

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEAL CASE NO: A166/2024

COURT A *QUO* CASE NO: 002870/2023

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED.

DATE 14/02/2025

SIGNATURE

In the Full Court Appeal of:

KOOPKRAG (PTY) LTD

Appellant

(Registration Number: 1938/011150/07)

and

TAUTE, BOUWER & CILLIERS INC

First Respondent

CATHERINA ELIZABETH JEAN JOUBERT

Second Respondent

HURSION PATHER

(ID: 9[...])

Third Respondent

SHERIFF OF THE HIGH COURT, UMZINTO

Fourth Respondent

FULL COURT JUDGMENT

CORAM: YENDE AJ; LABUSCHAGNE J; MAZIBUKO AJ.

- [1] The appellant (“Koopkrag”) entered into an instalment sale agreement with Ms Schaal for the purchase of a motor vehicle on or about 28 September 2020. The terms of the Instalment Sale Agreement were *inter alia*:
- 1.1 She would purchase from Koopkrag a Nissan Juke with registration number J[...] 8[...] B[...] G[...] and Vin Number S[...] (thereafter referred to as “the motor vehicle”);
- 1.2 The total amount repayable was the amount of R143 182.45;
- 1.3 Koopkrag would remain the owner of the vehicle until all amounts due under the Instalment Sale Agreement had been paid.
- [2] Ms Schaal and Mr Christo Lundie rented premises from the second respondent. On 8 February 2022 the first respondent, acting as attorneys on behalf of the second respondent, the landlord, caused a rent interdict summons to be issued out of the Magistrates’ Court for the district of Tshwane Central. The summons was not related to the Instalment Sale Agreement.
- [3] On 28 April 2022 default judgment was granted in favour of the second respondent against Mr Lundie and Ms Schaal.
- [4] The sheriff, the fourth respondent, attached the motor vehicle, owned by Koopkrag, at the residential premises of Ms Schaal on 15 August 2022. The vehicle was sold in an execution sale at auction and was purchased by the third respondent.
- [5] In the Court *a quo* Koopkrag instituted an application setting aside the sale and auction and claiming return of the motor vehicle from the third respondent.

[6] The application served before Mogotsi AJ who delivered a judgment on 15 June 2023 dismissing the application. It is against this dismissal that the appellant appeals to the Full Court.

[7] An application for leave to appeal was dismissed on 8 February 2024 and leave to appeal was granted to this court by the SCA.

FACTS GIVING RISE TO THE PROCEEDINGS BEFORE THE COURT A QUO

[8] During September 2022 Koopkrag was advised by Ms Schaal that the sheriff had executed at her premises and in doing so had attached the vehicle. Koopkrag contacted the sheriff and advised him that Koopkrag is the owner of the vehicle and that the vehicle could not be sold on auction. The sheriff asked Koopkrag to provide him with an affidavit confirming ownership and that the vehicle is currently under an Instalment Sale Agreement.

[9] Koopkrag sent an email to the sheriff on 19 September 2022, confirming that the vehicle is being financed by Koopkrag and that Koopkrag is the registered title holder. A copy of the vehicle's registration certificate was provided to the sheriff. No affidavit was provided.

[10] On 28 September 2022 Koopkrag followed up to determine whether the vehicle had been returned to Ms Schaal. The sheriff was reminded that there is a binding Hire Purchase Agreement in place and that the terms and conditions are being met by Ms Schaal.

[11] On 28 September 2022 the first respondent wrote a letter to Koopkrag and copied the sheriff thereon, advising the following:

"Note that the vehicle is attached under a rental interdict. The vehicle can only be returned to Ms Schaal upon payment of the capital amount as per the order being R42 000.00. The remaining legal fees our client is willing to make repayment arrangements for. If Ms Schaal fails to make payment as mentioned the sale of the vehicle will proceed. As previously informed after

the vehicle is sold the outstanding balance on the vehicle will first be paid to Koopkrag, which ensures that Koopkrag will suffer no prejudice.

We trust the above to be in order.”

[12] The matter was discussed with Koopkrag’s attorneys, and in a follow up email the first respondent was referred to the Security by Means of Movable Property Act 57 of 1993. A copy of the relevant section (section 2(1)(b)) was attached.

[13] Section 2(1)(b) of the Security by Means of Movable Property Act 57 of 1993 provides that movables that are subject to an Instalment Sale Agreement are not subject to the landlord’s tacit hypothec.

