REPUBLIC OF SOUTH AFRICA

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

CASE NO: 15838/12

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

……………………… DATE ………………………… SIGNATURE

In the matter between:

LOFFEL, RICHARD PATRICK Plaintiff

And

PRINSLOO, THEUNS FREDRICH JACOB Defendant

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] On 5 May 2012 the plaintiff in this matter, in his capacity then as the applicant in Motion Proceedings, claimed from the defendant, in his capacity as the respondent, relief in the following terms:

1.1 That the defendant and/or anybody who is in possession of the applicant/plaintiff's motor vehicle referred to hereunder and who has obtained possession thereof through the defendant/respondent be ordered immediately to return to the applicant/ plaintiff the said motor vehicle, being a Mercedes Benz motor vehicle, 2007 model 320 CDI, registration number VLP … GP, chassis number WD………. and engine number 6………… ("*The motor vehicle*").

<u>Alternatively</u>

That the Sheriff of the above court be authorised and directed to attach and remove the motor vehicle from whomever he may find it and to hand same over to the applicant/plaintiff.

1.2 That an order that the respondent/defendant pay the costs of the application in the event of the latter opposing the application be made.

1.3 For further and/or alternative relief.

[2] When the matter served before my brother Horn J on 21 September 2012 both parties agreed to a Draft Order being recorded and made an order of court in the following terms:

> "*Having heard Counsel for the applicant and the respondent, the following order is made:-*
>
> *1. The application stands as a simple summons and the applicant is to file a declaration within 20 days;*
>
> *2. The respondent is to file a plea within 20 days from receipt of the declaration;*
>
> *3. The costs are reserved for determination by the trial Court.*
>
> *BY ORDER*
>
> *REGISTRAR*"

[3] The plaintiff/applicant (hereinafter referred to as "*the plaintiff*") duly filed and served his declaration on 27 September 2012. Therein the plaintiff prayed for an order that:

> "*1. The defendant and/or anybody who is in possession of the plaintiff's motor vehicle and who has obtained possession thereof through the defendant be ordered immediately to return the plaintiff's motor vehicle being Mercedes Benz motor vehicle 2007 model 320 CDI, Registration No. VLP……., Chassis No WDB……….. and engine number 6…………… (…) to the plaintiff, alternatively the Sheriff of the above Honourable Court is hereby authorised and directed to attach and remove the plaintiff's motor vehicle from same and hand it over to the plaintiff.*
>
> *Alternatively to paragraph 1 –*

2. *In the event of the court finding that the defendant is no longer in possession of the plaintiff's motor vehicle, judgment is sought against the defendant as follows:*

   2.1 *Payment of the sum of R279 952,00;*

   2.2 *Interest on the sum of R279 952,00 calculated at the rate of 15,5% per annum from the date of service of this Declaration on the defendant to date of payment.*

3. *Costs of suit, which costs are to include the costs occasioned in the motion proceedings which preceded the issue of the Declaration.*

4. *Further and/or alternative relief.*"

[4] The respondent/defendant (hereinafter referred to as "*the defendant*") pleaded to the Declaration and subsequently filed an Amended Plea on 4 March 2014. For the sake of clarity, since the defendant is representing himself and drew up the plea himself, it is my considered view and finding that in order not to derogate or detract from the intent and meaning of the plea, same should be reproduced verbatim insofar and where it is material. It reads as follows:

"*3. Disagree. The plaintiff entered into a sale agreement on 8 April 2010 between the plaintiff and Spin City Auto (Annexure A), whereby Spin City Auto would sell the vehicle on the plaintiff's behalf. Spin City Auto then made a payment to the plaintiff of R140 000, the plaintiff deposited the cheque on 8 May 2010 (Annexure B). This enabled Spin Auto to put the vehicle in their name on 14 May 2010 and sell in to Aucor, in order to pay the remaining money to the plaintiff (Annexure C). The plaintiff then requested further payments for the vehicle, whereby another cheque of R113 000 was given to the plaintiff by Spin City Auto and the plaintiff was told to only bank the cheque at a later stage as Spin City Auto was still awaiting funds from the sale, from the auction at Aucor. The defendant bought the vehicle on 19 June 2010 from Aucor (Annexure D). Aucor then first put the vehicle in their name on 22 June and paid the proceeds over to Spin*

City Auto, the vehicle was then registered in the defendant's name as 'owner' and Wesbank as 'title holder' on 24 June (Annexure C). This process is a logical process for auctioning. The plaintiff then deposited the second cheque for R113 000 on 21 September 2010, only to find that the cheque could not be honoured (Annexure E). The plaintiff then went to Spin City Auto, but found out that they have since liquidated, as they could no longer meet their financial commitments. The plaintiff was very upset about this and first tried to claim for theft from his insurance at Alexander Forbes Insurance, but with no success as it was seen as a civil matter between the plaintiff and Spin City Auto. Failing at this, the plaintiff is now trying to recover his loses, by approaching the defendant in an attempt to deprive the defendant of the defendant's vehicle, using some of the R140 000 for his legal endeavours. The defendant is in possession of the registration papers for the vehicle showing him as owner and Wesbank as title holder (Annexure F).

3b. The defendant wish the court to grant him ESTOPPEL in this matter, as he had no dealing in any shape or form with Mr Loffel at any time. Mr Loffel had a contractual agreement between himself and Spin City Auto, to which he should hold Spin City Auto accountable. My dealing was ONLY with Aucor, to which I paid the full purchase price of R279,952 and financed this amount through Wesbank.

