REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 9452/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: **7 November 2024**

SIGNATURE:

In the matter between:

ARTHUR JOHN DA COSTA	**1ST APPLICANT**
SIMCHA DA COSTA	**2ND APPLICANT**
-and-	
SUNSET GAME LODGE CC	**RESPONDENT**

JUDGMENT

BRESLER AJ:

Introduction:

[1] The First Applicant seeks an order for the return of two vehicles to wit:

1.1 The Kruger Safari Vehicle (Nissan Hardbody with registration number: F[…])

1.2 Land Rover Open Game Vehicle (Land Rover Defender with registration number: B[…])

[2] The Second Applicant is joined by virtue of her marriage to the First Applicant in community of property.

[3] The Applicant's cause is premised on the *rei vindicatio*.

<u>Factual Synopsis:</u>

[4] On or about the 21st of April 2023, the First Applicant and the Respondent entered into a written lease agreement (hereinafter the 'Lease agreement'). Two further agreements were concluded on the same day being:

4.1 Addendum A, being the sale agreement in respect of the two vehicles (hereinafter the 'Sale agreement') and

4.2 Addendum B, being in respect of the Applicants' rights to continue occupying a house situated at the rental premises.

[5] The terms of the Sale Agreement are common cause between the parties and include:

5.1 The purchase price for the vehicles is R240,000.00;

5.2 The Respondent is obliged to make payment in the amount of R10,000.00 per month to the First Applicant until the vehicle has been paid in full.

[6] The Respondent defaulted on the Sale agreement and only two payments were received being an amount of R10,000.00 during June 2023 and a further amount of R10,000.00 during August 2023.

[7] It is apparent from the papers before court that a dispute arose between the First Applicant and the Respondent pertaining to the Lease agreement. As the circumstances that gave rise to the Sale agreement and the Lease agreement are more or less the same, the dispute regarding the Lease agreement resulted in the Respondent informing the Applicant on the 24th of August 2023 that it cancels the Lease agreement.

[8] This court is not called upon to determine the basis and validity of the cancellation of the Lease agreement. Suffice to state that the Respondent informed the First Applicant that it intends to seize all payments 'except for the vehicles'.

[9] It is the First Applicant's version that, on or about the 13th of September 2023, the First Applicant consequently cancelled the Sale agreement and demanded return of the vehicles. The Respondent in return disputes the cancellation in as far as the Respondent alleges *inter alia* that the vehicles were paid in full.

[10] In argument, the Respondent further submitted that the Sale agreement constitutes a common law credit agreement. No reservation of ownership was accordingly agreed upon and ownership transferred to the Respondent upon delivery. The Sale Agreement furthermore do not contain a *rouwkoop* clause entitling the First Applicant to retain the payments made. According to the Respondent restitution is claimed contractually without a reciprocal tender to return performance already made in terms of the agreement. This renders the relief claimed by the First Applicant objectionable and the First Applicant therefore cannot succeed.

[11] Surprisingly and contrary to the argument advanced in respect of the transfer of the ownership, the Respondent also submits that the First Applicant is not the owner of the vehicle and therefore does not have the required locus standi to institute proceedings in terms of the *rei vindicatio.*

[12] In its Counterclaim, the Respondent submits that it was an implied term of the Sale agreement that the Kruger permit would be transferred to the Respondent simultaneously with the sale of the vehicle. This is denied by the First Applicant in as far as the Kruger permit was issued and belongs to Ntsele Safari (Pty) Ltd and that it is a non-transferable permit that cannot be sold. The Respondent also claims specific performance in terms of the Sale Agreement (again contrary to its submission that the First Applicant does not have the required *locus standi* to institute the proceedings.

Legal framework:

[13] The law pertaining to the *rei vindicatio* is well-known. In ***Chetty v Naidoo***[1] it was held:

> *'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.'*

[14] The maxim, *ubi rem meam invenio, ibi vindico* captures the gist of the *rei vindicatio*: where my property is found, there I vindicate it.

