



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

Case Number: 22584/2017

In the matter between:

IAN MARK HALFON

Plaintiff

and

KEMPSTER SEDGWICK (PTY) LTD.

First Defendant

JUSTIN DAVIDSON

Second Defendant

JUDGMENT DELIVERED: THURSDAY, 23 NOVEMBER 2023

NZIWENI, J

[1] This is an interlocutory application in the form of absolution from the instance, in terms of Rule 39(6) of the Uniform Rules of Court (the Rules), by the defendants. At the close of the case for the plaintiff, both defendants applied for absolution from the instance. The defendants are raising a legal question. At the core of this application is the question of the plaintiff's *locus standi* to bring this action against the defendants. The main action commenced when the plaintiff instituted a claim for damages against the defendants, arising from a motor vehicle accident that occurred on 16 November 2016.

[2] The plaintiff entered into a credit agreement with Bankfin to purchase Volvo XC90 T8 model ("the vehicle"). The seller of the vehicle was a dealership in Johannesburg, operating under the name Bedfordview VOLVO Dealership. The Bedfordview Dealership at the time did not have a branch in Cape Town, and they arranged for the vehicle to be brought to Cape Town, at the dealership of the first defendant.

[3] Before the plaintiff could take physical possession of the vehicle from the first defendant, the vehicle was involved in a collision with another vehicle and as a result, the vehicle was damaged beyond economic repairs. At the time of the accident, the vehicle was driven by an employee of the first defendant and the other vehicle was driven by the second defendant. The plaintiff then issued summons asserting that the collision and the damages were caused by the negligence of both defendants.

[4] Consequently, he [the plaintiff] claims personally that the defendants are liable jointly and severally, for damages in the amount of R824 100.00, arising from their respective negligent acts. According to the particulars of claim the amount of R824 100, 00 is calculated as follows:

Fair and reasonable pre-accident value of plaintiff's vehicle R1 0 74 100

Fair and reasonable post-accident value of Plaintiff's vehicle R 250 000.00

[5] It is common cause that the insurance which the plaintiff took, after entering into a credit agreement with Bankfin, paid the bank the amount that was outstanding from the sale.

[6] At the commencement of the trial, pursuant to the parties' agreement, a separation of issues in terms of R33 (4) of the Rules, was ordered. The plaintiff in his particulars of claim avers that he was the owner, alternatively, the bona fide possessor with associated risk of profit and loss of the vehicle. It is plain that the claim of the plaintiff is an Aquilian claim.

[7] The plaintiff testified that he is the owner of the vehicle. He also testified that in terms of the National Road Traffic Act 93 of 1996 (NRTA), he was the 'owner' of the vehicle as depicted on Exhibit "B" page 2. It was his testimony that the vehicle was also transferred to him as an owner. During the arguments, the court was conceded that the plaintiff was not the owner of the vehicle, at the critical time.

[8] It is the plaintiff's testimony that in compliance with clause 6 of the ABSA credit agreement, he secured insurance for the vehicle and after the collision he was compensated by the insurance.

The credit agreement

[9] The credit agreement plainly stipulates that the Bank was the owner of the vehicle at the critical time. This much was never disputed by the plaintiff.

[10] It is not in dispute that the plaintiff had not yet taken actual physical possession of the vehicle at the time of the collision. Hence, there is an issue of the plaintiff's *locus standi* in these proceedings. It is also common cause that at the time of the accident the vehicle was in the physical possession of a third party [second defendant]. It is further common cause that when the accident occurred the first defendant was in the process of preparing the vehicle to be handed to the plaintiff.

[11] The central issue in this interlocutory application is whether the plaintiff has *locus standi*. However, this issue is inextricably linked to the question as to whether the vehicle was indeed constructively delivered to the plaintiff at the time it was involved in the collision.

Parties' submissions

[12] In the heads of argument by the plaintiff, it is contended that the present case is a classic example of constructive delivery. So, the argument continues, although the plaintiff did not take physical possession of the vehicle at the time, the plausible inference from conspectus of evidence is that there was intent on the part of the seller to transfer possession of the vehicle to plaintiff and that he [the plaintiff] had the requisite intention to receive. It is the plaintiff's argument that the delivery was fulfilled through constructive delivery, and the facts of this matter reveal a constructive delivery of the vehicle.

