

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 1970/2022

In the matter between:

NEDBANK LIMITED

APPLICANT

and

NONKULULEKO BUKWENI N.O.

(ID NO: 9[...]) in her capacity

as Master's Representative in the

Estate of the Late Mankuntswana Bukweni

RESPONDENT

JUDGMENT

Rugunanan J

[1] The subject matter of this application concerns a Toyota Hiace minibus (the motor vehicle) which is currently in the possession of the respondent. The respondent is the duly appointed Master's representative in the estate of the late Makuntswana Bukweni. The latter, as purchaser, acquired the motor vehicle from

the applicant on 18 December 2019 in terms of an electronically concluded instalment sale agreement.

[2] The purchaser subsequently passed away on 24 March 2021.

[3] The applicant, by way of vindicatory proceedings, claims the return of the vehicle contending that as owner thereof it is entitled to recover possession from the respondent – and given that the instalment sale agreement between itself and the deceased has terminated, the respondent was and remains at all times material hereto in unlawful possession of the vehicle.

[4] The proceedings were instituted on 23 June 2022 and the notice of motion and founding affidavit served personally on the respondent on 29 June 2022.

[5] The applicant seeks return of the vehicle on the basis that the instalment sale agreement was terminated upon the death of the purchaser as principal debtor. According to the certificate of balance attached to the founding affidavit the outstanding balance due in terms of the agreement as at 13 June 2022 is indicated as R422 964.16. And since the respondent is not authorised to remain in possession of the vehicle, and refuses to surrender it to the applicant, the applicant maintains that she is an unlawful possessor and it seeks return of the vehicle so that it may be sold and the proceeds be credited towards the reduction of the outstanding balance due to the applicant in terms of the agreement.

[6] At the commencement of the proceedings the applicant raised two points *in limine*. The first is that the respondent deposes to the answering affidavit in her capacity as an adult female whereas the pronoun in the commissioner's certification clause refers to the deponent as a person of male gender. The

regulations governing the administration of an oath or affirmation¹ require that the deponent to a declaration shall sign it in the presence of a commissioner of oaths². The incorrect certification of the deponent's gender may justify the inference that the deponent did not sign the affidavit in the presence of a commissioner of oaths and may render the answering affidavit liable to be set aside as an irregular proceeding. The fact of the matter is that the applicant did not lodge an objection in terms of rule 30 of the uniform rules of court and ought to have done so if it was serious in not being prepared to overlook the commissioner's use of the incorrect pronoun.³ The point *in limine* has no merit.

[7] The second point relates to the failure by the respondent to seek condonation for the late filing (by 7 days) of the answering affidavit, which had been delivered on 4 August 2022. The application for condonation was filed almost a year later during July 2023. The explanation is extremely lean in content – the deponent attributing the delay to the conduct of the matter in the hands of her local attorney.

[8] The applicant also sought condonation for the failure by some nine months to have filed its replying affidavit timeously. While the delay is certainly lengthy, I am satisfied that good cause has been shown for granting condonation. The deponent to the replying affidavit states that it became necessary for the applicant to terminate the mandate of its original attorneys of record and new attorneys had to be appointed. The circumstances surrounding this process caused a delay in the preparation of the replying affidavit which rendered it impossible for the applicant to have filed within the normal time frames provided for in terms of the rules.

¹ Issued under section 10 of the Justices of the Peace and Commissioner of Oaths Act 16 of 1963 and published in Government Notice R774, Government Gazette No. 8169 of 23 April 1982.

² Regulation 3(1).

³ See for example *Absa Bank Ltd v Botha NO and Others* [2013] ZAGPPHC 163; 2013 (5) SA 563 (GNP).

[9] In assessing both applications for condonation it is deemed unnecessary to enter upon a recital of the principles applicable to their evaluation or to gratuitously repeat the contents of the parties' affidavits. I am of the view, in the circumstances of this matter, that in the interests of achieving finality in the matter, it will be prudent to determine the merits of the application.

The *rei vindicatio*

[10] One of the incidents of ownership (*dominium*) is the right of exclusive possession of a thing with the necessary corollary that an owner may claim their property wherever found and from whomsoever holding it. The *rei vindicatio* is available to an owner who has been deprived of their property without consent and who wishes to recover it from someone else who retains possession.⁴

[11] In vindicatory proceedings it is trite that the claimant need do no more than allege and prove that they are the owner of the property, that the other party is holding the property, and that the property in question is still in existence and is clearly identifiable⁵.

[12] The *onus* is on the holding party to allege and establish an enforceable right (such as a right of retention or a contractual right) to continue to hold against the owner.

