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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 2021/11894

REPORTABLE: Yes / No

OF INTEREST TO OTHER JUDGES: Yes / No

3/8/2022

In the matter between:

PETER CRAIG COX

Applicant

and

GERHARDUS PETRUS JACOBUS HORN

First Respondent

PETRUS HORN

Second Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The applicant seeks the return of a motor vehicle from the first respondent.

2. The respondents in opposing the relief have not filed answering affidavits but in a notice in terms of Uniform Rule 6(5)(d)(iii) have raised questions of law. It follows that the averments in the founding affidavit must be taken as established facts.¹

3. The first respondent (or his son the second respondent, it matters not which for present purposes), was using a Toyota Fortuna belonging to a director (Pretorius) of his then employer pursuant to a lease agreement concluded on 11 November 2016. The first respondent feared that when his employment was terminated (which duly occurred), Pretorius (who remained a director of his now erstwhile employer) would demand the return of the Toyota Fortuna, particularly as the first respondent intended instituting action of some kind against his erstwhile employer. But the first respondent wanted to continue to use the vehicle.

4. So he approached his then friend, the applicant. He asked the applicant whether the applicant could assist him by approaching Pretorius, purchasing the vehicle from Pretorius and then leasing the vehicle to him. In that way, the first respondent envisaged that he and/or his son, the second respondent, could continue to use the vehicle but would pay rentals to the applicant, his friend.

5. The applicant was succeeded in persuading Pretorius to sell the vehicle during or about April 2019 for a purchase consideration of R158 446.50. The applicant needed to finance this purchase of the vehicle and did so through WesBank by way of an instalment sale agreement pursuant to which the applicant would pay for the vehicle together with finance charges over a period of 72 months with monthly instalments of R3 268.82. Wesbank reserved ownership of the vehicle.

6. Having purchased the vehicle, the applicant was in a position to lease the vehicle to the first respondent.

¹ *Boxer Superstores Mthatha and Another Mbenya* 2007 (5) SA 450 (SCA) at 452 F-G; *ABSA Bank Limited v Bianca Cara Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) at para 9.

7. On 27 May 2019, the applicant and the first respondent concluded an oral agreement in terms of which the applicant leased the vehicle to the first respondent at a monthly rental of R3 300.00 per month. The monthly rentals were only marginally more than the instalments that the applicant has to pay to WesBank and therefore it cannot be said that there was any real profit in this transaction for the applicant. This accords with this being a transaction between friends pursuant to which the applicant was seeking to assist the first respondent. The relevance of this will appear later in this judgment as it relates to the respondents' reliance upon what they contend are contraventions of the National Credit Act, 2005.

8. The oral lease agreement also provided for an option given to the first respondent to purchase the vehicle should he pay enough rentals to the applicant to settle the applicant's outstanding indebtedness to WesBank under the instalment sale agreement. This too demonstrates that the transaction is not an arm's length commercial transaction but rather a transaction between friends to assist the first respondent.

9. The oral agreement also provided that it was for the first respondent to comprehensively insure the vehicle.

10. Throughout, the first respondent remained (and remains) in possession of the vehicle, whether himself or through his son, the second respondent.

11. The first respondent paid some rentals but fell into arrears. After various indulgences afforded by the applicant to the first respondent, their friendship frayed to the extent that eventually the applicant's attorney on 23 February 2021 addressed a formal letter to the first respondent's attorneys in which, after setting out the terms of the oral lease agreement and the first respondent's multiple breaches of the lease agreement in the form of non-payment of monthly rentals and the failure to insure the vehicle, it was recorded that the first respondent had repudiated the agreement and that consequent thereupon the applicant cancelled the lease. This letter constituted both the notice of cancellation and the demand requiring the first respondent to return the vehicle now that the lease had been terminated.

12. What followed was exchanges between the parties' legal representatives and which culminated in the launch of these proceedings on 11 March 2021 pursuant to which the applicant sought the return of the vehicle.

13. As appears from the undisputed facts, the first respondent did not pay (and has not paid) the rentals that were payable at under the lease agreement, he was considerably in arrears when the applicant cancelled the agreement in February 2021, and that some eighteen months later he (or his son) still remains in possession of, and presumably continues to use the vehicle, without payment of any compensation to the applicant.

14. The respondent's rule 6(5)(d)(iii) notice is not a model of clarity and therefore the questions of law raised in opposition are not clearly delineated.²

15. With considerable leeway being afforded by the court in favour of the respondent given the difficulties in construing the notice, the respondents' counsel during the hearing effectively raised three primary legal issues.

16. The primary legal challenge is that the applicant has not made out a cause of action for the repossession of the vehicle, for the following reasons:

16.1. WesBank is the owner and that this disentitles the applicant from seeking repossession of the vehicle, particularly in the absence of any clause in the instalment sale agreement between the applicant and WesBank that allowed the applicant to have let the vehicle to the first respondent;

16.2. the oral lease does not contain a term that allowed the applicant to repossess the vehicle;

² Respondent's counsel that argued the matter was the author of neither the notice nor the heads of argument.