[14] On 29 September 2022 Koopkrag sent an email to the first respondent advising as follows:

“The issues between your client and Ms Schaal has nothing to do with the agreement between Koopkrag and Ms Schaal. The vehicle you have had confiscated is the property of Koopkrag until the final payment is made, that hasn’t happened yet, so it is still our vehicle. My concern in this instance is for the interests of Koopkrag only. I/We have no interest of what Ms Schaal does or does not do in her private life.

I totally agree, from the little I know, that Ms Schaal is in the wrong as far as her debt to her previous landlord is concerned but so is confiscating our vehicle. A simple check on Natis would have confirmed that the vehicle has a title holder and that would normally indicate that it is still financed. This obviously wasn’t done? Furthermore, confiscating the vehicle continued even after we confirmed (including a copy of the registration document) that the vehicle is currently financed by us and a vehicle financed under a Hire Purchase Agreement is clearly excluded from a landlord’s tacit hypothec.

Are you suggesting I appoint our attorneys to represent us in this matter?”

[15] There was no response until after the sale in execution had taken place which was on 11 October 2022. On 11 October 2022 the first respondent wrote to Koopkrag in the following terms:

- “1. You claim that your correspondence was ignored is denied.*
- 2. You were informed of the situation and the legal process followed.*
- 3. The vehicle was sold on auction and the sheriff needs to proceed with the distribution;*
- 4. Should you fail and/or refuse to provide the final settlement before the close of business today we hold instructions to proceed with a High Court application against Koopkrag for the necessary relief and punitive costs will be asked.*
- 5. We will further ask the court to make a negative inference on your failure and order that there is no settlement amount outstanding and that the papers should be provided to the sheriff.*
- 6. We trust the above to be in order and await the final settlement herein.”*

[16] The aforesaid was a response to Koopkrag’s letter of even date. On 11 October 2022 Koopkrag wrote to the first respondent advising:

“I refer you to all my previous emails in this regard which you have obviously chosen to ignore. This is our vehicle in terms of a legally binding Hire Purchase Agreement and will remain so until the final payment is made. Currently Ms Schaal is up to date with her commitments in this regard. We have no right to unilaterally cancel the said agreement as the terms and conditions of the agreement are currently being met. So, unless you can provide me with Ms Schaal’s written permission to sell our vehicle and to cancel our current Hire Purchase Agreement, we have nothing further to discuss. As mentioned previously the matter was discussed with our attorneys, should we not receive a response to this email before the end of business today I will be referring the matter to them.”

SECTION 2(1)(b) OF ACT 57 OF 1993

[17] The averment by the first respondent to Koopkrag that the vehicle had been attached in terms of a rent interdict needs to be analysed as it induced a train of events resulting in the current proceedings. Sec 31 of the Magistrates Court Act permits a summons for arrear rental to be accompanied by an automatic rent interdict, which can be sought and obtained *ex parte*. That would entitle the Sheriff to attach but not remove or

sell the *invecta et illata* on the rental premises. For that to occur further steps are required, e.g. the posting of security. The aforesaid averment conveyed this state of affairs to Koopkrag.

- [18] As the vehicle is subject to an instalment sale, the vehicle could however not be attached. Section 2(1) of the Security by Means of Movable Property Act 57 of 1993 reads as follows:

“(1) Notwithstanding anything to the contrary in the common law or in any other law, movable property –

(a) ...

(b) to which an instalment agreement, as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005), relates, shall not be subject to a landlord’s tacit hypothec.”

- [19] The only case relating to this section is **Janse van Rensburg v Mahu Exhaust CC and Another** 2014 (3) SA 431 (NCK). In that particular case the question was whether an agreement where deferred interest was not paid in the normal course as with a credit agreement, but only in the event of default, still fell within the ambit of the section. The following is stated at paragraph [35]:

“It is inconceivable what relevance the issue of interest could have in the legislature’s outspoken desire to exclude certain movable property from a landlord’s tacit hypothec. What would clearly be relevant is the issue of the ownership and possession of the movable property, pending final payment, and not whether it is the subject of an agreement in terms of which interest is or may become payable.”

- [20] In the correspondence between the first respondent and the appellant the first respondent mooted a distinction excluding the application of the aforesaid section from the motor vehicle in question. It was later stated by the first respondent that the vehicle was not attached by virtue of the rent interdict, but because of a default judgment.

