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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN**

CASE NUMBER: 5058/2024

In the matter between:

NEDBANK LIMITED

Applicant

and

NOKWESHINI NOMSITHELO GLADYS MVULA

Respondent

IDENTITY NUMBER: 5[...]

ESTATE NUMBER: 0[...]

JUDGMENT

ANDREWS, AJ

Introduction

[1] This is an opposed application in terms of which the Applicant seeks the following relief *inter alia*:

1. That the Instalment Sale Agreement be rectified by amending the engine number to reflect 2[...];

2. Confirmation of cancellation of the said Agreement;
3. Return of the vehicle referred to as:

2019 TOYOTA HILUX 2.4 GD-6 RB SRX A/T P/U S/C

Engine Number: 2[...]

Chassis Number: A[...]

4. The vehicle to be handed over to a duly authorised representative of the Plaintiff or the Sheriff;
5. Authorising the Sheriff or the authorised representative of the Plaintiff may attach and remove the asset wherever it may be found;
6. An order in terms of Section 30(b) of the Administration of Estates Act 66 of 1965 directing that the movable property may be sold in terms of Section 127 of the National Credit Act, 34 of 2005;
7. Attorney and client costs;
8. In the alternative, return of the vehicle as referred to herein to be placed in the Applicant's approved storage facility until such time as the Estate has been finalised or permission to sell granted or provided;
9. Further and/or alternative relief.

Factual Background

[2] On 26 August 2019, the Applicant entered into a written Instalment Sale Agreement (the "Agreement") with the late Sanjini Mvula, in respect of the sale of a

2019 Toyota Hilux (“the vehicle”). Sanjini Mvula (“the deceased”), died on 19 March 2023. The outstanding balance payable in terms of the Agreement as at 10 June 2024 is R315 971.93. The Respondent is the surviving spouse of the deceased and is currently in possession of the vehicle. It is undisputed that payments were made subsequent to the death of the deceased, but not consistently and in amounts less than the monthly instalment in terms of the contract which is R9 467.37. The arrears as at 10 June 2024 amounted to R44 500.85.

[3] On 26 September 2023, Mr Gerhardus Martinus Mostert (“Mr Mostert”) was appointed as the executor of the deceased estate. However, Mr Mostert filed a letter of renouncement as executor on 26 January 2024. An application for the appointment of the Respondent as the executrix of the deceased estate is currently pending before the office of the Master of the High Court.

Principal submissions on behalf of the Applicant

[4] The Applicant approaches this court as the owner of the vehicle, by virtue of the terms of the Agreement, namely:

‘3.3 You acknowledge that we are the owner of the Goods and will remain so until all obligations and repayments to us have been fulfilled by you, after which you will become the owner of the Goods.’¹(my emphasis)

[5] Ownership is therefore vested in the Applicant as is borne out by the NATIS certificate of registration.² The Applicant averred that the deceased is in breach of the Agreement in that the monthly instalment has not been maintained and there is no comprehensive insurance on the vehicle.³ The Applicant further alleges that the Respondent is in unlawful possession of the vehicle, as neither she nor the estate has

¹ The Agreement, page 26.

² Annexure “CT4”, page 90.

³ The Agreement, para 5 and 7, pages 26 – 27.

settled the full outstanding balance owing on the vehicle. The Respondent refuses to surrender the vehicle. Additionally, it was submitted that the vehicle is the only form of security that the Applicant holds in respect of the claim against the deceased estate, as the asset is a depreciating asset.

The grounds of opposition

[6] The Respondent raises a number of grounds in opposition to the relief being sought by the Applicant which includes *inter alia*:

- (a) The non-joinder of the Master of the High Court;
- (b) The non-joinder of the executor;
- (c) Lack of cause of action and
- (d) Misapplication of Sections 30 and 127.

Non-joinder of the Master of the High Court

[7] The Respondent submitted that the joinder of the Master of the High Court in matters involving a deceased estate is inherently necessary. The Applicant, however, contended that same is not necessary as no relief is being sought against the Master. In this regard, the Applicant submitted that a copy of the application was served on the Master's Office on 20 March 2024 in order to notify the Master of the institution of this application. The Respondent argued that pending the appointment of an executor or interim curator, the Master of the High Court is enjoined to protect the interest of the deceased heirs.

