

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 1116/2018

Heard on: 08/02/2019

Delivered on: 01/03/2019

In the matter between:

JACOBUS WILLEM JONKER

Applicant

And

GERDA THIEBAUT

Respondent

JUDGMENT

MAMOSEBO J

- [1] In this *rei vindicatio* matter the applicant seeks from the respondent the return of a Toyota Quantum Minibus with Vin Number JTFRX13PX08028754 and a Volkswagen Microbus with Vin Number AAVZZZ25ZVU004000; that upon failure by the respondent to do so within seven days the sheriff of this court be authorised to attach the said vehicles and deliver them to the applicant; and costs of the application.

- [2] The following were common cause. The parties entered into a verbal agreement in terms of which the applicant would purchase the said vehicles in his name. They were in a romantic relationship for three and a half years which terminated during August 2015. The vehicles were and still are registered in the applicant's name. The vehicles were purchased on credit for their joint business venture to transport miners in Kathu, Northern Cape Province. The vehicles are still in the possession of the respondent.
- [3] The respondent denies in her answering affidavit that the applicant is the *de facto* owner of the vehicles. She contends that she paid a deposit of R60 000.00 in cash on 14 November 2014 towards the purchase of the Quantum Minibus and a further R441 722.10 in instalments on the vehicles, the licence disc fees, permit fees as well as the insurance and maintenance of the vehicles bringing her total contribution to R501 772.10.
- [4] Ms Labuschagne, counsel for the respondent, submitted that the applicant should have instituted action proceedings as there is a dispute of fact not soluble on papers. The respondent maintained that they had an agreement that the vehicles will be transferred in her name as soon as the outstanding bank balance was settled.
- [5] The issues for determination are whether or not the applicant has established that he is the owner of the two vehicles and entitled to exercise the rights of an owner under the *rei vindicatio*; to demand the return of the vehicles to his possession; and, whether or not

there was an agreement to transfer the vehicles under the name of the respondent upon settlement of the purchase price.

- [6] The parties resided in Bloemfontein, which is in the Free State Province, during the existence of their romantic relationship. The applicant was and still is permanently employed in Bloemfontein. They established a joint business venture in Kathu to transport miners to and from work for remuneration. According to the applicant the arrangement was that they would have equal shares in the profits generated from the business and that the vehicles would form part of the business venture. He denies that there was an agreement that he would transfer ownership of the vehicles to the respondent. The respondent has been in *de facto* possession of the said vehicles since 2013.
- [7] On the certificate of registration the applicant's name is recorded as the owner and title holder of both vehicles. The applicant maintains that they had agreed that the financial responsibility which included depositing money generated from the business into the applicant's bank account on a monthly basis to enable him to pay for the credit agreements of the vehicles, the licence permit and insurance fees, shall lie with the respondent. The respondent either failed to make those monthly payments timeously or make sufficient amounts available which resulted in him incurring bank penalties in his account.
- [8] The applicant attached a list of expenses versus deposit payments by the respondent into his bank account from December 2013 to May 2018. A close scrutiny shows a shortfall resulting in the

applicant carrying those losses as the debits were linked to his bank account. He also attached the bank statements confirming the shortfall in other instances. The downside regarding the respondent's failure to take the Quantum Minibus for service resulted in the warranty, which would have been valid up to 190 000 kilometres, falling off before its expiry date.

- [9] The respondent made payments or was supposed to make payment from the profits of the business and not from her personally. The applicant maintains that the vehicles never stopped or failed operating but their business clientele changed from miners to school children but the business remained operational. He could not have been validly excluded from the business because the client basis changed. The respondent merely represented their business when she entered into an agreement to transport school children by utilising the very vehicles.
- [10] The assets utilised to purchase the Quantum Minibus were the trade in of the Toyota RunX and the Opel Corsa Utility 1.8i. As observed on Annexure "GT1" the total purchase amount was shown as R309 353.33 with no cash deposit but a trade in allowance of R110 000.00 minus an amount still owing of R37 000.00, leaving the net trade-in of R73 000.00 and a total purchase balance of R236 353.33.
- [11] In as far as the Volkswagen Microbus is concerned the applicant avers that the business grew and necessitated the purchasing of a second vehicle which they also bought and registered in his name.

