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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 16942/2021

Before: The Hon. Mr Acting Justice Montzinger

Hearing: 11, 15 October 2021

Judgment: 25 October 2021

In the matter between:

SEAN JACOBS

Applicant

and

ANDRE NICO MOSTERT

Respondent

JUDGMENT

(DELIVERED BY E-MAIL ON MONDAY 25 OCTOBER 2021)

MONTZINGER AJ:

[1] Mr Jacobs approached this Court urgently, seeking an order compelling Mr Mostert to return a Powerstar Beifang Benchi truck, and to pay the cost of the proceedings.

[2] This Court finds that the matter was urgent. Mr Jacobs is entitled to an order compelling the return of the truck and the costs of the proceedings. An order in these terms appears at the end of this judgment.

The dispute between the parties:

[3] On 1 July 2020 Messrs Jacobs and Mostert concluded a written lease agreement. The agreement provided that commencing on 1 August 2020 Mr Mostert would lease the truck from Mr Jacobs at a monthly rental amount of R35 000.00. The truck was described and identified between the parties as a Powerstar Beifang Benchi Truck with VIN and registration numbers LBZF56GA9AA04581 and [...], respectively.

[4] On 27 February 2021 the parties substituted the lease agreement with a written sale agreement. In terms of the sale agreement Mr Jacobs sold the same truck to Mr Mostert in the amount of R450 000.00. The purchase price would be paid in 9 monthly instalments of R50 000.00, of which the first was payable on 7 March 2021. Importantly, clause 2.1 of the sale agreement recorded that Mr Jacobs will remain the owner of the truck until such time that the full purchase price has been paid.

[5] Mr Mostert failed to adhere to his payment obligations and on 6 May 2021 Mr Jacobs took repossession of the truck. His actions were however immediately

reversed when the Magistrate's Court ordered him to return the truck to Mr Mostert (by way of spoliation), which he did.

[6] Mr Mostert's non-payment persisted and on 20 August 2021 Mr Jacobs demanded payment of the arrears failing which the sale agreement will be cancelled. This threat fell on deaf ears and on 23 September 2021 Mr Jacobs cancelled the sale agreement. Upon cancellation Mr Mostert was requested to return the truck, failing which he was informed a court would be approached to compel him to do so.

[7] Mr Mostert refused and on 4 October 2021 Mr Jacobs issued an urgent application out of this Court seeking an order to compel the return of the vehicle. The Court was requested to dispense and condone non-compliance with the rules that regulates service and form. Secondly, to issue an order and compel Mr Mostert to return the truck and if there is non-compliance with the Court's order to authorise the Sheriff to attach the truck and return it to Mr Jacobs.

[8] The matter was set down for hearing on 11 October 2021. On this day Mr Mostert filed an affidavit only challenging the urgency with which Mr Jacobs approached the court. The Court *prima facie* regarded the matter as urgent and provided Mr Mostert an opportunity to file an affidavit addressing the merits. After the exchange of further affidavits, the matter was argued on 13 October 2021.

[9] The issues for decision were: (a) whether the matter was urgent, (b) if urgent, whether Mr Jacobs has made out a case for the return of his vehicle.

Urgency:

[10] Generally two requirements are necessary to establish urgency. Firstly, the circumstances that renders the matter urgent must be set out in the founding affidavit. Secondly an applicant must explain why the same or similar relief, being sought on an urgent basis, could not be granted by a court at a later stage¹.

[11] Mr Jacobs terminated the sale agreement on 23 September 2021. The cancellation letter gave Mr Mostert 48 hours to return the truck. He failed to do so. On 4 October 2021 proceedings were issued in this Court and on the same day Mr Mostert was personally served with the court process. He thus had seven calendar days' notice of the application.

[12] While the notice of the hearing seems short, the founding affidavit consisted of a mere six and half pages, with minimum annexures. Mr Mostert filed an answering affidavit consisting of also six pages only attacking urgency. No attempt to address the merits of the matter was made.

[13] When it comes to determining whether a matter is urgent, the type of remedy at stake also influences a court's discretion whether to condone non-compliance with its rules. Our law recognises various proceedings that have an element of inherent

¹ *Salt v Smith* 1991 (2) SA 186 (NmHC) at 187 A – B

urgency to them. These include amongst others: spoliation applications², matters involving minor children³, insolvency proceedings and contempt of court applications⁴.

[14] That inherent urgency underlies a claim for the return of property (a vindication claim) is inferred from the importance our law attributes to this remedy. Firstly, in a claim for vindication our law factually presume that the owner will suffer harm if an interdict is not granted⁵. Secondly, the judgment of *Chetty v Naidoo*⁶ has confirmed that *'it is inherent in the nature of ownership that possession of the res should normally be with the owner.*

[15] This Court is of the view that our law supports an approach that in respect of a claim where a litigant pursues vindication then the proceedings always have an element of inherent urgency to it. Particularly in circumstances where the applicant complies with the legal requirements for a right of vindication and the respondent offers defences that does not defeat the heart of the vindication claim.