[8] It was submitted that Section 11 of the Administration of Estates Act⁴ (“the AEA”) becomes relevant which stipulates that:

‘11 Temporary custody of property in deceased estates

(1) Any person who at or immediately after the death of any person has the possession or custody of any property, book or document, which belonged to or was in the possession or custody of such deceased person at the time of his death-

(a) shall, immediately after the death, report the particulars of such property, book or document to the Master and may open any such document which is closed for the purpose of ascertaining whether it is or purports to be a will;

(b) shall, unless the Court or the Master otherwise directs, retain the possession or custody of such property, book or document, other than a document being or purporting to be a will, until an interim curator or an executor of the estate has been appointed or the Master has directed any person to liquidate and distribute the estate: Provided that the provisions of this paragraph shall not prevent the disposal of any such property for the bona fide purpose of providing a suitable funeral for the deceased or of providing for the subsistence of his family or household or the safe custody or preservation of any part of such property;

(c) shall, upon written demand by the interim curator, executor or person directed to liquidate and distribute the estate, surrender any such property, book or document in his possession or custody when the demand is made, into the custody or control of

⁴ Act 66 of 1965.

such executor, curator or person: Provided that the provisions of this paragraph shall not affect the right of any person to remain in possession of any such property, book or document under any contract, right or retention or attachment.

(2) Any person who fails to comply with the provisions of paragraph (b) of subsection (1) shall, apart from any penalty or other liability he may incur thereby, be liable for any estate duties payable in respect of the property concerned.'

[9] It is manifest that this provision envisages a situation where the assets of the deceased, in whose possession such assets were at the time of the death of the deceased, must be retained by that person until an interim curator or an executor of the estate has been appointed or the Master has directed any person to liquidate and distribute the estate. Until such time as an executor has been appointed, the estate cannot be wound up. It was furthermore mooted that the applicability of Section 11 is intended to protect the interest of the deceased's heirs pending the appointment of an executor or a curator. The applicability of Section 11, in my view, is dependent upon whether the vehicle in question is considered an asset under circumstances where the ownership of the vehicle vests with the Applicant and where there is a considerable amount outstanding which will ultimately be registered as a claim against the estate.

[10] In my view, the joinder of the Master to these proceedings is not essential in view of the relief being sought by the Applicant.

Non-joinder of executor

[11] It is trite that an executor's authority is anchored in their fiduciary duty to administer the deceased's estate in accordance with the terms of the Last Will and Testament and the law. An executor's primary responsibility is to identify and ensure the safeguarding of assets, settling debts and distributing the estate to beneficiaries.

Although an executor enjoys a measure of discretion, there must be adherence to the provisions of the AEA subject to the oversights of the Master of the High Court as aptly distilled by Collins J in **Labuschagne v Nel and Others**⁵ in reference to the writer D. Meyerowitz, Administration of Estates and their Taxation, 2010:

‘the executor acts upon his own responsibility, but he is not free to deal with the assets of the estate in a manner he pleases. His position is a fiduciary one and therefore he must act not only in good faith but also legally. He must act in terms of the law, which prescribes his duties and the method of his administration and makes him subject to supervision of the Master in regard to a number of matters.’

[12] The Respondent raised the argument regarding the non-joinder of the executor primarily because of the relief being sought by the Applicant insofar as it relates to the cancellation of the Agreement. In this regard, it was argued that the relief was premature and incompetent as the Respondent before the court was not a party to the Agreement. The question to be answered, therefore, is whether the Respondent, who has not yet been appointed as the executor can be cited in her personal capacity in circumstances where the relief being sought is the cancellation of the contractual agreement.

[13] It was contended that the Respondent has no contractual obligation to perform in terms of the Agreement if regard is had to the provisions of Section 13(1) of the AEA which stipulates:

‘No person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act, or under an endorsement made under section fifteen, or in pursuance of a direction by a Master.’

⁵ (319/2018) [2019] ZAGPPHC 68 (11 March 2019) at paras 13 – 14.

[14] Although the Respondent has not officially been appointed as the Master's representative or executor, she appears to have stepped into the shoes of the deceased by virtue of her attempts to rehabilitate the account. This was however done, in her personal capacity and not in her capacity as executrix in the execution of a fiduciary responsibility. The Respondent submitted that the deceased's obligations do not die with him or her but it is through the duly appointed executor, once appointed, who steps into his or her shoes in consultation with the heirs, legatees and creditors to decide whether or not to continue or terminate such agreements. The reality is that there is no executor appointed and therefore the obligations of an executor do not yet vest in the Respondent.

[15] The Respondent, in these circumstances, claims to hold possession of the vehicle in terms of Section 11(a) of the AEA and as such the relief being sought against the Respondent, being cited in her personal capacity for the cancellation of the Agreement is not competent as earlier stated. In this regard, the Respondent contended that without the cancellation, the Applicant is not entitled to the return of the vehicle. It is in this context that the Respondent argued that, even if the pleaded case of the Applicant was that of an interdict, such application would still fail for the absence of a right to take possession of the motor vehicle while the Agreement is still in existence.

