



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 34599/2018**

- |     |                                 |
|-----|---------------------------------|
| (1) | REPORTABLE: NO                  |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED.                        |

**23 FEBRUARY 2022**

**Date**

\_\_\_\_\_  
**K. La M Manamela**

In the matter between:

**INVESTEC PRIVATE BANK a division of INVESTEC  
BANK LIMITED**

**Applicant**

and

**TUMANGA CONSTANT QHOLOSHA**

**First Respondent**

**TSHEPANG PHILOMENA QHOLOSHA**

**Second Respondent**

**DATE OF HEARING: 09 NOVEMBER 2021**

**DATE OF JUDGMENT:** This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **23 FEBRUARY 2022**.

---

**JUDGMENT**

---

**KHASHANE MANAMELA, AJ**

## ***Introduction***

[1] Investec Private Bank, the applicant, and Mr Tumanga Constant Qholosha, the first respondent, and Ms Tshepang Philomena Qholosha, the second respondent, concluded an instalment sale agreement (the agreement) in September 2013. The purpose of the agreement was for the financing of the purchase by the respondents of a Discovery motor vehicle for a total amount of R786 003.60. The loan was repayable in 60 equal monthly instalments. The first and second respondents (the respondents) breached the agreement by not paying the instalments and consequently the applicant obtained default judgment on 27 September 2018. The terms of the order for the default judgment were that the agreement is cancelled and a declaration for the return of the motor vehicle is made. The applicant's claim for damages was postponed *sine die* in terms of the same default judgment.

[2] The applicant has now approached the Court in terms of this application for payment in the amount of R522 127.21, plus interest and costs. The amount represents the balance outstanding on the loan or the agreement. The applicant actually says the amount represents the damages suffered by the applicant due to its inability to sell the motor vehicle. The application is opposed by the respondents, including on the ground that the relief sought is not borne by the evidence put forward on behalf of the applicant.

[3] This judgment was reserved on 09 November 2021 when the matter came before me as an opposed motion. Ms J van der Merwe appeared for the applicant and Mr JS Marks for the respondents. Next, I deal with the statements and submissions made in support of the case put forward for the applicant, on the one hand, and that of the respondents, on the other.

*Applicant's case*

[4] In the execution of the order (in the default judgment) for the return of the motor vehicle and determination of its claim for damages, the applicant caused a warrant for the delivery of the vehicle to be issued. The warrant authorised the sheriff of this Court to attach the vehicle wherever it is found. Between 9 November 2018 and 3 February 2021, the sheriff attended at the respondents' residence searching for the vehicle, but was told the vehicle is elsewhere.

[5] On 5 March 2021 the applicant's attorney made telephonic contact with a certain Mr Desigan Naidoo who confirmed that the vehicle was stored at his workshop in Kyalami, Johannesburg. Mr Naidoo informed the attorney that the vehicle has no engine as it was removed by the first respondent. Mr Naidoo further informed the attorney that he has a lien over the vehicle for storage charges. On 8 March 2021 Mr Naidoo sent to the attorney an invoice for the storage fees in the amount of R69 825.00. This document is attached as an annexure to the founding papers in this application.

[6] After the location of the vehicle at Mr Naidoo's place, the applicant's attorneys obtained a valuation report from Hedley Harris Auctioneers (the valuer or auctioneer). The report dated 6 May 2021 valued the vehicle at R48 000.00, forced sale value. It also confirmed that the vehicle did not have an engine and reported that both turbos have "blown".

[7] The applicant decided not to sell the vehicle due to its condition and as the storage costs (in the amount of R69 825.00) exceeded the forced sale value of the vehicle in the amount of R48 000.00. In the replying affidavit the applicant stated that it was unable to have the engine inspected as it could not locate it. For these reasons, the applicant decided to apply

for judgment against the respondents for the balance of the loan in the amount of R522 127.21. The applicant states that it would be severely prejudiced were it to take delivery of the vehicle and thereafter deal with it in terms of the provisions of the National Credit Act 34 of 2005. There are no prospects of receiving a better price at an auction, but only severe loss, due to the condition of the vehicle. It is better to seek monetary judgment for what is owing by the respondents, the applicant's case concludes.