[16] A vast number of authorities seem to support an approach that a court should always endeavour to restore possession to the owner as soon as possible. This does not mean that a party can simply rely on vindication and be absolved from complying with the general accepted principles of urgency. Especially, where the remedy of

² *Mans v Loxton Municipality* 1948(1) SA 966 (C) at page 976; see also *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) par 21

³ *B v B* 2008 (4) SA 535 (W) at 541 H

⁴ *Protea Holdings (Pty) Ltd v Wriwt and another* 1978 (3) SA 865 (W), 868H869A; *Wright v Saint Mary's Hospital, Melmoth and another* 1993 (2) SA 226 (D), 228EF.

⁵ *Motor Distributors (Pty) Ltd v Rossman & another* 1980 (3) SA 1164 (D)

⁶ 1974 (3) SA 12 (A) 208 - D

vindication involves evictions⁷ or where there are other statutory prescripts laid down before vindication can be pursued.

[17] In this matter Mr Jacobs has cogently explained the reasons for the urgency. He is the owner and wishes to be in lawful possession of the truck. He is suffering financial losses due to not being able to utilise the vehicle in order to mitigate the substantial losses he incurred as a result of Mr Mostert's breach of the sale agreement. Mr Jacobs is concerned that the vehicle is being used every day and since the sale agreement is cancelled, he has no knowledge how the vehicle is being stored, used or maintained.

[18] These facts in support of urgency are on point with various judgments⁸ where the court pointed out that a motor vehicle, particularly one traversing rough rural roads, depreciates rapidly, and if the vehicle is eventually returned to the owner, it is entitled to have it returned in the condition in which it was at the date he sought to enforce his claim for delivery.

[19] It is thus apparent that Mr Jacobs cannot obtain relief at a later stage that will put him in a similar situation as he is in October 2021. Each day the truck remains in the possession of Mr Mostert the risk of losing the value of the asset is imminent and real. Also, he is not pursuing damages but rather the return of the vehicle.

⁷ Especially claims in terms of the Prevention of Illegal Eviction Act 19 of 1998; the Extension of Security of Tenure Act 62 of 1997 (where the High Court has jurisdiction by agreement) or matters involving the National Credit Act 34 of 2005

⁸ *VSA Motor Distributors (Pty) Ltd v Rossman* 1980 (2) PH A 58 (NPD) relying on a finding in *Kempster Sedgwick (Pty) Ltd v Rajah* 1959 (1) SA 314 (D)

[20] This Court is of the view that as soon as the sale agreement was lawfully cancelled Mr Jacobs was entitled to return of the truck. Since the terms of the sale agreement make it clear that he remains the owner, and by implication on cancellation the risk of the vehicle return to him, he had no other option but to approach a court urgently to protect his right. The trigger event for the urgency is thus the failure by Mr Mostert to rectify his breach.

[21] Mr Jacobs therefore launched the application as soon as possible after the 23rd of September 2021. Although this Court is aware that there are events prior to 23 September 2021, what obligated the urgency is the fact that the risk burden shifted after 23 September 2021 and Mr Jacobs was thus perfectly entitled to approach the court in the manner that he did.

The law: Rei Vindicatio:

[22] The owner of a thing has a right to possess, use, enjoy, destroy and to alienate it. If any of these things are in any way infringed he has appropriate legal remedies like in this case a *rei vindicatio*. In the South African law context, the *rei vindicatio* action's importance is clearly articulated and flows from the judgment of *Chetty v Naidoo*.

[23] In order for an owner to succeed he must proof that: (a) he is the owner of the truck; (b) that the other party was in possession of the truck at the time of the commencement of the application; and (c) that the item in question is still in existence

and clearly identifiable⁹. The Constitutional Court has confirmed the legal requirements for this remedy¹⁰.

[24] It does not make any difference whether the possessor is *bona fide* or *mala fide*. The owner of the movable property found in the possession of a third party may recover it from any possessor without having to compensate him. Even from a possessor in good faith who gave value for it. See: *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A)¹¹ *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A).

[25] If the person claiming vindication can prove all the requirements, the onus then shifts to the person claiming a right to retain the vehicle to establish such right¹².

Evaluation of the evidence:

[26] Mr Jacob's case is succinctly set out. He alleges that he is the owner. The vehicle was in the possession of Mr Mostert when the application was launched and that remains to be the case. The truck is also clearly identifiable.

