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Delivered: 1 June 2007

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 5227/07

In the matter between:

DANNY CORNELUS DANIELS Applicant

and

THE MINISTER OF SAFETY AND SECURITY First Respondent

THE NASIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE Second Respondent

CAPTAIN SUKAZI Third Respondent

INSPECTOR NTSHINGILA Fourth Respondent

JUDGMENT

MURPHY J

1. The applicant seeks an order directing the respondents to deliver to him a Nissan UG 780 truck seized by them in terms of section 20 of the Criminal Procedure Act of 1977.

2. In general terms section 20 provides that the State may seize articles concerned in, or believed on reasonable grounds to be concerned in the commission or suspected commission of an offence; or which may afford evidence of the commission or suspected commission of an offence; or is intended to be used, or on reasonable grounds is believed to be intended to be used, in the commission of an offence.

3. For the purposes of the present application, this section must be read with sections 30(c) and 31(1)(a) of the Criminal Procedure Act. Section 30(c) obliges the police to give the seized article a distinctive mark and to retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require. In terms of section 30(1)(a), if no criminal proceedings are instituted in connection with any article refer to in section 30(c), or if it appears that such article is not required at the trial for the purposes of evidence or for purposes of an order of the court, the articles shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article to the person who may lawfully possess it.

4. The truck forming the subject matter of this dispute, was seized by the fourth respondent, Detective Inspector Ntshingila, on 18 April 2006 from Mr Moses Kobue, while the latter was attempting to register the vehicle at the licensing department in Newcastle, Kwa Zulu Natal. The truck was seized because it appeared on the SAPS computer under case number Akasia CR/CA3397/4/2002 to be stolen. At the time of its seizure the truck had registration plates with number KBT 282 GP, which was not the registration number allocated by the registration authority to the truck.

5. The police do not intend to institute criminal proceedings in connection with the truck and thus in terms of section 31(1)(a) they are obliged to return it to the person from whom it was seized, provided he is entitled to lawfully possess it. If such person, namely Mr Kobue, is not entitled to lawfully possess it, the truck must be delivered to any other person who may lawfully possess it. The applicant contends that Kobue may not lawfully possess the truck, because he (the applicant) is the owner of it and that it was stolen from him. The respondents dispute the applicant's claim of ownership and submit that there is no reason why Mr Kobue may not be legally in possession of the truck. They are of the opinion that they are obliged in terms of section 31(1)(a) to return it to him.

6. The truck was last in possession of the applicant in 2001 and since then has passed through a number of hands. The police have conducted a

thorough investigation and have furnished a history of transactions that in their cardinal aspects are common cause.

7. During July 1996 the truck was purchased, the price paid in full and registered in the name of DDD Transport CC, a close corporation of which the applicant was the sole member. The current registration documentation regarding the vehicle, obtained on 9 February 2007, reflects that the truck was registered on 9 July 1996 in the name of the corporation and remains so registered. However, a CIPRO company enquiry as at 9 February 2007 records that the corporation was finally deregistered on 5 September 1991, almost five years before the truck was purchased and registered in its name. The applicant claims that the registration of the vehicle in the name of the deregistered close corporation was a mistake and that he was in fact the owner of the truck. He is somewhat scanty on the detail as how that came to pass. The effect of the deregistration of a close corporation is that its existence as a legal *persona* ceases - (*Ex parte Jacobson : In re Alec Jacobson Holdings (Pty) Ltd* 1984(2) SA 372 (W) at 376 - 377). Effectively this means that the applicant appears to have purchased the truck on behalf of a person that did not exist. I will revert to the significance of this later.

8. In July 2001 the applicant, acting in his personal capacity, sold the vehicle to Mr JAL Harmse. In his founding affidavit he makes the bald averment that it was agreed that he would retain ownership of the truck until Harmse paid off the full purchase price in instalments. He did not annex a copy of

the written sale agreement to his founding papers. However, during the course of their investigation, the respondents obtained a copy of the contract which is annexed to their answering affidavit as annexure JHS13. The terms of this agreement have some relevance and I propose to examine them more closely in due course.

