

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 2664/2006

In the matter between:

MAPITJA JOSEPH MACHAKA

Applicant

and

POLO ANNA MOSALA

Respondent

JUDGEMENT:

RAMPAI, J

HEARD ON:

31 AUGUST 2006

DELIVERED ON:

19 OCTOBER 2006

[1] The matter came to this court by way of an application.

The relief sought is the return of a motor vehicle. The car is currently in the respondent's possession. The applicant avers in his founding affidavit that his claim is grounded on his right of ownership.

[2] The motion is opposed. The respondent's ground of resistance is that the said sedan no longer belongs to the

applicant. She avers in her answering affidavit that the applicant gave her the sedan. Therefor she contends that she is not just a possessor but rather an outright owner of the sedan.

[3] In his replying affidavit the applicant reiterates that he is still the owner; that he never donated the sedan to the respondent as she alleges; that the right of ownership was never transferred to the respondent at any stage and he also denies that during the abortive negotiations to settle the matter, he offered to give the sedan to the respondent.

[4] The applicant's version was that: he bought the car alone, paid the price alone and acquired ownership alone. In November 2005 he bought a bigger car and placed his smaller car at the disposal of the respondent for her personal and private use. By then the intimate relationship had already broken down. From 1999 until March 2005 he and the respondent were living together as husband and wife. The relationship began to crack down. He

discovered that the respondent was using the vehicle for business purposes as well. Such use of the sedan was a violation of the comprehensive insurance policy relating to the sedan. He regarded such business use as a misuse of his property. Moreover, he noticed that the respondent was careless in the manner she used his car. The current market value of the sedan was approximately R91 950,00 according to him.

- [5] The respondent's version was that the applicant purchased the sedan, a BMW 318i during 2000; that he purchased a second sedan, a City Golf during 2002; that he traded in the City Golf and purchased yet another sedan, a Nissan Almera during 2004 and that during 2005 he traded in the Almera and purchased another sedan, a BMW 5 series. Because she had been using the Almera all along, the applicant gave her the BMW 318i instead of buying her a new car again. In that way, she averred, ownership was transferred to her.

[6] She and the applicant were unmarried. However, they were engaged. The applicant had already paid “bohadi”, in other words dowry for her. But she admitted that the relationship broke down. However she averred that the breakdown took place not in March 2005 as the applicant alleged but in June 2005. The couple had two minor children. The eldest was at school. The youngest was at crèche. She needed a car for her personal use as well as for transporting the couple’s children to and from school and crèche. She denied the allegation that she was using the sedan for business purposes and she also denied the allegation that she was careless in her use of the sedan. She denied the applicant’s claim that he was the sole owner of the sedan. She averred that she was the owner. The respondent’s case, therefor, is that she has lawful possession of the sedan.

[7] The foundation of the applicant’s case originates from the *actio rei vindicatio*. In order to succeed, it is incumbent upon the claimant to prove the following basic elements of

the *actio rei vindicatio*. Firstly, that ownership of the *res* vests in him: **GOUDINI CHROME (PTY) LTD v MCC CONTRACTS (PTY) LTD** 1993 (1) SA 77 (AD) at 82. See also **CONCOR CONSTRUCTION (CAPE) PTY LTD v SANTAM BANK LTD** 1993 (3) SA 930 (AD). Secondly, that the thing in dispute still exists and that it is clearly identifiable; **SORVAAG v PETTERSEN AND OTHERS** 1954 (3) SA 636 (CPD) at 639; and thirdly, that the defendant was in possession of the thing at the time of the initiation of the proceedings; **GRAHAM v RIDLEY** 1931 TPD 476 and **CHETTY v NAIDOO** 1974 (3) SA 13 (AD).

[8] The critical question which I am called upon to determine is who is the rightful owner of the sedan which forms the object of this dispute. The respondent's answering affidavit puts in issue the allegation that the applicant is the owner.

[9] I proceed to examine the facts. To start with I deal with the first element of the *actio rei vindicatio*. The applicant averred and the respondent admitted that alone he

purchased the car; that alone he paid the full price and that alone he owned the car for about five years. During that period the ownership of the car vested in the applicant. In the absence of proof that the applicant was the owner at the time these proceedings were initiated his claim cannot succeed. This must be so because she obtained possession of the sedan with his aid.