- [21] The appellant made much of the correction of what it termed a misrepresentation as to the basis for the attachment. A rent interdict attachment does not convey that judgment has been granted in respect of the summons for arrear rentals. Koopkrag's rights are protected by statute as the vehicle is not subject to the landlord's tacit hypothec.
- [22] An attachment after judgment would be valid, but the title holder had to assert its claim to ownership to the sheriff and the sheriff then would commence interpleader proceedings by issuing an interpleader summons- Sec 69 of the Magistrates Court Act.
- [23] The fact that the motor vehicle was the subject of an Instalment Sale Agreement indicates that ownership was not vested in the person who was in possession of the vehicle. The sheriff and the first respondent were made aware of the claim to ownership by Koopkrag before the execution sale. What could be attached for a sale in execution could not include property of third parties.
- [24] The express averment by the first respondent that the vehicle had been attached in terms of a rent interdict, combined with the fact that the vehicle is subject to an Instalment Sale Agreement, is the clearest indicator that the vehicle was not available for sale in execution for the debt of Ms Schaal in terms of the tacit landlord's hypothec.
- [25] Having been advised that the vehicle was attached in terms of a rent interdict, Koopkrag was entitled to assert its rights in terms of section 2(1)(b) of Act 57 of 1993 and did assert such rights.
- [26] The fact that this averment was incorrect and had lulled Koopkrag into a false sense of security cannot be discounted. Had Koopkrag been advised that the attachment was pursuant to a default judgment, Koopkrag would have the information necessary for it to prevent the auction.

[27] The focus then shifts to the sheriff to assess whether she acted lawfully. She was timeously advised of Koopkrug's claim to ownership and was provided with the registration certificate of Koopkrug to indicate that the vehicle that she had attached is not the property of Ms Schaal.

[28] As the judgment upon which the sheriff executed was a Magistrates' Court judgment, Rule 42(2) of the Rules under the Magistrates' Courts Act, 32 of 1944 applies:

*“(2) Where the movable property sought to be attached is the interest of the execution debtor in property pledged, leased or sold under a suspensive condition to or **by a third person**, or is under the supervision or control of a third person –*

*(a) Attachment shall be effected by service by the sheriff on the execution debtor **and on such third person of notice** of the attachment with a copy of the warrant of execution, which service may be effected as if such notice was a summons: Provided that where service cannot be effected in any manner prescribed the court may make an order allowing service to be effected in the manner stated in the order; and*

(b) The sheriff may upon exhibiting the original of such warrant of execution to the pledgee, lessor, lessee, purchaser, seller or such other third person enter upon the premises where such property is and make an inventory and valuation of the said property.”

[29] Notice of the attachment and a copy of the warrant of execution had to be given to Koopkrug as title holder- the third person envisaged in Rule 42(2).

[30] In **Absa Bank Limited v Van Eeden and Others** 2011 (4) SA 430 (GSJ), Willis J (as he then was) stated the following at paragraph [17]:

“Mr Meyer, who appeared for the applicant, submitted that a plain reading of this Rule (Rule 42(2) quoted above) was that the sheriff was obliged to effect service of the notice of attachment and warrant of execution on the

applicant, and only once the original warrant of execution had been shown to the applicant could the sheriff proceed to attach the property. I agree.”

- [31] The applicant in question was the title holder, i.e. the financier who had retained ownership pending final payment of the debt due in terms of an Instalment Sale Agreement. The court was also referred to section 68(3) of the Magistrates’ Courts Act, which provides that the sheriff may attach and sell in auction – *“the interest of the execution debtor in any movable property belonging to him and pledged or sold under a suspensive condition to a third person, and may also sell the interest of the execution debtor’s property, movable or immovable leased to the execution debtor or sold to him under any hire purchase contract or under a suspensive condition”*. This subsection however does not refer to the residual ownership interest of a title holder but of the execution debtor, where applicable.
- [32] In this matter the sheriff did not comply with Rule 42(2) by giving notice of the sale to Koopkrag as title holder.
- [33] Interpleader claims in the Magistrates’ Court are governed by Rule 44. The Rule distinguishes between a third party in possession of property to which two or more persons lay claim and the sheriff in the same scenario. In the first scenario the third party has to issue a third-party summons calling upon the claimants to appear and to state the nature and the particulars of their claims and to have their claims adjudicated (Rule 44(1)(a) of the Magistrates’ Court Rules).
- [34] However, where the person in possession of property is the sheriff, who has attached the property in execution of any process of the court, and where any person other than the execution debtor makes a claim to the property, the sheriff shall require from such claimant to lodge an affidavit in triplicate with the sheriff within 10 days setting out the identity of the claimant and the nature and grounds of his claim, substantiated by relevant evidence. The sheriff as stakeholder is then required to issue the interpleader summons.

