FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1762/2012

In the matter between:-

QWA QWA UNITED TAXI ASSOCIATION Applicant

and

TM MOKHASI Respondent

HEARD ON: 1 NOVEMBER 2012

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 15 NOVEMBER 2012

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[1] The appellant, a voluntary association, seeks declaratory relief concerning the ownership of a 2006 model Kia Cerato motor vehicle ("the vehicle"). The application is essentially vindicatory in nature and the respondent's first and foremost challenge thereto is that it is fatally flawed and defective because the material facts, relied upon by the applicant, are disputed. That being the case, respondent has argued that motion proceedings are not competent. The respondent is the erstwhile chairperson of the applicant's Executive Committee and a serving member of the applicant.

[2] It is convenient at the outset of this judgment to deal with the nature of the applicant taxi association. Like any trade union and employees' organisation, the applicant is a voluntary association that is created by agreement between its various members to perform functions in the interests and for the benefit of its members. From a reading of its constitution, a copy of which has been annexed to the applicant's founding affidavit, it is clear that the applicant possesses the characteristics of a corporate body, *viz* it exists quite apart from the individuals who comprise it, though these may change from day to day, i.e. it has perpetual succession and it is capable of owning property apart from its members. It therefore has all the characteristics of a *universitas*, its capacity to acquire rights and/or incur obligations being distinct from that of its members. (**MORRISON v STANDARD BUILDING SOCIETY** 1932 AD 229; **WEBB & CO LTD v NORTHERN RIFLES** 1908 TS 462; **VAN RENSBURG AND OTHERS v AFRIKAANSE TAAL- EN KULTUURVERENIGING** 1941 CPD 179)

It is a lawful association which has acquired a juristic personality simply by the voluntary act of its individual members in vesting property in the association, which property is owned by it and is separate and distinct from property owned by its members.

[3] The applicant's annual financial statements for the year ending 28 February 2009 reflects that the applicant was/is a financially stable institution and that its cash reserves are in credit and intact. Applicant alleges that it elected to finance the purchase of the vehicle in order to maintain its liquidity. The nature of the relationship between the applicant and its members is one of consensus on the essential characteristics and objectives of the association and it is the constitution of the applicant together with all rules and/or regulations pertaining to that association (if they exist), which collectively constitute the agreement entered into by its members. The constitution not only determines the nature and scope of the association's existence and activities, but also prescribes and demarcates the powers of the association and its office bearers. (**TURNER v JOCKEY CLUB OF SOUTH AFRICA** 1974 (3) SA 633 (A) at 645B – C and 645H – 646A; **THERON EN ANDERE v RING VAN WELLINGTON VAN DIE NG SENDINGKERK IN SUID-AFRIKA EN ANDERE** 1976 (2) SA 1 (A) at 25B; Joubert: **The Law of South Africa**, Vol 1, 303 para 455)

Because its powers are contractual and not statutory (its powers are limited by its constitution) if that constitution does not endow the association with the power to sue in a Court of law, it simply would have no *locus standi* to issue court proceedings.

[4] The undisputed factual background to this application it that the applicant resolved to purchase a motor vehicle, which turned out to be the Kia Cerato vehicle referred to in its notice of motion. Because the commercial banks were not inclined to extend vehicle finance to the applicant (it being a voluntary association) it was resolved that the respondent would in his personal capacity apply to Absa Bank to finance the vehicle. The finance was granted and the vehicle purchased for the sum of R135 000,00, the deposit having been paid by the applicant, who thereafter made payment of the licensing and registration fees, monthly instalments and all insurance and maintenance costs. On settlement of the loan on 6 July 2010 with Absa Bank, the vehicle was registered in the respondent's name.

[5] On 26 January 2011, the respondent was suspended by the applicant's governing body, the Thabo Mofutsanyana District Taxi Council, on the grounds of allegations of misconduct

relating to the failure to give a proper account of funds used (misuse of funds). He was requested to furnish the applicant with the spare keys to the vehicle, its registration certificate and to provide the applicant with duly completed and signed documents necessary for the passing of ownership of the vehicle to the applicant and for registration thereof into the applicant's name. He failed to do so and on 4 May 2012 the applicant approached this court on notice of motion for corresponding relief and for an order declaring applicant the lawful owner of the vehicle. The applicant is in possession of the vehicle.

[6] The applicant relies on para 4.5(h) of its constitution for authority to bring these proceedings. The respondent has challenged the applicant's authority on the basis that although para 4.5(h) empowers the applicant's Executive Committee

> "to appoint attorneys, accountants and other professional persons to act on behalf of the Association and take legal action against all or any parties or party who may act contrary to the interest of the members of the Association or in regard to the recovery of money owing to the Association" it does not

authorise the Executive Committee to issue the present proceedings. This is so because para 7.3 of the applicant's constitution requires a quorum of 50% plus one of the members present and voting at a special general meeting to give such authority. Respondent's case is that the special resolution purportedly taken on 3 May 2011 by the Executive Committee does not constitute a special resolution passed at a special general meeting and, accordingly, the applicant had no *locus standi* to apply to this court for its relief.

[7] The allegations made by the deponent to the applicant's founding affidavit are terse, unequivocal and to the point: he alleges he is the applicant's chairperson and that he has been duly authorised to depose to the affidavit on behalf of the applicant. The response thereto is that nowhere is it shown who applicant's members are, nor which of them had authorised the deponent to represent the applicant in these proceedings, as required by para 4.5(h) of its constitution. In reply, the applicant merely refers once again to its constitution, in terms of which the vital issue, it alleges, is that the Executive Committee has been endowed with the power to manage the applicant (para 3.1) and to that end it

has the power to authorise the applicant's attorney of record to launch the present application on applicant's behalf.

