trailer and was entitled to claim the costs from the appellant as the instructing attorney. This finding is incorrect. It was conceded by the sheriff during the trial that he could not attach the trailer as it was beyond his jurisdiction. It was therefore a misdirection by the