- [35] It is apparent that Rule 44(2) is the source of the sheriff's contention that Koopkrag had to file an affidavit.
- [36] When Koopkrag did not file the affidavit in question, but provided the sheriff with registration documents, the question arises whether the absence of an affidavit envisaged by Rule 44(2) would constitute grounds upon which the sheriff could proceed with the sale in execution. This question raises a constitutional consideration arising from sec 25 of the Constitution – i.e. whether the sheriff could pass good title or whether the sale is tainted with illegality. This issue involves the applicability of sec 70 of the Magistrates Court Act, which is discussed below.
- [37] Regardless of whether Koopkrag had filed an affidavit or not, it is apparent that the sheriff could not proceed with the auction unless he had given prior notice to Koopkrag so that it could take steps to protect themselves. In this instance, the sale had already taken place by the time Koopkrag was told that the property was attached in terms of a court order, rather than a rent interdict.
- [38] Even in terms of Rule 44(2) the sheriff would not be the arbiter of which party is entitled to have the property sold in execution. That depends on the outcome of the interpleader proceedings and is a court function.
- [39] If the sheriff, without having received an affidavit as envisaged by Rule 44(2) proceeds with an auction without notifying the claimant of the date of the auction, the auction proceeds at the sheriff's risk.
- [40] In the **Absa Bank v Van Eeden** case referred to supra, the court noted that it is a matter of simple enquiry to determine on the eNaTIS system whether a particular motor vehicle has a title holder and an owner (the latter referring to the person utilising the vehicle on a day to day basis). The cost of such an enquiry is minimal (approximately R60.00) and such an expense is not unduly onerous in ascertaining whether an attached motor vehicle could be

sold at auction or not. In this instance the sheriff did not make such an enquiry, but Koopkrag did provide the sheriff with proof of its title.

SECTION 69 AND 70 OF THE MAGISTRATES' COURTS ACT

[41] Section 69 of the Magistrates' Courts Act governs interpleaders in the Magistrates' Court. What is apparent is that the sheriff would issue an interpleader summons to determine disputed claims to property under attachment. It is this section which is also echoed in the provisions of Regulation 44. What is apparent from the process is that the sheriff is notified of competing claims, calls for an affidavit and then issues an interpleader summons which will be determined in court proceedings. The implication of not advising Koopkrag of the date of the auction is that Koopkrag was not alerted to the urgency in it supplying an affidavit to the sheriff. The failure to comply with the notice requirement in Rule 44 and as echoed in the **Absa v Van Eeden** judgment is that the owner of the vehicle was precluded from taking steps to protect a deprivation of property which could be seen as irrational when viewed from the vantage point of section 25 of the Constitution.

[42] Section 69 of the Magistrates' Courts Act reads:

“(1)(a) Where any person, not being the judgment debtor makes any claim to or in respect of any property attached or about to be attached in execution under the process of any court, or to the proceeds of such property sold in execution, his claim shall be adjudicated upon after issue of a summons in the manner provided by the rules.

(b) Upon the issue of such summons any action which may have been brought in any court whatsoever in respect of such property shall be stayed and shall abide the result of the proceedings taken upon such summons.”

[43] The appellant is taken to task by the sheriff for not issuing or providing the sheriff with an affidavit in support of the claim to ownership. While this affidavit might have been a requirement for purposes of initiating interpleader proceedings, the sheriff, with knowledge of the title of the appellant arising

from the registration certificate, would act at her own peril if she proceeds with a sale in execution without notifying the title holder of the date of the auction. That would trigger the urgency in the need for filing of an affidavit. The failure by the sheriff in this regard is a full explanation for the absence of an affidavit in support of the appellant's claim to ownership.

