IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 36672/2020

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: NO

.....	24 August 2021
SIGNATURE	DATE

In the matter between:

MAN FINANCIAL SERVICES (S.A.) (PTY) (RF) LTD	APPLICANT
AND	
ELSOLOGIX (PTY) LTD	FIRST RESPONDENT
TOKESH MANFANIKIO TRUST	SECOND RESPONDENT
DURANDT, BAREND JOHANNES VORSTER *N.O.*	THIRD RESPONDENT
FOWLER, JOYCE RUTH *N.O.*	FOURTH RESPONDENT

JUDGMENT

VAN NIEUWENHUIZEN AJ:

[1] In this application, the Applicant ("MAN Financial Services") seeks the return of a 2018 MAN truck, more fully described as set out in prayer 1.1 of the notice of motion ("the asset") from the First Respondent ("Elsologix"). The remaining Respondents do not feature in this application. The genesis of the application is an instalment sale agreement concluded between MAN Financial Services and Elsologix ("the agreement"). It is common cause that Elsologix is in breach of the agreement. MAN Financial Services has thus cancelled same. Accordingly, MAN Financial Services seeks possession of the asset either in terms of the *rei vindicatio*, or alternatively the right it asserts the agreement affords it to reclaim possession of the asset. Finally, MAN Financial Services therefore seeks that its claim for damages, as well as the prayer for costs in this application be postponed *sine die*.

[2] MAN Financial Services' case in its founding affidavit is summarised at paragraph 5 thereof as follows:

> *"5. This application is launched by virtue of the fact that:*
>
> *5.1 the Applicant is the respective owner of the vehicle, as will be demonstrated hereunder;*
>
> *5.2 the Applicant requested the First Respondent to return the vehicle to the Applicant in that the monthly instalments payable in terms of the Instalment Agreement are not paid and the account of the First Respondent has fallen in arrears."*

[3] MAN Financial Services continues to allege that Elsologix failed or refused to return the asset to it or to pay the arrear instalments, alternatively the balance due in respect thereof and that it consequently cancelled the agreement and demanded return of the vehicle unless the outstanding amount was settled. It follows, according to MAN Financial Services, that the possession of the asset by Elsologix is unlawful and that it is entitled to return thereof by virtue of its ownership, and in particular due to its election to cancel the agreement.

[4] Elsologix's grounds of opposition, albeit slightly more extensive in its answering affidavit, was appropriately limited by agreement between the parties' respective counsel in their practice note, as well as in argument before me, to a disputation of MAN Financial Services' asserted ownership in respect of the asset, and also a denial that MAN Financial Services has a contractual right flowing from the agreement to claim repossession of the asset.

[5] The starting point is of course to have regard to the relevant terms of the agreement as expressly referred to in the affidavits. I propose to quote from the agreement itself annexed to the founding affidavit and I accordingly interpose to make some apropos remarks in that regard prior to commencing with such an exercise.

[6] In the founding affidavit, MAN Financial Services did not expressly plead

many of the terms which are, in my respectful view, highly relevant to the present application. It is of course trite that not only must an applicant in motion proceedings make out a proper case in the founding papers and that an applicant is bound to the case made out therein and may not make out a new case in the replying affidavit. (See **National Council of Societies for the Prevention of Cruelty to Animals v Openshaw** 2008 (5) SA 339 (SCA) at paragraphs 29 to 30). Reliance on specific content of annexures in affidavits must be clearly identified (see **Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another** 2017 (6) SA 1 (CC) at paragraphs 169 to 171). It is further trite that an applicant is entitled to make out a case for relief on the averments contained in an answering affidavit (See **Administrator, Transvaal and Another v Theletsane and Others** 1991 (2) SA 192 (A) 195H/I). And then finally it is not an immutable rule that a court may not have regard to amplified matters in a replying affidavit.

