



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MTHATHA)**

CASE NO.: 5257/2022

Matter heard on: 20 April 2023

Judgement delivered on: 21 April 2023

In the matter between: -

NOBESUTHU MARGARET NOHAKE

Applicant

and

BENJAMIN NKOSINATHI NKOSI

Respondent

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED.

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Signature

.....
Date

JUDGMENT

SMITH J:

[1] The applicant seeks an order, inter alia, declaring the respondent's 'impoundment' of her vehicle, a Nissan Hardbody, unlawful and directing him to return the vehicle to her.

[2] The circumstances which resulted in the vehicle being in the respondent's possession are as follows.

[3] The applicant stated that during July 2022, she had lent her vehicle to her daughter, who on 9 September 2022, while driving the vehicle, collided with the respondent's vehicle. The respondent then 'impounded' the vehicle at the scene, without obtaining her or her daughter's consent. Despite numerous requests by her daughter for the respondent to return the vehicle, he has refused to do so, stating that he would only return it once his own vehicle had been repaired. On 27 September 2022, her attorneys wrote to the respondent demanding that he returned the vehicle forthwith. The respondent referred that letter to his attorneys who replied on 29 September 2022, inter alia, stating that the parties had agreed that he would keep and use the applicant's vehicle until such time as his own vehicle had been repaired. The respondent also denied that the applicant's vehicle was driven by her daughter, but asserted that it was driven by her son, without a valid driver's licence and whilst being under the influence of intoxication liquor.

[4] The respondent's version can be summarized as follows. On the day of the collision the applicant's vehicle was driven by her son, without a valid driver's licence, and whilst being under the influence of liquor. The accident was caused solely by his reckless and negligent driving. The applicant arrived on the scene and authorized her daughter to agree to an arrangement in terms of which he would retain and use the vehicle until such time that his own vehicle had been repaired to its pre-accident state.

[5] Despite having been alerted to the fact that the version proffered by the respondent raises genuine and fundamental factual disputes, the applicant nevertheless chose to institute application proceedings. She also did not apply for the matter to be referred for oral evidence. The approach to be adopted by the court in such an eventuality is trite. The matter must be decided on the respondent's

version unless it is so farfetched or uncreditworthy that it can be rejected out of hand. (*Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* [1984] 2 All SA 366 (A))

[6] In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), at para 26, the Supreme Court of Appeal clarified the *Plascon-Evans* principle as follows:

‘Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.’

[7] And in *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), at para 13, the Supreme Court of Appeal explained that:

‘A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him.’

[8] As mentioned earlier, the respondent's version raises material and bona fide factual disputes which, if decided on the papers, must in terms of the abovementioned legal principles, be resolved on his version. That version is not so improbable, uncreditworthy or farfetched that it can be dismissed on the papers. It

can also by no stretch of the imagination be described as a bald denial. The respondent has given a detailed explanation as to what had transpired at the scene of the accident and how it came about that the applicant's vehicle is in his possession. He has personal knowledge of those facts and has thus provided sufficient justification for the possession and use of the applicant's vehicle so as to raise a genuine and bona fide factual dispute.

[9] Mr Noah, who appeared for the applicant, submitted that the purported agreement is invalid, even on the respondent's version. In this regard he submitted that the respondent relies on an agreement which was allegedly concluded between him and the applicant's daughter. It is common cause that the applicant is the owner of the vehicle and her daughter therefore did not have the authority to conclude such an agreement on her behalf, or so the argument went.

[10] To my mind this argument is unsustainable. As Mr Talapile, who appeared for the respondent, correctly submitted, the latter unambiguously stated that the applicant had authorized her daughter to conclude the agreement and that she had freely and voluntarily handed the vehicle keys to him.

[11] Mr Noah has also belatedly applied for the matter to be referred for viva voce evidence. However, no such application was made on the papers. In any event, the applicant had been aware at the time of launching the application proceedings that the respondent's version will raise disputes of fact that might not be capable of resolution on the papers. The respondent's version was clearly stated in the letter of 29 September 2022, to which I referred to above. The applicant must therefore bear the consequences of her decision to institute motion proceedings regardless.

[12] I am therefore of the view that the applicant has failed to make out a case for the relief sought in her notice of motion and the application falls to be dismissed with costs.

[10] In the result the following order issues:

- (a) The application is dismissed with costs.

JE SMITH
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant : Mr. Noah
: T. Noah & Sons Inc. Attorneys
No. 54 Wesley Street
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(Ref.: TN/654/22)

Counsel for the Respondent : Mr. Talapile
: Babe & Talapile Inc. Attorneys
: No. 71 Cumberland Street
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