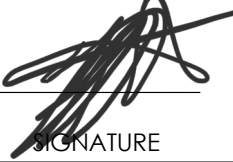


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: Yes
<u>24/2/2023</u>	
DATE	SIGNATURE

CASE NO: 2023-014934

In the matter between:

CAR BOYS CC

Applicant

and

STEERING AUTOWORLD CC

Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The applicant by way of urgent relief seeks to vindicate seven motor vehicles, asserting that it is the owner of the vehicles and that the respondent is in possession of the vehicles. The application is unopposed.¹
2. Both the applicant and the respondent are motor vehicle dealers, which entered into a business arrangement with each other. In summary, the case the applicant seeks to make out for this final relief is that it fell victim to what it describes was well-organised fraudulent scheme at the instance of the respondent.
3. For reasons that will become apparent, I set out *verbatim* the averments made in the founding affidavit on this aspect:

“10. The applicant is a well-known, reputable and credible car dealer. The applicant, *inter alia*, sells a variety of different classes of vehicles, both wholesale and retail; predominantly in the Kwazulu-Natal province – to individual customers as well as to motor dealers.

11. The applicant fell victim to a well-organized fraudulent scheme which was crafted and implemented by the respondent from or

¹ The application was not served by Sheriff. Rather it was a paralegal who sought to serve the application on 16 February 2023, by giving a copy to what is described as an employee of the respondent who refused to acknowledge receipt and then by placing a copy under the gate of the registered office, which appears to the offices of the respondent's auditors.

about 2021 to 2022. The respondent approached the applicant to supply the respondent with motor vehicles on a consignment basis. The respondent would take delivery and possession of the motor vehicles at its premises, and thereafter market and on-sell them on behalf of the applicant, subject to the applicant's consent – thus creating a footprint in the Gauteng province region.

12. *At all times, the motor vehicles would be kept at the respondent's premises, but the e-natis documents (ownership certificates) would be retained and kept by the applicant. The applicant would advise and provide the respondent with list pricing, and a profit share would be had between the applicant and the respondent upon the sale thereof. The vehicles described in paragraph 6 supra constitute a list of the motor vehicles which were to be in the respondent's possession as at date hereof.*

13. *If a potential purchaser demonstrated interest in purchasing a motor vehicle, either by way of immediate payment or bank finance, the respondent would advise the applicant of the same and only upon payment of the purchase price would the applicant release the e-natis documents and effect transfer ownership of the motor vehicle to the purchaser, with the assistance of the respondent.*

14. *At all material times, the respondent was obliged to inform the applicant if any motor vehicles was to be sold, and the motor vehicles were to remain in the respondent's possession, until full payment had been made and transfer of ownership had been effected by the applicant.*
15. *Recently, an individual contacted the applicant requesting the e-natis documents for the motor vehicle listed in paragraph 6.8 supra for purposes of transferring ownership to him/her for further purposes of renewing the vehicle license disc.*
16. *The applicant was shocked and advised the individual that it was in fact the owner of the motor vehicle and that such request could [not] be complied with, until such time that the full purchase price has been paid to the applicant. The applicant was not even aware that the motor vehicle had been sold, if this was the case.*
17. *The individual indicated that he/she had purchased the vehicle from the respondent, paid the full purchase price to the respondent (which was far below the purchase price which the applicant had informed the respondent to list it for), and the respondent advised the individual that it had misplaced the e-natis documents. The individual further informed the applicant that it had upon its own investigations, found that the applicant*

was in fact the owner of the vehicle, and that the respondent had acted fraudulently by misrepresenting facts to the contrary.

18. *Upon the applicant approaching the respondent with regard to the incident, the respondent indicated that the same was a mistake and merely a misunderstanding and that it was still in possession of the vehicles, as listed in the Notice of Motion.*
19. *I then attended at the respondent's premises, and found that the vehicles were not there. The respondent's representatives merely advised with no further explanation or justification, that the vehicles had been moved to another one of its showroom premises and that there is nothing to worry about.*
20. *I am not aware that the applicant had another premises, and this was contrary to the agreement had with the applicant. The respondent could not simply move the vehicles to different locations as it pleased.*
21. *To date, the respondent has failed to return the vehicles to the premises which the applicant agreed to have the same kept, and the respondent fails to indicate where the other premises is. I can only assume that the vehicles may in fact be at the premises known, but possibly stored in the yard behind the building.*

