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IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION: JOHANNESBURG

CASE NUMBER: 2014/03228

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
(4)	
.....	
DATE	SIGNATURE

In the matter between

PATRICK McBRIDE

APPLICANT

And

TOBI JOOSTE

FIRST RESPONDENT

NEDBANK LIMITED

SECOND RESPONDENT

JUDGMENT

ZULU AJ:

INTRODUCTION

1. In this matter, Patrick McBride (“the Applicant”) seeks an order for the return of a Porsche Cayenne (“the Porsche”), which he purchased from the Second Respondent by way of a credit instalment agreement. The relief sought by the Applicant in the notice of motion is couched in the following terms:

- 1. That the First Respondent deliver to the Applicant the motor vehicle namely Porsche Cayenne Triptronic with natis registration number S.... 9.....W, vehicle identification number WP..... and engine number: C..... 1....., (‘the Porsche’) alternatively, should the First Respondent fail to do so, that the Deputy Sheriff of this court attach and cease (sic) from the Respondent or from whoever’s possession it may be found and hand over same to the Applicant.*
- 2. The First Respondent opposed the relief sought by the Applicant and also launched a counter-application in which he sought the following relief:*

2.1 That a declaratory do hereby issue that the First Respondent be declared to be the lawful and bone fide possessor of the Porsche with registration number C.....P (engine number: C.....).

2.2 That the Applicant be directed to discharge all or any obligation towards the second Respondent herein and in terms of Applicant’s

contractual (sic) obligations may be applicable in respect of the motor vehicle.

2.3 That upon the discharge of the Applicant's obligations, obligations towards the second Respondent that the Applicant shall take such steps necessary to provide the transfer and registration of ownership of the motor vehicle into the name of the first Respondent and to provide such documents to the first Respondent as proof thereof."

2. The matter came before Levin AJ on 12 August 2014 and he determined that a factual dispute existed which warranted the hearing of the oral evidence of the following witnesses:
 - 2.1 Mr Patrick McBride
 - 2.2 Mr Tobi Jooste.
 - 2.3 Mrs L Watson.
 - 2.4 Mr Eddy Rust
3. In terms of the order of Levin AJ, the evidence of the aforementioned witnesses would be in relation to the terms and conditions under which the First Respondent came to be in possession of the Porsche.

ISSUES FOR DETERMINATION

4. The legal issue for determination is whether the Porsche which forms the subject of the dispute between the parties was, on the facts of this case, indeed donated by the Applicant to the First Respondent. The issue relating to the ownership of the motor vehicle is not in dispute. It is common cause between parties that the Porsche was owned by Nedbank and that the Applicant was required in terms of the credit instalment agreement to comply with his obligations of paying the monthly instalments to the Second Respondent.

EVIDENCE

5. The evidence of the parties was placed before court by way of affidavits deposed to by the Applicant and the First Respondent, as well oral evidence pursuant to the order of Levin AJ.
6. The gist of the Applicant's evidence was the following:

6.1 He met the First Respondent through a mutual friend in or around September 2012;

6.2 In or about May 2013 he and the First Respondent entered into an intimate relationship;

6.3 During the subsistence of their relationship the Applicant spoiled the First Respondent with gifts, including a diamond ring which was valued at approximately R200 000. By buying this expensive gift for the First Respondent, the Applicant testified that he was attempting to cement the intimate relationship which he had formed with the First Respondent;

6.4 The Applicant also pampered the First Respondent with a lot of gifts which included trips to Greece, Paris and Thailand. During these trips, the Applicant testified that he shared the same bed with the First Respondent. This is significant in the light of the First Respondent's denial that he had an intimate relationship with the Applicant;

6.5 The Applicant also testified that he also decided to purchase a motor vehicle for use by the First Respondent. This vehicle was to be used by the First Respondent for as long as their relationship existed. The vehicle in question is the Porsche. He stated that he understood that he could not donate the Porsche to the First Respondent as the motor vehicle was owned by the Second Respondent;

6.6 The Applicant also referred to the credit instalment agreement which he had entered into with the Second Respondent. He referred to clause 7.1 of the credit instalment agreement which provides as follows:

"OWNERSHIP

7.1 Ownership in the goods shall remain vested in the Bank until the client has paid all amounts due in terms of this agreement.”