4. Disagree.

5.

5.1 Disagree. Ownership of the vehicle passed to the defendant on 24th of June 2010 (Annexure F&H), after he purchased the vehicle at Aucor on 19th June 2010 (Annexure D).

5.2 No consent required to sell a vehicle where defendant is reflected as owner and vehicle is paid in full.

5.3 Disagree. The value of the plaintiff's vehicle was R121,000 on 1 July 2013. It would since then have depreciated further.

6. The defendant is not in possession of the vehicle. The defendant sold the vehicle, which is further proof that he was the rightful owner at the time."

THE PARTIES

[5] The plaintiff is an adult male person residing at 158 Derry Drive, Northriding, Johannesburg.

[6] The defendant is also an employee of Alexander Forbes Insurance Company, which company underwrote the motor vehicle in issue here to which the plaintiff claims ownership.

ISSUE(S) TO BE DECIDED

[7] What is to be decided here is whether or not the plaintiff was the owner of the motor vehicle; whether or not as at the time he issued letters of demand and/or issued proceedings against the defendant, the latter was in possession of the motor vehicle in issue; what the totality of surrounding circumstances are regarding this motor vehicle; and whether or not the plaintiff is entitled to the motor vehicle's return to him or payment of its monetary value.

INCIDENCE OF *ONUS* TO LEAD EVIDENCE FIRST

[8] In the light of the defendant's plea, it was agreed and was common cause that the defendant had to be the first to lead evidence. However, the defendant pleaded with the plaintiff through the court that the plaintiff lead evidence first so as to allow him the opportunity to observe how evidence was led in court. The plaintiff agreed to do so and it was so ordered, the understanding being that the *onus* still rested with the defendant.

HISTORY AND FACTUAL MATRIX OF CASE

[9] The historical overview of issues surrounding this motor vehicle are inherent or contained in the evidence led in court by both parties as well as in the particulars of claim insofar as the plaintiff is concerned and the plea as amended insofar as the defendant is concerned.

PLAINTIFF'S VERSION

[10] It was the plaintiff's case that he purchased the Mercedes Benz sedan in issue here (the "*motor vehicle*") from Mercedes Benz Sandton on 15 January 2008 and financed the deal through Nedbank. The registration certificate of the motor vehicle reflected Nedbank as the title holder and himself as the owner.

[11] He paid off the financing debt to Nedbank in two instalments.

[12] After the motor vehicle was paid off and during January 2010 before April he decided to sell the motor vehicle. To that end, he placed advertisements for its sale in the Auto Mail as well as in Junk Mail, both being publications through which people offer their properties to the general populace and/or public for sale.

[13] He received offers for the motor vehicle, one of which was from a Dr Denzel Chetty ("*Chetty*"), an employee of Spin City Auto, a car dealership situated at Corner Main and Bond Streets, Randburg. Chetty told him

(plaintiff) that he saw the advert in respect of this motor vehicle and that he had a buyer who was interested in purchasing it directly from him (plaintiff). According to the plaintiff, Chetty was adamant, clear and unambiguous that Spin City Auto did not intend purchasing the motor vehicle on behalf of the buyer but were merely acting as introducers of the buyer to the plaintiff in return for an introduction or finder’s fee from the prospective buyer: The plaintiff and the buyer were to negotiate terms between themselves. The plaintiff had driven to the Spin City Auto business premises when he talked to Chetty who asked him to leave the motor vehicle for the buyer to see.

[14] He drove there the second time and this time found the manager of the place, a Mr Ryan Edelstein (“*Edelstein*”).

[15] Incidentally, as the evidence revealed, Edelstein was the spouse to the sole director and shareholder of the company or close corporation (Spin City Auto or a company controlling Spin City Auto), Tauny or Toni Edelstein.

[16] Edelstein asked the plaintiff to complete and sign a document titled “*Consignment Note*” as confirmation that he left his motor vehicle there and so that the motor vehicle could also be covered by insurance of the business while there. The plaintiff complied. He inserted as a reserve price for the motor vehicle the amount of R300 000,00. He also amended clause 1 of 5 under the heading, “*NOTES*” at the bottom of the document from reading –

> “*1. Payment for vehicle sold on your behalf will be paid to you 14 days after delivery of the vehicle.*”

by drawing a line through it and writing by his hand the following in its stead:

> "*Transfer on payment*."

[17] The plaintiff was adamant that this document was neither a deed of sale nor authority or mandate to Spin City Auto to sell his motor vehicle. He further stated that at no stage was he called upon to approve any sale or sign transfer of ownership of the motor vehicle from him to Spin City Auto or any other instance. Equally, he testified that he approached the title holder, Nedbank, to find out if they ever signed any change of ownership documents in respect of this motor vehicle to Spin City Auto or any other instance, and the latter (Nedbank) told him that they never did.

[18] A day or two after leaving the motor vehicle at Spin City Auto he went back there and the motor vehicle was not at the premises. Upon enquiry he was told by Edelstein that the prospective buyer liked the car and had taken it to some specialised agent to have it checked. He went home. The following day he went to Spin City Auto again and his car was still not there. On enquiry Edelstein this time round told him the prospective buyer insisted that the car be taken to an authorised Mercedes Benz dealer for a complete or full service before he can conclude the deal for it. That Spin City Auto had indeed taken it to a Mercedes Benz dealership for that service.

[19] The day after that when he arrived at Spin City Auto and his car was still not there, he was told that the prospective buyer was still raising a bank finance for the deal.

