IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2020/9286

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
21 SEPTEMBER 2021

In the matter between:-

WESBANK, a division of FIRSTRAND BANK LIMITED	Applicant/Plaintiff
and	
MAZEL FOODS (PTY) LIMITED t/a OCEAN BASKET	First Respondent/Defendant
CHARLES VICTOR RENNEY	Second Respondent/Defendant

JUDGMENT

This judgment is handed down electronically by circulation to the parties or their legal representatives via email and by uploading same onto CaseLines. The handing down of this judgment is deemed to be 21 September 2021.

KHAN AJ:

Introduction

[1] This matter came before me as an opposed Summary Judgment Application, the Plaintiff seeks repossession of a Maserati motor vehicle, rectification of the Agreement to reflect the proper description of the vehicle, postponement of its claim for damages and costs.

[2] The facts are as follows: -

2.1 On the 15 May 2019, the Plaintiff and the First Defendant, represented by the Second Defendant entered into a written instalment sale agreement, ("the Agreement"), in terms of which the First Defendant purchased a 2019 Maserati Levante Diesel motor-vehicle, with Engine number [....] and chassis number ZN6TU61C00X27210, ("the vehicle") for the purchase price of R1,800,000, together with VAT and interest amounting to R2 865 536.61.

2.2 The First Defendant undertook to make 72 payments in the amount of R34 232.91 to the Plaintiff commencing on the 4 June 2019 with a final balloon payment of R435 000,00 payable on the 4 June 2025.

2.3 The Second Defendant bound himself as surety and co-principal debtor with the First Defendant on the 15 May 2019 for the due payment by the First Defendant to the Plaintiff of all monies which the First Defendant owed to the Plaintiff. The Second Defendant is the sole director of the First Defendant.

[3] The Agreement does not contain a correct description of the goods, the engine number should read [....] and the Chassis Number ZN6TU61C00X272**2**10. Rectification is sought of the description of the vehicle; this is not opposed by the Defendants'.

[4] The Plaintiff alleges that the First Defendant breached the terms and conditions of the instalment sale agreement by failing to pay the monthly instalments. As at 14 March 2020, the First Defendant was in arrears in the amount of

R212,603.99 with a full outstanding balance of R2,704,838.75. As a result of the First Defendant's breach the Plaintiff cancelled the instalment sale agreement.

[5] The First and Second Defendants oppose the granting of the Summary Judgment application on the basis that the Plaintiff's claims in terms of the rei vindicatio and the Defendants' were not in possession of the vehicle on the date of institution of the action and have not been in possession thereof since.

[6] The Defendants' affidavit resisting summary judgment has been filed late and condonation is sought from the Honourable Court in this regard. The Plaintiff does not object to the late service of the Affidavit. In **DENGETENGE HOLDINGS (PTY) LTD V SOUTHERN SPHERE MINING & DEVELOPMENT COMPANY LTD AND OTHERS (619/12) [2013] ZASCA 5; [2013] 2 ALL SA 251 (SCA)** at para 11, Ponnan JA held that

> "*factors relevant to the discretion to grant or refuse condonation includes the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.'*

[7] Having regard to the explanation for the late filing of the Defendants affidavit opposing summary judgement, the extent thereof- 4 days, the absence of opposition coupled with the need to have this matter dealt with as expeditiously as possible, the court is of the view that the administration of justice would best be served by condoning the late filing of the Defendants affidavit.

The Defendants' Defence

[8] The First and Second Defendants' defence is as follows:-

8.1 The First Defendant was introduced to members of a syndicate with whom the Second Defendant had personal interaction during December

2018 when the Second Defendant purchased a vehicle for his wife from Mercedes-Benz in Malborough.

8.2 The Second Defendant had difficulty obtaining finance for the purchase of the Mercedes-Benz and a sales representative referred him to 2 individuals to assist him, Abdul and Bongani. Abdul and Bongani successfully procured finance for him through Standard Bank.

8.3 During or about February/ March 2019 the Second Defendant approached Abdul and Bongani for assistance in applying for an overdraft facility. The First Defendant was not doing well and needed the overdraft facility in order to tie the First Defendant over during months when expenses exceeded turnover while he was looking for a buyer who would be interested in purchasing the restaurant.

