IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 12 February 2016

CASE NO: 6054/2016

In the matter between:

BSI BOILER & STEAM INSTALLATIONS CC	First Applicant
ANDRIES JACOBS	Second Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE

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

12/2/2016 .....

DATE SIGNATURE

EXECUTIVE TOYS COMMERCIAL (PTY) LTD	First Respondent
VAN SITTERTS REGISTERED AUDITORS	Second Respondent

JUDGMENT

DAVIS AJ

[1] In this urgent application the Applicants apply for an order safeguarding R1,1 million which the Applicants believed to be in a trust account operated by the First Respondents' auditors, the Second Respondent. In part B of the applicants' notice of motion, being the "*main application*", payment of this amount is claimed.

[2] How the disputed amount came to end up in the hands of the Respondents, came about as follows:

2.1 The Applicants (being either the First Applicant, represented by the Second Applicant or the Second Applicant himself, being a "*boilermaker from Kempton Park*" (as he is styled)) had purchased a certain motorhome from Vista Motorhomes CC (or so they thought) for an amount of R920 334,00 in October 2013.

2.2 Alleging that the motorhome was defective, the sale was cancelled and the motorhome was returned and a second motorhome was purchased some 18 months later at the same price.

2.3 Again being dissatisfied, the Applicants placed the First Respondent in possession of the motorhome with instructions to sell it at a sale price of R1,1

million (I shall return later to the relationship between Vista Motorhomes CC and the First Respondent).

2.4 After an initial unsuccessful sale, the First Respondent (being a dealer in luxury and exotic vehicles) obtained a purchaser for the motorhome at the stipulated price.

2.5 By this time the First Respondent had informed the Applicants that it needed the registration papers of the vehicle.

2.6 In the meantime further the purchaser, being anxious to obtain possession and use of the vehicle, had transferred the cash portion of the purchase price to a trust account operated by the Second Respondent who shared the same banker.

2.7 I interpose to state that the Applicants' agreement with the First Respondent was that the latter would be entitled to whatever profit it might raise above R1,1 million. In the end, it sold the vehicle for R1 260 175,44 (VAT inclusive) of which R1 190 000,00 formed the cash portion, the balance being made up by the trade-in of a certain Mazda Double-Cab vehicle.

2.8 What prompted the dispute was that the First Respondent had established that Vista Motorhomes CC had financed the vehicle through Wesbank in terms of which Wesbank retained ownership until fully repaid in respect of its "*Bank Installment Sale Agreement*" and was registered as the titleholder on the e-Natis registration documents of the vehicle. The Original registration documents were also held by Wesbank.

[3] What happened thereafter in connection with the R1,1 million in question, is the following:

3.1 The Second Respondent reported to the Applicants as follows by way of a letter dated 19 January 2016:

"Re: Vista 4 – Mr Andries Jacobs

PROOF OF FUNDS

We hereby confirm that we hold an amount of R1 100 000,00 in our ABSA CIPC Trust account on behalf of Mr Jacobs for the sale of his Vista Motorhome under instruction of Executive Toys (Pty) Ltd. Our instruction further is to release this amount to Mr Jacobs the moment we receive the original certificate of registration of the respective vehicle."

3.2 On 25 January 2016 the First Respondent confirmed in a letter that it had sold the motorhome on instructions of the Applicants

for the agreed price of R1.1 million. It proceeded to state that it could not obtain the registration documents from either the Applicants or Vista Motorhomes. The First Respondent then disclosed its intention to pay Wesbank directly the amount due to it on 8 February 2016 from the proceeds of the sale. It claimed that this was the "standard procedure" in the industry.

3.3 On 3 February 2016 the Applicant's attorneys demanded payment of the R1.1 million by 12h00 on Friday 5 February 2016. It stated the Applicants' case being the instruction to the First Respondent to find a buyer at the agreed price, to deliver the vehicle to such buyer and to pay the agreed price to the Applicants. The issue of documents and transfer of ownership was stated to fall outside the First Respondent's mandate.

3.4 In response, in a long and rather scathing letter, the First Respondent erroneously states the legal position to be that only upon registration does the ownership of a vehicle pass to the new owner. It goes on to suggest a voluntary agreement to pay Wesbank and pay the balance to the Applicants. It questioned the Applicants' rights to have obtained the Vehicle from Vista Motorhomes but confirmed conversations with on Tienie Schietekat of Vista Motorhomes regarding the direct payment of Wesbank. It insisted on a production of the Applicants' purchase agreement with Vista motorhomes, a confirmation that

Wesbank may be paid and an indemnity from both the Applicants and Vista Motorhomes by Tuesday 9 February 2016 failing which, it intended to pay Wesbank in any event.