[15] What lies at the heart of this matter is therefore a determination of the ownership of the vehicle. The First Applicant have attached two cession agreements to its Founding papers entered into respectively between the First Applicant and Ntsele Safaris (Pty) Ltd and the First Applicant and Stephanie da Costa. These cession agreements were concluded sometime after the Sale agreement was concluded between the First Applicant and the Respondent.

[16] As stated herein before, the argument raised by the Respondent in respect of the Counter application is detrimental to its own version and the relief in the Counter application. Surely, if the First Applicant is not the owner of the vehicle, then no relief

[1] 1974 (3) SA 13 (A) at 20 C – D

can be claimed in the form of specific performance in terms of the very same Sale agreement?

[17] As the Respondent's argument is purportedly premised on the fact that the vehicles are still 'registered' in the names of the erstwhile respective owners, the Respondent's line of argument is rejected. Ownership of a vehicle is after all not dependent on registration thereof at the Licencing Department. Similar to the registration of an immovable property, it is merely *prima facie* proof of ownership. In this instance, this Court is satisfied that ownership passed to the First Applicant upon conclusion of the respective cession agreements.

[18] It is apposite to note that the First Applicant does not claim contractual relief. Was this the case at hand, this Court would have had to revisit the Sale agreement to determine if the First Applicant had the required authority to conclude the Sale agreement on behalf of the *de facto* owners at that stage.

[19] The case of the First Applicant is premised on the *rei vindicatio*. It must therefore be determined if the First Applicant was the *de facto* owner of the vehicles at the time possession was reclaimed from the Respondent and thus at the institution of the application.

[20] Even if I am wrong, I am of the view that a finding that the First Applicant was not authorised to conclude the initial sale agreement, will achieve the same result. If the Sale Agreement is rendered void, it follows that the Respondent's possession of the vehicles is unlawful, and it must be returned to the lawful owner. In terms of the respective cessions, the vehicles therefore stand to be returned to the First Applicant being the current *de facto* owner of the said vehicles.

[21] This brings me to the second argument raised by the Respondent, to wit the allegation that the Sale agreement constitutes a common law credit agreement. I agree with the contentions by the Respondent in respect of the legal position pertaining to common law sale agreements. In essence, the rule is that if the sale is for cash, then ownership transfers upon payment with delivery, the real agreement being valid. If the sale is for credit, in other words later payment or payment in

instalments are permitted, then ownership transfers upon delivery alone. In each instance a valid real agreement remains a necessary element.[2]

[22] The Sale Agreement contains the following terms:

> *'It was further agreed that should the Tenant decide not to purchase the Property as per the Agreement after the rental period has lapsed, the ownership of both vehicles has become the property of the Tenant, <u>provided that the agreed purchase price of R240,000 (two hundred and forty thousand rand) has been paid in full.'</u>*
> (own underlining)

[23] It is common cause between the parties that the 'Tenant' (Respondent) elected not the purchase the Property. It follows that the parties specifically agreed that ownership of the vehicles will pass upon payment of the purchase price. Ownership was therefore pertinently reserved in favour of the First Applicant.

[24] This court is fortified in its understanding by the judgment in ***Natal Joint Municipal Pension Fund v Endumeni Municipality***[3] that expounds on the approach generally to be adopted when interpreting a contract as thus:

> *'Interpretation is the process of attributing meaning to words used in a document be it legislation, some statutory instrument, or contract, <u>having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence</u>. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not*

[2] Mosterd et al, The Principles of the Law of Property in South Africa, Oxford University Press on page 194
[3] 2012 (4) SA 593 (SCA) 12 paragraph 18

subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. <u>The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background in the preparation and production of the document"</u>.

(own underlining)

[25] The trite wording of the agreement simply does not lead itself to an interpretation that that parties intended ownership to transfer immediately upon delivery of the vehicle and the Respondent's argument in this regard can thus not be accepted.