8.4 Abdul and Bongani analysed his financial situation and concluded that the First Defendant needed to improve his credit score before an application for an overdraft facility was likely to be granted. The Second Defendant was advised that the best way to do this would be for the First Defendant to enter into an instalment sale agreement for a vehicle.

8.5 By April 2019, the Second Defendant was desperate to relieve his financial pressures and to obtain the overdraft facility and agreed that Abdul and Bongani could organise the finance for him. The Second Defendant was informed that a lady at Wesbank, called Bernadette had organised the approval of the grant of the instalment sale agreement.

8.6 On the 3rd of May 2019, the Second Defendant received a visit from Martin, the sales manager from Maserati and signed the paperwork that was presented to him by Martin, he did not read the paperwork and cannot remember what he signed.

8.7 On the 15th of May 2019 the Second Defendant went to Maserati Sandton and signed the instalment sale agreement annexed to the Plaintiff's

particulars of claim and took possession of the Maserati SUV, which is the vehicle referred to in the instalment sale agreement.

8.8 During August 2019 the Second Defendant, received confirmation that a credit card facility with a R50,000 credit limit had been approved for him but the overdraft facility promised to him had not materialised.

8.9 In September 2019, Bongani informed the Second Defendant that he had found a purchaser for the Maserati and that the selling price of the Maserati would be paid into the Wesbank account which would settle the amount outstanding due in terms thereof. The Second Defendant was eager to pay off the instalment sale facility and agreed to the sale. Bongani arranged to collect the vehicle from him and that he gave the keys to the vehicle to Bongani.

8.10 That Bongani left with the vehicle, he never received payment of the purchase price. The Second Defendant appointed a private investigator to assist him in tracing the vehicle and reported the theft of the vehicle to the Booysens Branch of the SAPS. Neither the private investigator nor the police have been able to trace the vehicle.

8.11 The Second Defendant alleges that he trusted Bongani and had no reason to believe that he would steal the vehicle. That the vehicle was not insured at the time. That he attempted to ascertain who Bernadette was who represented the Plaintiff in approving the finance for the First Defendant in terms of the instalment sale agreement. He was told that there was a person named Bernadette in the employ of the Plaintiff at its Wesbank office and that her surname was Ribeiro. He was told that she was a corporate sales manager of the Plaintiff's Wesbank operations, that he never dealt with the Bernadette who is part of the syndicate personally and admits that his enquiry does not prima facie establish the identity of the employee in question.

8.12 That neither himself or the First Defendant was requested to submit any financial documentation nor did they undergo a credit assessment process by the plaintiff.

8.13 That the Plaintiff, through its employee who organised the granting of the instalment sale facility played an integral role in the fraudulent scheme devised by the syndicate which ultimately lead to the theft of the vehicle and loss of the selling price thereof. The role of the employee was to ensure that the instalment sale finance would be approved without any examination of the creditworthiness or financial position of the First or Second Defendants.

8.14 The Second Defendant was coerced into entering into the agreement based on the promise of an overdraft facility being granted to it. The Defendants accordingly contend that agreement is illegal and unenforceable in that it is *contra bonos mores* due to the participation of the Plaintiff in the fraud perpetrated on the Defendants by the syndicate.

Summary Judgment Proceedings

[9] **MAHARAJ V BARCLAYS NATIONAL BANK LTD, 1976 (1) SA 418 A at 426B-C**:

"*A court considering whether to grant Summary Judgement or not must consider whether, (i) the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (ii) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary Judgment either wholly or in part, as the case may be*."

[10] **BREITENBACH V FIAT S A (EDMS) BPK 1976 (2) SA 226 (T) AT 228 C AND 228 E…**

I respectfully agree ... that the word "fully" should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides."

[11] **Jili v Firstrand Bank Ltd (763/13) [2014] ZASCA 183 (26 November 2014)**, Willis JA*:*

"It is indeed trite that a court has a discretion as to whether to grant or refuse an application for summary judgment. …… It is a different matter where the liability of the defendant is undisputed: the discretion should not be exercised against a plaintiff so as to deprive it of the relief to which it is entitled Where it is clear from the defendant's affidavit resisting summary judgment that the defence which has been advanced carries no reasonable possibility of succeeding in the trial action, a discretion should not be exercised against granting summary judgment. The discretion should also not be exercised against a Plaintiff on the basis of mere conjecture or speculation."

