

February 2013

"If you talk to a man in a language he understands, that goes to his head.
If you talk to him in his language, that goes to his heart." - Nelson Mandela

RECLAIMING YOUR VEHICLE: INSURANCE COMPANIES AND CONTRACTORS' SERVICES

Short term insurance companies come hand in hand with towing, recovery and salvage contractors on a daily basis. These contractors deliver essential services in transporting and storing vehicles. Your insurance company usually has an agreement with these contractors, and an agreed and fair remuneration for the service of recovering and towing is negotiated and paid to them.

Unavoidably, the contractor claims a right of retention over the vehicle (resulting in the owner not being able to retrieve the vehicle) demanding outrageous amounts from the owner or insurer to obtain its release. This right of retention is known as a lien. Insurers and members of the public need not be held to hostage to pay unfair or exorbitant release and towing charges in order to reclaim their own property. A lien has boundaries and an owner or insurer needs to be aware of these boundaries and certainly has recourse against unscrupulous contractors.

In order to exercise this lien, the contractor must show that he is in lawful possession of the vehicle. It cannot be claimed that a debtor-creditor lien exists whilst the contractor is, or was, aware that the person authorising the repair has no authority to do so. Where an owner has not approved the repairs and the repairer (the contractor in this instance) nevertheless proceeds with the repair, he accordingly cannot claim a lien on the "useful costs", but only, the proven "necessary costs".

As far as the vehicle owner's obligations are concerned, the operation of an instalment sale agreement or credit agreement does not affect the operation of the lien as these agreements require the credit receiver to maintain the vehicle in a proper state of repair. In order to meet a middleground then, it must be envisaged that the owner authorised the possessor to have repairs done on the vehicle, subject to the repairer's lien over the vehicle for the cost of such repairs.

Law & Laughter

ATTORNEY: "Now sir, I'm sure you are an intelligent and honest man--"
WITNESS: "Thank you. If I weren't under oath, I'd return the compliment."

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CONTRACTS OF SALE OF FIXED PROPERTY – WHY OBTAIN LEGAL ADVICE ?

There are many reasons why a contract of sale for fixed property should be drafted or perused by attorneys before being entered into. In this article, three of the most important reasons are highlighted in view of recent decisions by our courts and new legislation that came into effect during 2012.

When joint property ownership is considered, advice should be obtained prior to a sale or purchase pertaining to the advantages, disadvantages, practical issues and pitfalls in an event where the relationship between the joint owners comes to an end (break ups, divorces, deaths, etc). In the case of Dubs v Dubs the parties disagreed about the calculation of the net proceeds on both properties owned by them jointly. The court decided in favour of the husband with regard to one property and in favour of the wife with regard to the other property. The delay and costly litigation process could have been avoided had these issues been addressed when the properties were first purchased.

In the case of Yonda Investments CC the High Court held that an agreement of sale for a sectional title unit was invalid due to two easily avoidable oversights. Firstly there was no evidence that the person who signed the contract of sale on behalf of the Close Corporation had the necessary authority in writing to enter into the contract of sale. Secondly the purchaser, who was married in community of property, did not obtain the required consent from his spouse to enter into the agreement.

In terms of the Occupational Health and Safety Act (Act 85 of 1993) an Electrical Fence Certificate of Compliance has to be supplied by the Seller to the Purchaser of fixed property, if there is an electric fence on the property and the transfer is registered after 1 October 2012. Contracts of sale of immovable property should therefore be amended to include a clause dealing with this additional certificate to be obtained. Again, failure to implement this standard requirement can lead to countless problems for both the Seller and Purchaser and eventually frustrate the intended transaction to the point of cancellation.

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