

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 48/2022P

In the matter between:

TOYOTA FINANCIAL SERVICES

PLAINTIFF

And

ENIGE CONSULTING COMPANY (PTY) LTD

FIRST DEFENDANT

DAVAHN NAIDOO

SECOND DEFENDANT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Plaintiff instituted an action against Defendants claiming the return of a 2018 Toyota Etios 1.5 XS/SPRINT with chassis number M[...] and engine number 2[...]. Any damages which was claimable to be adjourned *sine die* and costs on a scale as between attorney and client.

[2] Defendants admitted that the agreement was entered into and that possession of the said motor vehicle had been taken by them. They however raised the defence that the vehicle was in a collision on 3 May 2019 and was written off and that the insurer had subsequently repudiated the claim. The underwriters were in the process of ceasing business. The vehicle wreckage was taken away by them and had remained in their possession. A further defence raised was that there had not been compliance with the National Credit Act.

[3] At the commencement of the hearing Defendants informed the Court that it was no longer pursuing the defence that the National Credit Act was not complied with. Plaintiff informed the Court that the only issue was the return of the motor vehicle. It was further agreed between the parties that due to the defence which was raised by Defendants that it could not return the motor vehicle as it had been destroyed that it has the duty to begin. The matter accordingly proceeded on that issue only. A trial bundle was handed in which was to be used during the evidence. The trial bundle consisted of the accident claim form and the accident report form.

[4] Mr. T Naidoo testified on behalf of Defendants and stated that he was the general manager of First Defendant and oversaw the finances of First Defendant. He had sight of the accident claim form in pages 1 to 6 of the bundle which has the heading of "Desire". According to the accident claim form the insured was one D Naidoo, a director. The vehicle is described as the vehicle which the one that Plaintiff is claiming return of with registration number N[...] 1[...] 9[...] and registered in the name of First Respondent. The driver of the vehicle, according to the form, was one Siyabonga Ndlovu. It is recorded thereon that the driver was an employee. In respect of accident damage it states that there was "impact to side and front". The vehicle was travelling at approximately 20 km per hour before and at the time of impact.

[5] From the accident report (AR) form it appears that the collision occurred on Hellen Joseph Road in Glenwood, Durban. It was not disputed that the accident report relates to the vehicle in question. The sketch indicates that the other vehicle collided with the front right corner of the vehicle in question. It appears, from the description of the accident, that the vehicle in question, which is marked A, was moving out of a parking bay when the other vehicle, marked B, collided with it. The witness was not present at the time of the accident but testified that the motor vehicle was removed from the scene and that he does not know where the motor vehicle is but it is not with him.

[6] During cross-examination he confirmed the two reports to which I have referred to above. He did not have possession of the motor vehicle and if he had it he would have returned it. He did not see the motor vehicle at the time of the collision or thereafter and did not see what damage had been caused to the vehicle. He could not provide an assessors report and stated that the administrative staff would have followed it up. He however does not know who of them did so. He never saw a report about the vehicle. All that he knew was what he was told when he called the call centre of the insurance company. He could not provide any document that the motor vehicle was written off. The claim form was completed by First Defendant and not himself. He was shown certain documents which indicated that a vehicle with the registration number in question was spotted during August 2022 in the Empangeni area. It was put to him that it was picked up by a camera and he said he could not dispute it as he had no knowledge thereof. He had no knowledge of it being written off. He further confirmed that the agreement between the parties made provision for costs to be awarded on an attorney and client scale.

[7] During re-examination he confirmed that from the accident reports there was no indication of the speed that the other vehicle was travelling at the time of the collision and that all that could be seen from the report handed in on behalf of Defendants was the registration number of the vehicle. That was the evidence for the Defendants as well as the case for the Defendants.