[7] In **Triomf Kunsmis (Edms) Bpk v AE&CI Bpk en Andere** 1984 (2) SA 261 (W), Coetzee J (as he then was) said the following at 269B – H:

> *"In die huidige geval word 'n finale bevel aangevra by kennisgewing van mosie-prosedure. Hier is nie sprake van slegs 'n tydelike bevel pendente lite nie en dit is by uitnemendheid ook die soort geval waar die volgende stelling wat NESTADT R in Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) op 177 aanhaal, van toepassing is:*
>
> > *"It is founded on the trite principle of our law of civil procedure that all the essential*

> *averments must appear in the founding affidavits or the Courts will not allow an applicant to make or supplement his case in his replying affidavits and will order any matter appearing therein which should have been in the founding affidavits to be struck out."*

Verder aan:

> *"This is not however an absolute rule. It is not the law of Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances."*

Dit is interessant dat wanneer NESTADT R sê dat dit nie 'n absolute reël is nie, hy praat van 'n diskresie

> *"... to allow new matter to remain in the replying affidavit."*

My indruk is dat hierdie reëls soos aldus geformuleer hoofsaaklik van toepassing is op wat gewoonlik beskou word as "new matter ", wat nie sinoniem is met 'n nuwe oorsaak van aksie nie. In die geval van 'n nuwe oorsaak van aksie wat die bestaande een vervang kan ek my kwalik omstandighede indink wat nie die onvermydelike gevolg het dat die proses, soos op daardie stadium, afgewys word nie. Dit is een ding om slegs ekstra feite ter ondersteuning van 'n bepaalde oorsaak van aksie, òf te onderstreep òf vir die eerste keer aan te haal in 'n repliserende verklaring. Dis 'n ander ding om geheel en al bollemakiesie te slaan ten opsigte van gedingsoorsaak wat die gedingvoering in 'n totaal verskillende rigting stuur.

Die oorsaak van aksie moet behoorlik uiteengesit word in stukke soos hierdie wat beide pleitstukke en getuienis kombineer. Dit is nodig om dit so uiteen te sit want daardeur, soos ek reeds aangetoon het, kan die saak verder op 'n ordelike manier bereg word. Indien daar dus van die oorspronklike oorsaak van

aksie geheel en al afgewyk word in die sin van prysgewing daarvan en vervanging met 'n splinternuwe verskillende oorsaak van aksie, het so 'n applikant eintlik alles wat voorafgegaan het laat vaar."

[8] In **Bowman NO v De Souza Raoldao** 1988 (4) SA 326 (T) at 327D – H, Kirk-Cohen J stated the following:

"Generally speaking, an applicant must stand or fall by his founding affidavit; he is not allowed to make out his case or rely upon new grounds in the replying affidavit. See, for example, Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635 in fin - 636 where Diemont JA said the following:

> *'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases*
>
> > *"... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".*
>
> *Since it is clear that the applicant stands or falls by his petition and the facts therein alleged*
>
> *"it is not permissible to make out new grounds for the application in the replying affidavit".'*

What should be set out in the founding affidavit and the particularity required has been dealt with in a number of cases; see, for example, Joseph and Jeans v Spitz and Others 1931 WLD 48; Victor v Victor 1938 WLD 16 at 17 and Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) at 369B. Each case will depend on its own facts. The correct approach

is set out in the Titty's Bar case supra as follows:

> *'It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit.'"*

[9] Finally, in **Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others** 2016 (3) SA 143 (SCA) at paragraph 16, Leach JA, on behalf of the unanimous Full Bench, held as follows:

> *"Then there is the fact that a voluminous replying affidavit containing a great deal of evidential material relevant to the issues at hand had been filed. Relying upon authorities such a Sooliman [Industrial Development Corporation of South Africa v Sooliman and Others 2013 (5) SA 603 (GSJ) para 9], the appellant argued that it was 'axiomatic . . . that a reply is not a place to amplify the applicant's case' and that the new matter had been impermissibly raised by Lehane in reply, that it was evidential material to which the appellant had not been able to respond, and that it fell to be ignored. However, again, practical common sense must be used, and it is not without significance that many of the hearsay allegations complained of were admitted by the appellant in its answering affidavit. …"*

[10] I hasten to add that Mr Kruger, who appeared on behalf of Elsologix, did not suggest that the contractual provisions I am about to refer to could not be considered.

