

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH**

Case No: 474/09
475/09

Date Heard: 5/05/11,
cur adv vult on 23 August 2011

Date Delivered: 29/03/12

In the matter between

ECU INVESTMENTS (PTY) LTD
t/a CBF MOTORS

Plaintiff

and

EUGENE VAN HEERDEN

First Defendant

DESERT CHARM TRADING 205 (PTY) LTD

Second Defendant

JUDGMENT

REVELAS J

[1] The plaintiff, a company which trades as a dealer in motor vehicles in Humansdorp, instituted two actions against the defendants which, were consolidated shortly before the trial commenced. The first action is a *condictio indebiti*, alternatively a claim for unjust enrichment. The claim in

consequence of a cession, is for R261 596.00, which was allegedly unduly transferred by the cessionary into the bank account of the second defendant. The second claim is a *rei vindicatio* in respect of four motor vehicles allegedly in the unlawful possession of the defendants.

[2] The second defendant is a property developer and the first defendant one of its directors. The pleadings in this matter are deceptively simple. The evidence led in this case was as a whole rather complex due to the various transactions involving several vehicles, about which the parties proffered different exclusive versions.

The First Claim (Enrichment)

[3] The following is a summary of the pleadings in respect of this claim:

The amount of R261 596.00 was allegedly paid by the cessionary as the purchase price for a vehicle, while under the impression that he was purchasing the vehicle from the plaintiff. The defendants pleaded that the first defendant was entitled to retain the money in his bank account because it was payment for a Colt Triton 4x4 truck (the Triton) which was sold by the second defendant to the plaintiff.

[4] The defendants claimed the amount of R175 000.00 from the plaintiff in their conditional counterclaim, which they allege was the purchase price which had been paid for the Triton, when it was bought from the plaintiff, represented by its employee and sales consultant, Mr Anton Jonker on 8 August 2008 in Humansdorp. The defendants pleaded

that the second defendant paid the amount of R175 000.00 for the vehicle with a cheque drawn on Catwalk Investments 582 (Pty) Ltd (Catwalk). The first defendant was also a director of Catwalk, another property development company. Jonker, at a later stage, before delivery of the Triton could take place, offered to improve the vehicle with extra fittings (a rollbar, run board, dvd player etc) which could then be resold to an interested buyer at a higher price. The extras were indeed fitted to the Triton according to Jonker, who subsequently advised that he had sold the (improved) Triton to someone (who remained anonymous for the duration of the trial) for R260 000.00. Together with bank commission of R1596.00, the amount of R261 596.00 (as claimed by the plaintiff) was therefore due in respect of the sale of the Triton and owed to the second defendant by the plaintiff. The defendants denied that they were unjustly enriched at the plaintiff's expense and claimed delivery of the Triton or repayment of the R175 000.00.

[5] In its plea to the counterclaim, the plaintiff admitted that it received an amount of R175 000.00 from Catwalk as pleaded by the defendants, but alleged that it was a payment in respect of a 2005 model Toyota 4x4 double cab truck ("2005 Toyota truck") and not the Triton. The plaintiff alleges that the 2005 Toyota truck was delivered to Catwalk (which is based in Johannesburg) in August 2008 and accordingly it did not owe the defendants delivery of the vehicle nor payment of any kind. The plaintiff denied any knowledge of the Triton.

[6] In the plaintiff's 'Replication of Lack of Authority' it dealt with the authority (or lack thereof) of its former employee, Jonker. In replicating to the defendants' plea, the plaintiff disputed Jonker's alleged authority to act as duly authorised representative of the plaintiff and to bind the latter to transactions concluded by Jonker with third persons, including the

defendants, during the currency of his employment with the plaintiff. The plaintiff further contended that during his employment with the plaintiff, Jonker implemented an unlawful scheme to defraud the plaintiff. He did so by misappropriating its vehicles, selling them at prices below trade value, misappropriating the profits which were made, by subsequently selling the same vehicles at much higher prices for his own account, issuing false documentation in respect of such sales. Jonker allegedly used the plaintiff's capital and stock for purposes of private vehicle sales entered into by himself, in his personal capacity, with third persons and the defendants. In doing so, the plaintiff contended, Jonker acted on a frolic of his own.

[7] The plaintiff further denied that it is estopped from relying on Jonker's lack of authority as pleaded by the defendants, whom it contends, knew, or ought to have known, that Jonker was acting on a frolic of his own. The plaintiff asserted that the defendants knew, or ought to have known, that it was impossible to legitimately obtain vehicles at such reduced prices from a well-established motor vehicle dealership such as that of the plaintiff.

[8] An amount equal to that claimed by the plaintiff, has been deposited into the trust account of the defendant's attorneys, pending the outcome of this action.

The Second Claim

[9] The plaintiff's second claim is *a rei vindicatio* for the recovery of four vehicles, which the plaintiff alleged, was in the unlawful possession of the

defendants, who pleaded that the vehicles in question were lawfully purchased by them, from the plaintiff. Other vehicles they alleged, were also bought from the plaintiff, and some of these vehicles were never delivered to them. In all these transactions, the defendants alleged that the plaintiff was also represented by Jonker.