### ***Respondents' case***

[8] The respondents' case in opposition to the relief sought by the applicant covers matters to do with both form and substance. They essentially argue that the application is based on the assumption that the vehicle cannot be sold as the engine cannot be repaired and the existence of some storage costs. All these assertions, on behalf of the applicant, are based on the affidavit deposed to by the applicant's attorney, but without the required confirmatory affidavits. Also that the choice of the motion procedure is unwarranted, due to the presence of a dispute of fact and the applicant's reliance on hearsay evidence.

[9] Further, the respondents substantiate their grounds of opposition as follows. Mr Naidoo was approached to determine the cause of the vehicle's mechanical failure. But it later turned out that he lacked the requisite skills. He took the vehicle apart, stripped the engine and destroyed it totally in the process. He subsequently mentioned that an engineer was required to repair the engine. A subsequent technician to whom the engine was taken said that it would cost an amount of R80 000.00 to repair the engine. The respondents say they will repair engine and sell the vehicle for a minimum amount of R394 000.00. They obtained the latter figure from the report by the applicant's valuer. I must immediately mention that the reliance by the respondents on the applicant's version in this regard is

surprising, to say the least. In fact, it contradicts the respondents own challenge of the expertise of the valuer and his opinion regarding the value and condition of the vehicle, including that the valuer did not provide a confirmatory affidavit. I will revert to these issues. The respondents further state that Mr Naidoo is not entitled to the storage costs. He has failed to indicate the basis for charging the costs. He simply does not have a lien over the vehicle. There is also a challenge to the invoice of Mr Naidoo as it is not confirmed under oath or accompanied by a confirmatory affidavit.

[10] According to the respondents the applicant's claim constitutes a damages claim and therefore ought to meet the relevant requirements. But in the replying affidavit the applicant pointed out that its claim is for monetary judgment or contractual damages based on the agreement between the parties due to the vehicle not capable of being sold. It is also pointed out in the latter affidavit that a valuation need not be under oath and that the valuer had clearly stated he is a sworn valuer.

### ***Submissions and applicable legal principles (discussed)***

#### **Submissions on behalf of the applicant**

[11] Ms Van der Merwe appeared at the hearing on behalf of the applicant. She had also filed written argument in terms of the practice directive of this Court. Her submissions resonated with what appears above as the applicant's case. I deal with some of her submissions, next.

[12] The applicant has elected to apply for a monetary judgment for payment of the amount still owed by the respondents in terms of the agreement. This is due to the condition (or state of disrepair) and negligible value of the vehicle. The vehicle is classified as "non-

runner”, due to its state of disrepair. The respondents had a contractual obligation to keep the vehicle in a good state of repair. Under these circumstances the applicant is entitled to apply for monetary judgment as per the certificate of balance attached to its founding papers. The damages are liquidated.

[13] Regarding the involvement of Mr Naidoo, it is submitted that the applicant is not privy to the arrangements and/or agreement reached by the respondents with Mr Naidoo. Mr Naidoo is entitled to payment of the storage costs and therefore has lien over the vehicle. The respondents may also have a damages claim and some recourse against Mr Naidoo regarding the latter’s conduct, the submission unfolds.

[14] The applicant relies on clause 7 of the agreement dealing, among others, with the obligation on the part of the respondents *“at all times keep the goods in its possession and under its control and shall take reasonable care in the use of the goods and shall at its own cost and expense maintain the goods in a proper working order...”*

[15] The applicant further relies on other terms of the agreement dealing with default or breach and the consequences thereof. It is further submitted that the liquidated damages in this matter constitute an agreed penalty or pre-estimate damages for breach of contract, which is enforceable in law.<sup>1</sup> I must immediately state that I do not find this part of the argument

---

<sup>1</sup> Section 1 of the Conventional Penalties Act 15 of 1962 provides that “... a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall, subject to the provisions of this Act, be capable of being enforced in any competent court.” See also *Fidelity Bank Ltd v Three Women (Pty) Ltd and others* [1996] 4 All SA 368 (W) in which one of the defendants raised a partially successful defence that the bank could not claim finance charges in respect of the unexpired term of the loan as this was contrary to ss 1 and 3 of the Conventional Penalties Act.

helpful to the applicant's case, especially given the fact that the agreement is cancelled and the existence of the other terms of the default judgment.