7. The Applicant emphasised that the motor vehicle was for the First Respondent's use only for as long as the relationship between them existed;
8. He emphatically denied that the Porsche was an unconditional donation by him to the First Respondent. He stated that he understood that he could not donate the Porsche to the First Respondent, as it (“the Porsche”) was owned by the Second Respondent and that he had no title to donate the vehicle to the First Respondent.
9. The First Respondent testified and also called two other witnesses, namely Mrs Watson and Mr E Rust.
10. The First Respondent's evidence was the following:
 - 10.1 He stated that he is a professional singer, TV presenter and writer;
 - 10.2 He agreed that he met the Applicant through a mutual friend;
 - 10.3 He denied that he entered into a physical or intimate relationship with the Applicant;
 - 10.4 He stated that he received the Porsche from the Applicant as a birthday gift. However the gift was received a couple of months earlier, as the Applicant

was advised by the dealership ("Porsche South Africa") that there was a vehicle in stock which was ready for delivery;

10.5 He stated that he understood and accepted that the Porsche was financed by the Second Respondent through a credit instalment agreement with the Applicant; the Porsche was given to him as a gift by the Applicant as a way of helping him to advance his career;

10.6 He admitted that he accompanied the Applicant on various overseas trips for holidays;

10.7 He owned a Land Rover 4x4 motor vehicle which was fully paid for. After accepting the motor vehicle from the Applicant, he sold the Land Rover and took the proceeds for his personal use;

10.8 He also referred to statements made by Mrs L Watson and Eddy Rust, which according to him supported the allegation that the Porsche was given to him by the Applicant as a gift.

11. Mrs L Watson submitted a statement which was annexed to the First Respondent's answering affidavit. This statement does not appear to be commissioned. Before court, she testified that out of concern about the relationship which the Applicant was having with the First Respondent, she decided to call a meeting with the Applicant to clarify her concerns.

12. In a meeting which she had with the Applicant, the Applicant confirmed to her that he was giving the Porsche to the First Respondent as a gift. She also stated that certain of the information contained in her statement came from the First Respondent.

13. Eddy Rust testified that he was the First Respondent's friend. He testified that at the Applicant's birthday party, he (the Applicant) stated before a number of people that he wanted to buy a motor vehicle for the First Respondent. He further testified about an incident which occurred in Thailand which apparently led to the breakdown of the relationship between the Applicant and the First Respondent. The facts relating thereto are not relevant for a determination of the issues which are before Court.

EVALUATION OF THE MERITS

14. A donation may be defined as an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality whereby a person under no legal obligation undertakes to give something to another person called the "donee" with the intention of enriching the donee in return for which the donor receives no consideration nor expects any future advantage.¹
15. It is important to note that in a contract of donation the gift is made with the intention that it should forthwith become the property of the recipient and that it would not be returned to the donor under any circumstances. In my mind this presupposes that the person making the donation must have some title to the property which he intends to donate, which title will give him the right or power to dispose of the property.

¹ Lawsa Vol 8 para 301.

16. It is common cause between the parties that the First Respondent was in possession of the Porsche, being physically handed to him by the Applicant at the time of its purchase. It is further not in dispute that the dealership and representatives of the Second Respondent were aware that the Porsche was going to be used by the First Respondent. I therefore accept for purposes of argument the First Respondent exercised the right of possession over the Porsche. The question is whether this right of possession was exercised by the First Respondent in consequence of the donation of the Porsche to him by the Applicant.
17. There was never any suggestion that the Second Respondent had agreed to part with its rights of ownership of the Porsche. In my mind, this fact should dispose of the argument that the Porsche was donated to the First Respondent. The Porsche was simply not capable of being the subject of the alleged donation by the Applicant to the First Respondent, as the Applicant did not have any right or authority to donate the Porsche to the First Respondent. I agree with the submission made by the Applicant's Counsel that the legal principle of *nemo plus iuris ad alium transferre potest quam ipse haberet*, entailing that the Applicant could not transfer more rights than he had on the Porsche.
18. If it is true that the Porsche was donated to the First Respondent, he would have acquired the right of ownership. To an extent that the Applicant may have attempted to donate the Porsche to the First Respondent, this purported donation would be legally void as the Applicant could not legally donate the Porsche to the First Respondent as it did not belong to him. At best, the Applicant could and in fact did transfer possession of the Porsche to the First Respondent and what he could have donated was the payment of the monthly instalments to the Second