22. *The respondent has been giving the applicant and myself the run around and I have stopped presenting myself at the respondent's premises to obtain the vehicles.*

23. *In the intervening period, the applicant has received a further telephone call similar to that described in paragraph 17 supra."*

13. And so the applicant concludes that it is a victim of fraud and seeks to vindicate the vehicles.
14. But there is considerable difficulty with the manner in which the applicant has sought to make out its case in its founding affidavit.
15. Other than the very generic reference to the scheme being implemented "*from or about 2021 to 2022*", there are no other dates at all in the founding affidavit.
16. No date is given, for example, when the unidentified individual approached the applicant which led the applicant to believe that something untoward was taking place. The applicant contents itself in paragraph 15 of the founding affidavit with the vague assertion that this was "*recently*".
17. No date is given when the applicant received a similar call, other than "*in the intervening period*" (paragraph 23 of the founding affidavit).

18. The applicant does not state when it approached the respondent with regard to the revelation that the respondent had acted contrary to their business arrangement (paragraph 18 of the founding affidavit).
19. The applicant does not state when it visited the respondent's premises to look for the vehicles (paragraph 19 of the founding affidavit).
20. The applicant gives no dates relating to the run-around he is experiencing at the instance of the respondent (paragraph 22 of the founding affidavit).
21. The applicant does not furnish any dates from which a court can determine whether the matter is urgent in the sense of when the averred fraud may have unfolded and whether the applicant then acted with sufficient expedition to bring these proceedings and so justify a hearing in the urgent court.
22. The only date that does appear in the founding affidavit, which is that the scheme was crafted and implemented by the respondent "*from or about 2021 to 2022*", does not advance the applicant's case for urgency because then at best for it on its own version the scheme was implemented several months ago, and which then leaves unexplained then how that fits into its "recent" discovery of the scheme. For the applicant to *bona fide* aver that the scheme was implemented from or about 2021 to 2022, which may cover a period of as much as two years, it must have more information than is set out in the founding affidavit.

23. The distinct impression that is created is that the applicant is being deliberately vague in its chronology of events. Whether this is for purposes of seeking to avoid a close scrutiny of whether the matter is sufficiently urgent to justify being heard by the urgent court or for some other reason is not apparent.
24. The version in the founding affidavit is also extremely vague in other instances.
25. The applicant and respondent, both juristic persons, and therefore need to act through natural persons. But the parties are consistently described as “the applicant” and “the respondent”, with no mention which natural persons were involved in any of the interactions described in the applicant’s factual version.²
26. For example, nothing is said about who represented the parties in putting together and implementing the business relationship.
27. Particularly pertinent is that the applicant does not state which natural person on its behalf was informed by the unnamed individual that that individual had purchased the vehicle, and which led to the revelation described by the applicant in its founding affidavit.
28. Particularly remarkable is that the deponent to the founding affidavit appears to have gone out of his way not to disclose the identity of this unnamed “individual”. The deponent refers simply to “*the individual*”. The deponent resorts to describing that individual as a “*he/she*” in paragraph 17 of the

² The only mention of a natural person are the reference to the deponent to the founding affidavit having attended the respondent’s premises, on an unidentified date, to look for the applicant’s vehicles – paragraphs 19 and 20 of the founding affidavit - and being run-around – paragraph 22.

founding affidavit to further make opaque the identity of this individual, unwilling to disclose even the gender of the individual.

29. The applicant's case is not that the individual is unknown to the applicant or that the applicant does not have any details of the person. The inference to be drawn is that the applicant is deliberately withholding these details. But the applicant gives no reason why it does so.
30. Apart from the obvious difficulty of the applicant not taking the court into its confidence, and without any explanation being proffered, the hearsay nature of much of this evidence is evident as it relates to what the unnamed individual told the applicant in relation to the respondent. As the "individual" is not named, it is not surprising that there is confirmatory affidavit from this individual.
31. There is no confirmatory affidavit from any natural person who professes to have first-hand knowledge of most of the asserted facts
32. Should the hearsay evidence be disregarded, and the applicant makes out no case for such evidence to be admitted, there is very little left of the applicant's factual version.
33. No supporting contemporaneous documents are produced in relation to, for example, the business relationship described by the applicant as existing between it and the respondent, both motor vehicle dealers, over a considerable period (some two years at least).