- [10] The applicant contends that he is still the sole owner of the car. The applicant derived his ownership from a motor vehicle dealer in 1999. However, the respondent's contention is that she derived her ownership from the applicant himself. The sedan is a movable. The derivative mode on which the respondent relies to have acquired ownership is delivery. The requirements for the passing of ownership by delivery include, *inter alia*, that delivery must be effected by the transferor with the intention of renouncing and transferring ownership and such delivery must be taken by the transferee with the corresponding intention of accepting ownership.

CONCOR CONSTRUCTION (CAPE) (PTY) LTD v SANTAMBANK LTD 1993 (3) SA 930 (AD) at 933 A-B per Milne JA.

[11] In the same case, **CONCOR** *supra* at 933 f – g Milne JA remarked:

“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.”

[12] The respondent contends that the applicant is no longer the owner of the car. She avers that prior to delivery he unconditionally gave her the car last year, on the 12 October 2005 to be precise. She asserts that by virtue of such deed of donation ownership of the car passed from the applicant to her. Therefor she now puts a defence that she is the current owner of the car.

[13] The law, as I conceive it to be, is that donation is never presumed. The onus of proving that a person gave away his property in favour of another rests on the one who makes such a claim.

[14] It is necessary to analyse the averments in order to test the validity of the respondent's contention. In paragraph 11 of the answering affidavit the respondent stated that the applicant acquired two motor vehicles, a Golf and an Almera for her personal use. It is not her case that she became an owner of any of those previous motor vehicles through such personal use. It seems to me that the applicant bought and sold motor vehicles at will for respondent's personal use. I get the impression that the respondent had very little say in the applicant's decisions to buy and sell the motor vehicles which the couple used.

[15] When the applicant decided to trade in the Almera he apparently made a unilateral decision as one would naturally expect from an owner. The respondent's

objection was merely based on considerations of practical convenience for her and the couple's children. Needless to say the interest of the children in a matter of this nature is not a relevant issue. Her objection boiled down to possessory and not proprietary considerations.

[16] During the period of five years, between 1998 and 2006 the applicant bought four motor vehicles. Apparently all was well between the parties from the beginning until mid 2005. However, during those happy days, the applicant did not express his gratitude to or affection for the respondent by presenting a car to her as a gift.

[17] According to the respondent's version, things became sour in June 2005. She says the following at paragraph 23 of the answering affidavit:

“I admit that our relationship has broken down since June 2005 when I discovered that the Applicant was having an affair with another female...”

I find it rather improbable that hardly four months later after the turbulent breakdown of the relationship the same man

who gave her no car for a gift during happy times would have done so after the breakdown.

[18] In paragraph 15 of the answering affidavit the respondent states:

“...it is clear from the above that the abovementioned vehicle was given to me and that ownership therein was transferred from the Applicant to myself.”

This averment does not tally with the admissions as set out in paragraph 20 of the answering affidavit where she said:

“I admit that the vehicle is fully paid for. I admit, further, that the Applicant paid for the vehicle. I also admit that the vehicle is registered on the name of the Applicant.

The Applicant indeed paid the last licence fees in relation to this vehicle as it is still registered in his name.”

[19] It will be readily appreciated that annexure “A” to the founding affidavit shows that the current motor vehicle registration certificate in respect of this particular car was issued on the 18th May 2006 in the name of the applicant. Moreover, annexure “B” also to the founding affidavit shows that the current motor vehicle licence in respect of

the same car was renewed on the 18th May 2006 in the applicant's name and that it expires on the 30 April 2007.

[20] This undisputed documentary evidence cannot be reconciled with the respondent's allegation that ownership in the car was transferred from the applicant to herself. Such an allegation is obviously untrue – not only in the light of these annexures but more importantly in the light of her admissions to the contrary in response to the applicant's averment as set out in paragraph 7 of the founding affidavit.

[21] Among others, the applicant states in paragraph 7 of the founding affidavit:

i°..I am the owner of the vehicle.”

The respondent's answer to paragraph 7 of the founding affidavit is to be found in paragraph 20. Nowhere in this paragraph does the respondent specifically deny this crucial and assertive averment by the applicant. In my view her failure to do so strongly militates against her

contention and bolsters the applicant's contention.

[22] Paragraph 4 of the applicant's founding affidavit reads:

"The purpose of this application is to request the Honourable Court for an order ordering the Respondent to return a certain BMW 318i motor vehicle with registration number BZY588FS, which is my property, to me."