[20] He visited this dealership on several more occasions and each time a new story was related to him as to why his motor vehicle was not at the premises. He was unhappy with this state of affairs and demanded that Edelstein return his motor vehicle to him. Edelstein and Spin City Auto continued spinning stories and twisting versions. Sometime during July or August 2010, when he insisted he was not leaving without his car, Edelstein told him that he (Edelstein or Spin City Auto) would make an interim payment of R140 000,00 to him and that the balance of the reserve price he wanted would be paid to him a day or two later. He (plaintiff) was pacified. He deposited the cheque on 5 August 2010 and the bank honoured it.

[21] A day after depositing the R140 000,00 cheque he (plaintiff) visited Spin City Auto again to collect the balance of R160 000,00. This time round Edelstein told him that the bank had withdrawn or suspended approval of the finance for the deal as they wanted to see the original registration papers of this motor vehicle. He handed them to him (Edelstein) and pointed it out to him that the papers still reflected Nedbank as the title holder and himself as owner, and that before any transfer of the ownership of this motor vehicle could be effected to any new buyer, Nedbank had to sign and transfer ownership thereof to him (plaintiff) as owner. Mr Edelstein assured him that

the financing institution merely wanted to see those registration papers to satisfy itself that everything was in order. As an indication of his earnestness and sincerity as well as eagerness to see the deal go through, Edelstein handed to him a post-dated cheque in the amount of R113 000,00.

[22] On the day the cheque was to be banked, Edelstein contacted him and asked him not to deposit it as he was still clearing some problems that could cause it to be dishonoured. He complied. When days passed without hearing anything from Spin City Auto he visited the dealership again. He found Edelstein in the company of his father. He demanded the return of his car. Edelstein (snr) stepped in and assured the plaintiff that he will personally ensure that his balance was ready and available by the following Monday. He agreed to return that Monday.

[23] He went there on the agreed upon date and found the dealership open for business but none of the Edelsteins were there. His car was also not there. He also found other car owners who were unhappy with what was happening. Those whose cars were still at the premises were taking them away.

[24] He then deposited the cheque for R113 000,00 on 20 September 2010 but it was dishonoured by the bank on 21 September 2010.

[25] He then reported a theft to his insurance brokers, Alexander Forbes. The latter advised him not to report the matter to the police and leave that to

them to advise when it was appropriate to do so after they had investigated his claim.

[26] On the day he found a group of irate car owners at Spin City Auto, one of the complaining owners impounded all the paperwork, documents and books of the business. As he had mislaid his copy of the "*Consignment Note*", he requested that owner to check same for him among the documents and provide him with same. Indeed, after a while that owner faxed him a copy of the "*Consignment Note*", which presently forms part of the papers in this action.

[27] Alexander Forbes conducted investigations and discovered that the plaintiff's motor vehicle had been fraudulently transferred into the names of Spin City Auto and ultimately into those of the defendant, both transactions taking place on the same day, being 19 April 2010. From documents produced only at court by the defendant, which he stated in court he obtained during August 2012, the following scenario unfolded:

27.1 According to the document marked by the court as Exhibit "A1" being an extract from eNatis, Mercedes Benz Financial Services acquired this motor vehicle and registered it as owner and title holder on 6 December 2006.

27.2 On 10 January 2007 the plaintiff purchased the motor vehicle from Mercedes Benz Financial Services, financing the deal through Nedbank. On this date the motor vehicle was registered as follows: Nedbank was title holder and the plaintiff was the owner.

27.3 On 14 May 2010 Spin City Auto registered the motor vehicle in its names, both as owner and title holder.

27.4 On 22 June 2010 Aucor (Sandton) (Pty) Ltd had the vehicle registered in its names, both as owner and title holder.

27.5 The motor vehicle was then registered into the names of the defendant as "*owner*" thereof. The details relating to the title holder have been erased with a tippex from the document.

[28] From the above, it is clear that when the Edelsteins told the plaintiff as early as during July/August 2010 that certain things were being done to satisfy a prospective buyer of this motor vehicle or upgrade its security gadgets as well as when they gave the plaintiff the first cheque for R140 000,00, they knew all along that they had some-how contrived to fraudulently have the car registered into their names – both as owners and title holders. They also knew that they had sold it to Aucor (Sandton) (Pty) Ltd or at the least allowed it to be registered in the names of Aucor – both as owners and title holders – as by or on 23 June 2010.

[29] According to Exhibit “A2” also produced by the defendant in the middle of the trial, Spin City Auto generated a payment invoice in favour of an entity going by the names, Blue Chip Motor Enterprises CC for the amount of R280 000,00. That was on 19 April 2010. The object of the deal here is the self-same motor vehicle the plaintiff left with Spin City Auto.

[30] Exhibit “A4” is a tax invoice generated by Blue Chip Motor Enterprises CC for the same amount and relating to this motor vehicle. Blue Chip Motor Enterprises CC was requisitioning payment from its resources to pay Aucor Midrand the amount of R340 000,00, which was in respect of two vehicles it (Blue Chip) bought on an action conducted by Aucor at its Midrand premises: R280 000,00 in respect of the Mercedes Benz motor vehicle in issue here and R60 000,00 in respect of a 2007 Proton LDV with registration letters and numbers BKF……... It is also dated 19 April 2010.