Respondent, on the Porsche. This, however, does appear to be the case which is advanced by the First Respondent. I am satisfied that the Applicant has made out a compelling case for the return of the Porsche as it was not capable of donation by the Applicant.

19. Even if I am wrong on the finding that the Porsche was not capable of being the subject of the alleged donation between the Applicant and the First Respondent, the Applicant should succeed on the probabilities of this case. I have stated above that a donation is a contract and must comply with the formal requirements of a valid contract. On the undisputed version of the Applicant and the First Respondent there was no meeting of the minds with regards to the nature of the transaction they were entering into. The Applicant stated that he understood that he could never have donated the Porsche, as it belonged to the Second Respondent. The First Respondent understood the transaction as a donation. This much is evidenced by the attempt on the part of the First Respondent to get the Applicant to sign a document which stated that the Porsche was a donation given by the Applicant to the First Respondent. The Applicant, on the evidence before Court, refused to sign the document.
20. In all civil proceedings, the existence of a contract of donation must be proved on a preponderance of probability. The question is whether, in the circumstances, it is likely the alleged donor would have agreed to part with property without receiving a consideration.²

² See LAWSA Second edition para 3.15

21. The First Respondent was not able to discharge the onus lying on him to prove that there was a valid donation. In **Timoney and King v King**³ Innes CJ stated the following:

“The general legal principle that a donation is not presumed and must be proved by him who relies upon it.”⁴

22. I was also not impressed with the evidence of the First Respondent and his two witnesses. The evidence of the First Respondent was so improbable that no reasonable person would believe it. He tried hard to persuade the court that there was no love relationship between him and the Applicant. I find this highly improbable and have no hesitation to reject this evidence as a lie. I observed that demeanour of the witnesses. I was particularly impressed by the evidence of the Applicant. He gave the court an honest account of his relationship with the First Respondent. I have no hesitation to believe his evidence that he had a love relationship with the First Respondent. The First Respondent wanted the court to believe that he followed the Applicant and travelled with him around the world slept with him on the same bed and without the existence of a relationship between them. His version was that he was only happy to accept the gifts.

³ 1920 AD 133.

⁴ This legal principle has over the years been applied in various other cases.

See: *Avis v Verseput* 1943 (AD) 331 at 337; *Jordan v De Villiers* 1991 (4) SA 396; *Thornycroft v Vas* 1957 (3) SA 754 (FC)

23. I have no problem in rejecting the evidence of the First Respondent and his witnesses, insofar as it contradicts the evidence of the Applicant. I accept that it was never the Applicant's intention to give the Porsche as a donation to the First Respondent. It is clear to me that the First Respondent colluded with both his witnesses to present a skewed and false picture about the relationship which the Applicant had with the First Respondent. It is not clear to me as to why the First Respondent and his witnesses went out of their way to attempt to hide that he (the First Respondent) had a love relationship with the Applicant. From the evidence given by the First Respondent, he thought that as a public persona, he wasn't sure whether his relationship with the Applicant would generate negative publicity for himself and his career. This may be understandable, but there was no need for them to lie or be deceptive when the matter reached the Court.