[16] This argument is not sustainable as in my view, the Applicant has demonstrated a strong right to cancellation of the agreement as the Agreement specifically stipulates:

'7. DEFAULT AND BREACH

7.1 If you fail to make payment of any amounts due to us, we may terminate this Agreement. The following will be events of default;

...

7.1.3 If you die or are sequestered...' (my emphasis)

[17] In my opinion, the Applicant has an automatic entitlement to cancel the Agreement upon the death of the deceased by virtue of this clause in the Agreement. The clause essentially gives the Applicant the election to cancel the Agreement upon death. The question however remains whether the Applicant could enforce this election by way of relief against the Respondent in her personal capacity in this application or whether such election should be exercised when an executor or curator has been appointed.

Lack of cause of action

[18] The Respondent contended that the deceased after death cannot be said to have committed a breach of contract in circumstances where he could not have performed. This argument further serves to reinforce the Respondent's contention that the Applicant's relief for cancellation is not competent. In further augmentation, the Respondent contended that a mere failure to pay monthly instalments does not constitute a breach of contract, and in this instance, there is a legal justification in that no executor has yet been appointed to liquidate and distribute the assets in the deceased estate, as prescribed by law. This process includes an obligation placed on the executor in terms of Section 35(12) of the AEA, to pay creditors and distribute the estate to the heirs only once a liquidation and distribution account has been confirmed by the office of the Master, laid for inspection and no objection having been raised against the liquidation and distribution account.

[19] The Respondent further submitted that the creditor's claim only becomes due and payable thereafter. In further amplification it was contended that if there has been no compliance with Sections 29 and 35(12) of the AEA, it cannot be said that the Applicant's debt against the deceased's estate is due and payable, and that it cannot be said that there is a failure to make payment when same was not due and payable in terms of the procedures envisaged by the AEA. In other words, according to the Respondent, there is a factual and legal justification for asserting non-payment and in terms of Section 29 of the AEA, the Applicant's debt, being a contractual obligation

against the deceased estate, is only due and payable once a claim against the estate has been submitted and only once the jurisdictional factors contemplated in Section 35(12) have been established.

[20] This argument can clearly not be sustained as the event of death is identified under the default and breach clause in the Agreement. Whilst the AEA sets out the requirement for payment of claims against the estate, this process does not alter the fact that the non-payment of the account has caused the account to be in arrears which entitles the Applicant to pursue a claim against the estate and/or elect to recover the asset as a means of security for the debt owing. This consideration must be viewed against the Applicant's application which is predicated on its right as the owner of the vehicle.

Rei vindicatio

[21] It is trite that the legal requirements for *rei vindicatio*, the claimant has to prove:

- (a) that he or she is the owner of the thing,
- (b) that the thing was in possession of the Defendant at the time the action was commenced and
- (c) that the thing which is vindicated is still in existence and clearly identifiable.⁶

[22] The Respondent does not challenge the Applicant's ownership of the vehicle. There is a dispute as to whether the Respondent is in lawful possession of the vehicle if regard is had to the terms of Section 11 of the AEA or whether ownership

⁶ *Chetty V Naidoo* 1974 (3) SA 13 (A) 20 B-C. 'in order to succeed, it is incumbent on the claimant to prove the following basic elements of the *actio rei vindicatio*, i) that he or she is the owner of the thing, ii) that the thing was in possession of the Defendant at the time the action was commenced and iii) that the thing which is vindicated is still in existence and clearly identifiable.'

triggers the *actio rei vindicatio* that is available to an owner who has been deprived of their property without consent and who wishes to recover it from someone else who retains possession.

[23] To reiterate, clause 11(1)(b) of the AEA, makes it peremptory for the person to retain the possession or custody of such property, until an interim curator or an executor of the estate has been appointed or the Master has directed any person to liquidate and distribute the estate. It therefore begs the question whether this legislated possession of the asset trumps the vindicatory common law right of the Applicant.

[24] The Respondent would have to show that she has some right that is enforceable against the Applicant. The matter of **Chetty v Naidoo**⁷ is instructive where the following was stated:

'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...The owner,in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is the owner and 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.' (my emphasis)

[25] In vindicatory proceedings, it is trite that the claimant need do no more than to allege and prove that they are the owner of the property, that the other party is holding the property, and that the property in question is still in existence and is clearly identifiable. The Applicant averred that it makes no difference whether the possessor is *bona fide* or *mala fide*.

⁷ 1974 (3) SA 13 (A).