[12] The issue before this court is not to consider the circumstances under which the instalment sale was approved and whether or not the First and Second Defendant had provided necessary documentation to the Plaintiff in respect thereof. The Defendants do not deny signing the instalment sale agreement or receiving delivery of the vehicle.

[13] The Defendants' were happy to rely on the agreement and did not question the validity of the instalment sale agreement or how same was approved until after such time as they parted with the vehicle and were called upon to pay the purchase price.

[14] The First and Second Defendants have disclosed the nature and grounds of their defence and the facts upon which it is founded, the first stage of the enquiry has thus been met, what the court now has to decide is whether on the facts so disclosed the Defendants have a defence which is both *bona fide* and good in law. Further whether what has been alleged, if proved at the trial, will constitute a defence to the Plaintiff's claim.

[15] The following is evident from the evidence before this court,

15.1 The Defendants do not dispute the existence of the cause of action and the instalment sale agreement.

15.2 The Defendants do not deny signing the instalment sale agreement.

15.3 The Defendants do not deny that the Plaintiff is the owner of the vehicle.

15.4 The Defendants do not deny taking possession of the vehicle.

15.5 The Defendants do not deny being in default of payment in respect of the vehicle or dispute the correctness of the amounts claimed.

15.6 The Defendants do not deny that the vehicle was not insured and that same was voluntarily handed over to a third party, without the Plaintiff's consent and in breach of the instalment sale agreement.

15.7 The Second Defendant cannot prove any fraud or criminal syndicate or involvement of the Plaintiff and admits that speaking to a person by the name of Bernadette in the employ of the Plaintiff does not *prima facie* establish the identity of the employee in question.

15.8 The Defendants' version is that Bernadette was Abdul and Bongani's contact, the Defendants' did not at any time speak to or meet Bernadette.

15.9 Fortuitously for the Defendants, a person by the name of Bernadette is employed by the Plaintiff, this is the only link to the Plaintiff that the Defendants have been able to establish in the fraud they allege has been perpetrated by the Plaintiff.

15.10 The Defendants rely on the say so of Abdul and Bongani that Bernadette arranged the finance, both of whom are individuals of questionable motives and integrity, who are now sought by the police for the theft of the vehicle. It is apparent that these individuals will never attend Court and testify on behalf of the Defendants' at the trial of the matter.

15.11 The Second Defendant alleges that he was coerced into entering the instalment sale agreement with the Plaintiff. This is not so, the Second Defendant sought the help of Bongani and Abdul, both of whom had previously assisted him in December 2018 to obtain finance through Standard Bank to purchase a Mercedes Benz motor vehicle for his wife.

15.12 Abdul and Bongani were accordingly the Defendants' "contacts" and not the Plaintiff's agents.

15.13 The Second Defendant records that there is no documentary evidence that exists to support any of the contentions made in the plea or in the opposing affidavit.

15.14 The Defendants have further not attached copies of the Affidavits in support of the charge of theft as the docket cannot be traced by the SAPS.

[16] I am, accordingly satisfied that there is no evidence that the Defendants could procure or prove at trial to substantiate the claim that the Plaintiff is part of a criminal syndicate. It may indeed be that the Defendants are victim of fraud but this is a result of their own actions and not the Plaintiff's.

[17] The Defendants argue that the Plaintiff cannot succeed with the vindicatory order, as the Defendants have not been in possession of the vehicle since before the institution of the action.

[18] This then became the nub of the contention between the parties at the hearing of the matter, i.e. whether the court can grant an order for restitution of the motor-vehicle given that the Defendants are no longer in possession of the vehicle in terms of *the rei vindicatio* or whether the Plaintiff should have instituted a claim for damages in terms of the *actio ad exhibendum*. The parties were asked to submit additional heads on this issue.

