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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 36055/2020

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

10/08/23

In the matter between:

BLK CONSTRUCTION (PTY) LTD

Applicant

and

APOGEE MANAGEMENT PROJECTS (PTY) LTD

Respondent

JUDGMENT

MAHON AJ:

[1] In this matter, the applicant seeks specific performance of an agreement of sale of a vehicle. In particular, the applicant seeks an order:

[1.1] that the respondent be directed and/ordered to provide the requisite motor vehicle ownership documents for the Isuzu KB motor vehicle

with registration number [...] within ten (10) days from the day of service of this order;

[1.2] in the event of the respondent's failure to comply with the order above "... *the Applicant shall be entitled to attach the Respondent's assets for the amount of R160 000.00*".

[2] The applicant also initially sought an order interdicting the respondent from contacting the applicant's clients and/or other third parties for purposes of tarnishing the applicant and its members' reputation, but I was informed by counsel for the applicant that this prayer had been abandoned.

[3] By way of a point *in limine*, the respondent argued that the deponent to the founding affidavit was not properly authorised to "represent" the applicant. This point can be dealt with fairly swiftly:-

[3.1] as a starting point, the deponent to an affidavit need not be authorised to depose to the affidavit. Rather, it is the institution and prosecution of the application by the applicant's attorneys that must be authorised;

**See: Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA)
at [19]**

[1.1] furthermore, if a respondent disputes the applicant's attorney's authority to institute and/or prosecute the application, the respondent's remedy lies under Rule 7. No rule 7 notice was delivered in this matter;

[1.2] finally, a lack of authority may be cured by way of ratification and may be dealt with in reply.

See: MEC for Economic Affairs, Environment and Tourism v Kruisenga 2008 (6) SA 264 (CKHC) at 294D–299H, confirmed on appeal *sub nomine* MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruisenga 2010 (4) SA 122 (SCA)

[1.3] To the extent that any deficiency in authority existed at the time of the institution of the proceedings, this was cured by means of the resolution annexed to the replying affidavit marked RA1 which ex *abundante cautela*, ratified the actions of the deponent to the founding affidavit.

[2] There is thus no merit in the point *in limine*.

[3] It is common cause that in March 2021 the parties had the intention to enter into an agreement of sale of a motor vehicle and that this intention was reduced to writing but was not signed by the parties. Although the respondent denies the validity of the agreement because it was unsigned, it nonetheless accepts that consensus was reached on the terms of the sale agreement and that, notwithstanding that the agreement was not signed, the parties nonetheless acted in accordance with its terms.

[4] They did so, that is, until an amount equal to the purchase price had been paid by the applicant, whereupon the respondent contended that the sale agreement was inchoate and that the parties had instead decided to conclude

an oral agreement in terms of which the applicant would pay a monthly rental for its continued possession of the vehicle, until such time as the purchase price was paid in full. These monthly payments are said by the respondent to have been in addition to and not in reduction of, the purchase price.

- [5] The respondent provides no evidence of this oral agreement. Despite alluding to a WhatsApp message sent in December 2021 which might (and I emphasize the word “might”) have provided some context from which the cogency of the allegations relating to the alleged oral agreement might have been considered, the Whatsapp message was not produced. No explanation is given as to why the parties, having gone to the trouble of recording the terms of the sale agreement in writing, would not similarly have reduced the terms of the oral agreement to writing.
- [6] Moreover, the existence of the sale agreement and the alleged oral agreement are mutually exclusive. The terms of the alleged oral agreement are such that they would necessarily have novated the sale agreement. Despite this, and subsequent to the alleged conclusion of the oral agreement, the respondent wrote to the applicant alleging that it was in breach of the sale agreement. This approach is entirely at odds with the notion that a new oral agreement had superseded the sale agreement.
- [7] I regret to say that I find the respondent’s version on this score so far-fetched and untenable as to warrant its rejection on the papers.

See: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 635C; National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at paragraph [26];

- [8] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.

See: Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) at 375G

- [9] In my view, the existence of the alleged oral agreement could not conceivably stand apart from a broader matrix of circumstances which could have been appreciably dealt with by the respondent. The respondent's failure to have alluded to this broader context in any respect, undermines any serious suggestion that a *bona fide* dispute of fact exists.
- [10] In the circumstances, I am of the view that the applicant is entitled to the relief referred to in paragraph [1.1] above.
- [11] As for the relief referred in paragraph [1.2] above, I raised with the applicant's counsel the competence of seeking an attachment order, in the absence of a judgment or an appropriate form of security. Counsel, correctly in my view, did not press the issue and indicated that he was satisfied to "*leave it in the court's hands*".
- [12] I am unpersuaded that the applicant is entitled to such relief.

[13] Finally, I must point out that the respondent was not legally represented in the proceedings. It is presumably for this reason that the answering affidavit concluded with prayers for relief which had not been motivated for by way of a counter-application and which were unsupported by the allegations contained in the answering affidavit. To the extent that these prayers for relief are properly before me (which is, in any event doubtful), they nonetheless fall to be dismissed for the same reasons that the relief to which the applicant is entitled, will be granted.

[14] I accordingly make the following order:

[14.1] the respondent is ordered to provide to the applicant, the requisite motor vehicle ownership documents for the Isuzu KB motor vehicle with registration number [...] within ten (10) days from the date of service of this order upon it;

[14.2] the relief prayed for by the respondent in its answering affidavit is dismissed;

[14.3] the respondent is directed to pay the applicant's costs of the application on a party and party scale, which costs shall be inclusive of any costs associated with the relief sought by the respondent in its answering affidavit.

D MAHON

Acting Judge of the High Court

Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 10 August 2023.

APPEARANCES:

For the Applicant: Adv S Rajah

Instructed by: Chivizhe Katiyo Attorneys

For the Respondent: Not legally represented. Appearance by Mr Hilary Molotsi

Instructed by: N/A

Date of hearing: 1 August 2023

Date of judgment: 10 August 2023