[10] Counterclaims (conditional and unconditional) for the delivery, alternatively, for the repayment of the purchase prices allegedly paid to the plaintiff in respect of these vehicles, were instituted against the plaintiff.

[11] The defendants' plea, their counterclaims, and the plaintiff's plea to the counterclaims, will be dealt more fully below. As was done in the first claim, the plaintiff replicated to the defendants' plea pertaining to Jonker's authority, (or lack thereof) in a 'Replication of Lack of Authority' and because the allegations therein are the same, they will not be repeated further on in the judgment, after the plaintiff's plea to the counterclaims is referred to.

General Background

[12] The plaintiff called two witnesses to testify on its behalf. The first witness was Mr Pieter Nortjé, the cessionary of the first claim. The second witness was Mr Bakkes Muller, the plaintiff's managing director. Mr Eugene van Heerden (the first defendant) testified on behalf of the two defendants. Much of the testimony of van Heerden pertained to facts and circumstances which were obtained by him from Anton Jonker.

[13] All the transactions which gave rise to the actions and counter-claims in this matter occurred while Jonker was employed as a sales consultant by the plaintiff from April 2008 to December 2008. He featured in all the impugned and legitimate transactions in this matter. During the relevant period, the plaintiff held the agency for selling Mercedes Benz and Mitshubishi motor vehicles in Humansdorp and it also conducted the business of a dealer in used motor vehicles.

[14] The defendant's case was that there were many business transactions between van Heerden and Jonker, but van Heerden at all material times believed he was dealing with the plaintiff, represented Mr Jonker. According to van Heerden, Jonker would approach him with a new vehicle, which he would buy and perhaps sell later. The idea was not to make a profit though. The second defendant had a large fleet of cars and constantly required them for use in his business and to this end vehicles were bought and sold to the plaintiff.

[15] Muller testified that Jonker was appointed by the plaintiff as a salesman in April 2008, and his services were terminated during December 2008, after certain fraudulent activities came to light. According to Muller, Jonker never had access to the plaintiff's bank account or its cheque book. He was only permitted to negotiate the purchase of stock on behalf of the plaintiff, but did not purchase the vehicles himself. The negotiations were to be conducted within the parameters set by the plaintiff with regard to prices and trade-ins. Jonker was especially not permitted to trade in his own name or for his own account from the premises. Jonker was eventually convicted of other fraud charges laid against him by Muller. When this matter was heard he

had not yet been sentenced yet.

[16] The documents which Muller relied upon in support of proving the transaction between the parties were of substantial significance in evaluating the evidence in this matter.

[17] Of particular significance were the plaintiff's standard order forms and the invoices generated by its administrative and accounting personnel, processed on the information contained in the order forms. The main purpose of the standard order form was to record the details of the purchaser, the vehicle being purchased and any other transactions in connection with the particular sale such as for example, the trading in of the purchaser's existing vehicle. Muller explained that when a vehicle is purchased from the plaintiff, the transaction enters the plaintiff's accounting system, firstly, by the prospective purchaser's signature on the plaintiff's standard order form. Secondly, by printing the invoice for the purchase. Muller testified that the standard order forms would be completed by hand, whereas the invoices are always printed, and that has been the case for the last ten years, since the introduction of its new accounting programme. Prior thereto, invoices were made out by hand and the plaintiff still had some of these old invoice form books in storage.

[18] Payment and delivery would normally follow the issue of an invoice. These two events could happen simultaneously or, in the case where a bank finances the purchase, it may happen, that delivery takes place before payment. In such cases the invoice is made out to the bank or other financier. The computer system used by the plaintiff for the recording and processing of its sales transactions, is called Autoline, a programme which was specifically designed for the motor vehicle sales

business by Carriages (Pty) Ltd, a British Company. The invoices are prepared by the Autoline programme in a particular way which is used by Mercedes Benz dealers worldwide.

[19] The reason why the programme is used so widely in the automobile trade is because it is impossible, Muller testified, for such an invoice to be issued in the Autoline programme if the vehicle in question has not been taken up as part of the dealer's stock, which in turn, would not occur if the vehicle has not been paid for. It is therefore a double entry system which protects parties from fraud and theft. Muller also explained that the purchasing process would not necessarily be incomplete without the offer to purchase the order form and a vehicle could be purchased without it. The order form also contains the words: "I/We understand that this offer is subject to confirmation by the Management of CBU Motors" which the plaintiff submitted, demonstrates that Jonker could not have been given the necessary authority to act on its behalf when purchasing vehicles and entering into schemes with third parties.