[19] The Plaintiff relies on the matter of **ALDERSON & FLITTON (TZANEEN) PTY LTD V E G DUFFEYS SPARES (PTY) LTD AND PHILLIPS ROBINSON MOTORS (PTY) LTD V N M DADA (PTY) LTD 1975 (2) SA 420 (A).** Where Botha J, held

> "*that when a plaintiff owner sues a defendant in an actio ad exhibendum for payment of the value of the owner's property which was formally in the defendant's position but which he is unable to restore because of his having ceased to possess it, the general principle to be applied is that the onus is on the plaintiff to allege and prove at least that at the time of the Defendants loss of possession he had knowledge of the Plaintiffs ownership or of his claim to ownership of the property*."

[20] In **CHETTY V NAIDOO 1974 (3) SA 13 (A) 20 B-C** Jansen JA held,

> "in order to succeed, it is incumbent on the claimant to prove the following basic elements of the *actio rei vindicatio*, i) that he or she is the owner of the thing, ii) that the thing was in possession of the Defendant at the time the action was commenced and iii) that the thing which is vindicated is still in existence and clearly identifiable.

[21] The Plaintiff submits that it is trite that in order to succeed with a claim for *rei vindicatio*, a Plaintiff need only prove that his property was and/or is being held by the Defendant, the second leg requires fictional or notional fulfilment.

[22] The submission that the second leg of this enquiry requires only fictional fulfilment can, in terms of **CHETTY V NAIDOO 1974 (3) SA 13 (A)** not be sustained.

[23] The Defendant contends that it is established law that in order for an owner to succeed in vindicating its thing from another person, it must prove, *inter alia*, that the party from whom it is sought to be vindicated was in possession thereof at the moment of institution of the action. The rationale for this requirement is that an order ought not to be made which a defendant will not be able to comply with. In **MEHLAPE V MINISTER OF SAFETY AND SECURITY 1996(4) SA 133 (W),**

> "The *rei vindicatio* is not instituted in respect of an act that has been performed, it is instituted in respect of a factual situation pertaining at the time of the institution of the legal proceedings... legal proceedings based on the *rei vindicatio* therefore always have to relate to the physical control being exercised by the respondent over the object in question at the time of the institution of the legal proceedings. Possession a calendar month prior to the institution of the legal proceedings based on the *rei vindicatio* is irrelevant to those legal proceedings."

The Defendant then referred the court to various judgements in terms of which the Court ordered damages and not the return of the object.

[23] A closer look at the matter of **ALDERSON & FLITTON (TZANEEN) (PTY) LTD v E G DUFFEYS SPARES (PTY) LTD 1975 (3) SA 41 (T),** reveals that there are exceptions to the general rule that a vindicatory action should be brought against the person who is in possession of the goods claimed:

> "*if it is established that the Defendant disposed of the vehicle wrongfully and unlawfully with full knowledge of the Plaintiff's ownership, the Plaintiff's claim is no longer for the return of the vehicle but for delictual damages on the grounds of the Respondents unlawful alienation of the property. In Vulcan Rubber Works (Pty.) Ltd. v South African Railways & Harbours, 1958 (3) SA 285 (AD), Dealing generally with the remedies of an owner of property,*

SCHREINER. J.A., said at p. 289: "Subject to special defences our law gives the owner of property the right to recover it from anyone who is in possession of it. He may moreover recover its value from anyone who has been in possession of it but has parted with possession after he has had notice of the owner's right. (Aspeling, N.O. v Joubert, 1919 AD 167 at pp. 170, 171). The two cases quoted above show that it is not enough for a plaintiff claiming the value of his property merely to allege and prove that the defendant was at one time in possession of it; and the allegation and proof that the defendant had parted with the possession with knowledge of the plaintiff's claim is but one way of completing a cause of action in respect of the claim for payment of the value. In general terms it is a way of alleging and proving a particular state of mind on the part of the defendant at the time of his loss of possession of the property. Voet, 6.1.10, at the end of the second paragraph of the passage quoted above, equates the position of a possessor who sells off or uses up the property with knowledge of the owner's title, with the position of one who has in "ill fraud ceased to possess", a position which he discusses more particularly in 6.1.32. This latter passage was referred to in the case of Sadie v Standard Bank, 7 S.C. 87 at pp. 92 - 3, by DE VILLIERS, C.J.: "It is quite correct, as a general rule, to say that the vindicatory action should be brought against the person who is in possession of the goods claimed, ***but this rule is subject to well-established exceptions. One of these exceptions is where a possessor, whether a bona fide or mala fide possessor, parts with the goods intentionally with knowledge and in power (sic) of the real owner's rights****. A loss of the goods through negligence before litis contestatio would, according to Voet, 6.1.33, relieve a bona fide possessor from liability to the vindicatory action, whatever other remedy there might be against him, but it is clear that Voet does not there refer to the species of negligence known as culpa lata which in law is equivalent to dolus (Voet, 12.3.2). The deliberate sale and delivery of goods, with full knowledge of the owner's claim to his rights of ownership, cannot be regarded as an ordinary loss by negligence.* ***It is a wrongful act, which the person committing it cannot avail himself of as a defence to an action for the redelivery of the***