[11] The afore alluded to relevant provisions of the agreement were:

"Our Instalment Sale Agreement is in two parts, Commercial Terms and Standard Terms, referred to together as 'Agreement'. In this Agreement:

- *MAN Financial Services (S.A.) (RF) (Pty) Limited is referred to as 'we' or 'us';*
- *the Borrower is referred to as 'Borrower' or 'you';*
- *the money that we lend you is referred to as the 'Loan';*
- *the asset purchased with the Loan is referred to as the 'Asset'; and*
- *the supplier of the Asset to you is referred to as "Supplier".*

Standard Terms

2. Instalment sale

Our instalment Sale Agreement allows you to purchase the Asset using the Loan which you repay by regular instalments over an agreed period, with fees and interest.

3. Ownership

Under this Agreement:

- *the Asset purchased with the Loan belongs to us until you have paid all your financial obligations;*

- *provided you are not in default, you are entitled to possession and use of the Asset; and*

- *when you have paid all your financial obligations we will transfer ownership of the Asset to you.*

4. *Delivery and Acceptance*

Before you accept delivery of the Asset from the Supplier, you will check that it is:

- *what you want or ordered;*

- *fit for the purpose for which you intend to use it;*

- *in good working order; and*

- *free of any defects.*

We will pay for the Asset when you have accepted it and ownership will pass to us, unless we already own the Asset in terms of a Sale and Purchase Agreement or Interim Loan Agreement that we have entered into with you.

...

13. *Default and consequences*

...

If you are in default, we may:

- *by notice to you, end this Agreement and demand immediate payment of the whole outstanding balance of your Loan with continuing interest, fees and costs;*

- *re-possess the Asset; or*

- *enforce any Security provided in terms of this Agreement;"*

[12] According to Mr Kruger, albeit that the provisions of the agreement unambiguously record and confirm MAN Financial Services' ownership of the asset, the agreement is a simulated one in that respect. In his submission, because the agreement is simulated, I am to give effect to the true nature thereof which does not evidence the requirements for MAN Financial Services to acquire ownership and, as such, MAN Financial Services had not discharged its onus to prove ownership (with reference to the requirements for the transfer of ownership). His submissions continued to the effect that Elsologix, on its version, asserts ownership of the asset on the basis that the agreement was no more than a loan agreement and that a cash sale occurred between Elsologix and the supplier, and in accordance with the general proposition that in a sale for cash, ownership passes upon payment of the purchase price from the supplier to Elsologix and that the source of the funds of that purchase price was indeed the money paid by MAN Financial Services through the agreement constituting the loan (as defined). Elsologix was thus no more than the

borrower or credit consumer and MAN Financial Services the lender or credit provider.

[13] There is of course no onus, in the strict sense, on MAN Financial Services to prove ownership and whether or not a case has been made out falls to the trite legal position enunciated in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) 634E – 635C. As was stated by Harms DP in **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at paragraph 26:

> *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.[1]"*

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[1] "*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634 - 635; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55; *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC) (2008 (2) SACR 421; [2008] ZACC 13) paras 8 - 10."*

[Fn number 13 in the judgment, which due to formatting, is numbered 1 in this judgment]

[14] I am not of the view that there is no irresolvable dispute of facts on the papers before me, rather there is a dispute of conclusions emanating from the facts on the papers.

[15] Mr Kruger placed particular reliance on **Concor Construction (Cape) (Pty) Ltd v Santambank Ltd** 1993 (3) SA 930 (A) at 933B and **ABSA Bank Ltd t/a Bankfin v Jordashe Auto CC** 2003 (1) SA 401 (SCA), paragraphs 2, 9, 10, 16 and 18 in support of his submissions that it was necessary for MAN Financial Services to demonstrate that there had been an intention for ownership of the asset to pass to it (presumably at some stage) and delivery of the asset in some form recognised in law, which it did not do. However, I find that the *ration* In **Concor Construction** at 933B – 934A rather supports the case of MAN Financial Services, where Milne JA held:

> *"The scraper is a movable. The derivative mode of acquisition of ownership on which the plaintiff relies is delivery. The requirements for the passing of ownership by delivery include, inter alia, (a) that the transferor must be capable of transferring ownership; (b) delivery must be effected by the transferor with the intention of transferring ownership and taken by the transferee with the intention of accepting ownership; and (c) payment where the sale is a cash sale. Joubert (ed) The Law of South Africa vol 27 para 165. In Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and Others 1976 (4) SA 464 (A) at 489H it was held that*
>
> > *'. . . ownership cannot pass by virtue of the contract of sale alone: there must, in addition, be at least a proper delivery to the purchaser of the contract goods . . .'*

and at 490A that

> *'. . . under a cash sale ownership is normally taken to have been intended to pass once there has been, in addition to delivery, due payment of the purchase price . . .'.*

In Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO 1978 (4) SA 281 (A) at 301H-302A it was held that:

> *'Volgens ons reg gaan die eiendomsreg op 'n roerende saak op 'n ander oor waar die eienaar daarvan dit aan 'n ander lewer, met die bedoeling om eiendomsreg aan hom oor te dra, en die ander die saak neem met die bedoeling om eiendomsreg daarvan te verkry. Die geldigheid van die eiendomsoordrag staan los van die geldigheid van enige onderliggende kontrak.'*

It is clear, however, from the passage at 302G-H and the reliance upon the judgment of Centlivres JA in Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd 1941 AD 369 at 411 that the legal transaction preceding the delivery may be evidence of an intention to pass and acquire ownership. Equally, the absence of such an agreement may, depending upon the circumstances, be evidence of the absence of any such intention. What is required for the transfer of ownership of movables is further analysed in Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander 1980 (3) SA 917 (A) at 922E-F where Jansen JA said:

> *'Blote ooreenkoms kan dus nie eiendomsreg oordra nie - traditio (oorhandiging) moet ook geskied; en omgekeerd, blote oorhandiging is ook nie voldoende nie – dit moet gepaard gaan met 'n ooreenkoms tussen oorhandiger en ontvanger dat daarmee eiendomsreg gegee en geneem word.'*

After examining the meaning of traditio in our law, the following conclusion is reached at 923H-in fine:

> *'. . . dat traditio neerkom op 'n besitsoordrag - hetsy met 'n verskuiwing van die*

regstreekse daadwerklike beheer van een persoon na 'n ander, hetsy daarsonder. In lg geval geskied daar geen verandering van persoon wat die regstreekse beheer betref nie, maar daar vind tog 'n besitsverskuiwing plaas deur ooreenkoms, op grond van toepassing van die leerstuk van middellike besit.

Om eiendomsreg van 'n roerende saak oor te dra moet daar dus die nodige saaklike ooreenkoms wees (soos hierbo genoem) en ook traditio in die sin in die vorige paragraaf verduidelik.'"

[16] Van der Merwe explains the distinction between the real agreement and the agreement that gives rise to the duty to transfer as follows:

"At the moment of passing of ownership the transferor must have the intention of transferring ownership (animus transferendi dominii) and the transferee must have the intention of accepting ownership (animus accipiendi dominii). This intention supplies the subjective element for the passing of ownership whereas the objective element is supplied by delivery or registration. The intention of the parties at the moment of transfer is important: if the transferor has the intention of passing ownership at the time of the conclusion of the agreement but changes his mind before the moment of delivery, this requirement is not fulfilled. The mental element has been referred to as the "saaklike ooreenkoms" in contradistinction to the "verbintenisskeppende ooreenkoms" or agreement which gives rise to the duty to transfer. The difference between the "contractual" agreement and the "real" agreement (that is, the agreement to give and accept transfer) becomes apparent where the "transferee" takes the law into his own hands and takes possession of the object without there being an intention to transfer on the part of the transferor. Far from becoming owner of the thing, the "transferee" will be branded a mala fide possessor who is open to the mandament van spolie of the "transferor". The principles applicable to agreements in general in regard to capacity to act, error, and so forth also apply to real agreements. It is therefore a factual question whether the real agreement

is effected in the circumstances of the particular case."[2]

[17] From the wording of the agreement I have quoted above, in line with the aforegoing authorities, it is clear that the parties had the necessary intention for ownership of the asset to vest with MAN Financial Services until such time as the loan had been paid in full by Elsologix. The very delivery that Elsologix asserts from the supplier to it constituted vicarious possession as referenced in **Concor Construction** and which the pleadings before me (as affidavits constitute both pleadings and evidence[3]) on behalf of MAN Financial Services certainly covers. I am unable to agree with Mr Kruger's submission that the provisions in the agreement relating to the *"loan"* is irreconcilable with those dealing with the ownership of the asset and that they are thus or should thus be regarded as *pro non scripto* in some way or form. Not only had that not been pleaded, but it is also irrelevant to the alternative suggestion of Mr Kruger that such purported irreconcilability would result in MAN Financial Services failing to discharge its onus. As already mentioned above, there is no onus to speak of in motion proceedings where final relief is sought.