[26] It was furthermore contended that the onus is on the person in possession of the vehicle to establish an enforceable right to remain in possession of the asset as previously stated. The Applicant submitted that reliance on this contention is found in the matter of ***Nedbank v Nonkululeko Bukweni N.O. in her capacity as Master's Representative in the Estate of the Late Mankuntswana Bukweni***⁸ where Rugunanan J, stated:

'The rei vindicatio postulates that once a claimant establishes ownership in the thing in issue, and where the respondent is in possession at the commencement of the action, the thing shall immediately be returnable.'

[27] The Respondent on the other hand, argued that reliance on ***Nedbank v Nonkululeko Bukweni N.O.*** matter is misplaced in that the matter is clearly distinguishable from the matter in *casu* for the following reasons:

- (a) That matter was instituted against the appointed Master's representative, not the Section 11 custodian, which cemented the Respondent's contention that legal proceedings against the deceased estate can only be instituted against an appointed Master's representative or executor, not the Section 11 custodian. The Master's representative or executor "steps into the shoes of the deceased" who is required to perform any obligation of the deceased.
- (b) The repossession of the property was a consequence of the cancellation of the contract, not based on the *rei vindicatio*.

[28] It is trite that the Applicant in an application for an interim interdict must establish:

- (a) A *prima facie* right;

⁸ (Case number: 1970/2022) Eastern Cape Division, Makhanda High Court, para 13.

- (b) A reasonable apprehension of irreparable harm and imminent harm to the right if the interdict is not granted;
- (c) The balance of convenience must favour the grant of the interdict; and
- (d) The applicant must have no other available remedy.

[29] The Applicant contended that the purpose of an interim attachment order is to protect the owner of the goods against deterioration and damage pending the finalisation of the main proceedings between the parties. It is trite that in matters where the Applicant brings a vindicatory or quasi-vindicatory interdict, the harm is presumed until proven otherwise. Erasmus points out that:

*'There are two exceptions to the rule that an applicant for an interlocutory interdict must show the requisites outlined above. These are applications pending (i) vindicatory, and (ii) possessory (usually, but loosely described as quasi-vindicatory) actions. A vindicatory action is one in which the plaintiff claims delivery of specific property as owner or lawful possessor. An action is said to be quasi-vindicatory when delivery of specific property is claimed under some legal right to obtain possession. The most familiar example of the latter is an action for delivery or transfer of property under a contract of sale, which in certain circumstances supports a claim to an interdict restraining the seller from dealing with the property pending the action.'*⁹

[30] In addition, the Applicant contended that it has established that a *prima facie* right which is predicated in substantive law for the restoration of the vehicle. Furthermore, that the use of the vehicle on a daily basis causes rapid deterioration and diminution thereof in value. It was submitted that the case is ultimately founded upon

⁹ DE van Loggerenberg & E Bertelsmann *Erasmus: Superior Courts Practice* (2019 – Revision Service 9) at D6 – 22.

contentions regarding relative harm, convenience and the strength of the right in issue. The Respondent contended that the Applicant's entitlement to full payment of the contractual amount is not a basis to assert apprehension of irreparable harm.

[31] A pivotal consideration is the prospects of success. This is to be weighed against the degree of prejudice to either party in the event of an interim order being refused. It is evident that the Applicant is desirous to ensure the preservation of the asset at this stage. If regard is to be had to the delay in the appointment of the executor, it is my view that the preservation of the vehicle warrants that interim protective relief be granted.

National Credit Act

[32] The Applicant argued that it is entitled to recover the vehicle in the Respondent's possession based on the provisions of the National Credit Act ¹⁰("NCA") which permits interim attachment of goods pending the outcome of vindicatory or quasi-vindicatory proceedings.

[33] The Respondent on the other hand contended that the Applicant's reliance on Section 30(b) of the AEA and Section 127 of the NCA, as a basis for seeking to attach and sell the motor vehicle in question, is misplaced and finds no application for the following reasons namely:

- (a) Section 30 of the AEA deals with situations where there is a court order or writ already in existence before or after the demise of the deceased. In the latter instance, the execution creditor must not have known about the death of the deceased.
- (b) Section 127 of the NCA deals with voluntary surrender of goods at the instance of or by a consumer, not the creditor or the court, otherwise it would not be a

¹⁰ Act 34 of 2005.

voluntary surrender of the motor vehicle in question. In this regard, the machinery of section 127 of the NCA cannot be invoked by the Applicant or the court and accordingly finds no application in this matter.

[34] It was submitted that an interim attachment order is not to enforce remedies or obligations under the credit agreement, and the remedy is not integral to the debt enforcement process under the NCA. It is trite that interim attachment of goods *pendent lite* is well-established and in my view, does not have to be predicated on Section 127 of the NCA which deals with the voluntary surrender of goods. I do, however, agree with the Respondent that Section 30(b) of the AEA finds no application.