9. According to the applicant, Harmse did not keep to his side of the bargain and disappeared without making full payment after receiving delivery of the truck. During April 2002, the applicant opened a fraud and theft case at the Akasie police station. As I have mentioned, the vehicle was only discovered four years later with different number plates in Newcastle. It seems strange that the police took so long to recover the vehicle. As appears from annexure JHS13, the applicant had Harmse's address and ID-number. The police were eventually able to locate Harmse at that address, the *domicilum citandi et executandi,* and take a statement from him on 6 June 2006. This raises a question or a doubt about the applicant's averment that he was unable to trace Harmse. Be that as it may, the respondents have conceded that the applicant was unable to trace Harmse.

10. If is common cause that the truck seized at Newcastle is indeed the vehicle that was the subject matter of the sale between the applicant and Harmse. It has the same chassis and engine number, and the applicant was able to open it with a key he had retained.

11. The respondents refuse to deliver the vehicle to the applicant, as I have said, because they doubt and question his claim to be entitled to lawful possession.

12. In the first instance they contend that the applicant was never the owner of

the vehicle as it was registered in the name of the close corporation. The difficulty with the submission though is that the close corporation did not exist at the time and hence it was not possible for it to own anything. Consequently, the registration papers cannot be seen as conclusive. It is perhaps permissible to rely on the fact that the applicant undisputedly paid the purchase price for the truck to conclude that he acquired ownership. However, I hasten to add, I do not consider it necessary to finally determine this question. I am prepared for present purposes to assume, for reasons that will become apparent presently, that prior to the sale to Harmse the applicant was the owner of the vehicle, despite its registration in the name of the close corporation.

13. The investigation conducted by the police included, as I have said, an interview with Harmse. The respondents annexed a sworn statement from him attested on 6 June 2006. In it Harmse maintains that he bought the truck from the applicant for an amount of R169 500 of which he paid all but R80 000 directly to the applicant. The balance of R80 000, he says, was paid to the applicant's attorneys, CR Botha and Associates by his attorneys Stroh and Coetzee. He has annexed receipts in support of his claim of payment. Harmse stated further that the applicant signed over the close corporation documentation to him and he then re-registered the vehicle, changing the registration number from XBX 456 T to KRY 226 GP. Harmse then sold the vehicle to a certain Mr Gert van der Merwe, but did not deliver the registration documentation to him because of a dispute between them. Mr van der Merwe then sold the truck on to Mr Hamilton Masuku also without delivering any registration documentation. Mr Kobue, the person from whom the vehicle was seized, acquired the truck from Mrs Angus Masuku, who passed it to him in her capacity as executrix of the estate of Hamilton Masuku. It seems therefore that in none of transactions concluded subsequent to Harmse's acquisition of the truck were the registration papers passed on, or the registration process completed.

14. The applicant admits that he concluded the written contract,annexed JHS13, with Harmse in July 2001 but denies that the payments were made as alleged by Harmse. He points convincingly to the fact that some of the deposit slips are dated before July 2001. Moreover, the agreement stipulates a price different to that mentioned by Harmse. Clause 2.1 of the agreement sets the price at R122 100 and not R169 500..

15. In the final analysis, the issue to be determined is whether the police are obliged to restore possession of the vehicle to Mr Kobue or whether Mr Kobue is a person who may not lawfully possess the truck, while the

applicant is a person who may lawfully possess it. As mentioned earlier, the relevant provision is section 31(1)(a) of the Criminal Procedure Act. It reads as follows:

> "If no criminal procedings are instituted in connection with any article referred to in section 30(c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it."

16. Given that the police do not propose to institute criminal proceedings in connection with the truck and do not require it as evidence, the section obliges them in the first instance to return it to the person from whom it was seized unless such person may not lawfully possess it.