[20] After his nefarious dealings came to light in December 2008 Jonker's employment was terminated. Both parties contended that Jonker had defrauded them, but sought to hold each other accountable. Most significantly, on the version of the two defendants, they were involved in twenty nine transactions during the course of 2008, where vehicles were purchased and sold through Jonker. Approximately R900 000.00 was paid into Jonker's personal bank account by the defendants, in connection with twelve different vehicle sale transactions. Of the twenty nine transactions in terms whereof vehicles were sold through Jonker to the second defendant only nine of them were recorded in the plaintiff's accounting system. The payments made to the plaintiff in terms of the nine legitimate sales was R932 000.00.

[21] In paragraph 3 of his warning statement to the police, van Heerden stated that because he wanted to upgrade his (probably the second defendant's) fleet of vehicles, he agreed with Jonker that he, personally would pay Jonker *ex gratia* compensation or commission in instances where he (van Heerden) would sell vehicles through Jonker, because it consumed a lot of Jonker's time searching for buyers. According to van Heerden's statement he paid R105 600.00 to Jonker, *ex gratia*. His oral testimony and the last paragraph of the warning statement is to the contrary. He stated that he believed at all times that he was trading with the plaintiff.

The First Claim (*Condictio Indebiti*)

The Evidence

[22] It was common cause that on or about 9 December 2008, Nortjé paid the amount of R261 596.00 into the first defendant's First Rand Bank account. Nortjé's largely undisputed testimony was the following:

[23] During October 2008 he conducted a search on the Mercedes Benz website for a 2008 Mercedes Benz CLS 500 (Sport Coupe), for which he wanted to trade in for his own 2003 Mercedes Benz CLK 500 vehicle. After about two days he was contacted by Jonker, who introduced himself as a salesman for the plaintiff. Nortjé said he gave Jonker details about his own Mercedes which he wished to trade in, as well as the qualities in the type of car he was looking for, and told Jonker that he would trade in his own car if the terms were favourable. A week or so later, Jonker contacted him again with the good news that he had found just the

vehicle for him. It had a very low mileage, was the right colour and had the right interior finishing. According to Jonker, this Mercedes belonged to a person in Johannesburg who had just bought it, but was compelled by circumstances to sell it immediately.

[24] Jonker told him that if he bought the vehicle, it would be transported to the Eastern Cape by lorry. Nortjé said he was interested in the sale and advised Jonker he would be paying for cash, whereupon Jonker clearly became excited. Sometime later, without even enquiring about Nortjé's address, Jonker suddenly appeared at Nortjé's Kirkwood office in a vehicle sporting the plaintiff's logo, and was carrying an invoice book, also with the plaintiff's logo on its cover. In this book was an "Order" form which Jonker asked him to sign. Jonker had already filled in all the relevant details of the sale. Because the vehicle had not yet been delivered, Nortjé felt he had to delete the words "This is to confirm that the mentioned vehicle is to the satisfaction of the buyer" which appeared on the form.

[25] The details of his own vehicle (which he wanted to trade in), its mileage and the details of the vehicle he intended to purchase were also completed on the form. The purchase price was set at R531 596.00 (including VAT). Minus the trade-in value of his own vehicle (R270 000.00), Nortjé had to pay the balance which came to R261 596.00. He then, in good faith made the payment by electronic transfer into the account specified by Jonker, because Jonker had explained that the seller was not prepared to release the vehicle and have it transported all the way from Johannesburg before receipt of payment.

[26] After some time, (which to Nortjé seemed a rather lengthy period)

but still in December 2008, Jonker notified him that the vehicle had arrived and he could see it at the plaintiff's business premises in Humansdorp. On his arrival at the premises several aspects conspired to change his excitement about being the owner of a new sports car to suspicion.

[27] Firstly, Nortjé found it strange that the vehicle was not on the shop floor or in the showroom, but parked behind the building. Secondly, the vehicle did not have the appearance of having been transported by truck from Johannesburg, because it was very dirty, it had Eastern Cape number plates and its odometer reading was much higher than the 2000 kilometres promised by Jonker. Thirdly, it also appeared to be a much older model than the one he was told about. When he inspected the boot of the vehicle he found, hidden below the spare wheel, a cell phone, keys and small golfing paraphernalia. He immediately took the matter up with Mr Bakkes Muller ("Muller") the plaintiff's managing director. During this conversation Nortjé had learnt that he had paid the balance of the purchase price for the vehicle into the banking account of the second defendant, and not as he thought, into the banking account of the plaintiff. He had no prior dealings with the defendants. Because of the defendants' refusal to reverse the payment, Muller suggested that Nortjé cede his claim to the plaintiff, which he did.

[28] Van Heerden's testimony in respect of the first claim was the following:

He employed Jonker's wife, Renata Jonker, during the time relevant to this matter. He would then meet Jonker when he came to the house to meet her or fetch her. Through Jonker, who he believed represented the plaintiff, he bought several vehicles. At that time the second defendant

was involved in the development of a golf estate near Humansdorp and several vehicles were required for its fleet. During August 2008, Jonker approached him with an offer to purchase the Triton for R175 000.00 and the money was then paid into the plaintiff's account. Delivery of the vehicle was not made. Jonker said he had found a prospective buyer for this Triton, who would pay R260 000.00, for it provided it could be improved with extras. These extras which comprised a roll-bar, a run-board, a canopy, a DVD player, a nudge bar, and a few other expensive items were indeed fitted (according to Jonker). The vehicle was then sold (through Jonker) to this other client whom nobody knew when the amount of R261 596.00 was then paid into the first defendant's bank account it was an expected event. The fact that the payment was not made by the plaintiff, but by Nortje, was a fact which apparently did not surprise van Heerden.