- [44] The question that arises is where the sale in execution leaves the purchaser of the motor vehicle, in this instance Mr Pather. Section 70 of the Magistrates' Courts Act purports to govern the principle that a sale in execution gives good title. It reads:

"A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect."

- [45] There is no evidence before the court indicating that Mr Pather does not fit the description of *"a purchaser in good faith and without notice of any defect"*.

- [46] However, this was not due to the absence of such information regarding the appellant's claim to title.. The sheriff was well-aware of the appellant's claim to ownership and was merely awaiting an affidavit in support thereof. Yet, he proceeded with an auction without notifying the appellant of the date of the auction.

- [47] The question is whether a deprivation of property rights of the appellant in such circumstances could be branded as arbitrary and whether the Constitution will protect a sale in terms of section 70 of the Magistrates' Courts Act in such circumstances.

- [48] This issue has served on two occasions before the Supreme Court of Appeal.

- [49] In **Campbell v Botha and Others** 2009 (1) SA 238 (SCA) the court had to consider the consequences of a sale in execution where the judgment and execution upon which the sale was based was found to be void. The SCA found that there can be no sale in execution without a judgment and an attachment in execution of that judgment. If the judgment is void and there is no attachment (because neither the warrant nor the notice of attachment was served on or brought to the notice of the owner), the subsequent sale of the property is not a sale in execution but merely a purported sale in execution. Such a sale is not protected by section 70 of the Magistrates' Courts Act and the owner retains ownership of the property (see **Campbell v Botha** at paragraphs [11], [13], [15], [18] to [19] and [20] (at 242D, 243E-F, 245A-B and 245D-E).
- [50] In **Menqa and Another v Markom and Others** 2008 (2) SA 120 (SCA) the Court dealt in similar circumstances with the consequences of the sale in execution. This judgment brings the validity of the subsequent sale in line with Constitutional imperatives arising from section 25 of the Constitution. The SCA held that if a sale in execution was null and void because it violated the principle of legality, the sheriff had no authority to transfer ownership to the purchaser and would therefore not acquire ownership despite registration of the property in his or her name. On the facts, the first respondent was found theoretically to be entitled to recover the property in vindicatory proceedings – see paragraphs [24] to [25] at 129G to 130G.
- [51] In a concurring judgment Cloete JA expressed the Constitutional basis for such finding. He found that at common law a sale in execution was void for want of compliance with an essential formality. However, non-compliance with non-essential formalities did not have that result. Cloete JA was of the view that section 70 of the Magistrates' Courts Act should be interpreted as being to the same effect as the common law, except that a sale in execution in a Magistrates' Court could be impugned even for want of non-essential formalities where the purchaser did not act in good faith or had notice of the non-compliance. Further, he found that section 70 should not be interpreted as protecting a sale which is void, as this conflicts with the basic principle of

legality and section 25 of the Constitution – see paragraph [46] and [47] (at 141D-E and 142B-D).

[52] It is necessary to integrate the consequences of section 2(1)(b) of Act 57 of 1993, the failure by the sheriff to advise the appellant of the date of the auction as required by law and the provisions of section 70 of the Magistrates' Courts Act. If the position of the appellant is the sole consideration, then the position can be summarised as follows:

52.1 As the appellant has retained ownership and is the title holder in terms of the registration certificate on the Natis System, the motor vehicle is not susceptible to attachment under the landlord's tacit hypothec. This is the consequence of section 2(1)(b) of Act 57 of 1993;

52.2 The reason why that provision is in place is because a vehicle which is subject to an instalment sale as envisaged by that section, is a motor vehicle in which the possessor of the vehicle is not the owner. This section protects the property rights of the financier as title holder or owner of the motor vehicle;

52.3 Once judgment has been granted, the question arises whether the position changes if that same motor vehicle were now to be attached in execution. It could be argued that section 2(1)(b) covers the period prior to judgment. Assuming this to be the case, once judgment has been granted, the attachment of the motor vehicle does not fundamentally differ in law from the position prior to attachment. It is still not the motor vehicle of the judgment debtor, but of the title holder. In this scenario the attachment would be valid. However, interpleader proceedings would resolve a disputed claim to the motor vehicle once attached;

52.4 The need for the sheriff to give notice to the title holder of the date of the auction comes into sharp focus in this context. Only if notified of the date of the auction can the title holder be expected to take steps necessary to protect its property rights. To preserve the legality of the sale and the transfer of title notice to the owner/title holder is

necessary. It requires the property owner to be notified of the impending risk to its property once sold at auction;