[8] The requirements for an unincorporated voluntary association to have the power to sue and be sued in its own name under the common law have been set out in numerous decisions of our courts. (**MORRISON**, *supra*; **WEBB**, *supra*; **BANTU CALLIES FOOTBALL CLUB (ALSO KNOWN AS PRETORIA CALLIES FOOTBALL CLUB) v MOTLHAMME AND OTHERS** 1978 (4) SA 486 (T))

The applicant has not relied on section 38 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution") as a basis for asserting that it has standing to bring this application. Section 38 bestows standing with regard to the enforcement of the rights enshrined in the Bill of Rights. Hence it will not be necessary for me to consider the issue of whether the standing bestowed by section 38 affects the applicant's right to institute these proceedings. I have also not been asked by the parties to adjudicate the question as to whether the applicant's position under the common law as regards its *locus standi* is compatible with the context provided by section 38 of the Constitution and I shall not apply my mind to that aspect.

[9] Whether or not litigation has been authorised, is not dependent on the authority of a deponent to depose to an affidavit in proceedings relating to that litigation for he/she is merely a witness. But the practice which has developed of taking issue in regard to the authority of a deponent was inspired by the fear that a person may deny being a party to litigation instituted in his name. His signature to the court process or formal proof of authority by way of a resolution, where the litigation is being conducted in the name of a juristic person to whom he is connected, (either as director or member) avoided risk to the opposing party and the administration of justice. (**<u>VILJOEN v FEDERATED TRUST LTD</u>** 1971 (1) SA 750 (O) at 752D – F)

That risk however is adequately managed if the attorney is authorised to bring the proceedings. Uniform Court Rule 7(1) provides for this with an appropriate procedure and it is accepted that no attorney will act for a person without such authority. Proof is dispensed with except and only if that authority is challenged by the opposing party. The respondent has not availed himself of the procedure provided and I must accept, which I do, that these motion proceedings, on behalf of the applicant, are duly authorised.

I accordingly find that there is no merit in the respondent's challenge to the *locus standi* of the applicant. (**GANES AND ANOTHER v TELECOM NAMIBIA LTD** 2004 (3) SA 615 (SCA))

[10] I turn now to the merits. It is clear from the applicant's founding papers that it brings these motion proceedings on the basis of its common law real right to derivative acquisition of ownership. The applicant alleges that during 2006 it resolved in a general meeting to purchase the vehicle for utilisation by the applicant's chairperson in attending applicant's affairs and that it was intended and decided that ownership of the vehicle would vest and remain in the applicant despite the vehicle being registered in respondent's name due to the commercially practical considerations mentioned. Applicant has lost the minutes taken at that meeting and relies on the memory of members present at the meeting to justify its claim to ownership. On the other hand it is the respondent's case that members of the applicant

resolved to purchase the vehicle exclusively for him as compensation for personal financial losses, which he sustained as a result of his dedication as chairperson in attending to the daily administrative affairs of the applicant. As corroboration for his version the respondent relies on the minutes of a general meeting of members of the applicant held on 13 September 2006. The respondent accordingly contends that the vehicle is his personal property. The applicant's reply is to take issue with the authenticity and veracity of the minutes recorded, because they have not been attested to under oath, there are discrepancies as to the date of the meeting to which the minute refers and the content of the minute which has a direct bearing on the issue of ownership is not clear, but convoluted and "nonsensical".

[11] On behalf of the respondent Mr Snellenburg applied for the dismissal of the application on the ground that, in view of the existence of disputes of fact, it was not possible for the issue to be resolved on the papers and that, in electing to proceed with a vindicatory application (*res judicata*) on motion instead of by way of action (summons), applicant had done so at his peril. Mr Van Aswegen argues for a decision based on probabilities, which he asserts are overwhelmingly in

applicant's favour. That being so and having regard to the presumption of law that, the possessor of a movable asset is the owner thereof, (**RUSKIN, NO v THIERGEN** 1962 (3) SA 737 (A)), he submits that this court should grant an order in applicant's favour.

[12] On the basis of the diametrically opposed versions of the parties, it is inescapable that a *bona fide* dispute of fact exists as to what precisely was decided by the members of the applicant in the general meeting during 2006 in the context of the ownership of the vehicle. I fail to understand the applicant's election to prove their claim by way of motion and not by trial action. There is nothing untenable or farfetched about either party's version. The probabilities are equivocal and, therefore, neither party's version warrants mere rejection on the papers. Decisions of fact cannot be founded on probabilities where they are equivocal. (**ADMINISTRATOR, TRANSVAAL, AND OTHERS v THELETSANE AND OTHERS** 1991 (2) SA 192 (A) at 196 I – 197A; **ROOM HIRE CO (PTY) LTD v JEPPE STREET MANSIONS (PTY) LTD** 1949 (3) SA 1155 (T) at 1162 – 1168)

The crucial and only test is whether a *bona fide* dispute of fact exists between the parties. That issues of fact would arise ought reasonably to have been anticipated by the applicant. The question of ownership of the vehicle is the only issue between the parties, which raised its ugly head, apart from the respondent's suspension. Applicant must have known before launching proceedings what respondent's stance would be. In these circumstances, the appropriate order is one of dismissal of the application with costs and it is so ordered.

S. EBRAHIM, J

On behalf of applicant:	Adv W A van Aswegen Instructed by: Naudes BLOEMFONTEIN
On behalf of respondent:	Adv N Snellenburg Instructed by: Honey Attorneys BLOEMFONTEIN

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