[16] Regarding the allegations of the existence of a dispute of fact, it is submitted on behalf of the applicant that there is no real, genuine and *bona fide* dispute of fact. With regard to the use of motion procedure, the submissions on behalf of the applicant are that, where the facts relied upon are disputed a trial of the issues is necessary, but where the facts are really not seriously and unambiguously disputed a motion procedure may represent a feasible procedure.<sup>2</sup> A dispute of fact may be resolved by application of the *Plascon-Evans rule*.<sup>3</sup> It is submitted that when these legal principles are applied to this matter the relief sought by the applicant ought to be favourably considered by this Court.

#### Submissions on behalf of the respondents

[17] Mr Marks for the respondents, in the main, submitted that this application is based primarily on the assumption that the motor vehicle cannot be sold, due to its unrepairable engine, and the existence of some storage costs or a lien in respect of the motor vehicle. He had also filed the mandatory written argument.

[18] Further, the submissions for the respondents were with regard to the alleged formal deficiencies in the application. The founding affidavit was deposed to by the applicant's

---

<sup>2</sup> *Frank v Ohlsson's Cape Breweries Ltd* 1924 AD at 294-295, in which it was also held that it was undesirable to endeavour to settle the dispute of fact upon affidavit as it is more satisfactory to lead evidence so that a court can see and hear the witnesses before concluding on the matter.

<sup>3</sup> In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) it was held (at 634-635) that: "[i]t is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D - H)."

attorney, but there are no confirmatory affidavits to support the allegations by the valuer and Mr Naidoo, the mechanic and alleged lienholder. These, it is argued on behalf of the respondents, constitute unsubstantiated and therefore inadmissible hearsay.<sup>4</sup> The exceptions regarding the admissibility of hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988 do not apply.<sup>5</sup> But apart from the hearsay nature of the evidence with regard to the valuer, no evidence is proffered to confirm his qualification as an expert for purposes of his filed valuation report. Neither has the valuer set out the method used to value the vehicle or how he arrived at the amount stated in his report. Further, the valuer did not even enquire about the engine or consult the expert nominated to assess the vehicle. Despite all these deficiencies and the fact that this is essentially a damages claim, the applicant consciously chose motion proceedings.

[19] Regarding the merits<sup>6</sup> of the application, the submissions on behalf of the respondents are essentially as follows. The first respondent approached Mr Naidoo, trading as Grand Prix Auto, when “difficulties” were experienced with the vehicle. Mr Naidoo was asked to tow the vehicle and establish the cause of the mechanical failure. But it later turned out that Mr

---

<sup>4</sup> Section 3 of the Law of Evidence Amendment Act 45 of 1988 provides as follows: “(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or (c) the court, having regard to- (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice. (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence. (3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection. (4) For the purposes of this section- **'hearsay evidence'** means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence; **'party'** means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.”

<sup>5</sup> *Ibid.*

<sup>6</sup> There may well be issues relating to the merits already dealt with above.



Naidoo lacked the requisite knowledge and skills to diagnose the problem. He stripped the vehicle and took its engine apart. This totally destroyed the engine. Mr Naidoo thereafter said that he needed an engineer to repair the engine. These actions are inimical to the existence of a lien over the vehicle. Mr Naidoo is also not entitled to any storage costs. It may actually be the respondents who are entitled to sue Mr Naidoo for the damage caused to the vehicle. He misrepresented his expertise and removed the engine from the vehicle without consent “which resulted in the vehicle being unable to be driven”. I hasten to point out that the latter submission contradicts the earlier one that the vehicle was to be “towed” as it had “mechanical failure”. Clearly the mechanical failure and towing do not suggest a vehicle capable of being driven. The circumstances under which Mr Naidoo’s invoice was prepared and furnished to the applicant are also questioned by the respondents, apart from the evidential value thereof. The engine of the vehicle was taken by the first respondent from Mr Naidoo to Triple J Diesel (Pty) Ltd. The latter, after evaluating the engine and testing the injectors, advised that the engine required an overhaul and various parts to repair for a cost of R80 000.00. The first respondent intends to repair the engine and sell the vehicle for a minimum amount of R349 000. This figure is obtained from the applicant’s own version, counsel for the respondents echoes his clients.