[31] Exhibit “A5” is a requisition or demand for payment by Aucor auctioneers directed at Blue Chip Motor Enterprises for the amount of R340 000,00 representing bids Blue Chip Motor Enterprises made at the auction. This document is dated 21 April 2010. R280 000,00 of the amount is the value of the purchase of the Mercedes Benz motor vehicle belonging to the plaintiff.

[32] Exhibit “A6” is confirmation that Blue Chip Motor Enterprises CC paid Aucor the amount of R340 000,00 on 22 April 2010.

[33] According to the plaintiff as he continued his testimony, Alexander Forbes repudiated his claim because he breached a term of their contract of insurance which outlawed dealings with motor dealers in respect of the Mercedes Benz.

[34] During his cross-examination of the plaintiff the defendant regurgitated the terms of his amended plea. He repeated *ad nauseum* that he bought the motor vehicle at an Aucor auction at Midrand on 19 June 2010 for R279 952,00.

[35] The plaintiff closed his case without calling further witnesses.

DEFENDANT'S VERSION

[36] He too was a single witness. He did not call witnesses to corroborate him also.

[37] According to him, he bid for and won the bid for the motor vehicle in issue here at the auction conducted by Aucor Auctioneers at their Midrand premises. He paid R279 952,00 for it through Wesbank. As such he was the owner of the papers thereof and Wesbank was the title holder. He drove it for three (3) years until it became too expensive to maintain as it needed several important parts to be replaced, and at too high an amount. He decided to sell it.

[38] At the time he sold the motor vehicle, this case was already underway. He stated that despite this vindicatory action which started as motion proceedings had already started, he still decided to sell the motor vehicle as he believed he was the rightful owner thereof with full entitlement to dispose of it, pending legal proceedings relating to it notwithstanding. He sold it for R121 000,00 but refused to disclose the buyer as –

> "*… I did not want to lose credibility with the purchasers who are also dealers in motor vehicles. Plaintiff could easily have gone to them and told them the motorcar they purchased from me was a stolen motor vehicle …*"

[39] At this stage when he was still testifying in chief, he insisted that the market value of the motor vehicle was R81 000,00. He explained the difference between this amount and the R121 000,00 he received as follows: the dealers tweaked the interest rate he was to pay for the vehicle he was purchasing as a replacement for the Mercedes Benz and added the amount thereat arrived (R40 000,00) to the R81 000,00 market value to make the R121 000,00 they paid over to him.

[40] During cross-examination by counsel for the plaintiff the defendant totally deviated from his plea. He agreed with suggestions to him that the plaintiff was the victim of a massive and well orchestrated fraud by several instances. Yet he still insisted that he should not be made part or party to those shenanigans. It was at this stage that he produced the documents I alluded and referred to as Exhibits "A1" to "A6" above.

[41] For the record, the defendant –

41.1 Conceded that the market value of the motor vehicle was R121 000,00 as on the date he disposed of it, being 1 July 2013. This was confirmed by a document from SARS which he brought to the fore only at this stage confirming the date of the sale of the motor vehicle.

41.2 When pressed for details of the person or instance he disposed the motor vehicle to, he produced a document which this Court market Exhibit "B" and confirmed that he sold it to Westland Motors of 497 Jan Smuts Avenue, Blairgowrie, Johannesburg, which evidence the document corroborated.

41.3 He confirmed paragraph 5 of his plea and amended plea (which are almost identical save for a few insignificant aspects) that he was still in possession of the motor vehicle in issue here at least before the date on which he disposed of it on 1 July 2013, being 13 August 2012. He confirmed also that he sold this motor vehicle well knowing that there was a vindicatory action ongoing relating to it <u>alternatively</u>, payment of its market value as by that date. He also formally confirmed receiving the letters of demand that preceded the launching of the initial motion proceedings on 26 April 2012. He also conceded that as the insurance company employee, especially being employed by the insurance company that underwrote the insurance cover for this motor vehicle, it was easy for him to check and/or determine its status.

41.4 He could not gainsay the plaintiff's evidence insofar as it concerned Spin City Auto.

41.5 He testified that Aucor told him that they bought the motor vehicle from Spin City Auto and also made payment therefor to them. This evidence is incorrect as it contradicts the clear proof contained in document Exhibit 5 produced by himself, which depicts that Aucor bought the motor vehicle from Blue Chip Motor Enterprises CC for R280 000,00.

[42] The above are but a few of the many or numerous instances where the defendant materially deviated from his own plea.

ANALYSIS

[43] The issue of ownership of a motor vehicle is dependent on those procedures that are specifically laid down in the Road Traffic Act and Regulations. According to the plaintiff, in order to change the ownership of the motor vehicle in issue here, one had of necessity or invariably had to have it changed from the title holdership of Nedbank into his names as owner, making him owner and title holder first and he would be the instance that would have transferred ownership to Spin City Auto by physically participating

in that process. According to the defendant, anybody can change ownership of a motor vehicle, even bypassing the participation of the registered owner if or any time he/she has the original registration papers in his/her possession. He stated that as somebody who regularly purchased motor vehicles at public auctions, he would witness that being done or even personally have had it so done.

[44] The defendant's viewpoint on this aspect in my view is not only wrong but also unlawful or illegal. An owner of a vehicle as reflected in the registration papers is not a mere figure-head. He is an active actor who cannot be bypassed when that vehicle's ownership is changed. It is so that the change of ownership from title holder to the owner as well as from owner to a third party may take place on the same day or simultaneously. It may so happen that an owner would have paid off the amount owing to the title holder but had not yet demanded that the latter amend or cause to be amended, the registration papers to reflect him as both title holder and owner. However, whenever that vehicle is to be transferred into the names of a third party, there must definitely be a transfer, first from the title holder to the owner, who in turn would transfer such vehicle to the new owner and/or title holder, as the case may be. To act otherwise would be contrary to the traffic laws, rules and regulations and consequently unlawful or illegal. Such a transfer against the law, regulations or rules will be of no force or effect *vis-à-vis* the bypassed owner.