[29] Van Heerden deposed to a comprehensive warning statement to the South African Police Services relating to the various motor vehicle sales transactions. The statement was made pursuant to the fraud charges laid against Jonker by Muller, in which van Heerden, who also testified, was linked as a business associate of Jonker. A summary of events compiled by van Heerden's son-in-law was also produced in evidence.

[30] In paragraph 15 of his warning statement, van Heerden dealt with the Triton vehicle transaction, corroborating the defendants' case as pleaded, with the added detail that Jonker had promised to pay for the improvements himself and that van Heerden could repay him later. He stated that regarded the transaction as profitable and therefore when the amount was deposited into his bank account, he was satisfied that it represented the purchase price of the Triton.

[31] It appeared that this Triton vehicle never existed. Given the defendants' pleas, counterclaims and the evidence deduced in support of their counterclaims, they obviously attracted an evidentiary burden to justify retention of the money in question. Mr van Heerden was unable to provide a satisfactory explanation in that regard.

[32] The Van Heerden clearly had no right to retain this money in his bank account. The money was never paid into the second or first defendant's bank account by the plaintiff, as it would have been, if the defendants' version were true. It also struck me as highly unlikely that a purchaser would have agreed to such expensive improvements to be fixed onto a vehicle he had just paid for, but had never seen. Such a scenario would only be likely to be found in an ongoing and separate business relationship, such as the plaintiff contends, existed between Jonker and the defendants. The alleged improvements to the Triton appeared unrealistically expensive in relation to the very low purchase price of R175 000.00. The R1596.00 which conveniently was accounted for as bank commission is also strange because bank commission was never charged in any other of the transactions referred to. This snippet of evidence just adds to the general ring of contrivance which permeated the defendants' case as is seen later herein. Van Heerden's express intention to make a profit (as contained in his warning statement) in this context, supports the plaintiff's case that Jonker and the defendants were involved in a scheme at the expense of the plaintiff.

[33] As stated, the plaintiff admits that it received a cheque drawn on Catwalk cheque for R175 000.00. Muller explained that it was payment for a 2005 Toyota truck which was, according to the plaintiff's accounting and sales records, purchased by Catwalk. Van Heerden was unable to refute this explanation and like in respect of all the counterclaims, the

question arises why, if van Heerden thought he was dealing with the plaintiff, why was there no demand for the money or vehicles allegedly owed by the plaintiff. Van Heerden's attempts to distance himself from Jonker and his activities were unconvincing. Only Jonker was in a position to dispute Nortje's evidence, which was more credible than Van Heerden's very flawed testimony. On Nortje's version, Jonker acted with the view to deceive the plaintiff, and used the plaintiff's resources and documents to perpetrate a fraudulent transaction which benefitted the defendants. In the absence of Jonker's testimony, the greater part of Van Heerden's testimony is uncorroborated hearsay and the remainder of it, so improbable that it ought to be rejected.

The Plaintiff's *Rei Vindicatio* Action

[34] The four vehicles which form the subject matter of the plaintiff's second claim are now held in storage by the Sheriff of this Court in pursuance of a court order obtained to that effect in an urgent application brought by the plaintiff some time after summons was issued.

[35] Before dealing with the evidence pertaining to the four vehicles it is appropriate to deal with the pleadings in the second claim first.

[36] The particulars of the four vehicles are described as follows in the plaintiff's particulars of claim:

- a) A 2008 model Mercedes Benz Vito Crew Bus, with chassis number WDF 63970323329082;
- b) A Nissan 1.6 Litre bakkie with chassis number

ADNUSNID5U0000841;

- c) A 2008 Nissan 1.6 Litre bakkie with chassis number ADNUSNID5U0000981;
- d) A 2008 model Toyota-Double Cab bakkie with chassis number AHTF229GX09030147.

[37] In this judgment these vehicles will, to avoid confusion with the many other vehicles referred to, be referred to respectively as the Vito Bus, the two Nissan 1.6 litre trucks and the 2008 Toyota 4x4 truck. The plaintiff alleged that the first defendant, alternatively the second defendant, obtained possession of these four vehicles without its consent and without any lawful justification.

[38] The defendants admitted in their plea, that they were in possession of the four vehicles, but contend they were in lawful possession, having lawfully purchased the vehicles from the plaintiff, who was in each instance, represented by Jonker.

[39] Defendants' Plea

[39.1] The Vito Bus

The defendants pleaded that they bought the Vito bus from the plaintiff for R110 000.00 on 27 October 2008 and the second defendant was issued with an invoice number 005500 in the aforesaid amount and the vehicle was accordingly delivered.