[26] The Respondent states at the conclusion of paragraph 4.32 of the Answering affidavit the following:

> *'Having regard to the aforementioned it is clear that the Respondent is not indebted to the Applicants in any amount and has in fact paid for the vehicles'.*

[27] In considering the alleged 'payments' made towards the vehicles, this Court is not convinced that the vehicles were paid in full at the time when the agreement was cancelled as alleged by the Respondent. The Respondent's submission is premised on the basis that the set-off must be applied in respect of several expenses incurred by the Respondent as more fully set out in Annexure 'VVR 1' to the Answering affidavit.

[28] This Court has the following difficulties with the alleged calculation:

28.1 In paragraph 4.32.1 the Respondent states that a certain payment was made to Eskom before the Respondent took occupation of the property. This amount was deducted in terms of paragraph 4 of the Lease Agreement. The payment was therefore pertinently earmarked as a 'rental payment' and cannot be allocated retrospectively to the outstanding balance on the vehicles.

28.2 Several of the further alleged amounts are similarly earmarked as a deduction in the rental amount agreed upon.

28.3 In paragraph 4.32.16, the Respondent alludes to an amount of R4,950.00 that was forfeited to a contractor because further maintenance was prohibited by the First Applicant. In order to ascertain if this amount is due, surely the Court needs to ascertain if the maintenance was indeed necessary. It also stands to be noted that this expense is in any event disputed by the First Applicant.

[29] As correctly concluded by the First Applicant, even if all the alleged set-off amounts were entertained, the Respondent was still in arrears and the full outstanding balance was not paid in full.

[30] Ownership of the vehicles did not pass to the Respondent upon delivery, and the Respondent is in unlawful possession thereof. It follows that the Applicant must be successful in its claim for the return of the vehicle premised on the *rei vindicatio*.

[31] As stated before, the Respondent has also instituted a Counterclaim that must be decided upon by this court.

[32] Counsel for the Respondent has provided the Court with a proposed concept order providing for *inter alia* the following relief:

32.1 Declaring the Sale Agreement entered into between the parties to be in force and effect; and

32.2 Referring the determination of the aforesaid relief to trial.

[33] As a starting point, the Respondent submits that the agreement was not properly cancelled as the letter demanding performance did not pertinently refer to performance of the Sale agreement. The Respondent articulately states in its Heads of Argument at paragraph 49 that:

> *'... the Applicant makes the fundamental error using the alleged arrear rental, due in terms of the Lease Agreement, to the question whether the Sale of Vehicle Agreement was being breached. As such, the Applicants must proof that there was a valid agreement, that the Respondent was in breach of the material term, that the Respondent was placed in mora (an accrued right to cancel)[4] and that the subsequent valid cancellation occurred. The Applicants have simply not made out that case.'*

[34] In this Court's view, the reliance on the case of ***Singh v McCarthy Retail Ltd t/a McIntosh Motors*** *supra* is misplaced. This case essentially turns on the question if a contract may be cancelled as a result of a material breach, or because of an implied *lex commissoria*. The learned Olivier JA states at [14]:

> *[14] As long ago as 1949 it was said by this Court in Aucamp v Morton 1949 (3) SA 611 (A) at 619 with regard to the relevant question that it was not possible to find a simple general principle which can be applied as a test in all cases because contracts and breaches of contract take so many forms. In deciding, in that case, whether the respondent was entitled to cancel the contract, the Court said (at 620)*
>
>> *'. . . nor were the obligations which were broken so vital or material to the performance of the whole contract that respondent could say that the foundation of the contract was destroyed'.*

[35] It is evident that this case does not support the contention of the Respondent that the First Applicant failed to place the Respondent *in mora*, and therefore the cancellation was invalid.

[4] With reference to the case of Singh v McCarthy Retail Ltd t/a McIntosh Motors 2002 (4) SA 795 (SCA).

[36] What then is required from the First Applicant to constitute a valid cancellation? Applying the principles enunciated in ***Singh v McCarthy Retail Ltd t/a McIntosh Motors supra*** it is undeniable that the breach, in as far as the Respondent's failure to pay is concerned, is material.