16.3. the oral lease does not contain a *lex commissoria* that entitled the applicant to repossess the vehicle without first furnishing notice to remedy to the first respondent.

17. The second legal challenge is that the lease agreement is regulated by the National Credit Act and so it is necessary for the applicant to first comply with the provisions of the National Credit Act, including furnishing the requisite notices in terms of and otherwise complying with sections 129 and 130 of that Act.

18. The third legal challenge is that the principles of the law relating to pledges needs to applied to the present situation and so require of the applicant to sell the vehicle at a fair price and then retain only such of the proceed as was due to him (presumably being the difference between what he had paid and still had to pay Wesbank and the rentals he had received from the first respondent), and to pay the balance of the sale proceeds to the first respondent. This argument continues that the applicant's repossession and retention of the vehicle without so selling the vehicle and accounting for the sale proceeds would effectively amount to self-help and is analogous to an invalid *pactum commissorium* as applies in the case of a pledgee retaining a pledged item.

19. Dealing with the first legal challenge, the legal principle is settled that it is not open to a lessee to contest the title of a lessor.

20. In *Boomporet Investments (Pty) Limited and Another v Paardekraal Concession Store (Pty) Limited* 1990 (1) SA 347 (A), Van Heerden JA writing for the majority at 351H-I said:

"It is, of course, true that in general a lessee is bound by the terms of the lease even if the lessor has no title to the property. It is also clear that when sued for ejectment at the termination of the lease it does not avail the lessee to show that the lessor has no right to occupy the property."

21. In that matter the question arose whether the general principle also applied where the lessee not only disputed the lessor's title but claimed to be entitled to

occupy the property by virtue of a right acquired independent of the lease. After considering the position, the majority found that as the lessee had not established such a right, it did not have to resolve that issue.

22. In the present instance, the respondents do not contend for any right to possess the vehicle independent of the lease agreement between the applicant and the first respondent. For example, the first respondent does not contend that he is entitled to ownership of the vehicle through someone other than the applicant, and so that has a superior right of possession.

23. In a minority judgment, Nestadt JA in *Boomporet* did not depart from the majority's view on the legal principle that a lessee cannot contest the title of a lessor but acknowledged that if a lessee could show a stronger right to the property than the lessor, such right would enjoy protection.³

24. Any doubt about this principle that a lessee cannot contest the title of a lessor is removed by the Constitutional Court decision of *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Limited and Another* 2006 (1) SA 621 (CC). In that matter, the Constitutional Court described the right of a lessor to take back the property upon termination of the lease as a term implied by the common law into a lease, being a natural incident of all contracts of lease.⁴ The Constitutional Court declined to develop the law to depart from this principle, which it described as being at the heart of the common law of lease.⁵

25. Applying this trite principle, the respondents' ground of opposition that there is no term in the lease entitling the applicant to repossess the vehicle dissipates. At the very least, there is an implied term that the applicant as lessor is entitled to possession of the vehicle once the lease ends. This founds the applicant's right to possess the vehicle.

³ At 358 H-I referring to *Pretoria Stadsraad v Ebrahim* 1979 (4) SA 193 (T) at 196B, approved on appeal in *Ebrahim v Pretoria Stadsraad* 1980 (4) SA 10 (T) at 13H.

⁴ At para 46.

⁵ At paras 46 and 68.

26. The opposition that the applicant does not have title to the vehicle in that he is not the owner also dissipates as it is not open to the first respondent to contest the applicant's entitlement to the vehicle. As reaffirmed in *Mighty Solutions*,⁶ a valid lease is not dependent on the title of the lessor, and so the lessor does not, unless otherwise expressly agreed, warrant any entitlement to let. Just as in *Mighty Solutions* where the sub-tenant could not dispute the title of the sub-lessor to let the premises, in the present matter the first respondent as the lessee cannot contest the title of the applicant as the lessor to let the vehicle. It therefore is not a defence that the applicant is not the owner of the vehicle or that there is no term in the instalment sale agreement between the Wesbank as the owner of the vehicle and the applicant that permits the applicant to let and then take possession of the vehicle.

27. The applicant disavows relying on any ownership to vindicate the vehicle. Instead, the applicant's counsel describes the cause of action being a possessory action in the sense of the applicant asserting a superior title to possess the vehicle than that of the first respondent. That this is a cognisable cause of action in law, apart from any vindictory relief, is firmly established, as appears from *Pretoria Stadsraad*.

28. The applicant having chosen to seek relief based upon the possessory action must establish that he has a superior right to possess to that of the first respondent.⁷ This can be contrasted to the *mandament van spolie* where a court does not look into the rights of the parties to possess.

29. The first respondent's only right to possess is that conferred upon him by the applicant pursuant to the oral lease. Should the applicant prove that the lease was validly terminated, that would be the end of any competing right of possession that the first respondent had.

30. The applicant has in his founding affidavit described the breaches of the oral lease agreement by the first respondent and how these constitute a deliberate and

⁶ Para 28.