- [12] The respondent's contention on the other hand is that during their love relationship she and the applicant agreed to relocate to Kathu to start the said transport business. The applicant was meant to resign from his permanent employment in order to use his severance package to purchase the minibus for the transport business. Since she was unemployed when they applied for credit for the Quantum Minibus they agreed that the applicant would make the application in his name. Not knowing its total costs she, nevertheless, made a down payment of R60 000.00. The applicant only raised an amount of R13 000.00, she says.
- [13] The respondent took possession of the Quantum Minibus in November 2013 when she relocated to Kathu. She found herself 'unemployed and unsteady without an income' and decided to join Ms Retha Van Rensburg who was operating a scholar transport business. This resulted in purchasing part of Ms Van Rensburg's business for R137 000.00 which included a transfer of a Volkswagen Microbus (not the same Minibus forming the subject matter in this case). Thereafter she and the applicant bought another Volkswagen Microbus which was also registered in his name on his insistence. She and the applicant agreed that the vehicles will be transferred into her name once the purchase price was paid in full. As stated earlier the respondent vehemently denied that the applicant is the owner of the vehicles and could claim them under *rei vindicatio*.
- [14] In order to succeed with this real right remedy an applicant need to allege and prove:

- (a) That he or she is the owner of the thing;
- (b) That the thing was in the possession of the respondent when proceedings were instituted; and
- (c) That the thing which is vindicated is still in existence and clearly identifiable¹.

It is common cause that the two vehicles do exist and that they are clearly identifiable. What remains in dispute is whether or not the applicant is the owner of the vehicles.

[15] Section 1 of the National Road Traffic Act² states that ‘owner’ in relation to a vehicle, means:

- (a) the person who has the right to the use and enjoyment of a vehicle in terms of the common law or a contractual agreement with the title holder of such vehicle;
- (b) any person referred to in paragraph (a), for any period during which such person has failed to return that vehicle to the holder in accordance with the contractual agreement referred to in paragraph (a); or
- (c) a motor dealer who is in possession of a vehicle for the purpose of sale, and who is licensed as such or obliged to be licensed in accordance with the regulations made under section 4, and “owned” or any like word has a corresponding meaning.

[16] “Title holder”, in relation to a vehicle means that:

¹ Introduction to the Law of Property, A J van der Walt et al, Juta, 7th Ed, at 164; Silberberg and Schoeman’s The Law of Property, 5th Ed, LexisNexis at 243

² Sec 1(d) of Act 64 of 2008

- (a) The person who has to give permission for the alienation of the vehicle in terms of a contractual agreement with the owner of such vehicle; or
- (b) The person who has the right to alienate the vehicle in terms of the common law, and who is registered as such in accordance with the regulations under section 4.

[17] This pronouncement was made by Jansen JA in *Chetty v Naidoo*³:

“It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the *onus* being on the defendant to allege and establish any right to continue to hold against the owner.”

[18] The respondent maintains that there was an agreement with the applicant to transfer the properties into her name upon full payment of the purchase price. The remarks by Milne JA in *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd*⁴ are insightful:

“In *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and Others* 1976 (4) SA 464 (A) at 489H it was held that

‘...ownership cannot pass by virtue of the contract of sale alone: there must, in addition, be at least a proper delivery to the purchaser of the contract goods...’

And at 490A that

‘....under a cash sale ownership is normally taken to have been intended to pass once there has been, in addition to delivery, due payment of the purchase price.....’

³ 1974 (3) SA 13 (A) at 20B-D

⁴ 1993 (3) SA 930 (A) at 933C – H

In *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO*⁵ it was held that:

“Volgens ons reg gaan die eiendomsreg op ‘n roerende saak op ‘n ander oor waar die eienaar daarvan dit aan ‘n ander lewer, met die bedoeling om eiendomsreg aan hom oor te dra, en die ander die saak neem met die bedoeling om eiendomsreg daarvan te verkry. Die geldigheid van die eiendomsoordrag staan los van die geldigheid van enige onderliggende kontrak.’

It is clear, however, from the passage at 302G – H and the reliance upon the judgment of Centlivres JA in *Commissioner of Customs and Excise v Randles, Brothers, & Hudson Ltd* 1941 AD 369 at 411 that **the legal transaction preceding the delivery may be evidence of an intention to pass and acquire ownership. Equally, the absence of such an agreement may, depending upon the circumstances, be evidence of the absence of any such intention.** What is required for the transfer of ownership of movables is further analysed in *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en ‘n Ander* 1980 (3) SA 917 (A) at 922E – F where Jansen JA said:

‘Blote ooreenkoms kan dus nie eiendomsreg oordra nie – *traditio* (oorhandiging) moet ook geskied; en omgekeerd, blote oorhandiging is ook nie voldoende nie – dit moet gepaard gaan met ‘n ooreenkoms tussen oorhandiger en ontvanger dat daarmee eiendomsreg gegee en geneem word.’” (Own emphasis added).