17. The respondents' refusal to deliver the vehicle to the applicant is predicated upon their view that they would only be able to escape their obligation to return the seized vehicle to Kobue if it was shown that the vehicle was stolen. The decision in *Dookie v Minister of Law and Order and others* 1991(2) SACR 153 (D) at 157 h - i, lends support to that approach. While the possession of a *bona fide* purchaser for value who does not have notice of any defect of title of the seller (such as Kobue), can be considered lawful, theft is a continuing crime meaning that the theft continues to be committed as long as the stolen property is outside of the

possession of the true owner, and may be attributed to subsequent holders of the property when they participate in it with knowledge of the fact that the property is stolen. Unlawful possession implies that the *animus* element of possession consists in part of knowledge that the article is stolen or misappropriated. Nevertheless, in *Minister van Wet en Orde v Erasmus en 'n Ander* 1992(3) SA 819(A) the then Appellate Division held that the possessors of a stolen vehicle who enjoyed a lien for improvements effected to it were in lawful possession of it despite knowledge that it was stolen.

18. The question then is whether there is sufficient evidence that Harmse stole the vehicle from the applicant. As I have indicated, it is common cause that the vehicle was sold by the applicant to Harmse in terms of the written agreement annexed to the respondents' affidavit as annexure JHS13. It is well established law that there is a presumption that where a seller sells and delivers the *res vendita* to another, the intention is to make the purchaser the owner of it. The presumption is rebuttable by evidence indicating a contrary intention. The most pertinent evidence of such a contrary intention, inevitably, would be a term in the written agreement reserving ownership to the seller until payment of the full purchase price. The onus will be on the seller asserting reservation of ownership to prove that the common intention was indeed to reserve ownership in the seller -

Meyer v Retief and Co 1932 OPD 3.

19. There is no express, unequivocal term in annexure JHS13 explicitly reserving ownership to the applicant. Clause 1 records that the seller sells and the purchaser purchases the vehicle upon the terms and conditions of the agreement. Clause 2 stipulates that the price of R122 100 is payable in two amounts of R40 000 and R82 100 on 16 July 2001 and 31 August 2001 respectively, such to be paid to the sellers attorneys. The agreement does not specify a date or manner of delivery. In terms of clause 13 the purchaser agrees to pay R10 000 per month for use of the vehicle until such time as the full outstanding balance has been settled. It is clear from clause 2 read with clause 13 that the intention was that the full balance would be paid by 31 August 2001, that is some seven weeks after the agreement was concluded.

20. There are two clauses in the agreement that point to the reservation of some interest by the seller. The most significant is clause 6.1 headed: "**Restriction of purchaser's rights**". It reads:

> ‘‘6.1.1 The purchaser shall not sell, cede, assign, transfer or pledge the vehicle or allow it to become subject to any lien of whatsoever nature or deliver possession thereof to any person while any portion of the purchase price remains unpaid.
>
> 6.1.2 The purchaser agrees and consents that should he fail to meet any term and condition of this agreement, the seller will have the right to immediately re-possess the vehicle without it being necessary to obtain a court order. The purchaser further explicitly waives any right of spoliation it may have against the seller should it become necessary for the seller to re-possess the vehicle."

21. Clause 5.1 allows for the risk to pass to the purchaser on delivery. Clause 4.1.1 obliges the purchaser to insure the vehicle at his own expense for an amount equal to the purchase price, and most significantly to "notify the insurance company of the seller's interest in the vehicle". The exact nature and extent of the seller's interest in the vehicle is not expressly defined in the agreement.

22. The question that arises then is whether the prohibition on alienation, the right to re-possession and the duty to notify the insurer of the seller's unspecified interest, taken together, are sufficient to rebut the presumption that on sale and delivery the seller intended to transfer ownership to the purchaser. I incline to the view that these provisions are a strong indication of an intention to reserve ownership until payment of the final instalment and that they may very well be sufficient to rebut the presumption. However, Mr Coetzee, who appeared for the respondents, submitted that ownership has no direct or immediate bearing on the return of an article in terms of section 31(1)(a) where the only criterion is the right of possession. He contended that the applicant bore the onus of showing that Kobue's possession was unlawful by virtue of the fact that Harmse had stolen the vehicle from the applicant.