[13] It was also submitted on behalf of the plaintiff that Bedfordview Dealership was wearing two hats; one as a seller and the other as an agent. According to Mr McLachlan there were two distinct agreements between the plaintiff and Bedfordview Dealership, one was to transport the vehicle on behalf of the plaintiff and at his expense. It was further submitted on plaintiff's behalf that there is a plausible inference that there was an agency agreement.

[14] On the other hand, it was strenuously asserted on behalf of the defendants that there had been no delivery, either actual or constructive, of the vehicle. It was further contended on behalf of the defendants that there is no averment in the particulars of claim that delivery took place by constructive method. It was also submitted that the evidence led by the plaintiff is not sufficient to make out a case for constructive delivery.

[15] It was further argued on behalf of the defendants that there was no evidence from the plaintiff that there was an agreement with any third party to hold the goods on his behalf. According to the defendants, there was no agency agreement and there was no evidence tendered in this matter regarding agency agreement. It is submitted on behalf of the first defendant that there is no sufficient evidence to prove separate delivery agreement.

[16] It is common ground between the parties that the testimony of the plaintiff reveals that it was understood and agreed between the plaintiff and Volvo Bedfordview, that the vehicle was to be delivered in a very near future. Thus, there was a delay between the time when the contract of sale was concluded and the time

when the delivery of the vehicle had to occur. During the window period the vehicle got damaged whilst it was still in possession of a third party.

Counsel on behalf of the plaintiff contended that it was unnecessary to make the allegation of delivery in the particulars of claim. According to Mr McLachlan such an averment was implied.

[17] Of course, as noted above, in the light of the submissions made by the parties, it is evident that the primary question to be considered is whether there was delivery of the vehicle to the plaintiff before the vehicle was involved in an accident. It is common ground that, if it was, the plaintiff has *locus standi* to bring this action.

Analysis

What constitutes delivery?

[18] In *Grobbelaar v Van Heerden* 1906 EDC 229 on pages 232-233, the following was stated:

“It seems to me a pure and baseless fiction to regard the purchaser, before delivery of the thing sold, as if he were its owner, for he has neither *dominium* nor possession. He cannot, for instance, if the thing sold is stolen or injured by a third party, bring a *vindictory* action, nor *condictio*, nor an action for damages... He has first to obtain a cession of all actions from the vendor to cede these actions to the purchaser, but until this is done the latter will have no *locus standi* and cannot sue the wrong doer...

It is elementary principle of our law that with certain exceptions, some of which arise in this case, delivery or some acts equivalent to delivery, is essential to transfer the *dominium* in the property sold from the vendor to the purchaser ...”

It is trite that the delivery of a *merx* can either be actual (*traditio*) or constructive (fictitious). In terms of our law, constructive delivery is an equivalent of actual delivery. Additionally, it is well established now that constructive delivery may apply in several situations and can present itself in different forms namely, *clavium traditio* (symbolic delivery), *traditio longa manu*, *traditio brevi manu*, *constitutum possessorium*, and attornment. See *LAWSA* 2ND Edition at para 220; *Wille's Principle of South African Law* 8th Edition on pages 297-299.

Was delivery of the vehicle effected to the plaintiff?

[19] The law is settled that with constructive delivery the law permits a change of possession without any change of actual custody of the *merx*. Hence, others have described it to be an artificial or a fictitious concept.

In this matter, to determine the main question whether there was a constructive delivery of the vehicle, this Court only has the evidence that was presented during the plaintiff's case.

[20] When this Court determines whether a constructive delivery occurred; what happened after the sale of the vehicle is also important. The evidence in this matter demonstrates that Bedfordview Dealership was the seller of the vehicle. As mentioned earlier, there is common ground between the parties that there was no actual physical

transfer of possession of the vehicle to the plaintiff in order to effect delivery. Thus, it is asserted on behalf of the plaintiff that the delivery of the vehicle was carried out through constructive delivery.

[21] It was contended on behalf of the defendants that the evidence led on behalf of the plaintiff did not reveal that there was an agency agreement entered. At the same time, it is important to note that the plaintiff testified that the first defendant was providing valet services. Notably, when the plaintiff testified, it was never put to the plaintiff that the first defendant never held the vehicle on behalf of the plaintiff.