[39.2] The two Nissan 1.6 litre Trucks

With regard to the two 2008 model Nissan trucks the defendants pleaded that they actually purchased four such trucks for R280 000.00 (R70 000.00 each) which cash payment van Heerden made to Jonker on 28 July 2008, but only two trucks were delivered. They were thus still owed R140 000.00 for the other two by the plaintiff because of the partial delivery, and this amount was claimed in their unconditional counterclaim. (The defendants claimed delivery of the two vehicles in their conditional counterclaim).

[39.3] The 2008 4x4 Toyota Truck

The defendant's plea in respect of the 2008 4x4 Toyota Truck was that the second defendant bought it for R160 000.00 from the plaintiff on 22 September 2008 and paid for it by cheque.

[40] Authority

The defendants pleaded that because the plaintiff appointed Jonker, it intentionally or negligently represented to the public, which included the defendants, that Jonker was authorized to conclude agreements relating to the sale of vehicles on behalf of the plaintiff. The defendants subsequently acted to their detriment in accepting these representations and the plaintiff is therefore estopped from relying on any alleged lack of authority, which they also dispute.

[41] The Defendant's Conditional Counterclaims

In their conditional counterclaim the defendants claimed the repayment alleged payments made by the second defendant in respect of all four of the vehicles in the event of a finding that the vehicles are to be returned

to the plaintiff.

[42] The Defendants' Unconditional Counterclaims

Reference has already been made to the R140 000.00 claimed in the defendants in respect of the two 2008 model Nissan 1.6 litre trucks which were allegedly not delivered to the defendants. The defendants claim delivery of these two vehicles or payment in the amount of R140 000.00.

[43] In addition to the aforesaid, the defendants claimed the amounts of R50 000.00 and R160 000.00. The amount of R50 000.00 they alleged, was for a 2000 model Mercedes Benz C270 motor vehicle, bought by, but not delivered, to the second defendant. The defendants allege that the aforesaid Mercedes was purchased for R50 000.00 from the plaintiff on 28 July 2008, together with a 2003 model Colt 2800 Turbo Diesel Double Cab 4x4 light delivery vehicle (the Colt) for the amount of R82 000.00. Both vehicles were paid for with a cheque in the amount of R132 000.00 to the plaintiff. Only the Colt was delivered, hence they claim R50 000.00 or delivery of the Mercedes.

[44] The defendants alleged that on 16 September 2008, the second defendant bought a Mercedes Benz CLS 350 from the plaintiff for R160 000.00 and paid for it with a cheque which was met by the second defendant's bank. Notwithstanding the aforesaid, the vehicle was not delivered to the second defendant who claims its delivery, alternatively repayment of the R160 000.00. In all the aforesaid transactions the defendants contended that Jonker acted on behalf of the plaintiff.

[45] The Plaintiff's Plea to the Defendants' Conditional Counterclaims

[45.1] The Vito Bus (allegedly bought for R110 000.00 from the plaintiff)

The plaintiff admitted that it received the R110 000.00 on 27 October 2005 as alleged by the defendants, but pleaded that the payment was in respect of a 2005 Toyota Corolla and not the Vito bus. In respect of the invoice numbered 00550 relied upon by the defendants in this regard, the plaintiff pleaded that it was a fraudulent document prepared on the plaintiff's official documentation (by Jonker).

[45.2] Delivery of the Two Nissan 1.6 Litre Trucks (allegedly not delivered to the defendants) or repayment for them in the amount of R140 000.00

The plaintiff denied ever receiving payment of R280 000.00 as alleged and pleaded that the two Nissan 1.6 litre bakkies (allegedly undelivered) referred to in the defendants counterclaim, were bought from Atlantis Motors in Centurion and the plaintiff was under no obligation to deliver them to the defendant or to repay the defendants R140 000.00 for them.

[45.3] The repayment of R160 000.00 (allegedly paid for the 2008 4x4 Toyota Truck

The plaintiff admits that it received this payment on 28 September 2008, but pleaded that it was in respect of two other Nissan 1.6 litre trucks, with stock numbers U10725 and U10726 respectively. The plaintiff pleaded that on 28 November 2008, Jonker caused a tax invoice to be issued in the plaintiff's name in respect of the 2008 model Toyota truck to Wesbank, because the second defendant intended to purchase it for R320 000.00. The plaintiff was subsequently informed by Wesbank that the second defendant never applied for credit facilities with regard to this vehicle, which was never paid for, even though it was in the possession of the defendants.