[45] The defendant's evidence points to him having acquired or received Exhibits "A1" to "A6" in August 2012. That is long before he pleaded to the plaintiff's declaration on 24 October 2012 and served and filed his amended plea on 5 March 2014. Consequently, the defendant was obliged to have factored in the contents of these exhibits into his plea and/or amended plea. He did not do so. I find that by his conduct in this regard the defendant actually misled the court about the true position. Why he did so is not clear. I also find that by so deviating from his plea or pleadings during the trial materially vitiated the defendant's case. He has thus not succeeded in warding off the plaintiff's claim.

[46] The defendant in his plea, further distorts the plaintiff's story or sequence of events by weaving a story of how the plaintiff deliberately asked Spin City Auto to act as the actual sellers of his motor vehicle and there and then handing over to them the vehicle, its keys and its registration papers. There is nothing further from the truth as the defendant himself conceded under cross-examination. He also conceded muddling up how and when the R140 000,00 and R113 000,00 cheques were handed over to the plaintiff. It was to be expected. He was not there when all that happened. It was also the reason why he could not shake the plaintiff's evidence on the aspect.

[47] Primarily the plaintiff's claim is based on the *rei vindicatio* remedy, i.e. the return of his Mercedes Benz motor vehicle from the defendant. If the motor vehicle had been disposed of or lost one way or another, the alternative claim is for its monetary value. It is a principle of our law and not in dispute

between the parties that such monetary value should be fixed as at the date of alienation or loss of that vehicle.

[48] The defendant in his closing address made a rather strange request or submission: he stated that in the event of this Court finding against him, especially on the aspect that he should recompense the plaintiff the value of his motor vehicle, he should first be allowed the opportunity to find and deliver the motor vehicle to the plaintiff as he knows how it can be done.

[49] The above is worrisome. How will the defendant be in a position to put the plaintiff in possession of his motor vehicle again in the light of his conduct and attitude from the time letters of demand were served on him of denying knowledge of where the vehicle is and even refusing to disclose the instance to whom he sold it. It is my considered view that the defendant is not entirely candid with this court: one would be wont to believe that he knows all the time where this motor vehicle is. The above hunch may be supported by his deliberate and conscious disposal thereof when he knew it was the object of these court proceedings.

[50] The owner of a thing has the right to possess it, to use it and enjoy it; to destroy it[1] and to alienate it.[2] If any of these rights are in any way infringed he has appropriate legal remedies, like in this case, the *rei vindicatio*.

[1] *Neebe v Registrar of Mining Rights* 1902 TS 65 at 81, 85 and 86; *Lazarus v Wessels* 1903 TS 499 at 504, *Dadoo Ltd v Krugersdorp Municipality* 1920 AD 530 at 537.
[2] *Van der Linden* 1.7.1; *Grotius* 2.3.9; *Voet* 6.1.1.

[51] If and when an owner of property is deprived of his possession thereof, he may, by the *rei vindicatio* or reclaim, recover the possession from any person in whose possession the thing is found.[3] To succeed with a *rei vindicatio* or vindicatory action the claimant need merely prove two facts, namely,

(a) that he is the owner of the thing, and

(b) that the thing is in the possession of the defendant.[4]

[52] It does not make any difference whether the possessor is *bona fide* or *mala fide*. The owner of a 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.[5] In the case of land the absolute owner may eject any person in possession and/or interdict him and others from further trespassing on it or even claim damages for loss or destruction caused by trespassers.[6]

[53] Where movable property, as in this case, the motor vehicle, the owner has been unlawfully deprived of it in some other way, and it has been alienated in such circumstances that the owner cannot vindicate the property,

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[3] *Vorster v Hodgson* (1902) 19 SC 493 at 495.
[4] *Shimuadi v Shinungu* 1990 (3) SA 344 (SWA) at 347; *Akbar v Patel* 1974 (4) SA 104 (T) at 109; *Ontwikkelingsraad, Oos Transvaal v Radebe and Others* 1987 (1) SA 878 (T); *Jeena v Minister of Lands* 1955 (2) SA 380 (A); *Chetty v Naidoo* 1974 (3) SA 13 (A).
[5] *Mngadi v Ntuli* 1981 (3) SA 478 (D); *Wainwright & Co v Trustee Assigned Estate's Hassan Mahomed* (1908) 29 WLR 619 at 626-627.
[6] *Moller v SAR&H* 1969 (3) SA 374 (N) at 381; *Botha v Minister of Lands* 1965 (1) SA 728 (A) at 741; *Priel Diamond Mining Co v Berlin Mission Society* (1909) BAC 391.

he may claim the value thereof from the culprit or from any other person who parted with the possession thereof with knowledge of the owner's claim (my emphasis).[7]

[54] However, an owner will not have a claim against a *bona fide* purchaser of his property who has resold it in good faith[8] (my emphasis). This in my considered view and finding would not be applicable to a possessor who purchased the property in good faith but then proceeded to dispose of it when legal proceedings are already under way to reclaim such property. The disposition would not be *bona fide*.