goods, or, failing such delivery, for the value (Digest, 6.1.68; Voet, 6.1.32)." (*my emphasis).*

[24] The Second Defendant at the time of handing over the vehicle to Bongani was aware of the Plaintiff' s claim and that he had no right to hand same over, the deliberate sale and delivery of goods, with full knowledge of the owner's claim to his rights of ownership, is a wrongful act, which the person committing it cannot avail himself of as a defence to an action for the redelivery of the goods, or, failing such delivery, for the value.

[25] Having regard to the Second Defendant's intentional handing over of the vehicle to Bongani to sell on his behalf I am not convinced that this court is precluded from ordering the return of the vehicle. I am, further puzzled by the Defendants motivation in making a payment in November 2019 after the vehicle was allegedly no longer in its possession. The First Defendant submits that he no longer uses the FNB Current account from which the vehicle was paid and that there was only sufficient funds therein because UberEats did not timeously update the First Defendant's banking details. It seems unlikely to me that someone as cash strapped and in such dire financial circumstances as the Defendants would not know when money was deposited into their accounts, more especially when the account was still in operation.

[26] The Plaintiff argues that the very purpose of the return of the vehicle is to quantify the extent of the Plaintiff's loss after the sale in execution of the vehicle and will actually reduce the Defendants indebtedness once the vehicle is sold in execution.

[27] The Plaintiff as owner is entitled to seek its vehicle wherever it may find it and to establish for itself whether the vehicle cannot be found. The Plaintiff argues that it cannot rely on the vague and sketchy sequence of events as submitted by the Defendants' to prove that the vehicle has indeed gone missing.

[28] The Defendants admit that they would welcome a search for the vehicle, yet oppose the relief sought. The Defendant has not set out what prejudice it will suffer if

such an Order is made. To my mind such an order can only benefit the Defendants, in the event the vehicle is found, this will reduce the Defendants indebtedness.

[29] I submit that a Court is allowed to look beyond the papers if the interest of justice calls for this. I am guided by the approach of Schreiner JA in **TRANS-AFRICAN INSURANCE CO. LTD V MALNLEKA 1956 (2) SA 273 (A) AT 278F**, where he emphasised that:

> " No doubt parties and their Legal advisers should not be encouraged to become slack in their observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

[30] The overriding factor to be considered is prejudice, The Defendants have not indicated what their prejudice would be, should an order be made that the Applicant attempt to recover the vehicle wherever it may be found. The Defendants have made out a case for the Plaintiff's to be awarded damages, but I am of the view that this would operate harshly against the Defendants.

[31] In the circumstances, I make an order in the following terms:

1. The Agreement is rectified to reflect the motor-vehicle more fully described as a 2019 Maserati Levante Diesel with Chassis Number ZN6TU61C00X272210 and Engine Number [....];

2. The First Defendant is ordered to immediately return the vehicle to the Plaintiff;

3. In the event of the First Defendant failing to return the vehicle, the sheriff of this Court is directed and authorised to give effect to this order and repossess the vehicle;

4. The Plaintiff's damages claim is postponed *sine die* pending the return of the motor-vehicle and determination of the value thereof;

5. The Plaintiff may approach the court, on duly supplemented papers for the damages claim;

6. The First and Second Defendants are ordered to pay cost on an attorney-and-client scale, jointly and severally, the one paying the other to be so absolved.

J.L. Khan
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard:	25 May 2021
Judgment:	21 September 2021
Applicant's Counsel:	Adv. L. Peter
Instructed by:	Rossouws Leslie Inc.
Respondent's Counsel:	Adv. E. R. Venter
Instructed by:	Greg Morris