[46] The Plaintiff's Plea to the Defendants Unconditional Counterclaim s

[46.1] The alleged purchase of the Colt Double Cab and Mercedes C270 for R82 000.00 and R50 000.00 respectively (R132 000.00)

The plaintiff denied that such a sale took place in respect of either vehicle. In amplification of its denial the plaintiff pleaded that during July 2008 it sold a 2008 TDi Double Cab (stock number U10683) to the second defendant for the sum of R90 000.00 of which R15 000.00 was paid in cash, and the remainder by way of a trade-in of a Toyota 4x4 bakkie priced at R75 000.00. On 28 July 2008 (the date alleged by the defendants in their counterclaim) the plaintiff indeed sold a Mercedes Benz to another dealer, Autohaus Gobel, for the sum of R132 000.00 and the payment was with a cheque issued by the second defendant, and it was not for a 2000 Mercedes Benz C270, but for a 2004 Mercedes Benz C180.

[46.2] The alleged purchase of the two remaining 1.6 litre Nissan bakkies (for R140 000.00)

The plaintiff pleaded that on 16 September 2008 the second defendant purchased two Nissan bakkies with stock numbers U10711 and U10712 respectively from the plaintiff and indeed paid R160 000.00 to the plaintiff for the bakkies (and not a Mercedes Benz CLS 350, as alleged).

The Evidence

[47] The four vehicles which form the subject matter of the plaintiff's *rei vindicatio* action were delivered to van Heerden by Jonker, without the necessary registration documentation. The Vito bus and the 2008 Toyota 4x4 truck displayed false number plates when they were attached by the Sheriff. The Vito bus also displayed the plaintiff's licence disc. The

Toyota truck had no licence disc whatsoever.

The Vito Bus

[48] Muller provided an invoice from Mercedes Benz Financial Services on 15 February 2008 as proof that the plaintiff purchased the Vito bus from Mercedes Benz (where the plaintiff purchases all its vehicles) in Centurion for R282 526.20. According to Muller, the plaintiff never sold this vehicle to either of the defendants and was unable to explain how it ended up in the second defendant's possession.

[49] According to van Heerden's testimony the Vito bus was bought from the plaintiff for R110 000.00 on 28 October 2008. The defendants relied on a cheque which was indeed paid to the plaintiff and dated 28 October 2008. The plaintiff contended that this cheque was in respect of a 2005 Toyota Corolla motor vehicle (the Corolla) and Muller produced the relevant invoices which proved conclusively that the Corolla was purchased by the plaintiff from the Humansdorp Toyota dealership for R95 000.00 and sold to the second defendant for R110 000.00.

[50] Van Heerden could not dispute that the Corolla was bought by the second defendant from the plaintiff for R110 000.00 on 28 October 2008. However, he had no proper proof of purchasing the Vito bus for the aforesaid amount. The invoice purportedly completed by Jonker in respect of this sale was not computer generated. On the probabilities it is hardly likely that the plaintiff would have sold the Vito bus for almost a third less than it had paid for it, just six months prior thereto.

[51] The plaintiff's version is inherently more probable, namely that it sold the Corolla it had previously bought, at a profit for a price which was R15 000.00 higher than its cost price. The aforesaid is akin to a legitimate business transaction, whereas the defendants' version, given

the Vito's real purchase price, resembles a separate arrangement between Jonker and the defendants, at the plaintiff's expense.

[52] Moreover, Muller testified that when he inspected the Vito bus on 4 February 2009, the vehicle was still registered in the plaintiff's name and that fact was reflected on the licence disc, despite its false number plates.

[53] Mr van Heerden's only way of dealing with the overwhelming evidence which favoured the plaintiff's version about the Vito Bus was to blame Jonker. Interestingly, van Heerden insured the Vito Bus not at R110 000.00, but for R300 000.00, an amount more in keeping with its true market value. This fact confirms, in my view, that van Heerden was well aware of the true trade value of the vehicle and was involved in a profit making scheme with Jonker. Clearly the defendants have no entitlement to retain this vehicle since it has not been paid for. Their disingenuous defence and counterclaim in this regard also has serious implications for the remainder of their defences and counterclaims.

The Two Nissan 1.6 litre Trucks

[54] These were two light delivery vehicles with almost identical chassis numbers which differed only in respect of the last three digit numbers (841 and 981, respectively). Muller relied on invoices to show that these two vehicles were bought from Atlantis Motors in Centurion on 20 November 2008. Muller said these vehicles were never sold to the defendants and they are still registered as part of the plaintiff's stock.

[55] Van Heerden's evidence to explain how he came to be in possession of the two vehicles was the following:

He purchased certain vehicles from the plaintiff, represented by Jonker, which Jonker then sold to a dealer in Johannesburg for R230 000.00. He

was shown the money which was in Jonker's desk drawer. Van Heerden said he then gave Jonker another R50 000.00 in order to purchase a Mercedes he was interested in. When Jonker was unable to find one, he did not return the cash, but promised to buy four demonstration model Nissan bakkies for him with the R280 000.00 cash. Of the four bakkies only two were delivered. Van Heerden produced a receipt from Jonker for the R280 000.00 on the plaintiff's letterhead.

[56] Muller maintained that the invoice or receipt completed by Jonker was a forgery. Apparently Mr Louw, a previous salesman had kept the plaintiff's old invoice books which were used, prior to the introduction of Autoline, in his desk drawers. The inference sought to be drawn was that Jonker stole these old invoice books and used them when he was conducting business for his own account or when he tried to bypass the plaintiff in his transactions.