[27] Mr Mostert's defences essentially consists of the following:

⁹ See: Silberberg and Schoeman's, The Law of Property, 5th Edition at pages 243 and 244

¹⁰ *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC)

¹¹ at 82

¹² *Dreyer and Another NNO v AXZA Industries (Pty) Ltd* 2006 (50 SA 548 (SCA)

- (a) He is entitled to withhold payment of approximately five (5) months as set-off of for payments against damages and losses he allegedly incurred as the result of Mr Jacob's repossession of the vehicle during May 2021.
- (b) Since Mr Jacobs unlawfully cancelled the sale agreement and in effect committed repudiation of the sale agreement. He exercised his election which he had in law and decided to hold Mr Jacobs to the agreement.

[28] There is no dispute that Mr Jacobs is the owner of the truck bearing registration [...] and vin number LBZF56GA9AA04581. The registration paper of the vehicle confirms this. The fact that ownership is not in dispute and that the vehicle exist in the hands of Mr Mostert means that he must advance a case why he should retain the vehicle.

[29] The defence of set-off is unsustainable. The principle of set-off only applies in a situation where there are reciprocal debts between the same parties that are certain and due¹³. On application of the legal principle of set off to the facts of this matter a claim for damages which Mr Mostert assert cannot be set-off against the claim for the return of the truck. There is no reciprocal debt between the parties of which amounts are certain and due.

[30] The second defence that no right to cancel exists in the sale agreement, is also without merit. Since the sale agreement does not contain a breach clause Mr Mostert seems to suggest that Mr Jacobs in fact committed a breach himself, by first sending

¹³ *Schierhout v Union Government* 1926 AD 286 at 289 – 290

the breach and later the cancellation notices. The proposition is thus that Mr Jacob's attempt at cancellation constitutes a conclusion that he no longer wanted to be bound by the sale agreement. He therefore committed an act of repudiation.

[31] However, it was only during argument that the repudiation defence was identified and relied on. This defence is not apparent from the answering affidavit, wherein Mr Mostert only denied that a right of cancellation has accrued to Mr Jacobs.

[32] In any event, on review of the various correspondence addressed to Mr Mostert it is evident that he never responded to the allegations Mr Jacobs expressed in the letters alleging a breach and an entitlement to cancellation and a return of the truck. Nowhere does he respond and raise the issue that the cancellation has not accrued, and that Mr Jacob's conduct is akin to repudiation.

[33] This failure by Mr Mostert to respond to the material allegations in writing has the result of a negative inference drawn by this Court. In *McWilliams v First Consolidated Holdings*¹⁴ the court said:

"...I accept that "quiescence is not necessarily acquiescence" (see *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at p 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained,

¹⁴ [1982] 1 All SA 245 (A) 250; 1982 (20 SA 1 (A) 10 D - H

may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion.

[34] This Court is of the view that the approach adopted in the *McWilliams v First Consolidated Holdings* judgment is applicable in this case. This Court has no doubt that Mr Mostert's silence and inaction after receipt of the various letters justify an inference adverse to him. The inference is that there was no misunderstanding in the mind of Mostert. He was aware that Mr Jacobs is entitled to cancellation and that this right has accrued by virtue of his non-payment and breach of the sale agreement.

[35] The contention that no right of cancellation accrued just because the sale agreement does not contain a cancellation clause, is also refuted by the law. The legal principles are well established in authorities like *Qatorian Properties (Pty) Ltd v Maroun*¹⁵ that if there is a breach of a term of a contract which goes to the root of the contract, the innocent party is entitled to cancel. In this matter non-payment of the monthly instalment goes to the root of the contract and entitled Mr Jacobs to cancel.

[36] Mr Mostert's defences to the relief fail. Mr Jacobs is thus entitled to the relief he seeks.

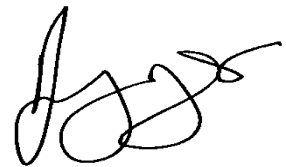
[37] Regarding costs, this Court could find no justification to depart from the ordinary rule that the successful party is entitled to costs.

¹⁵ [1973] 4 All SA 1, 1973 (3) SA 779 (A) 784

Conclusion and order:

[38] The following order is made:

1. The non-compliance with the uniform rules relating to form and service is condoned and the matter is heard as one of urgency.
2. The respondent must return to the applicant a Powerstar Beifang Benchi Truck with VIN/Chassis number LBZF56GA9AA045815 and bearing vehicle registration number [...] within 72 hours of the granting of this order.
3. If the respondent fails to return the vehicle described at 2 above and within the stipulated time the Sheriff of this Honourable Court is then authorised to attach the vehicle and deliver it to the applicant.
4. The respondent to pay the applicant's costs on a party and party scale.



A MONTZINGER
Acting Judge of the High Court

Appearances:

Applicant's counsel:	Adv S Khoza
Applicant's attorney:	C Small Attorneys
Respondent's counsel:	Adv D Claassens
Respondent's Attorney:	RH Heydenrych & Associates