[20] Further regarding the alleged lien by Mr Naidoo, Mr Marks for the respondents, submitted that the applicant simply accepted the storage claim without any proof thereof. For a valid lien there ought to be a claim. There are no allegations by Mr Naidoo in support of his claim for storage costs or that the lien arose from the improvements to the vehicle. A person

exercising a lien is not entitled to any storage costs merely for keeping the property at his premises.<sup>7</sup>

[21] Counsel for the respondents relied on *Amler's Precedents of Pleadings*<sup>8</sup> for his further submissions on the lien. This authority distinguishes between salvage and improvement liens, and debtor-creditor liens. The former type of liens provide a dilatory defence against vindication and possessory claims as they preclude an owner-plaintiff to recover possession of a property from another or a defendant lawfully in the possession of such person without compensation of the latter person who has a valid enrichment claim.<sup>9</sup> And the debtor and creditor liens (apart from also providing a dilatory defence) depend on the existence of a debtor-creditor relationship between the parties; are enforceable only against a party to the contract;<sup>10</sup> cover all agreed improvements effected, including those of a luxurious nature,<sup>11</sup> and their only purpose is the enforcement of the payment of the contract price.<sup>12</sup> The enrichment of the plaintiff is irrelevant for purposes of the debtor and creditor liens.<sup>13</sup> *Amler's Precedents of Pleadings* further states that a typical debtor and creditor lien is that of a builder or an attorney with regard to the documents of a client.<sup>14</sup>

---

<sup>7</sup> *Thor Shipping and Transport SA (Pty) Limited and Another v Sunset Beach Trading 208 CC t/a Auto Complete* (AR664/2016) [2017] ZAKZPHC 44 (3 November 2017) at par [28] "As to the enrichment claim ... [a]ssuming it to be arguable that some level of enrichment (and matching impoverishment) arose because the second defendant had his vehicle kept safe without charge for the storage period, the answer to the claim would probably lie in the proposition that a lien-holder keeps possession for its own benefit, as a result of which it is not entitled to claim compensation by way of storage charges. (See in this regard the full court decision in *Wessels v Morice* (1913) 34 NPD 112; and *Laingsburg School Board v Logan* (1910) 27 SC 240.)".

<sup>8</sup> Harms, LTC. 2018. *Amler's Precedents of Pleadings*, 9<sup>th</sup> ed. LexisNexis (online version – last updated: 2018).

<sup>9</sup> *Singh v Santam Insurance Company Limited* [1997] 1 All SA 525 (A), 1997 (1) SA 291 (SCA) at 296 *et seq.*

<sup>10</sup> *Wynland Construction (Pty) Ltd v Ashley-Smith en andere* [1985] 2 All SA 368 (A), 1985 (3) SA 798 (A) 812-813.

<sup>11</sup> *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* [1970] 3 All SA 332 (A), 1970 (3) SA 264 (A).

<sup>12</sup> *Amler's Precedents* at 250. See also *Van Niekerk v Van den Berg* [1965] 2 All SA 367 (SCA), 1965 (2) SA 525 (A).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Amler's Precedents* at 251, relying on *Benson and another v Walters and another* [1984] 1 All SA 283 (A), 1984 (1) SA 73 (A) 89 and *Botha NO v EM Mchunu & Co* [1992] 2 All SA 427 (N), 1992 (4) SA 740 (N).

[22] It is further submitted that the applicant had elected to obtain possession of the vehicle and consequently pursued an action for damages. Now that the agreement between the parties is terminated, the applicant is obligated to sell the vehicle to mitigate its losses.<sup>15</sup> Also, the losses are not liquidated and therefore there is a dispute of fact in this regard in the same vein as what was envisaged by *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).<sup>16</sup> The existence of a dispute of fact alone justifies the dismissal of the current application, the submission on behalf of the respondents conclude.

### ***Conclusion***

[23] From the above it is clear that the main issue for determination is premised on the fact that whilst the applicant obtained the default judgment for the return of the motor vehicle, with the determination of its claim for damages deferred, the applicant now simply wants payment for the balance of the loan mainly due to the condition of the vehicle. On the other hand, the respondents' case is simply that the applicant should sell the vehicle to mitigate its losses. Obviously, there may be other issues, ancillary or otherwise, contributing to the determination to be made.

### ***Hearsay and absence of confirmatory affidavits***

[24] The respondents argue that the invoice by Mr Naidoo or reliance thereon and the valuer's report or reliance thereon constitute hearsay evidence, which is inadmissible. Further that the exceptions applicable for the admissibility of hearsay evidence under section 3 of the Law of Evidence Amendment Act do not find application.<sup>17</sup> It is common cause that both Mr Naidoo and the valuer did not furnish affidavits to confirm their respective assertions under

---

<sup>15</sup> *Standard Bank of South Africa Ltd v Dlamini* (2877/2011) [2012] ZAKZDHC 64; 2013 (1) SA 219 (KZD) (23 October 2012) at par [73].