[55] The defendant has submitted and argued that the plaintiff should be estopped from reclaiming possession of the motor vehicle from him or any other *bona fide* possessor as his conduct points to him having acted in such a manner that a reasonable person would believe he allowed Spin City Auto to sell it to any buyer. This is contained in his plea and he persisted herewith in the closing address.

[56] It deserves mention that the defendant conceded that his argument in favour of estoppel did not hold water when under cross-examination. However, it is my view that the proper legal position in relation to estoppel under these circumstances should be re-stated.

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[7] *Atkinson Oats Motors Ltd v Trust Bank of Africa Ltd* 1977 (3) SA 188 (W); *Alderson and Flitton (Tzaneen) (Pty) Ltd v E G Duffy Spares (Pty) Ltd* 1975 (3) SA 41 (T) at 51; *Hall & Sons Ltd v Kleinsmith* 1963 (4) SA 320 (T) at 321; *Vulcan Rubber Works (Pty) Ltd v SAR&H* 1958 (3) SA 285 (A) at 289; *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (A) at 153; *Aspeling NO v Joubert* 1917 AD 167 at 171.

[8] *Westeel Engineering (Pty) Ltd v Sydney Clow & Co Ltd* 1968 (3) SA 458 (T) at 462; *Marobane v Bateman* 1918 AD 460 at 466; *Unimark Distributors (Pty) Ltd v Erf 94 Silverstone (Pty) Ltd* 1999 (2) SA 986 (T).

[57] The legal position is: where the owner of movable or immovable property[9] entrusts the possession of it to another person in such circumstances that his conduct amounts to a representation that the custodian is the owner of the thing or that he has power to alienate it, and the custodian sells or delivers the thing to a *bona fide* purchaser who relies on the representation, the true owner if his conduct was negligent, is estopped by his conduct from disputing the title of the innocent holder, and he consequently cannot vindicate the thing.[10] The justification for such estoppel will be that the original owner was negligent.[11] The *onus* of proof of such negligence is on the innocent holder and it is normally a difficult task to achieve. In *Johaardien v Stanley Porter (Paarl) (Pty) Ltd*[12] the court held among others that the owner may "*possibly*" be estopped where his conduct has not been proved negligent but where "*compelling considerations of fairness within the broad concept of the exceptio doli*" exist.

[58] The plaintiff in this action does not fall under the category of owners who acted negligently. His case has consistently been that he never authorised Spin City Auto to act as his selling agent for his motor vehicle. His

[9] *Michelsen v Aaronson and Baikie* 1914 TPD 158; *Apostoliese Geloofsending van SA (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C).
[10] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) at 161; *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A).
[11] *Sonday v Surrey Estate Modern Meat Market (Pty) Ltd* 1983 (2) SA 521 (C); *Trust Bank of Africa Ltd v Eksteen* 1964 (3) SA 402 (A); *Penne father v Gokul* 1960 (4) SA 42 (N); *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) at 427.
[12] 1970 (1) SA 394 (A) at 409.

conduct of returning now and again to Spin City Auto's business premises to demand return of his motor vehicle cannot by any stretch of the imagination be said to have created the impression in the mind of reasonable persons that he has allowed or authorised Spin City Auto to act as it did with his motor vehicle. There is evidence that at the time Spin City Auto gave the plaintiff the R140 000,00 cheque and assured him that the prospective buyer was still organising finance or checking the vehicle for defects or installing security cameras to it, they knew that they had already forged documents to have the car's ownership changed into their names. The defendant acknowledged this evidence and agreed that it was the case. As such, it cannot be said that the plaintiff entrusted his car to Spin City Auto in such circumstances that his conduct amounted to a representation that Spin City Auto was the owner thereof or that they had been granted the power or authority to have it registered into their names, let alone alienate it by selling it.

[59] It is important that the conduct of the defendant be examined after he became aware that the motor vehicle had had allegedly bought at an auction was being claimed in court papers served on him. Armed with this knowledge the defendant went ahead and sold the motor vehicle on 1 July 2013. It thus cannot be said that he sold this motor vehicle in good faith. When questioned about this conduct during cross-examination he was unrepentant about what he did, claiming such as a right he acquired when he purchased the motor vehicle. As already stated hereinbefore, this attitude by the defendant was in spite of him conceding that his pleadings or pleas were based on faulty

evidence or foundations and that he has no way of disputing or gainsaying the plaintiff's version of events.

[60] In *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO*[13] the court found that ownership of a thing only passes where the owner delivers it to another with the intention of transferring ownership, and the other takes the thing with the intention of acquiring ownership. As Trengove AJA put it in that case[14]

> "*Volgens ons reg gaan 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 'n ander die saak neem met die bedoeling om eiendomsreg daarvan te verkry. Die geldigheid van die eiendomsoordrag staan los van die geldigheid van enige ander onderliggende kontrak.*"

[61] In *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd*,[15] Watermeyer JA held among others that –

> "*Ownership of movable property does not in our law pass by the making of a contract. It passes when delivery of possession is given accompanied by an intention on the part of the transferor to transfer ownership and on the part of the transferee to receive it.*"

[62] At 398-399 of the same judgment the honourable judge of appeal continued to state that –

[13] 1978 (4) SA 281 (AA).
[14] At 301H to 302A-E.
[15] 1941 AA 369.