I have to stress the important words of this passage:

;"...BZY588FS, **which is my property,..."**_

How does the respondent react to this important averment?

Again she hardly comments on this material issue raised by the applicant. On page 46 of the record she deals with paragraph 3 of the founding affidavit first. From there she jumps over the important paragraph 4 and deals with paragraph 5.

[23] The respondent had the car in her possession for hardly for months. During that short period of time she endured a great deal of disturbance in her possession by the person claiming to be the owner. The claimant was the applicant. It seems more probable than not that the applicant was the owner. If the sedan had been delivered to the respondent

as a gift, it is improbable that the applicant would have despoiled the respondent at one stage, lost the spoliation case in the lower court but still persisted in the high court to regain possession. To avoid possible delictual claims which could possibly arise from the business use of the car he only had to have the car registered in the name of the respondent so that she could be responsible for the annual renewal of the motor vehicle licence fee and to have the comprehensive insurance policy cancelled so that the risk associated with any misuse could be borne by the respondent herself. The fact that he did none of these things after delivering the vehicle to the respondent suggests that he never had any intention to relinquish ownership. After the alleged donation he continued to act in a way consistent with an outright owner's natural conduct. All this strongly militates against the presence of any legal transaction which could have preceded delivery of the sedan to the respondent.

[24] In **CHETTY v NAIDOO** 1974 (3) SA 13 (AD) at 20 A – C

Jansen JA observed as follows about the legal concept of ownership:

°It may be difficult to define dominium comprehensively (cf. Johannesburg Municipal Council v Rand Townships Registrar and Others, 1910 T.S. 1314 at p. 1319), but there can be little doubt (despite some reservations expressed in Munsamy v Gengemma, 1954 (4) SA 468 (N) at pp. 470H - 471E) that one of its incidents is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. 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 ...”

[25] For the reasons advanced above I am of the view that the respondent has failed to discharge the requisite onus of establishing that the applicant unconditionally divested himself of the ownership of the car by way of a deed of donation. Therefor I have come to the conclusion that ownership of the car still vests in the applicant. It never passed from him to the respondent on the 13th October

2005 or at any other time material to these proceedings. I would therefor find in favour of the applicant that he has established the first requirement of the *actio rei vindicatio*.

[26] As regards the second requisite, it is not in dispute that the thing in dispute, that is to say the BMW 318i sedan with registration number BZY588FS still exists and that it is clearly identifiable. The car is not a consumable commodity. The car has not been dismantled or damaged beyond repair. Specific performance is possible in this instance because it has been established that the sedan is still in existence and under the respondent's physical control. **SORVAAG v PETTERSEN AND OTHERS** *supra* I am therefor inclined to find in favour of the applicant that the second requirement of the *actio rei vindicatio* has been proven.

[27] The law tells us that possession of one's property by another is *prima facie* unlawful. **KRUGERSDORP TOWN COUNCIL v FORTUIN** 1965 (2) SA 335 (TPD), **CHETTY v**

NAIDOO 1974 (3) SA 13 (AD), **SINGH v SANTAM**

INSURANCE LTD 1997 (1) ALL SA 525 (SCA) or 1997 (1)

SA 291 (SCA). I turn now to the third requisite of the *actio rei vindicatio*.

It is not for the applicant as the owner to prove that the possession of the car by the respondent is unlawful. It is also not required of the applicant to prove that he has a personal right against the respondent which entitles him to claim repossession of the BMW 318i sedan. In principle the onus rests on the respondent to prove that her continued possession of the sedan is lawful.

[28] The applicant's claim was vindicatory. It was for the respondent to aver and prove the grounds which, in law, would justify her continued possession of the car in other words grounds that would justify her refusal to restore possession to the proven owner. It is so that the respondent initially derived her possession from the applicant's consent. In my view she no longer has the right to remain in possession. On her own version, the applicant gave her notice to quit or to surrender possession on a few occasions prior to the institution of these proceedings. He thereby effectively terminated her right to hold the car any

further. She is obliged to restore.

[29] In the case of **CHETTY v NAIDOO** *supra* the words of Jansen JA at 20 E- G were paraphrased as follows in the headnote at 13 B – C:

“Although a plaintiff who claims possession by virtue of his ownership, must *ex facie* his statement of claim prove the termination of any right to hold which he concedes the defendant would have had but for the termination, the necessity of this proof falls away if the defendant does not invoke the right conceded by the plaintiff but denies that it existed.”