<sup>16</sup> *Plascon-Evans Paints v Van Riebeeck Paints* at 634-635.

<sup>17</sup> See footnote 4 above.

oath. The applicant says that the valuation or inspection report need not be under oath. I disagree. The Court cannot rely on the opinions of the valuer not expressed under oath as evidence. The same would apply to Mr Naidoo's invoice. Both lack the requisite evidential value when not accompanied by depositions. Their contents simply constitute hearsay evidence on the part of the applicant's deponent.

[25] However, the reliance by the respondents (to advance their case) on some of the contents of the inspection report slightly alters the position on the admissibility of the contents of this document. The respondents stated that they will repair the engine and sell the vehicle for a minimum amount of R394 000.00. They derived this figure from the valuation report. The figure relates to the retail value of the vehicle, ostensibly including the engine. This sways me to admit the valuation report to form part of the evidence before the Court in the interests of justice. I invoke section 3(1)(c) of the Law of Evidence Amendment Act in this regard.<sup>18</sup> I have taken into consideration, among others, the nature of the evidence, being an inspection or valuation report; the fact that the valuer appears to have the necessary skills or expertise *ex facie* the document; the fact that the valuer has compiled what appears to be an objective document and because the only real or material challenge by the respondents is the absence of the deposition. But the challenge by the respondents cannot exist in the same sphere as their reliance of the contents of the very document, even if only on part thereof. I will also deal further with the invoice by Mr Naidoo under a different rubric below, despite my ruling on this one.

### *Dispute of fact*

[26] The respondents also argue that there is a dispute of fact. For this assertion they say the motion procedure is ill-advised. But the following material issues are common cause.

---

<sup>18</sup> See footnote 4 above for a reading of s 3(1)(c) of the Law of Evidence Amendment Act.

First, the existence of the default judgment which requires that the vehicle be returned to the applicant. Second, it cannot be reasonably denied (even if not being common cause) that the respondents did not return the vehicle, but instead they held on to vehicle until the applicant's attorney persisted in the quest to find same. Third, despite the default judgment being obtained on 27 September 2018 and the warrant for the return of the vehicle served personally on the first respondent on 09 November 2018, it was only on 5 March 2021 that the applicant's attorney established the location of the vehicle at Mr Naidoo's place. Fourth, the first respondent admits that the vehicle wasn't at his place when the sheriff attempted to attach same on 9 November 2018. Fifth, on his own version, the first respondent, admit that he did not keep the vehicle at the address agreed upon with the applicant but took it to Mr Naidoo and later the engine to another place. Sixth, it is also common cause that the engine was not at Mr Naidoo's place when the applicant's valuer attended there. These facts alone do not suggest the existence of a dispute of facts or even if such dispute exist elsewhere, it is not a real, genuine or *bona fide* dispute of fact to materially alter the outcome of this application.<sup>19</sup>

*Mr Naidoo's storage costs and lien*

[27] I have already ruled against the admissibility of the contents of the invoice by Mr Naidoo. But there is one more thing to be said regarding the applicant's argument that the storage costs suggest the existence of a lien over the vehicle. It is common cause that Mr Naidoo's claim is entirely about storage costs in the amount of R69 825.00. I rely on the authority of *Thor Shipping and Transport SA (Pty) Limited and Another v Sunset Beach Trading 208 CC t/a Auto Complete* (AR664/2016) [2017] ZAKZPHC 44 (3 November 2017) *per* Olsen and Masipa JJ that a lien-holder keeps possession for its own benefit and is not

---

<sup>19</sup> *Plascon-Evans Paints v Van Riebeeck Paints* at 634-635, read with *Room Hire v Jeppe Street Mansions* at 1163 - 5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D - H."

entitled to claim compensation in the form of storage charges.<sup>20</sup> Therefore, the alleged storage charges in the amount of R69 825.00 cannot be used to confirm the existence of a lien on the part of Mr Naidoo. This puts paid to the applicant's assertion that it also pursued the current application due to the storage costs exceeding the forced value of the vehicle in the amount R48 000.00.