[22] It is to be observed that the evidence in this matter demonstrates that there was an arrangement that the vehicle in question would be brought to Cape Town at the dealership of the first defendant. The plaintiff's testimony reveals that, given the fact that the Bedfordview Dealership did not have a branch in Cape Town, they organized for the vehicle to be brought to Cape Town. Mr McLachlan then posed a question to the plaintiff as to whether he [plaintiff] was in anyway involved in the arrangement. The plaintiff answered this particular question in the negative.

[23] As mentioned previously, it was argued on behalf of the first defendant that there is no evidence that an agreement was ever reached between the parties [the seller, the first defendant and the plaintiff] regarding the delivery of the vehicle, by the first defendant to the plaintiff.

[24] For the reasons that I set out above, it is now necessary to determine *inter alia*, whether the first defendant ever became party to the agreement of delivering the vehicle to the plaintiff arises for determination. I do not think that the fact that the plaintiff did not have anything to do with the arrangements related the vehicle being brought to Cape Town, can be interpreted to mean that there was no agreement between Bedfordview Dealership, the plaintiff and the first defendant.

[25] In *LAWSA supra*, in paragraph 225 the following is stated:

“Ownership is transferred by attornment when the thing to be transferred is in the physical thing of the third party who holds it on behalf of the owner. Attornment takes place if the transferor, the transferee and the holder of the thing enter into a tripartite agreement to the effect that the holder (the party attorning) is henceforth to hold the thing no longer on behalf of the transferor but on behalf of the transferee. . .

The requirements for a valid attornment are the following:

- (a) there must be a tripartite agreement or mental concurrence on the part of all three interested parties that the holder will henceforth hold the thing on behalf of the transferee and not on behalf of the transferor; and
- (b) the holder must exercise factual control over the thing or at least have the right of control at the moment when he or she consents to hold it in future on behalf of the transferee.”

See also *Southern Tankers (PTY) Ltd t/a Unilog v Pesco* 2003 566 at 570 G-J-571A.

[26] Although there were no expressed terms of agreement between the plaintiff and the first defendant; in this matter, it is important to note that the plaintiff's evidence

reveals that he received a telephone call from the dealership of the first defendant stating that he should not go and fetch the vehicle because it was involved in an accident. Moreover, it is a point worth considering that this plaintiff's evidence was never challenged. Thus, no issue was raised regarding this particular evidence by the plaintiff.

[27] In the context of this case, the telephone received by the plaintiff from the first defendant's dealership is a point worthy of consideration. In my mind, this unchallenged evidence indicates strongly that the first defendant acknowledged and accepted that it held the vehicle before the accident on in favour of the plaintiff. Such is demonstrated by the lengths the first defendant's dealership went to after the accident.

In other words, the first defendant attorned that fact. The evidence of the telephonic call shows that the first defendant, before that accident, intended to deliver the vehicle to the plaintiff. It also shows that the first defendant was a party to the agreement to deliver the vehicle to the plaintiff and that he knew why it [first defendant] had the vehicle in its possession. The conduct of the first defendant in this regard after the accident makes it very improbable that it did not know that it was holding the vehicle on behalf of the plaintiff.

[28] In this matter, there is no direct evidence that the first defendant notified the plaintiff of the arrival of the vehicle in Cape Town. That notification is meant to

complete the first defendant's duty to the seller. The notification serves as an attornment.

It is my view that the telephone call by the first defendant's dealership to the plaintiff after the accident provides sufficient grounds to infer that, before the accident it [first defendant] must have notified the plaintiff about the arrival of the vehicle at its dealership in Cape Town. If they did not do so, how would the plaintiff have known when to go and fetch the vehicle. Surely, the telephone call was meant to stop the plaintiff from coming to pick up the vehicle and notify him of the accident. So far the evidence runs in accord with this antecedent probability.

[29] In the circumstances of this case, the inference seems virtually irresistible that the phone call from the dealership of the first defendant, confirmed that at the time of the accident the first defendant was not holding the vehicle on behalf of the seller [Bedfordview Dealership], instead it [first defendant] held the vehicle on behalf of the buyer [the plaintiff]. In other words, when the first defendant notified the plaintiff about the arrival of the vehicle there was a relationship forged between the first defendant and the plaintiff. It is also evident from the testimony of the plaintiff that there was a mutual consensus from the seller and the plaintiff that the first defendant makes such acknowledgement. Further, this is confirmed by the statement which was put to the plaintiff by Mr. Smit [first defendant's counsel] when he stated the following:

"we are going to call Mr Bergsma to testify. He would testify that on 16 November 2016, he was busy preparing the motor vehicle to be delivered to you and he was on route to put fuel in the vehicle for it to be delivered to you. ... as a result of the collision the car was never delivered to you."