52.5 If the owner is not notified of the date of the sale and cannot reasonably be expected to take the steps necessary to initiate interpleader proceedings by filing an affidavit with the sheriff in terms of Rule 44(2) of the Magistrates' Courts Act, then the deprivation of property would be arbitrary. Arbitrary deprivations of property infringe the principle of legality and section 25 of the Constitution. In such circumstances the sale of property in execution can be impugned and overturned despite the purchaser being *bona fide* and without notice of any defect in title (section 70 of the Magistrates' Courts Act);

52.6 From the above analysis it is apparent that the failure by the sheriff to notify the appellant of the date of the auction has resulted in an auction sale that falls to be set aside.

[53] Despite Mr Pather being a *bona fide* purchaser who purchased the vehicle in the expectation of obtaining good title, the sale of the motor vehicle in circumstances as set out above does not make it a protected sale. It offends the principle of legality and has purported to deprive the appellant of property in an arbitrary manner in breach of section 25 of the Constitution.

[54] The sale in execution therefore falls to be set aside.

[55] I will now deal with two specific defences raised on behalf of the first respondent. The first was a contention that the deponent of the applicant was not authorised to depose to the affidavit.

[56] The authority to institute legal proceedings has been determined by the SCA in **Ganes and Another v Telecom Namibia Ltd** 2004 (3) SA 615 (SCA). The SCA held:

"It is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the

institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In any event, rule 7 provides a procedure to be followed by respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705 C-J)."

[57] What needs to be established is the authority to institute the proceedings by the juristic person in question. That would usually be established by means of a resolution and the authority of the attorneys would be established by means of the filing of a power of attorney. These are matters dealt with by Rule 7. They are dealt with extra-curially.

[58] In **Unlawful Occupiers of the School Site v City of Johannesburg** [2005] 2 All SA 108 (SCA) at paragraphs [14] to [16], Brand JA stated:

"[14] At the hearing of the appeal, counsel for the appellants conceded that she could not support this ground of appeal. I think the concession was fairly made. The issue raised had been decided conclusively in the judgment of Flemming DJP in Eskom v Soweto City Council 1992 (2) SA 703 (W), which was referred to with approval by this court in Ganes and another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) 624I-625A. The import of the judgment in Eskom is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant, is provided for in rule 7(1). The ratio decidendi appears from the following dicta (at 705D-H):

'The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. ... The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the

attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority. As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1).'

And (at 706B-D):

'If the applicant had qualms about whether the 'interlocutory application' is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment. Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority.'

[15] These remarks by Flemming DJP must be understood against the background that rule 7(1) in its present form was only introduced by way of an amendment in 1987. Prior to the amendment an attorney was obliged to file a power of attorney whenever a summons was issued in an action, but not in motion proceedings. The underlying reason for the distinction, so it was said, was that in motion proceedings there is always an affidavit signed by the applicant personally or by someone whose authority appears from the papers (see e.g. Ex Parte De Villiers 1974 (2) SA 396(NC)). On the basis of this reasoning, it is readily understandable why, before 1987, the challenge to authority could only be directed at the adequacy of the averments in the applicant's papers and pre-1987 decisions regarding proof of authority should be read in that light.

[16] However, as Flemming DJP has said, now that the new rule 7(1) remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this

matter, i.e. by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case for example the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of, but against the advice of its own director or legal services? That question can, in my view, only be answered in the negative."

- [59] The reliance on **Cullinan Holdings Limited v Lezmin**, as referred to in paragraph 30 of the judgment of the Court *a quo* is misplaced. That case merely establishes the known principle that the institution of the proceedings by the juristic person in question needs to be established, and not the deponent. If the **Cullinan Holdings** case suggests anything other than what is stated by the SCA in the **Telecom Namibia** case *supra*, then it is clearly wrong.
- [60] To recap, the issue of the authority to institute proceedings is not to be confused with the authority requiring the deponent to be authorised. What needs to be authorised is the institution of the proceedings and the attorneys who have instituted those proceedings. As far as the deponent is concerned, that is a choice of the attorney who would be required to identify a deponent who has knowledge of the facts. That is the only requirement for a deponent, and it is not a question of authority.
- [61] The non-joinder of Ms Schaal was also raised as a defence. The court *a quo* regarded her as an essential party because the appellant wanted to return the vehicle to her. That is however no basis for joinder. The test for joinder is

whether Ms Schaal has a direct and substantive interest in the relief being sought. Applied to the facts the question is whether the judgment could be carried out without adversely affecting the interests of Ms Schaal.