[57] In my view, the defendants were unable to demonstrate any entitlement to these vehicles without the evidence of Jonker. Van Heerden's evidence about the money in Jonker's desk drawer, which he admits he did not count, and the open mandate to Jonker to purchase vehicles with the money, only tends to support the assertion that he and Jonker had a separate arrangement with each other which was at the exclusion of the plaintiff. In circumstances like these, it hardly lies in van Heerden's mouth to say he thought he was dealing with the plaintiff.

[58] Van Heerden testified that he never saw or completed one of the plaintiff's standard order forms referred to by Muller. Neither did he ever see an electronically reproduced invoice form the plaintiff, only handwritten invoices issued to him by Jonker. This evidence does not strengthen the defendant's case. It rather provides corroboration for the contention that Jonker used old invoice books when he entered into those transactions to the plaintiff's prejudice.

The 2008 Toyota 4x4 Truck

[59] It was the defendants' case that the second defendant purchased a 2006 Toyota Double Cab from the plaintiff and paid for it with a cheque in the amount of R160 000.00 but when the vehicle was delivered, according to van Heerden, he noticed it was a brand new vehicle. When he drew Jonker's attention to this fact, the latter assured him that it was indeed an older 2006 model, but that its defective odometer had recently been replaced. During the course of the trial the defendants tendered the return of the vehicle.

[60] This vehicle was purchased by the plaintiff on 3 November 2008 from Toyota in Humansdorp (trading as Kritmar Motors CC) for the sum of R297 741.42, according to a trading invoice from the aforesaid dealer in the plaintiff's bundle of evidence. This could not be disputed by the defendants. This evidence renders it very unlikely that the same vehicle would be sold to anyone (with the plaintiff's knowledge or approval) for R160 000.00, almost half of its value.

[61] Van Heerden's explanation was that he thought he was buying an older 2006 model of the same vehicle, only to find after its delivery, that it was a newer model. Jonker explained that the vehicle was fitted with a new odometer. This version has a false ring to it and is most improbable. The plaintiff's case is that the second defendant bought two Nissan bakkies for R160 000.00, not the Toyota. Van Heerden's testimony confirmed that the plaintiff received the amount of R160 000.00 from the second defendant, and pleaded that it was, not for the 2008 4x4 Toyota truck, but for two other vehicles, namely two Nissan 1400 bakkies at R80 000.00 each. Their stock numbers were given as U10725 and U10726 respectively.

[62] The more important fact is that this vehicle is registered in the plaintiff's name, that the defendants took possession of the vehicles and in their possession it acquired a false number plate reading "GOLF 3 EC". Given that the second defendant was developing a Golf Estate at the time, the choice of this particular personalized (false) number plate only weakens the defendants' case. At the back of the cheque made out to the plaintiff were words which constituted proof of allocation of the payment, being the two vehicles, stock numbers, U10725 and U10726 respectively, and that they were sold for R80 000.00 each. There was also an invoice for R75 000.00 from Atlantis Motors where the plaintiff bought one of these bakkies. There were also invoices made out to the second defendant for R80 000.00 in respect of one of these trucks.

[63] The paper trail presented in support of the plaintiff's version does not prove the sale with the same conclusiveness as in the other instances. Yet it is substantial proof and on the probabilities, the second defendant bought two Nissan bakkies, and not the 2008 4x4 Toyota truck with the cheque in question. The price of R160 000.00 seems unrealistically low for the Toyota truck in question, if one has regard to the prices which were generally referred to during the trial.

[64] In my view, the defendants have no entitlement to the four vehicles or any money allegedly paid for them, and the vehicles should be returned to the plaintiff.

The Defendants' Unconditional Counterclaims

[65] The first claim under the heading is the delivery of the two Nissan bakkies allegedly bought for R70 000.00 each and as part of a group of four such vehicles, (bought in one transaction for the sum of R280 000.00). Alternatively, the defendants claim R140 000.00 as payment. The defendants could not prove this purchase as demonstrated

when dealing above with the two 1.6 Litre Nissan trucks claimed in the plaintiff's *rei vindicatio* action. The parties are *ad idem* that the plaintiff sold the Colt to the second defendant. This particular sale also included a trade-in, for a 2003 model Toyota Hilux 4x4 truck. The Colt was sold for the trade-in value of the Hilux for R75 000.00, plus R15 000.00 cash. The invoice for this transaction is dated 7 August 2008.

[66] According to van Heerden's warning statement he, on the same day, he bought the 2005 model BMW 318i for R87 000.00, he also bought a Mazda 626 (2004 model) for R55 000.00, as well as a 2007 model Nissan 1400 truck for R25 000.00. Jonker sourced these vehicles in Johannesburg. He said he gave Jonker one cheque for R80 000.00 to, purchase these two vehicles. Interestingly, he requested two cheques (not one) from his bank which was made out to "A Jonker" for R55 000.00 and R25 000.00 respectively. According to Jonker, these vehicles were sold to Inspecta Motors in Johannesburg for R230 000.00 (at very substantial profit) and this amount was kept in Jonker's desk drawer. R50 000.00 was added by van Heerden to constitute the R280 000.00 with which the four Nissan trucks were bought.