[37] In the case of ***Scoin Trading (Pty) Ltd v Bernstein NO***[5] the Supreme Court of Appeal expressly dealt with the meaning of '*mora*'. The following is stated:

> *'[11] The starting point is therefore an examination of the meaning of mora. The term mora simply means delay or default. This concept is employed when the consequences of a failure to perform a contractual obligation within the agreed time are determined. The date may be stipulated either expressly or tacitly and there must be certainty as to when it will arrive. Thus, when the contract fixes the time for performance, mora (mora ex re) arises from the contract itself and no demand (interpellatio) is necessary to place the debtor in mora. The fixed time, figuratively, makes the demand that would otherwise have had to be made by the creditor.*
>
> *[12] In contrast, where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (interpellatio) becomes necessary to put the debtor in mora. This is referred to as mora ex persona. The debtor does not necessarily fall into mora if he or she does not perform immediately or within a reasonable time. In this situation mora arises only upon failure by the debtor to comply with a valid demand by the creditor. Mora ex persona is so referred to since it requires an act of a person (the creditor) to bring it into existence.'*

[38] Having regard to the trite terms of the Sale Agreement, no demand was therefore required or necessitated as mora ex re arises in terms of the agreement itself. This renders the cancellation valid even in the absence of any demand to

[5] 2011 (2) SA 118 (SCA) at [11] – [12]

rectify performance. The First Applicant was under no obligation to place the Respondent *in mora.*

[39] The remaining issue pertains to the Kruger permit. This court do not need to make a finding on the question if the permit was included in the *merx* or not. Having found that the cancellation is valid, that the Respondent is in unlawful possession of the vehicles and that same stands to be returned, the issue of the Kruger permit is moot. The Respondent has conceded in its Heads of Argument that the vehicle and the permit is essential and that the permit was 'transferred, as part of the sale'. As there was not 'transfer' subsequent to the sale, it follows that the permit could not have, and in fact was not transferred at all.

[40] On this basis, there is no need to refer the determination of the Counter Application to trial. It would serve no purpose as the Counter Application is fatally flawed in law. The Counter Application therefore stands to fail with costs.

[41] It is in any event questionable if the permit, by its very nature, could have been transferred. Contractual rights of this nature are normally personal to the individual involved (*delectus personae*). If indeed this is the case, these contractual rights would not have been susceptible to cession or transfer.[6]

<u>Costs:</u>

[42] There is no reason why the costs should not follow the outcome of the proceedings, and the Applicant is thus entitled to its costs in respect of both the Main Application as well as the Counter Application. The Court is however not convinced that a case has been made out for a punitive cost order.

[43] Having regard to the nature of the proceedings, the duration thereof, the extent of the pleadings and the importance to the parties, it will be just if the costs of counsel are allowed on Scale C.

[6] University of Johannesburg v Auckland Park Theological Seminary and Another 2021 (6) SA 1 (CC) at [58] to [59]

<u>Order:</u>

[44] In the result the following order is made:

44.1 The Respondent is ordered to forthwith return the following vehicles to the Applicants more fully described as:

44.1.1 The Kruger Safari Vehicle
Make and model: Nissan Hardbody Reg No: F[…]
Vin No: A[…]

44.1.2 The Land Rover Open Game Vehicle
Make and model: Land Rover Defender
Reg No: B[…]
Vin No: S[…]

(the 'Vehicles')

44.2 Should the Respondent fail to return the Vehicles to the Applicants, the Sheriff of the High Court, Limpopo Division shall be directed and authorised to attach and remove the vehicles and to deliver same to the Applicants.

44.3 The Counterclaim instituted by the Respondent is dismissed.

44.3 The Respondent is ordered to pay the Applicants' costs pertaining to the Main Application and the Counterclaim including costs to counsel on Scale C.

M BRESLER
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

<u>APPEARANCES:</u>

FOR THE FIRST AND SECOND APPLICANT	**:**	**Adv. WC Carstens**
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FOR THE RESPONDENT	**:**	**Adv. RJ Groenewald**
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DATE OF JUDGMENT	**:**	**7 November 2024**