Discussion

[35] The Respondent contended that there is an alternative remedy for contractual damages, and as such, even if the case was rooted in the interdictory relief, such application would fail for want of the essential requirements of an interdict. The question to be answered is whether the Applicant has made out a case for alternative relief in the founding papers. It is trite that the Applicant cannot make out a new case in its replying affidavit and heads of argument.

[36] The Respondent asserted that she enjoys possession of the vehicle under the protection of Section 11 of the AEA. However, it is uncontroverted that the vehicle is currently being utilised by the Respondent and is not in safe-custody or preservation as envisaged in Section 11 of the Administration of Estates Act. Inasmuch as the Respondent wishes this court to take cognisance of the provisions of Section 13 of the AEA¹¹, a fundamental consideration is overlooked, namely, that no person is allowed to

¹¹ *'Deceased estates not to be liquidated or distributed without letters of executorship or direction by Master*

13. (1) *No person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act, or under an endorsement made under section fifteen, or in pursuance of a direction by a Master.*

(2) *No letters of executorship shall be granted or signed and sealed and no endorsement under section fifteen shall be made to or at the instance or in favour of any person who is by any law prohibited from liquidating or distributing the estate of any deceased person.*

liquidate or distribute the estate of any deceased person, except under letters of executorship.

[37] Until such time as an executor to the estate has been appointed, the estate assets and liabilities must remain undisturbed. The Applicant's concerns regarding the vehicle being its only security and the potential risk of loss, damage or destruction cannot be ignored, especially in circumstances where there is no insurance cover on the vehicle.

[38] The Applicant has set out the grounds upon which its application is predicated with due regard to the applicable law for the relief it seeks in its founding papers. It was only after the Respondent laid bare her defences in the answering affidavit that the Applicant, responded thereto in reply. These defences, it was submitted, were purely of a technical nature, as the Respondent has not in any way demonstrated an entitlement to the vehicle save for shrouding it under the cover of Section 11 of the AEA.

[39] The alternative relief sought is for the return of the vehicle which is to be placed in the Applicant's approved storage facility until such time as the estate has been finalised or permission to sell granted or provided. In my view, this appears to be a sensible approach. In light of the conclusion to which I have come, I am satisfied that the Applicant has made the essential averments necessary for relief sought in the alternative. Even if such relief was not sought, same could in any event be considered, in the exercise of this court's discretion, under the prayer for further and/or alternative relief, in the interest of justice.

Conclusion

(3) The provisions of sub-section (2) shall not apply to any person nominated as executor by the will of a person who dies before the first day of July, 1966.'

[40] In my view, based on the unique facts of this matter, the legislated possession of the asset in terms of Section 11 of the AEA, cannot trump the vindicatory common law right of the Applicant. In any event, the Respondent has failed to show that she has some right that is enforceable against the Applicant. I am therefore not persuaded that the Respondent's asserted entitlement to possession of the vehicle under the veil of Section 11 of the AEA can be sustained, which requires the vehicle to be kept in safe custody or preservation.

[41] It is unrefuted that the vehicle is being used by the Respondent to the potential risk of the Applicant and the deceased estate as the vehicle is not insured. Consequently, I am satisfied that the Applicant is entitled to cancel the agreement. The relief for the amendment to the chassis number under these circumstances in my view will not be prejudicial to the Applicant or the deceased estate. I am satisfied that the Applicant has succeeded to discharge the onus for the alternative relief sought, which in my view will not be to the prejudice of the deceased estate and serve as interim relief. In the circumstances, the application succeeds.

Costs

[42] It is trite that costs follow the result.¹² In the exercise of my discretion, I am of the view that the Respondent should bear the costs of the application.

Order

[43] In the result, the following order is made:

1. Order granted as per attached order marked "X".

¹² *Ferreira v Levin N.O. and Others; Vryenhoek and Others v Powell N.O. and Others* 1996 (1) SA 984 (CC) at para 155 '*...One of the general rules is that, although an award of costs is in the discretion of the Court, successful parties should usually be awarded their costs and that this rule should be departed from only where good grounds for doing so exists*'.

P ANDREWS, AJ
Acting Judge of the High Court

APPEARANCES:

Counsel for the Applicant: Advocate Michael Garces

Instructed by: Kemp & Associates

Counsel for the Respondent: Mr. Khanyisa Lingani

Instructed by: Lingani & Partners Inc.

CASE NUMBER: 5058/2024

Heard on: 13 August 2024

Delivered: 27 August 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email.