> "*… If the parties desire to transfer ownership and contemplates that ownership will pass as a result of the delivery, then they in fact have the necessary intention and the ownership passes by delivery …*"

[63] The above scenario did not occur or take place in this instance. There was no such intention or the meeting of the minds between the plaintiff and Spin City Auto that ownership of the motor vehicle was to pass over when the motor vehicle was left with Spin City Auto. It is also clear that Spin City Auto contrived through chicanery or fraud to have the motor vehicle transferred into its names. The defendant also agreed that it was so.

[64] In *Alderson & Flitton (Tzaneen) (Pty) Ltd v E G Duffeys Spares (Pty) Ltd*[16] it was 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 formerly in the defendant's possession 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 to prove at least that at the time of the defendant's loss of possession, he had knowledge of the plaintiff's ownership or of his claim to ownership of the property.

[65] The plaintiff herein has alleged and also proved that at the time the defendant lost possession of the motor vehicle when he sold it on 1 July 2013, he (defendant) had knowledge of the plaintiff's claim to ownership of the motor vehicle.

[16] 1975 (3) SA 41 (TPD).

[66] The question to be answered again is whether the defendant was accentuated by some negligence or lack of sufficient knowledge of relevant facts and factors at the time he disposed of the motor vehicle.

[67] The totality of evidence herein does not lend itself to such interpretation.

[68] In *Sadie v Standard Bank*[17] De Villiers CJ held among others that –

> "*… 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 re-delivery of the goods, or, failing such delivery, for the value (Digest 6.1.68; Voet 6.1.32) …*"

[69] The totality of the evidence in this action points to the defendant falling under the category of persons mentioned by De Villiers CJ above. He sold the motor vehicle in issue here well knowing that court proceedings for its return or payment of its value were well and truly under way.

[70] The defendant argued that his situation is synonymous to that which obtained in *Marobane v Bateman*.[18]

[71] In *Marobane v Bateman (supra)* the plaintiff had sued the defendant for delivery of certain cattle belonging to her, or payment of their value. The defendant had acquired the cattle from the plaintiff's brother in settlement of

[17] 7 SC 87 at 92-3.
[18] 1918 AD 460.

grazing fees owed by the brother to the defendant's principal and the defendant had then sold the cattle for his own benefit.

[72] It is my view and finding that the above case does not support the defendant's case. In fact it is totally against him and is "*on all fours*" with the plaintiff's case. As Solomon JA put it in that case[19] –

> "*… Now it was found by the magistrate as a fact that the cattle were the property of the plaintiff, and that they were removed without her knowledge or consent. Prima facie, therefore, the taking of the cattle would be a wrongful act, so that the onus lies upon the defendant to show that he is not liable in the action.*"

[73] The court thereat also found that the plaintiff's cause of action as formulated in her summons had been an alleged "*wrongful and unlawful removal of the cattle*", presumably from the farm where they had been kept. The evidence for the plaintiff had been that the defendant had forcibly removed the cattle, which part of the evidence was rejected by the trial court. Solomon JA nevertheless still found that the plaintiff's case as set forth in her summons would still have been established if it appeared from the defendant's own evidence that the removal had been wrongful and unlawful. The reason for this finding was that there existed at the time a statutory prohibition against the acquisition of cattle from a Coloured person, such as the plaintiff's brother was, without a particular certificate having been obtained. The defendant had failed to discharge the *onus* of proving that such a certificate had been obtained and the removal of the cattle had accordingly

[19] At page 468.

been an illegal and criminal act, with the further result that the defendant could not rely upon it as justification for his action, even although he had believed that the cattle had belonged to the plaintiff's brother.

[74] As stated above, this case cannot assist the defendant.

[75] The issue to be investigated next is what the value of the motor vehicle was at the time it was disposed of by the defendant.

[76] This aspect was also dealt with in *Philip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd.*[20]

[77] The facts in the above case are as follows: The appellant, a motor dealer, had sold a new car to one P on 23 January 1970 under a hire-purchase agreement. On 24 June 1970, P, while there was still an unpaid balance and arrears in instalments, had, without the knowledge of the appellant, sold the car to the respondent, another dealer. On 4 July 1970 the respondent had sold the car to one V without the appellant's knowledge. On 26 October 1970 a director of appellant's telephoned to the respondent claiming that the car be returned or that the balance owing be paid to the appellant. On 30 October 1970 the director and his attorney had a meeting with two representatives of the respondent. The latter were then informed that the appellant would attach the car unless the balance was paid, the hire-purchase agreement being exhibited to them. On 5 November 1970, P having died meanwhile, a director of respondent and his attorney went to see his

[20] 1975 (2) SA 420 (AD).

widow who assured them that the car had been paid for and produced a cheque for a substantial amount. In point of fact there was still a substantial balance outstanding and on 11 January 1971 appellant cancelled the hire-purchase agreement on that ground, and became entitled to possession of the car, at any rate against P's estate. On 27 February 1971 V had traded the car back to the respondent and bought another vehicle from the respondent. On 17 June 1971 the respondent sold the car to another person, despite the fact that the appellant's attorney had written to the respondent's attorney on 8 June 1971 asking for confirmation that the car was still in possession of the respondent, appellant having involved itself in abortive proceedings in the meanwhile, among others against P's estate before an executor had been appointed. Also on 17 June 1971 the appellant issued summons against the respondent for the return of the car or, alternatively, delictual damages in the sum of R3 000,00 on the ground that the respondent, with full knowledge of the appellant's rights in the car, had wrongfully and unlawfully disposed of or alienated it. As the car was no longer in the respondent's possession, the claim at the trial was for delictual damages. The respondent had pleaded among others, that the appellant was estopped from asserting its ownership in that it had misled the respondent to its prejudice into believing that it was not pursuing its claim in regard to the car. A Provincial Division of the High Court having held that the appellant had failed to discharge the *onus* of proving that the respondent had the requisite knowledge, and having ordered absolution from the instance, in an appeal, the Appellate Division held that if the respondent had been *bona fide*, it would have been a simple and reasonably prudent precaution, in view of all that had gone before, to telephone the appellant and ask whether the coast was clear; the principle being that there should be honour among motor dealers. The court further held that, having regard among others, to the respondent's awareness of the appellant's resolute and persistent claim that there was a balance outstanding, that there was no validity in the respondent's plea of estoppel: the respondent had acted *mala fide* in disposing of the car, which conduct constituted a delict. The respondent's delictual conduct had deprived the appellant of its vindicatory right. The court further held that the time at which to measure the delictual damages was the date of the delict, i.e. the date on which the car was unlawfully sold, and not, as in a vindicatory action, when the date would be the date of trial or judgment.