3.5 On Thursday 4 February 2016, the Respondents' attorneys stated in an e-mail that the purchaser of the vehicle had every right to demand the registration papers from the First Respondent. It proposed (on instructions) that, if the Applicants so desire, the Respondents are prepared to pay the R1.1 million into the said attorney's trust account "*until the matter is resolved*". It requested proposals on how the Applicant intended to indemnity its agent, the First Respondent.

3.6 At 13h51 on Friday 5 February 2016 the Applicants' attorneys gave notice of the Applicants' intention to launch the urgent application, which was done later that day.

3.7 From the Respondents' answering affidavit, it transpired that the Second Respondent had in the meantime and prior to the launching of the urgent application, paid the funds over to the First Respondent and that the funds are no longer held in any trust account.

3.8 In addition hereto, a picture of a close relationship between the First Respondent and Vista Motorhomes emerged. It transpired that the first motorhome purchased by the Applicants was in fact purchased not from Vista Motorhomes, but from the First

Respondent. This appears from a written document with a Vista Motorhome letterhead. The return of this vehicle, the construction and sale of the second vehicle to the Applicants (at the same price) and the agreement thereto by the First Respondent is reflected in a letter from Vista Motorhomes to the First Respondent bearing a virtually identical letterhead. During argument in court it was conceded that the First Respondent is indeed also an agent of Vista Motorhomes. Various correspondences between these two parties also emerged, all relating to the second vehicle in question.

[4] Against this backdrop, the Respondents' opposition to the urgent application must be evaluated. It contends in its papers that the position is the following: Wesbank had retained ownership of the vehicle through its financing of the vehicle to Vista Motorhomes, the latter could therefore not transfer ownership thereof to the Applicants and neither could they in turn transfer ownership to any other person. The First Respondent had purchased the vehicle from the Applicants and then on-sold it to its client, a certain Mr Van der Merwe. Should Wesbank exercise its rei vindicatio against Mr Van der Merwe, a chain reaction of recoveries would have to take place between the various sellers and purchasers based on the implied common law guarantees against eviction.

[5] Whilst the legal position might be as the Respondents contend, it is clear that the culprit in the scene is Vista Motorhomes, an associate of the First

Respondent. There is also a dispute as to the terms of the agreement between the Applicants and the First Respondent with the latter's version being in conflict with the prior correspondence to which I have referred.

[6] Despite this, the Respondents say the Applicants have no right to attach the funds and referred me to extracts from the judgment in Fedsure Life Assurance v Worldwide African Investment Holdings 2003 (3) SA 268 WLD.

[7] I had regard to the whole of the aforesaid judgment and find that in the present application:

7.1 The Applicants have sufficiently indicated a prima facie quasi-vindicatory right, even if open to some doubt, to the earmarked funds in question (Stern and Ruskin NO v Appleson 1951 (3) SA 800 W).

7.2 As such, the Applicants need not allege irreparable loss (see Fedsure-case supra at [27] and [28]) and the issues of an anti-dissipation interdict as referred to by the Respondents with reference to Knox D'Arcy Ltd and others v Jamieson and others 1996 (4) SA 348 (A) do not arise

7.3 Having regard to the principles for interim interdicts as set out in the well-known case of Setiogelo v Setlogelo 1914 AD 221 at 227 as expounded on in Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 A at 691 C-G, and, in exercising the court's discretion in weighing up the prejudice which the respective parties may suffer (also referred to as the balance of convenience), the earmarked funds, like any species of property, should be interdicted.

[8] Having reached the aforesaid conclusions, I am fairly convinced that whatever prejudice the First Respondent may suffer will be alleviated if its associate, Vista Motorhomes or itself on behalf of Vista Motorhomes, see to the payment of Wesbank, which in turn will then relinquish its ownership of the vehicle and the sought after registration papers, thereby removing any reputational risk to the First Respondent and liability to its client, the ultimate purchaser. There is no similar convenience available to the Applicants which would not leave them out of pocket.

[9] I therefore make the following order:

1. The First Respondent is ordered to pay the amount of R1.1 million into its attorney's trust account, to be held pending finalisation of the relief claimed by the Applicants in part B of their notice of motion.

2. The amount may be invested in an interest-bearing trust account.

3. For purposes of determining part B of the notice of motion, the parties may supplement their respective papers.

4. The liability for costs of this application shall be determined at the hearing of aforementioned part B of the application.

N DAVIS

ACTING JUDGE OF THE HIGH COURT

Date Heard:	11 February 2016
Counsel for Applicant:	Adv R Mastenbrok
Instructed by:	Fluxmans Attorneys
Counsel for Respondent:	Adv HF Oosthuizen SC
Instructed by:	Froneman, Roux & Streicher Attorneys
Date of Judgment:	12 February 2016