IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 2980/2017

In the matter between:

MOTUS CORPORATION (PTY) LTD Applicant

t/a BLOEMFONTEIN MULTIFRANCHISE

and

JACOBUS LAMBERT FICK LUCAS Respondent

HEARD ON: 10 AUGUST 2017

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 30 AUGUST 2017

---

[1] The applicant is seeking a relief for the attachment and return of the motor vehicle sold to the respondent. The interim order was granted by my sister Reinders, J on the 14th June 2017. The respondent is resisting the confirmation of that order. The motor vehicle in question is the **2015 Renault Captur 88kw turbo EDC Dynamique 5 door with Vehicle Identification Number VF 12R401E52841174 and Engine Number H5FD403D098309.** The current registration letters and numbers is **[C...]** issued to the respondent.

[2] On the 30th March 2017, the parties concluded a cash sale agreement for the aforesaid motor vehicle. It appears that the entire negotiations took place at the premises of the respondent at 89 Oliver Tambo Street, Bloemfontein. The salient terms of agreement were that the purchase price was the sum of R231 419.78 (excluding VAT) including an extended service plan agreement of R5 631.39. Payment was to be made into a designated account or address. In the event of any breach the innocent party will have the right to recover all legal costs and disbursements on an attorney and client scale. On payment of the sum of R231 419.28, the delivery of the motor vehicle would be affected.

[3] The respondent arranged with his bankers namely First National Bank through their Kimberly branch to effect an Electronic Funds Transfer into the nominated bank account of the applicant. On receipt of the document purporting to be a proof of payment, the motor vehicle together with the registration documents were handed to the respondent. The funds were never received by the

applicant. It is apparent that the transaction was reversed either by the two (2) banks or the respondent. Negotiations between the parties for the payment of the purchase price or return of the motor vehicle reached a dead end.

[4] In his oral argument, Mr Groenewald submitted that the claim was not a *rei vindicatio* but contractual in nature. In this case, the applicant had cancelled the agreement and was entitled to the return of the property. It was his contention that the applicant had the *locus standi* because as at the 1st January 2017, the business of Kia Motors South Africa was taken over “lock stock and barrel” by the applicant. In this matter the parties had concluded a cash sale agreement whereby possession will be given to the respondent on receipt of payment. He argued, and correctly so, that the handing over of the registration documents did not transfer ownership to the respondent. The agreement was for a specific amount to be paid into a specific account.

[5] In his response, Mr Pienaar submitted that there was a factual dispute and that the court should be cautious in dealing with this matter in this manner in the face of conflict of facts. He argued that proper documents were handed over on fulfilment of the obligations by the respondent. He referred to the agreement that the applicant had taken over the business of Kia Motors South Africa. The definition of stock referred to in that agreement did not include the motor vehicle which is the subject of the dispute between the parties. There was also no affidavit confirming that it was part of the stock. It was his further submission that the rule nisi should be discharged.

[6] The transaction between the parties was essentially a cash sale agreement and nothing more. In such matters the general rule is that ownership does not pass until the purchase price is paid in full despite delivery being given to the purchaser. This principle was held not to be inviolable but depended on the totality of circumstances, inference or otherwise showing the intention of the parties. See **Eriksen Motors Ltd v Protea Motors and Another 1973 (3) SA 688 (A).**

[7] The respondent approached the representative of the applicant on the 30th March 2017. The offer to purchase and the tax invoice were generated by the applicant on the same day and reflect the amount to be paid as the full purchase price. The purchase price is interchangeably referred to as the net selling price or total amount due. The respondent also instructed his bankers to provide the applicant with a proof of payment reflecting the same amount on the very same day. This modern method of payment can only be complete when the funds are received in the account of the recipient. If the funds are not received, logic dictates that payment has not been made.

[8] The necessary documents to facilitate the registration of the motor vehicle were handed to the respondent when the proof of payment was received despite the funds not being in the designated bank account. He proceeded to register the motor vehicle in his name. On this basis he maintains that since 30th March 2017, he had been the lawful owner of the motor vehicle. This view is incorrect. In **Absa Bank v Knysna Auto Sonics CC, Case number 266/2015 SCA (unreported) at par 11 the court said the following:-**

> **"The effect of this argument is this: once the vehicle were registered in the name of the respondent became the owner and title holder by virtue of the NATIS registration documents. As pointed out above this argument incorrectly found favour with the court a quo, which erroneously held that unless the registration was impugned or set aside, ownership vests in the respondent"**.