[78] The facts of the above case are similar to the facts in our present action. The defendant acted *mala fide* by disposing of the motor vehicle when he fully and well knew that the plaintiff is claiming it back, alternatively its value. He committed a delict which deprived the plaintiff of his vindicatory rights.[21]

[79] The time at which to measure delictual damages is ordinarily the date of the delict. That is when the owner's patrimony is reduced. In the present case the date is 01 July 2013, i.e. the date on which the defendant wrongfully and unlawfully disposed of or alienated the plaintiff's car to Westland Motors.

[21] *Marobane v Bateman (supra)* at 465; *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (AD) at 152.

[80] The quantum of damages is the value of the motor vehicle to the plaintiff.[22]

[81] As to the actual value of the motor vehicle as on the date it was sold both the parties herein are agreed that it was worth R121 000,00. If the defendant elects, as he alluded to in his closing address, to tender the same vehicle back, justice would dictate and demand that the vehicle be valuated on the date of delivery. Should the value thereof be below the agreed upon R121 000,00, then the defendant should be ordered to pay the difference between the actual value thereof and the R121 000,00 it was worth on 01 July 2013. I am considering ordering that this be so in the light of the fact that the defendant blatantly refused to provide to the plaintiff information as to the whereabouts of the motor vehicle after he sold it to Westland Motors and then persisted throughout the trial with his acquiescence as to where it was. His one-liner at the end of his closing argument that he should be allowed the opportunity to locate and bring back the car appears to have been an afterthought or the last throes of a dying horse.

[82] As a matter of law, ownership over this motor vehicle never passed to the defendant and/or the other so-called "*purchasers*" or "*owners*". Subsequent registrations of the motor vehicle into the names of others did not pass to or give them ownership. The requisite delivery accompanied by the required intention was and is lacking or missing.

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[22] *Mlombo v Fourie* 1964 (3) SA 350 (T) at 358.

[83] I find that the plaintiff has made out a case for the main claim of *rei vindicatio.* As to the alternative claim of payment of the value of the motor vehicle as on the date of alienation by the defendant to Westland Motors, it is the finding of this Court that merely on the evidence of the defendant on its own, the alternative claim was proved. When the plaintiff's version is factored in, the proof thereof becomes absolute.

[84] The plaintiff has also claimed payment of interest on the amount payable should this Court so order. The principle here also is that interest is payable from the date of loss, which is 01 July 2013.

[85] Despite the ostensible richness (unbelievability) of the defendant's request or say-so that he can trace and deliver the motor vehicle to the plaintiff, this Court is prepared to afford him such an opportunity subject to strict deadlines.

<u>ORDER</u>

[86] Having heard counsel and the defendant in this matter and having listened to evidence and after considering the matter, the following order is made:

86.1 The defendant is ordered to deliver back to the plaintiff on or before 26 May 2014 the plaintiff's motor vehicle, namely, Mercedes Benz sedan, 2007 model, 320 CDI, Registration No

VLP 713 GP or whatever its new registration details would presently be, Chassis No WDB110222B086230 and Engine No 64292040310089;

86.2 Should the defendant have failed, neglected or refused to so put the plaintiff in possession of the above motor vehicle on or before the above stated date of 26 May 2014 this order shall fall away and be of no more force and effect;

86.3 In the further event of the prayer in 86.1 falling away and/or the defendant not complying therewith within the stipulated period, the following orders hereunder shall take effect forthwith:

86.4 The defendant shall be and is ordered to pay to the plaintiff the sum of R121 000,00 (one hundred and twenty one thousand rand);

86.5 The defendant shall be and is ordered to pay to the plaintiff interest on the sum of R121 000,00 (one hundred and twenty one thousand rand) with effect from 02 July 2013 to date of payment at the rate of 15,5% per annum;

86.6 The defendant is ordered to pay the plaintiff's costs, which costs are to include the costs incurred in the application proceedings and which were previously reserved.

N F KGOMO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

FOR THE PLAINTIFF	ADV A P BRUWER
INSTRUCTED BY	LE ROUX-WAGENAAR ATTORNEYS c/o CHAIRMAIN GIBBENS ATTORNEYS MARBLE TOWERS, JOHANNESBURG TEL NO: (011) 333 1050
FOR THE DEFENDANT	MR PRINSLOO (SELF) 8 VILLAGE-ON-AVON ELM AVENUE, CRAIGAVON JOHANNESBURG TEL NO:
DATE OF HEARING	16 APRIL 2014
DATE OF JUDGMENT	25 APRIL 2014