[67] The conditional counterclaim for the repayment of R110 000.00 and R160 000.00 respectively ought to be dismissed. It is clear from the aforesaid that the second defendant did not pay the sum of R132 000.00 for 2000 model Mercedes Benz C270 motor vehicle and a Colt. The payment was in respect of a 2004 model Mercedes Benz Classic bought by Auto House Global on 28 July 2008 and an order form and bank account entry in the plaintiff's bank account provided proof thereof. It may very well be that Jonker misled the defendant, in this regard and also other respects. The third counterclaim is another example thereof.

[68] In respect of the third counterclaim, van Heerden alleged that R160 000.00 was paid for a Mercedes Benz CLS on 16 September 2008.

The defendants claim its delivery, alternatively repayment of the R160 000.00. Although in its plea to the counterclaim the plaintiff denied the sale, Muller however, testified that the plaintiff did receive a payment of R160 000.00 from the second defendant. This was for two Nissan trucks. The plaintiff's paper trail, demonstrated by Muller, showed that on 5 September 2008, the plaintiff bought two Nissans from Atlantis Motors for R75 000.00 each and sold them to the second defendant for R80 000.00 each on 22 September 2008. Four separate invoices support the aforesaid. These trucks were also licensed and delivered to the second defendant. On the probabilities, this is what occurred.

[69] Whereas there may possibly be instances where the defendants, were defrauded by Jonker, it cannot be accepted they lawfully purchased all the vehicles referred to in this matter with the *bona fide* intention of expanding, minimizing or generally upgrading the second defendant's vehicle fleet. The prices paid for many of the vehicles were far below trade value and van Heerden knew, or ought to have known this. On van Heerden's own version in his warning statement, he and Jonker were engaged in a profit making relationship. Van Heerden and Jonker speculated with vehicles to that end. There is no doubt about that. Many vehicles belonged to the plaintiff. Van Heerden is a highly qualified businessman, with many years of experience in business. He must have known, or ought to have known, that Jonker was dealing behind Muller's back at the plaintiff's disadvantage, at the very least.

[70] It seems that Jonker wore two hats. He acted as salesperson for the plaintiff and in his personal capacity for his own account. This van Heerden must have realised during the period when he and Jonker (his employee's husband), were speculating with the vehicles. The paper work of the purchases was done through the plaintiff, mostly on dodgy order forms, yet there was sometimes no delivery of the vehicles, hardly any registration documents, and sometimes the vehicles weren't even

seen. The defendants' counterclaims, as stated before, raised the question why there was no demand for these vehicles. One would have expected that if van Heerden genuinely believed that they were dealing with the plaintiff.

[71] Jonker did not have the necessary authority to act as he did. Van Heerden could not possibly have believed that he did, and therefore the plaintiff is not estopped from relying on Jonker's lack of authority. He was clearly acting on a frolic of his own. Insofar as the defendants were defrauded by Jonker, they should look to him to compensate them for their losses. The plaintiff is not liable because the defendants' losses were not as a result of the plaintiff's conduct.

[72] In the circumstances, I make the following order:

In Case Number 474/09:

- a) The defendants are to pay the plaintiff the sum of R261 596.00, as well as interest thereon at the prevailing legal rate, from date of summons to date of payment, jointly and severally, the one paying the other to be absolved.
- b) Mr Swanepoel of Christo Swanepoel Attorneys is ordered to pay the sum as aforesaid kept in his trust account, together with accumulated interest thereon, to the plaintiff's satisfaction of the order in paragraph (a).
- c) The defendants' counterclaim against the plaintiff under the above case number is dismissed.

In Case Number 475/09:

- d) The Deputy Sheriff is ordered to release the following vehicles in its custody or safekeeping under the aforesaid case number or case number 492/09 (in terms of the order dated 7 April 2009) to the plaintiff at 35-37 Voortrekker Road, Humansdorp:
- 1) One 2008 model Mercedes Benz Vito Crew Bus, with chassis number WDF 6397032.
 - 2) One 2008 Nissan 1.6 Bakkie with chassis number ADNUSNID5U0000841.
 - 3) One 2008 Nissan 1.6 Bakkie with chassis number ADNUSNID5U0000981.
 - 4) One 2008 Toyota Cab Bakkie with chassis number AHTFZ29GX09030147.
- e) The defendants' conditional and unconditional counterclaims against the plaintiff under this case number (475/09) are dismissed.
- f) The defendants are to pay the plaintiff's cost of suit, jointly and severally, the one paying the other to be absolved.
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E REVELAS
Judge of the High Court

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Date Heard:

5 May 2011

Date Delivered:

29 March 2012