*No engine, repairs and sale of the vehicle*

[28] Under this rubric the applicant says that due to the condition of the vehicle after the removal of the engine it would be severely prejudicial for the applicant to be given possession of the vehicle and for the applicant to deal with the vehicle in terms of the provisions of the National Credit Act.

[29] The default judgment declared that the applicant takes possession of the vehicle. This was additional to the order cancelling the agreement between the parties. This prompts me to mention that, in my view, any lien by Mr Naidoo would have been defeated by the terms of the default judgment. It is common cause that the return of the vehicle was not conditional upon the state of repair of the vehicle.

[30] Considering what is stated above, the relief sought by the applicant may be untenable whilst the terms of the default judgment remain extant. It may be that the applicant ought to have sought some variation of the default judgment. I explain this further below.

[31] The monetary order sought by the applicant will be additional to the order already granted for the return of the vehicle. I do not understand the applicant's case to include the abandonment of that particular order. This means that should the Court grant the current

---

<sup>20</sup> *Thor Shipping and Transport SA v Sunset Beach Trading* at par [28].

application the net effect of it will be a situation where the applicant is entitled to the vehicle and the balance outstanding thereon. The unfairness of this scenario is patently clear.

[32] The return of the possession of the vehicle to the respondents would require the variation or abandonment of the order for the return of the vehicle. It would have to be accompanied by an order for the repayment of the loan balance. This, in my view, paints a fairer picture than the one above. But the applicant will be obviously without the object of security for its claim. It is beyond any argument that the applicant did not seek anything near the variation of the default order. The applicant, in fact, is relying on the very default judgment and seeks the remaining order as a claim for damages. This makes perfect sense since the damages claim is the only part alive under the action proceedings from which this application evolved. The latter claim was merely postponed *sine die*.

[33] Therefore, without the abandonment or variation of the default judgment the applicant's only option, I can think of, is to enforce the relevant terms of the default judgment. Enforcement of the default judgment would enable the applicant to gain possession of the vehicle, inclusive of the engine. Anyone frustrating the execution of the default judgment runs the risk of liability under contempt of court proceedings. The terms of the default judgment are sufficient to compel anyone including the respondents to avail to the applicant, through the sheriff or the applicant's representative, the vehicle together with the engine. With respect, this Court cannot be expected to sit idle and silent whilst litigants add to the load of the Court by either not enforcing or respecting orders already granted. I cannot do more about this as the current application does not provide the Court with any room to express its displeasure against what – at face value - appears to be a blatant non-compliance with the terms of the default judgment by the respondents, particularly the first respondent.

The first respondent appears to be resolute in having matters go only his way despite the rule of law pointing him to the opposite direction. He appears to be holding on to the vehicle and is determined to do so until when he decides to sell it, despite being aware that this Court has ordered for its surrender to the applicant. But the terms of the default judgment are sufficient to address this only if fully enforced.

[34] By taking possession of the vehicle the applicant will be in a position to fully make out a case for damages upon the applicant's return to this Court. At the moment there is no evidence before the Court regarding the engine of the vehicle. This renders the current valuation of the vehicle inchoate. This Court - even if fully sympathetic to an applicant's plight - cannot serve the interests of justice by accepting a value of the vehicle which clearly excludes a vital component such as the engine. The facts of this matter do not permit of such an approach. I respectfully reiterate that it is not enough for the applicant to say that the respondents have failed to comply with the terms of the agreement by keeping the vehicle at the chosen address or wherever, when there is a court order and a warrant empowering the sheriff of this Court or the applicant's representative to take possession of the vehicle wherever it is found.

[35] For the reasons expressed under this part this application will fail and costs will follow this outcome. To avoid doubt I find the application to be without merit. With this being the find there is no need for me to determine other issues in the application.

### ***Order***

[36] In the premises, I make the following order:

- a) the application is dismissed with costs.



---

**Khashane La M. Manamela**  
**Acting Judge of the High Court**  
**23 February 2022**

**Appearances:**

|                     |   |                                                      |
|---------------------|---|------------------------------------------------------|
| For the Applicant   | : | Ms J van der Merwe                                   |
| Instructed by       | : | Ivan Pauw & Partners Attorneys<br>Lynnwood, Pretoria |
| For the Respondents | : | Mr JS Marks                                          |
| Instructed by       | : | June Stacey Marks Attorneys<br>Sandown, Johannesburg |