[19] The following aspects were, among others, considered in establishing whether the applicant is the owner of the vehicles in issue:

19.1 The applicant is the registered owner and titleholder of the two vehicles. It is incomprehensible why he would assume the entire risk of the credit purchases on two occasions if the vehicles belonged to the respondent;

⁵ 1978 (4) SA 281 (A) at 301H – 302A

- 19.2 It is not discernible in the papers that the applicant intended to transfer the motor vehicles to the respondent;
- 19.3 The Road Traffic Act defines a person in the position of the applicant as the owner of these vehicles.
- 19.4 The respondent intimated in her answering affidavit that she was unemployed at the time of purchase of the first vehicle and depended on the applicant to keep up the premiums for the vehicles. It is not in dispute that it was arranged that instalments would be debited against the applicant's bank account; the money paid into the applicant's account by the respondent was derived from the profits of the business.
- 19.5 On her own version the respondent was unemployed and unstable financially before she joined Ms Van Rensburg. This implies that whatever income that accrued to her was generated by the Quantum Minibus. This must have enabled her to raise the R137 000.00 to buy into Ms Van Rensburg's business. Mindful of the common cause fact that the decision to allow the applicant to apply for credit and register the vehicles in his name was informed by the respondent's unemployed status.
- 19.6 The respondent did not deny the averment by the applicant that she used the money generated from the profits to make deposits into his account.
- 19.7 Because the purchase of the Quantum Minibus in the applicant's name was based on the lack of income of the respondent, I enquired why the second vehicle was also bought in his name because at that stage the respondent was enjoying an income and was no longer dependant on the applicant. I was not persuaded by the response.

19.8 In her answering affidavit the respondent stated at para 5.11 that she and the applicant bought another Volkswagen Microbus jointly whereas at para 11.4 she claimed to have bought the Volkswagen Microbus solely. When I pointed out the discrepancy counsel ventured to submit that the vehicle was purchased by both the applicant and the respondent. Counsel is debarred from testifying from the bar to resolve her client's contradiction.

[20] I am not persuaded by the submission made on behalf of the respondent that the agreement was for the applicant to transfer ownership upon full payment. I am satisfied that based on the certificates of registration of the motor vehicles attached as well as the other supporting documentation that the applicant is the registered owner thereof.

[21] What remains is to make a finding on the submission by Ms Labuschagne regarding the existence of a dispute of fact and whether this Court should either dismiss this application or refer it for oral evidence. The principle in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*⁶ was stated as follows:

"...where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that the facts, though not formally admitted, cannot be denied, it must be regarded as admitted."

⁶ 1957 (4) SA 234 (C) at 235E - G

In *Plascon-Evans Paints v Van Riebeeck Paints*⁷ Corbett JA's insightful remarks need repetition in clarifying the general rule in the *Stellenbosch Winery* case stating:

"It seems to me, however, this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It 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 the 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). (Own emphasis added)

[22] Regard being had to the afore-mentioned principles, and the factual analysis I am satisfied that I could grant the relief sought by the applicant on the papers. The submission made on behalf of the respondent that this application cannot be dealt with in motion proceedings and be finalised must therefore fail. The denials raised by the respondent do not raise a real, genuine or *bona fide* dispute of fact and I accordingly reject them. The applicant is therefore entitled to final relief sought.

[23] On the issue of costs. There is no reason why costs should not follow the result. In the result, the following order is made:

⁷ 1984 (3) SA 623 (A) at 634

Order

1. The respondent, Ms Gerda Thiebaut, is ordered to forthwith return the Toyota Quantum Minibus with VIN number JTFRX13PX08028754 and the VOLKSWAGEN MICROBUS with VIN number AAVZZZ25VZU004000 to the applicant, Mr Jacobus Willem Jonker.
2. Should the respondent fail to comply with the order in paragraph (1) above within seven (7) days of this order, the sheriff of this Court is authorised to attach these vehicles and deliver them to the applicant.
3. The respondent is to pay the applicant's costs of suit.

MAMOSEBO J

NORTHERN CAPE DIVISION

For the applicant

Instructed by:

Adv JM Rust

Huggey Hendricks Inc

c/o Venters Rust Inc

For the respondent:

Instructed by:

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