[62] In Absa Bank Ltd v Naude NO and others¹ the Supreme Court of Appeal considered the issue of whether the non-joinder of creditors in an application to set aside a business rescue plan was fatal to the subject-matter of the litigation which may prejudice the party that has not been joined. The court in Absa relied on Gordon v Department of Health, KwaZulu-Natal² where it was held that “if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined”³.

[63] In casu, when applying the principle of non-joinder as enunciated by the Supreme Court of Appeal in Absa⁴ it is apparent that Ms Schaal did not have any direct and substantial interest in the matter and thus her being joined in the proceedings was not necessary.

[64] If the application succeeds, then the judgment will benefit her – i.e. if Koopkrug were to restore her possession of the vehicle. If it fails, she is no worse off as she is not in possession at present.

[65] The non-joinder defence has no merit and the court a quo erred in upholding the defence.

COSTS

[66] The first respondent was remiss in misstating the facts to Koopkrug as set out above. This misstatement brought Koopkrug under the wrong impression regarding the basis for the attachment of the vehicle. Once the misstatement

¹ Absa Bank Ltd v Naude NO and others [2015] ZASCA 97; 2016(6) SA 540(SCA) ('Absa') para 10.

² Gordon v Department of Health, KwaZulu-Natal [2008] ZASCA 99; 2008(6) SA 522 (SCA) para 9.

³ Absa para 10.

⁴ Ibid

was identified, the first respondent should have corrected the statement and should have taken on the consequences of the misstatement. It failed to do so. Rather it raised technical defences and persisted in its position without any recognition of the consequences of its misstatement.

[67] Further, the first respondent conducted itself as aforesaid while being the attorneys for the second respondent. Normally the principal bears the consequences of its agent's conduct. However, I take into account the fact that the conduct of the first respondent was an error in the professional sense. In the exercise of our discretion, as the first respondent is a party, the costs of this error are not visited upon the second respondent. She is a lay person and a pensioner.

[68] In the premises the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel on Scale C.
2. The costs of the appeal, including the costs of the second respondent on Scale B, are to be paid by the first and fourth respondents jointly and severally, the one paying the other to be absolved.
3. The order of the court a quo is set aside and replaced with the following:
 - "1. The sale in execution held on 11 October 2022 is set aside.
 2. The third respondent is directed to return the Nissan Juke, with registration number J[...] 8[...] B[...] G[], VIN number S[...] 1[...] and engine number H[...] to the applicant at an address provided by the applicant to the third respondent.
 3. If the third respondent fails to deliver the vehicle within five days of date of notification of this order, the sheriff is authorised to take steps to give effect to this order, to attach and remove the

aforesaid vehicle wherever it is found, and to hand it to the applicant at the address provided by the applicant to the sheriff.

4. The costs of the application, including the costs of the second respondent, are to be paid by the first and fourth respondents jointly and severally, the one paying the other to be absolved.
5. The costs of the applicant shall include the costs of two counsel, on Scale C and the costs of the second respondent shall be on Scale B”.

J YENDE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I concur.

LABUSCHAGNE J
JUDGE OF THE HIGH COURT
Gauteng Division, Pretoria.

I concur.

N MAZIBUKO
Acting Judge of the High Court
Gauteng Division, Pretoria.

*This judgment was prepared by **JUSTICE YENDE ACTING JUDGE**. It is handed down electronically by circulation to the parties/their legal representatives by e-mail and uploaded on Caselines electronic platform and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed **14 February 2025**.*

Appearances:

Advocate for Appellant(s): **MP Van der Merwe SC**

Appearing with : **A A Basson**

Instructed by: **TIM DU TOIT & CO INC**

Advocate for First Respondent(s): **A VAN DER WESTHUIZEN**

Appearing with: **M COETZEE**

Instructed by: **TAUTE, BOUWER & CILLIERS INC**

Advocate for Second Respondent's: **NC HARTMAN**

Instructed by Second Respondent's Attorneys: **HOPGOOD ATTORNEYS INC**

Heard: 31st January 2025

Delivered: 14 February 2025