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[2] The Law of South Africa, Volume 27, First Re-issue Volume, paragraph 362(d) [footnotes omitted]. In his work **Sakereg**, 2nd Edition, Butterworths, Durban, 1989, the learned author goes further at page 303 by stating the following:

> *"At delivery of movable things, the requirement of consensus generally appears from the "verbintenisskeppende ooreenkoms" that accompanies or precedes delivery."* (my translation)

[3] See the authorities approved by Zondo J (as he then was) in **Genesis Medical** *op cit*

[18] The provisions quoted above, as expressly referenced in the affidavits before me, are clearly sufficient to cover a scenario of vicarious possession for purposes of the delivery requirement in the transfer of ownership from the supplier to MAN Financial Services. It is patently not a case such as contended for by Mr Kruger of MAN Financial Services trying to achieve some sort of pledge through a simulated transaction. Further corroboration (if any was required) of the parties' intention and the form of delivery is found with reference to the registration documents indicating that the asset is indeed registered in the name of MAN Financial Services as *'title holder'* and Elsologix as *'owner'* and I agree with what was said by Rogers J in **ABSA Bank Ltd v Nedbank Ltd t/a The Motor Finance Corporation and Others** (13187/16) [2016] ZAWCHC 190 (15 December 2016) at paragraph 15:

> *"In terms of the National Road Traffic Act 93 of 1996 a vehicle is registered in the name of an 'owner' and 'title holder'. Depending on the circumstances, the same person or different persons may be 'owner' and 'title holder'. The expression 'owner' is defined in s 1 as meaning inter alia the person who has the right to the use and enjoyment of the vehicle in terms of the common law or a contract with the title holder or a motor dealer who is in possession of the vehicle for the purposes of sale and who is licensed or obliged to be licensed as a dealer. The expression 'title holder' means the person who has to give permission for the alienation of the vehicle in terms of a contract with the owner or the person who has the right to alienate the vehicle in terms of the common law. The 'title holder' is thus closer to the common law notion of an owner than the 'owner' as defined in the Act."*

[19] The contentions on behalf of Elsologix in its answering affidavit that suggests to contradict the content of the agreement insofar as ownership of the asset is concerned is contrary to the parol evidence rule and cannot be taken into account. As was held by Watermeyer JA in **Union Government v Vianini Ferror-Concrete Pipes (Pty) Ltd** 1941 (AD) 43 at 47:

> *"(T)his Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save for the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."*

[20] I further find significance in the absence of any clear and cogent assertion on behalf of Elsologix that it intended to acquire ownership of the asset other than as provided for in terms of the agreement. The high water mark in this regard is set out paragraph 32 of the answering affidavit on behalf of Elsologix as follows:

> *"By lending money to the first respondent, the applicant enabled the first respondent to purchase the truck from a supplier. A cash sale was concluded between the first respondent and the supplier and the ownership of the truck passed to the first respondent upon payment of the purchase price and delivery of the truck to the first respondent. In this scenario, the applicant does not acquire ownership of the truck notwithstanding statements in the alleged instalment sale agreement to the contrary."*

[21] Attempted reliance on behalf of Elsologix of the rebuttable presumption in law that the possessor of a movable thing is also the owner thereof does not even arise given the facts of this matter and even if it could notionally be said to have arisen, it was stillborn due to the facts and thus rebutted to the extent necessary.

[22] Elsologix's reliance on **Jordashe Auto** is misplaced. In that matter, the Appellant, ABSA Bank, had asserted ownership acquired through *constitutum possessorium* in respect of certain motor vehicles acquired by a dealership under a floor plan agreement. Those vehicles were in turn obtained by the dealership from the Respondent, Jordashe Auto, on consignment. It was found that whether or not ownership by delivery had been transferred to ABSA Bank was a factual question to be determined on whether or not Jordashe Auto had indeed reserved ownership and its version of the contract. That question was referred back to the court *a quo* to hear oral evidence. In that matter there were competing claims of ownership from the original supplier, and a subsequent funder thereof, which is not the case before me.