[13] The *rei vindicatio* postulates that once a claimant establishes ownership in the thing in issue, and where the respondent is in possession at the commencement of the action, the thing shall immediately be returnable.

⁴ *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) at 995I; *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 285 (A) at 297E; *Sorvaag v Pettersen and Others* 1954 (3) SA 636 (C) at 639G.

⁵ *Van Der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) para 114.

[14] It is apparent from a reading of the respondent's answering affidavit that the applicant's ownership of the motor vehicle is not seriously disputed. What the respondent seeks to place in issue is that the copy of the agreement attached to the founding affidavit does not disclose the signature of her deceased father and that there is no proof that the conclusion of the agreement was facilitated with a one-time pin.

[15] Moreover, she puts up the argument that she made payments to the applicant and was therefore entitled to have been served with a notice in accordance with section 129 of the National Credit Act 23 of 2005 before the applicant had resorted to instituting this application.

[16] I deal with these aspects below.

The authenticity of the agreement

[17] Section 2 (3) of the National Credit Act specifically provides that a signature or initial may be effected by way of an advanced electronic signature or an electronic signature as defined in the Electronic Communications and Transactions Act 36 of 2005. An inspection of every page of the copy of the agreement attached to the founding affidavit discloses that the agreement was signed by the deceased whose name, identity number and time of signature by means of a one-time pin is evident. The electronic signature utilised by the deceased as purchaser/buyer accords with the provisions of the legislation aforesaid.

[18] In the circumstances, the copy of the agreement is valid and enforceable.

[19] In her challenge to the applicant's ownership of the vehicle the respondent contends that the vehicle in her possession bears the registration JMG[...] which

does not accord with the vehicle register number HPX[...] indicated in the Certificate of Registration which is attached to the founding affidavit.

[20] This discrepancy is inconsequential.

[21] The engine number and vehicle identification number in the instalment sale agreement accord with those indicated in the Certificate of Registration respectively as 2TR[...] and AHT[...]. There is no dispute about this and no dispute about the make and model of the vehicle in question, it being a Toyota Hiace.

[22] It follows that the identity and existence of the vehicle have also been established.

The payment plan

[23] In seeking to establish the existence of a right to possession, the respondent avers that the applicant accepted monthly instalments from herself and her family in respect of the motor vehicle. The applicant correctly points out in its replying affidavit that this simply does not pass muster. An item purchased under an instalment sale agreement can only be an asset in a deceased estate if it has been paid in full – until then it is a debt in the estate and the heirs and/or executor and/or Master's representative of the estate has absolutely no say over the property.

[24] It is considered incumbent nonetheless to mention something of material significance about the content of the agreement. Clauses 3.3; 7.1; and 7.1.3 of the agreement specifically provides that the applicant will remain owner of the vehicle until all amounts due under the agreement has been paid by the purchaser and if the latter dies, the applicant may proceed with the enforcement or termination of the agreement and take repossession of the vehicle.

The section 129 notice

[25] As to the averment that such a notice was to be sent to the respondent, this is misplaced. A Master's representative appointed in terms of section 18(3) of the Administration of Estates Act 66 of 1965 does not fall within the scope of the definition of the word 'consumer' in the National Credit Act.

[26] As such, the National credit act is not applicable and the respondent cannot assert an entitlement to have received such a notice prior to the institution of these proceedings.

[27] It is patently clear that the respondent has not established a right to retain possession of the vehicle of which the applicant has established ownership.

[28] In the circumstances the following order issues:

1. The late filing of the applicant's replying affidavit is condoned.
2. The late filing of the respondent's answering affidavit is condoned.
3. Each party shall pay their own costs in seeking condonation.
4. The respondent is directed to return a 2019 Toyota Hiace 2.7 Sesfikile with engine number 2TR[...] and vehicle identification number AHT[...] to the applicant within five (5) days of service of this order.
5. Should the respondent fail to comply with paragraph 1 of this order, the Sheriff is hereby authorised to attach the aforestated motor vehicle and to hand same over to the applicant.
6. The applicant is hereby authorised so sell the aforementioned motor vehicle and credit the proceeds towards the reduction of the debt.

7. The respondent shall pay the costs of this application.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: *C G T Cordell* (heads of argument by *P Jacobsz*), Instructed by Wheeldon Rushmere & Cole, Makhanda (Ref: S Amm).

For the Respondent: *Z Matukuta*, Instructed by Mgangatho Attorneys, Makhanda (Ref. A Mgangatho)

Date heard: 3 August 2023

Date delivered: 24 October 2023