[9] The respondent alleges that the motor vehicle is the property of Kia Motors South Africa not the applicant. I was referred to the Certificate of Registration appearing on page 149 of the paginated papers. The explanation proffered is that the business of Kia Motors South Africa was sold to the applicant "lock stock and barrel" with effect from the 1st January 2017. In addition, as correctly pointed out by Mr Groenewald, at no stage was the respondent informed by any person that he was transacting in any manner with Kia Motors South Africa. The extrinsic evidence points to the transaction as being concluded with the applicant. The offer to purchase and tax invoice had the name of the applicant in the legible manner emblazoned on the letterhead. The bank account into which the cash price had to be paid was that of the applicant. At all material times the parties were transacting with each other. This argument is misplaced and I do not find any merit in it.

[10] The respondent acknowledged that exactly the same amount as the one paid to the applicant was credited in his bank account on or around the 1st April 2017. In paragraphs 82 and 83 of the opposing affidavit he stated the following:-

> **"It need to be mentioned that, on or about 1 April 2017, a transfer of a sum of R231 419.78 has been made into my current account**

> **from First National Bank, as is evident from a copy of my bank statement for that period annexed hereto as Annexure "I"; and**
> **"Since this transfer has been made into my account by First National Bank, I have requested the official of Standard Bank to enquire from First National Bank why such payment was made into my account".**

[11] The outcome of his enquiry as to the origin of the funds remains unexplained despite the lapse of more than one hundred and twenty (120) days. On receipt of the aforesaid amount, the stunned respondent administered the funds as his own. The **R20 000.00** was used to defray his personal expenses and **R200 000.00** deposited in his money market account. The explanation by his counsel is that he was still waiting for the explanation of the origin of the funds from the bank. This conduct militates against common sense and the dictates of a reasonable man. The explanation is so preposterous that it must be rejected. I do not find any merit in it.

[12] I am satisfied that the applicant has stablished a clear right. In addition that the applicant will suffer irreparable harm in the event the respondent keep the motor vehicle without the corresponding payment. Clearly the balance of convenience favours the applicant in this regard and is entitled to the order sought.

[13] The costs shall follow the result as per the general rule governing the issue of costs. Despite the rule, judicial discretion must be applied in such a manner to achieve fairness to all parties. In this matter, paragraph 7.6 of the **"Standard Terms and Conditions of the Seller"** provided that in the event of a breach the **"innocent party shall have the right to recover all legal costs and**

disbursement on an attorney an client scale". I do not have any reason to award costs against a losing party on a different scale than the one both parties agreed upon. Given the conduct of the respondent, the applicant should not be out of pocket because of the actions of the respondent.

[14] I make the following order.

1. The application is granted.
2. The Respondent is ordered to forthwith return to Applicant a 2015 Renault Captur 88kw turbo EDC Dynamique 5door with engine number H5FD403D098309 and VIN number VF12R401E52841174.
3. Respondent is ordered to forthwith return/or supply Applicant the original eNATIS documentation, together with duly signed Notification of Change of Ownership Forms (NCO(5)) of the Renault.
4. That, in the event of Respondent failing and/or refusing to return/or supply to Applicant forthwith the aforesaid documents, the Sheriff of Warrenton be and is hereby authorized and requested to enter into and upon Respondent's premises, or wherever same may be found, to attach the documents referred to in 3 above, and to return the vehicle and documents to Applicant as a matter of urgency.
5. That, in the event of Respondent failing and/or refusing to forthwith sign and return to Applicant the Notification of Change of Ownership Forms (NCO(5)) the Sheriff of Warrenton be and is hereby authorized and requested to sign such documents.

6. The respondent is ordered to pay the costs of the application on an attorney and client scale together with all disbursements incidental thereby.

____

MATHEBULA, J

On behalf of applicant:	Adv. W Groenewald
Instructed by:	De Lange, Du Plessis & Leach Att.
On behalf of respondents:	Adv. C D Pienaar
Instructed by:	Kramer Weihmann & Joubert Inc.

/roosthuizen