34. No documents are produced which emanated from the applicant once it discovered the asserted fraud. Ordinarily it would have been expected of an applicant who had fallen victim to such a fraud to have, for example, addressed formal demands to the alleged wrongdoer in one form or other. There is not a single demand or exchange of correspondence attached to the founding affidavit, even by email.
35. But perhaps most concerning is that what the applicant attaches as proof of its ownership of each vehicle is a single certificate of registration³ but each of which is outdated by years. The earliest of these documents, for one vehicle, is October 2017. For another vehicle, the document is for 2018. For three further vehicles, the documents are for 2019. And for the remaining two vehicles, the documents are for 2021, the most recent being dated April 2021.
36. The evidence of ownership that is produced thus ranges from nearly five years old to almost two years old. It is remarkable that the applicant in seeking final relief by way of vindication seeks to prove ownership by certificates of registration that are so outdated. Ordinarily the applicant as the owner would have attended to licensing and the like of the vehicles on an annual basis and so it should easily have been able to produce updated certificates of registration to support its averment of ownership. Instead it contents itself with outdated evidence. This is all the more remarkable as the applicant is a self-

³ Leaving aside that vehicle registration documents are not irrebuttable proof of ownership of vehicles.

professed well-known, reputable and credible car dealer and can be expected to have turnover in its vehicle stock.

37. In the circumstances, I am unable to find that the applicant has adduced sufficient evidence in its founding affidavit to satisfy me that it has established the necessary requirements for vindicatory relief, especially as it is final in nature.
38. I am also wary of granting an order which, at least implicitly, affirms the applicant's ownership of the vehicles where the evidence of ownership is so out-dated. I am also wary, especially given the paucity of evidence, of granting an order that is not only effective against the first respondent (who has not opposed these proceedings) but also effective against any third person who may be possession in vehicles and enabling those vehicles to be attached wherever they may be found.
39. The applicant's counsel, when the paucity of the evidence was pointed out during argument, urged upon me to craft some form of alternate relief, such as potentially an attachment of the vehicles. However, no case is made out for such relief, or even suggested, in the papers, which presumably would be based on some or other interim interdictory basis which has its own requirements.
40. I have considered whether in light of the paucity of evidence in the founding affidavit the matter should rather be struck from the roll, and so afford the applicant an opportunity to produce further evidence and re-enrol the matter in

due course. The applicant's counsel did mention, if I recall correctly, during argument that perhaps further evidence can be adduced.

41. But upon reflection I have decided that the application should be dismissed.
42. The applicant describes itself as a well-known, reputable and credible car dealer. It appears to have been in business for quite some time – its year of registration is 1996. It is represented both by attorneys and counsel. The applicant appears to be sufficiently resourced, from a legal perspective.
43. This notwithstanding, the applicant has elected, in an urgent court, to pursue final relief based upon a perturbingly deficient founding affidavit. Not only is the affidavit deficient because of the evidence that it omits that would usually be adduced (such as contemporaneous supporting documents), it is also deficient in what appears to be the deliberate vagueness of the assertions that are made in the founding affidavit.
44. In dismissing the application,⁴ I do so on the basis that insufficient evidence has been produced, akin to absolution from the instance.⁵ I am not persuaded that the applicant has made out a *prima facie* case for vindication in that the

⁴ Had I not dismissed the application, I would have struck the application from the roll as the applicant has not made out a case for urgency because, as described above, in the absence of any dates in order to ascertain the relevant chronology, urgency cannot be assessed.

⁵ See *Vena v Vena and another NO 2010 (2) SA 248 (ECP)*, para 8.

evidence that has been adduced is insufficient to persuade a reasonable person to find in the applicant's favour.⁶

45. The following order is granted:

45.1 the application is dismissed, no order as to costs.



Gilbert AJ

Date of hearing: 21 February 2023

Date of judgment: 24 February 2023

Counsel for the applicant: B Bodhania

Instructed by: Mayet Vittee Inc.

For the respondent: No appearance

⁶ *Momentum Life Assurers Ltd v Thirion* [2002] 2 All SA 62 (C), para 43.