[8] Ms Hlongwane, an employee of Wesbank, testified that they provide assistance to Toyota, Volkswagen and various other financial services in legal matters in establishing the whereabouts of certain motor vehicles. She indicated that there are various cameras which are placed at various positions throughout South Africa. She then referred to printed documents which registered the registration number of the vehicle in question in the Empangeni area during 2022 thus after the collision had been reported. This normally happens after somebody has requested a report and then as soon as the vehicle passes what she termed as the MPR System then it would record the vehicle registration number. However what is picked up is only the registration

number of the vehicle. There is no picture of the vehicle or a description of the vehicle. That was the evidence on behalf of Plaintiff and also Plaintiff's case.

[9] At the request of Defendants the matter was adjourned as Defendants wished to submit written submissions.

[10] It is submitted on behalf of Defendants that the denial of possession is a defence to a *re vindicatio*. That a copy of the claim form was attached as well as the SAPS Accident report. He submitted that the vehicle was in the accident as appears from the accident report and that the witness was telephonically advised by the insurer of the vehicle that it was written off. The vehicle registration being captured in the Empangeni area was only the registration number of the vehicle and not the asset itself and from the collision description it could not be determined what the accident damage would have been. The witness Ms Hlongwane on behalf of Plaintiff could only indicate that it was the registration number of the vehicle that was recorded. He further submitted that it would be unenforceable if judgment was granted to Plaintiff for the return of the motor vehicle as it is not in possession of Defendants.

[11] It was submitted on behalf of Plaintiff that it was contended by Defendants that Lion Africa took physical control of the vehicle and that they set up a special defence. Accordingly they had to satisfy the Court that they were entitled to succeed on this defence. The witness Mr. T Naidoo indicated, during cross-examination, that he would have returned the vehicle if it was in his possession thus indicating that he accepted that Plaintiff was entitled to receive the said motor vehicle. The evidence of the witness T Naidoo was of a telephonic conversation which was hearsay and inadmissible. The damage to the vehicle must have been minimal and T Naidoo never had sight of the damage to the vehicle and therefore could not comment thereon. He submitted that the SMAC extracts which were provided by Plaintiff indicated that the vehicle had been sighted after the collision in the Empangeni area.

[12] All that can be determined from the claim form and the police accident report is that the vehicle in question was involved in a collision in Durban during 2019. The driver of the vehicle was not called, who could have enlightened the Court as to the damage to the said vehicle. There was also no evidence from the panel beater or the insurance company that the said vehicle was damaged beyond repair. Further no enquires were made by Mr. T Naidoo as to where the vehicle was, who merely accepted that it was with the insurance company. Accordingly there was no evidence indicating what the condition of the vehicle was after the collision, what happened to it after the collision as there was no evidence as to its condition when it was towed away. He has no direct knowledge of where it was taken and his evidence was mostly hearsay which is inadmissible and did not take Defendants case any further. The evidence by Plaintiff's witness also merely indicated that a vehicle with that registration number was spotted in the Empangeni area in 2022 sometime after the collision. However there is no indication that it is the vehicle in question but merely the registration number and therefore also does not take the matter any further.

[13] Defendant could place no evidence before Court that the vehicle was no longer in its possession. The fact that it may have been taken to a panel beater does mean that Defendants lost possession of the said vehicle. Further Defendants with knowledge of Plaintiff's claim as it has admitted the agreement and it was agreed that the only issue was whether the vehicle could be returned. The disposal of the vehicle in such circumstances would be wrongful and provide no defence.

[14] Accordingly there was no evidence as to the damage to the vehicle, where the vehicle was taken, by whom it was taken, where it is except hearsay evidence. Defendants have thus failed to that the vehicle is no longer in their possession and accordingly the defence cannot be sustained.

Order:

1. An order is granted in terms of paragraph 2 of the particulars of claim.

2. The further relief which is sought in paragraph 3 of the particulars of claim is adjourned *sine die*.
3. First and Second Defendants jointly and severally, the one paying the other to be absolved to pay the costs on a scale as between attorney and client.

P C BEZUIDENHOUT J.

MATTER HEARD ON: 5 FEBRUARY 2024
JUDGMENT RESERVED ON: 12 FEBRUARY 2024
(When heads of argument were filed)
JUDGMENT HANDED DOWN ON: 19 FEBRUARY 2024

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