On the face of this statement, it is difficult to see how, in the absence of a contractual obligation on the part of the first defendant to deliver the vehicle to the plaintiff, he would have obtained the basis to deliver the vehicle to the plaintiff. The plaintiff's response to this assertion by counsel on behalf of the first defendant was that the vehicle was not physically delivered to him, but he took delivery because he paid for it. This statement which was put to the plaintiff further buttress in the clearest terms that an agreement was concluded between the parties [the seller, the first defendant and the plaintiff], that the first defendant was meant to deliver the car to the plaintiff, but the accident prevented this from happening. Therefore, the plaintiff was a constructive possessor of the vehicle as he knew that the vehicle was held by the first defendant for him. The evidence also reveals that the first defendant was not holding the vehicle for its own purposes as he did not have any proprietary interest in the vehicle. Accordingly, the first defendant was restrained from disposing or selling or dealing in whatever manner with the vehicle. It appears from the fact of this case that the first defendant, before the accident, pertinently agreed to hold the vehicle on behalf of the plaintiff. Such an inference can properly be drawn from the evidence that was led by the plaintiff.

[30] So far as direct evidence goes, there is none to demonstrate that an agreement between the plaintiff and the first defendant was entered. In so far as a tripartite agreement, the evidence in this matter shows that there was a mutual tripartite agreement that was reached by the seller, plaintiff and the first defendant. According to authorities, the tripartite agreement need not be entered simultaneously. As far as the first defendant and the plaintiff are concerned, the contract between them came into existence when the first defendant contacted the plaintiff. On the evidence the

circumstances are such that the parties did intend that the vehicle would be delivered to the plaintiff when the agreement between the three parties was made. Had there not been an agreement between the parties, the plaintiff would not have testified that the first defendant was just a valet, and that the vehicle was released for him [plaintiff] in Johannesburg but in Cape Town after the prep another car bumped into it.

[31] From the foregoing events, it becomes clear that nothing turns on the fact that there was no direct evidence of the tripartite agreement.

[32] It therefore seems from the context of this case that, the vehicle would not have been in Cape Town, if, the plaintiff and the seller did not know or consent to the first defendant to hold the vehicle on behalf of the plaintiff. In this matter, it is evident that when the first defendant received the vehicle at its dealership here in Cape Town, he attorned to it and it [first defendant] became the bailee for the plaintiff [the ultimate consignee]. Initially, the first defendant was a mere agent of the seller, that took charge of the vehicle for delivery to the plaintiff.

[33] As the matters stand, there cannot be any doubt that when the first defendant notified the plaintiff about the arrival of the vehicle, the agency agreement between the first defendant and the seller came to an end. It is to be observed that at that point the plaintiff acquired constructive delivery of the vehicle.

[34] In the consequence of these occurrences, it is then easy and natural to infer in this case that the first defendant at that particular juncture held the vehicle on behalf of the plaintiff. Having examined the evidence in this matter, I am satisfied that the facts of this case slot most neatly into the definition of constructive delivery.

[35] There is thus considerable force in the argument made on behalf of the plaintiff, by Mr McLachlan on this point. Thus, this Court cannot accept the argument that in this case there is insufficient evidence that constructive delivery took place.

[36] I am thus satisfied that the plaintiff has discharged his onus of proving that he has *locus standi* to claim damages from the defendants. Additionally, the facts of the matter at hand reveal that it was not necessary for the plaintiff to plead that delivery of the vehicle was effected by constructive delivery. It is trite that a plaintiff does not need to plead the evidence.

[37] I accordingly make the following order:

1. Absolution from the instance is dismissed;
2. Both first and second defendants are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.



NZIWENI J

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff: Adv HG McLachlan

Instructed by: Visagie Vos Inc.

Ref: Mr Jaco Van Der Westerhuizen

Counsel for First Defendant: Adv J Smit

Instructed by Pearce, Du Toit & Moodie Attorneys

Ref: Mr Kelvin Moodie

Counsel for Second Defendant: Adv A Smit

Instructed by Bothas Attorneys

Ref: Mr A Botha