In *casu* the respondent denies that delivery conveyed the bare right of possession.

[30] On the facts as examined I am satisfied that the respondent was in possession of the applicant’s car at the time these proceedings were initiated. I am of the firm view that she does not have *ius possidendi* in respect of the BMW 318i sedan any more. The applicant has, therefor established the third requisite of the *actio rei vindicatio*.

[31] In actual fact the respondent's possession was not really an issue. The issue revolved around her claim that she was entitled to retain such possession forever on account of a donation. I am not persuaded by the respondent's version. Her answering affidavit is lamentably terse. On the contrary I am persuaded by the applicant's version. On the facts I am moved to accept that the applicant's temporarily surrendered possession of his car to the respondent and allowed her the right to use the car on sufferance.

[32] What he delivered to her was *vacua possessio*. There was no traditio in the strict sense to transfer *dominium in res*. The arrangement had all the elementary hallmarks of a precarium. A precarium may be reached tacitly. In such a scenario the user's right to use a thing owned by another may be revoked at any time and the thing used is always recoverable at the will and whim of the person granting the use provided reasonable notice is given to the user

concerned. **ELLIS v VILJOEN** 2001 (4) SA 795 (CPD).

[33] The respondent merely avers that the applicant gave her the vehicle and that ownership was transferred to her. The averments were not sufficiently particularised. Since the relationship was already virtually dead at the time of the alleged donation, I expected to find some explanation as to what prompted him to give her a car at that time. No reason whatsoever was advanced by her for his rather generous change of heart. There are more questions than answers about her claim. The onus is on the party alleging a donation to prove the donor's motive was pure liberty. See **AVIS v VERSEPUT** 1943 AD 331 and **DE JAGER v GRUNDER** 1964 (1) SA 446 (AD).

[34] A donation may be revoked on account of gross ingratitude or because it was subject to a modus and that the donee has breached the modus. See **BENONI TOWN COUNCIL v MINISTER OF AGRICULTURAL CREDIT AND LAND TENURE** 1978 (1) SA 978 (TPD). As regards donations in

general see COMMISSIONER, SOUTH AFRICAN

REVENUE SERVICES v MARX NO 2006 (4) SA 195

(CPD).

[35] In my view the respondent has dismally failed to advance concrete facts in support of her contention that the applicant donated the car to her. She has raised no arguable or plausible case to justify the referral of the parties to trial for *viva voce* evidence. This is why I decided to finalise the matter on papers. There is no genuine dispute. If the applicant genuinely wanted to donate the car to her at the time when their relationship was deeply troubled by mistrust and all the violent storms, he would probably have caused the vehicle to be transferred to the respondent so as to allay her fears and would have signed the official documentation to effect such transfer.

[36] As regards the respondent, she would probably have insisted on having the BMW 318i immediately registered in her name in order to guard her back lest the applicant

changed his mind and unilaterally decided to sell it as he did with the previous cars that he had allowed her to possess for her personal use.

[37] Seeing that the applicant has established all the essential elements of the *actio rei vindicationem* there is no reason why the relieve he seeks should not be granted. I would therefore grant the application.

[38] The general rule of cost is that the victorious party is entitled to recover the costs of litigation from the vanquished party. Such costs are the sweet fruits of victory and the sour grapes of defeat. In this instance no sound reason exists to justify a departure. The costs must therefor follow the winner.

[39] Accordingly I make the following order:

39.1 The application succeeds;

39.2 The respondent is directed to redeliver the applicant's property, the BMW 318i sedan with registration number BZY588FS to the applicant within seven (7) days from the date of service hereof by the court sheriff.

39.3 The court sheriff is hereby authorised to attach and to remove the said motor vehicle from the respondent and deliver it to the applicant, at the address chosen by the applicant, should the respondent fail to comply with this order voluntarily.

39.4 The respondent is directed to pay the taxed costs of this application to the applicant.

M.H. RAMPAL, J

On behalf of the Applicant:

Adv. P. J. J. Zietsman
Instructed by:
Claude Reid Inc.
BLOEMFONTEIN

On behalf of the Respondent:

Attorney C. Frade
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