THE RECUSAL APPLICATION

24. This matter was set down for hearing from 8 to 10 December 2014. A few days before the matter was heard, I received an application from the First Respondent in terms whereof they sought that I should recuse myself from hearing this matter. The First Respondent alleged that in an informal discussion which had taken place, I had expressed a view that a relationship of three months was too short for an expensive gift to the First Respondent.
25. What transpired is that as the matter was set down for the hearing of oral evidence, I enquired from the Senior Judge whether I should proceed and hear the oral evidence from the parties. The Senior Judge advised me that the matter

should be removed from the roll and I should advise the parties to apply for a trial date. Both Counsel for the Applicant and Respondent approached me outside Court, and I advised them of what had been communicated to me by the Senior Judge.

26. Counsel for the Applicant, Mr Hattingh, enquired to what my views were in the light of the fact that I was not going to hear the matter. I, in a jokingly manner, advised both Counsel that I did not have any views on the matter but had spoken to my wife who had expressed a view “that a relationship of three months was too short a period for Porsches to be involved”. I did indicate to both Counsel that I did not have any view on the matter.
27. The recusal application was argued on 8 December 2014 and I dismissed the application. During argument, Counsel for the First Respondent, Adv Swanepoel, conceded that he had no doubt that I would be impartial, but expressed a view that his client harboured a suspicion that I was biased in favour of the Applicant. My view at the time was that there was no merit to that application and that application was brought merely to try and delay the hearing of this matter.
28. The First Respondent had failed to establish before me that objectively, there were grounds for me to recuse myself. The issue of the duration of the alleged relationship between the Applicant and the First Respondent was irrelevant for purposes of determining the issue which was whether the Applicant had donated the Porsche to the First Respondent. The First Respondent’s Counsel also conceded that I had not expressed a personal view, which when objectively

viewed, would lead to a reasonable litigant to entertain a suspicion that I would be biased against him. There was no suggestion that the First Respondent would not receive a fair trial before me.⁵

29. In **President of the Republic of South Africa and Others v South African Rugby Football Union and Others**⁶ the following was stated by the Court:

“Section 165(2) of the Constitution requires Courts to apply the law “impartially and without fear, favour or prejudice” and the oath of office prescribed by Schedule 2 of the Constitution requires each Judge that he or she will uphold and protect the Constitution...and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.”

30. In paragraph 35 of the same judgment the following was stated by the Court:

“a cornerstone of any fair and just legal system is the impartial adjudication of disputes which comes before Courts and other tribunals. This applies, of course to both criminal and civil cases as well as to quasi-judicial administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.”

31. In this case there was “no real likelihood of bias” or “a reasonable suspicion or apprehension of bias”. This is in light of the concession by the First Respondent’s

⁵ See Council of Review, South African Defense Force and Others v Monnig and Others 1992 (3) SA 482 at 491 e-f

⁶ 1999 (4) SA 147 (CC) at para 29

Counsel that he did not believe that I would be impartial in my adjudication of the dispute between the parties.

32. A Judge who is appointed to adjudicate disputes between litigants must do so unless there is a *“real likelihood of bias”* or a *“reasonable suspicion or apprehension of bias.”* He or she cannot recuse himself or herself merely because there is an application for recusal. If this were to happen it would be a total abdication of responsibilities entrusted on Judges by the Constitution. The First Respondent did not persuade me that there was a proper case for me to recuse myself from hearing this matter. It was for this reason that the application for my recusal was dismissed. As indicated above, the First Respondent waited until a few days before the hearing was scheduled to begin, to bring this recusal application. I agree with the submission made by the Applicant’s Counsel that this was a ploy to delay the finalisation of this matter.

ORDER

33. In the result I make the following order:
1. The First Respondent is directed to forthwith deliver the Porsche to the Applicant, failing which the Sheriff or his deputy is authorised to seize it from the First Respondent and have it delivered to the Applicant.
 2. The First Respondent’s counter application is dismissed with costs.

3. The First Respondent is ordered to pay the costs of this application, which costs shall include the costs incurred by the Applicant in opposing the recusal application of 8 December 2014.

ZULU (M)

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 8 to 10 December 2014

Date of Judgment: 06 February 2015

Appearances

For the Applicant : Adv J J Hattingh

Instructed by : Nothnagel Attorneys

For the Respondents : Adv J H Swanepoel

Instructed by : D F Oosthuizen