[23] Finally, very recently Yacoob J handed down a judgment in this court on almost identical facts in the matter of **ABSA Bank Limited v Elsologix (Pty) Limited**, as yet unreported, under case number 21179/2020 on 9 March 2021. Mr Alli, who appeared for MAN Financial Services before me, also appeared on behalf of ABSA Bank in that matter, and Mr Kruger on behalf of Elsologix.

The facts are virtually identical as was the grounds of opposition raised by Elsologix. Leave to appeal was refused by the learned judge, and the petition to the Supreme Court of Appeal likewise failed. Mr Kruger submitted that I was not bound by the judgment of Yacoob J for two reasons, namely, firstly, the learned Judge did not deal with the submissions of Elsologix and the authorities relied upon by it (to which I have already referenced herein) and thus her judgment is *sub silento*. Secondly, that I was to find that she was clearly wrong, and as the learned judge had been sitting as a single judge in this division, I was able to diverge from her decision.

[24] Whilst the learned judge did not refer to or discuss the authorities relied upon by Elsologix, I can find no fault whatsoever with her logic and reasoning. Thus, not only do I have doubts that the decision could be considered to be *sub silento*, but even if it was, that has the same effect of *obiter dictum* which constitutes convincing authority and I am sufficiently convinced that her judgment is correct. In the same breath it therefore follows that I am definitely not convinced that the learned judge was clearly wrong and that I may (or should) depart from her judgment.

[25] In closing, I have considered all the written and oral submissions on behalf of the parties (even though I might not have expressly dealt with each and every single one of them) and I have come to the unequivocal conclusion that MAN Financial Services is entitled to the relief claimed based not only on

the *rei vindicatio*, but on the provisions of the agreement itself. Put differently, even if there had been some basis upon which it could have been held that Elsologix was indeed the owner of the asset, and not MAN Financial Services, MAN Financial Services was nonetheless entitled to possession thereof (irrespective of the word *"re-possess"* used in the agreement), by virtue of its terms and the common cause breach by Elsologix in meeting its obligations thereunder.

[26] There is no saving grace for Elsologix in the suggestion that absent establishment of ownership on behalf of MAN Financial Services' ownership over the asset, that it would not have a contractual right to such *"re-possession"*. The obligation created in the agreement for Elsologix to hand over possession of the vehicle to MAN Financial Services cannot be discarded and any way you slice it, MAN Financial Services must succeed.

[27] Accordingly, I make the following order:

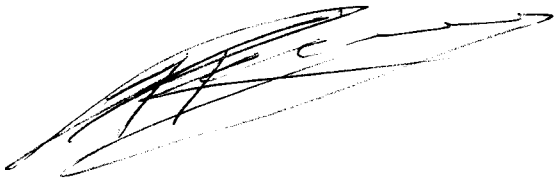
1. The First Respondent is ordered to return to the Applicant a 2018 MAN truck TGS-26-4406X4BLS-LX-ALU-E with engine number 51549981045002 and chassis number AAM78W6349PX37630 ("the asset");

2. In the event of the First Respondent failing or refusing to return

the asset to the Applicant forthwith, then in that event, the sheriff of this court is authorised and directed to enter upon the First Respondent's premises, or wherever the asset might be kept, to attach the asset and return same to the Applicant;

3. The costs of this application are reserved and the Applicant's claim for damages (if any) is postponed *sine die*;

4. The Applicant is directed to deliver to the Respondents, and file with the Registrar of this court, an affidavit which sets out the damages claimed by it at least ten (10) days before the date upon which the matter is re-enrolled for an order for damages and costs (including the adjudication of the reserved costs).



H P VAN NIEUWENHUIZEN
Acting Judge of the High Court
Gauteng Division of the High Court,
Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 24 August 2021 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 August 2021.

Date of hearing: 3 August 2021

Date of judgment: .24 August 2021

Appearances:
Jay Mathobe Inc
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Counsel for the Applicant: **Advocate N Alli**

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