⁷ *Boompriet* at 358H-I.

unequivocal intention by the first respondent to no longer be bound by the oral agreement, thereby constituting a repudiation by the first respondent of the lease. In the absence of the first respondent delivering an answering affidavit to gainsay these averments and where it appears common cause from the correspondence attached to the founding affidavit that the first respondent had persistently breached the lease agreement in failing to pay rentals and insure the vehicle, I am unable to find that the first respondent has raised a *bona fide* factual dispute that his conduct did not amount to a repudiation. The first respondent was specifically afforded an indulgence during the course of the litigation to deliver an answering affidavit but instead chose to deliver only a Rule 6(5)(d) notice.

31. The applicant having cancelled the lease agreement consequent upon the first respondent's repudiation, the first respondent is unable to insist upon first being furnished notice to remedy before the applicant can cancel.⁸ The absence of a *lex commissoria* in the oral lease agreement therefore is of no consequence.

32. In relation to the second challenge, the first respondent's reliance upon the applicant's non-compliance with the National Credit Act too must fail. It is clear from the circumstances giving rise to the conclusion of the oral lease agreement and the terms of the oral lease itself that the agreement is not a credit transaction as regulated by the Act, even assuming in favour of the first respondent that the lease was a 'credit agreement' falling within one of the categories described in section 8 of the Act (which is by no means clear). The parties were not dealing with each other at arm's length⁹ and were not independent of each other and consequently not necessarily striving to obtain the utmost possible advantage out of the transaction.¹⁰ Should the first respondent have abided the lease agreement, the applicant would have gained no material advantage from this transaction as he was obliged to

⁸ *South African Forestry Co Limited v York Timbers Limited* 2005 (3) SA 323 (SCA) at para 37, at 342D.

⁹ Section 4(1).

¹⁰ Section 4(2)(b)(iv). Compare *Friend v Sendal* 2015 (1) SA 395 (GP) para 33 to 37. See also the recent full court decision of this Division in *Heydenrych v Forsyth* [2022] ZAGPJHC 391 (31 May 2022).

transfer ownership of the vehicle to the first respondent. To the contrary, the applicant exposed himself considerably, for no reward, in incurring credit indebtedness towards WesBank in acquiring the vehicle at the behest of his then friend, the first respondent.

33. In relation to the remaining legal ground of opposition, the respondents have not done nearly enough to make out a case for the application of the legal principles from the law of pledge to the present facts. What is required of a party seeking to develop the law has been set out in several cases, including that of *Mighty Solutions* in paragraph 39:

“Before a court proceeds to develop the common law, it must: (a) determine exactly what the common-law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law can be amended; and (e) take into account the wider consequences of the proposed change on that area of law.”

34. Three paragraphs of less than hundred words in a rule 6(5)(d)(iii) notice referring to a *pactum commissorium* and self-help, and which are elevated during argument to a request for the principles of the law of pledge to be applied to the present situation cannot suffice.

35. In any event, this argument is based upon the transaction being an instalment sale agreement, the respondents contending that the seller of goods under an instalment sale agreement is not permitted to repossess the goods without selling those goods and then transferring any profit arising from that sale to the purchaser.¹¹ But, as appears from the undisputed terms of the oral agreement, the transaction is a lease and not an instalment sale agreement.

¹¹ As is effectively provided for in section 131 read with sections 127(2) to (9) of the National Credit Act.

36. But even if the lease agreement coupled with an option by the first respondent as lessee to take ownership of the vehicle at the end of the lease if he has paid sufficient rentals to settle the applicant's exposure to the financier Wesbank, is to be construed, as the respondents contend, as a disguised instalment sale agreement, it would still not assist the respondents. Apart from not having made out even a most rudimentary case for the development of the law, sufficient consumer legislation is in place to protect a purchaser in an instalment agreement.¹² The National Credit Act in specifically excluding certain agreements from its ambit including those which are not concluded at arm's length, in circumstances such as these, strongly militates against any development of the common law to give protection to those falling beyond the protection afforded by the Act. If the legislature has seen fit to exclude protection in particular instances (such as in transactions that are not at arm's length, such as between friends), a court must be circumspect in extending the law to afford such protection.

37. The respondents have not made out a defence to the relief sought by the applicant and the applicant is entitled to possession of the vehicle.

38. An order is made that:

38.1. The first and second respondents, as the case may be, are directed and ordered to return to the applicant the Toyota Fortuna 3.0D-4D R/B A/T 2012 model, chassis number [...], engine number [...] with registration number [...] ("the motor vehicle").

38.2. In the event that the first and/or second respondent, as the case may be, fail to return the vehicle to the applicant within ten days of this order, the sheriff and/or deputy sheriff, as the case may be, are authorised and directed to attach the motor vehicle wherever same may be found and to place the applicant in possession of the vehicle.

¹² Again, see section 131 read with sections 127(2) to (9) of the National Credit Act.

38.3. The first and second respondents are ordered to pay the costs, jointly and severally.

Gilbert AJ

Date of hearing: 22 July 2022

Date of judgment: 3 August 2022

Counsel for the applicant: Advocate V Mackenzie
Instructed by: Hilary Shaw Attorneys

Counsel for the first and
second Respondents: Advocate R van Dyk
Instructed by: Van der Walt Attorneys