23. The fact that the vehicle was delivered to Harmse pursuant to a contractual arrangement is a persuasive fact militating against the possibility of theft. Nevertheless, I accept that had Harmse intended to appropriate the property with the aim of permanently depriving the applicant of it without payment, such could constitute theft in the form of embezzlement. In *S v Van Heerden* 1984 (1) 666 (A) the court held that where a person purchases an article from another on instalments, and in terms of the agreement the seller is to remain owner thereof until the purchaser was paid the last instalment, and the purchaser then disposes of the property contrary to the agreement without the seller's consent and before the last instalment is paid, the purchaser may be convicted of theft, provided the necessary intent is present.

23. In his affidavit filed with the police, Harmse maintains that he in fact paid the purchase price. I agree with the applicant that the evidence put up in support of that is unconvincing. First of all, the amount he mentions as the agreed price differs from that reflected in the agreement. Furthermore, it is evident from the written receipts provided by Harmse that they do not relate to the agreement. Not only do they not equate with the purchase price, but they are dated months, even years, before the date of the purchase agreement. Harmse also states in his affidavit that his attorneys paid an amount of R80 000 to the attorneys of the applicant. No attempt has been made by the respondents to corroborate this by furnishing any supporting or confirmatory affidavit by the attorneys. Moreover, on 5 October 2001, the applicant's attorneys addressed a letter to the attorneys of Harmse suggesting that payment had not been made, which reads as follows:

> ''U telefaks gedateer die 2de deser, verwys.

Ons bevestig dat ons optree namens DDD Vervoer Bk, soos hierin verteenwoordig deur mnr D Daniëls.

Ons bevestig dat skrywer ons kliënt bygestaan het by die verkoop van die Nissan IG780 vragmotor met registrasienommers en letters KRY226GP vir 'n bedrag van R122 100.00 aan u kliënt. Benewens die voorafgenoemde koopsom, sou u kliënt 'n bedrag van R10 000.00 per maand vanaf die 7de Julie 2001 aan ons kliënt betaal vir gebruik van die voorafgenoemde vragmotor tot en met volle vereffening daarvan. Tot op datum het u kliënt slegs 'n bedrag van R5000.00 aan ons kliënt oorbetaal.

In vooropstelling ontvang ons graag u advies op welke wyse u kliënt finansiering vir aflossing van die koopprys sal bekom aangesien skrywer u mnr Harmse as positief ervaar nie.

Geliewe verder ons kantoor in kennis te stel of welke datum betaling van die koopsom verwag kan word aangesien ons kliënt ons reeds voorsien het met die nodige instruksie om 'n aansoek te loods ter her in besitstelling van die genoemde vragmotor.

Graag verneem ons dringend van u in hierdie verband."

24. Furthermore, it is common cause that the applicant opened a theft case in early 2002 and it is improbable, because he would have had no further interest to protect, that he would have done so had Harmse fully paid for

the vehicle.

25. More tellingly, Harmse contradicts himself by stating in his affidavit that when the person to whom he sold the vehicle, Mr van der Merwe, failed to pay him, he then went to the applicant and requested him to open a theft case at Akasia police station. Implicit to his explanation is the idea that the truck had not been fully paid for. The relevant part of the affidavit reads as follows:

> "I didn't gave (sic) the registration document to Mr van der Merwe after he finished to pay me my sixty thousand rand because he was still owing me lot of money for the rental of the other trucks. He then went to registration authority in Pretoria where he got contact to do registration for him (sic). On 11 August 2004 he went without my authority he take out the license disc on Triple D Transport CC name. The they (sic) change the registration number towards KBT 282GP
>
> I wish to state that I discussed the matter with Mr Danniels to go and report the case of theft of truck in Akasia because I couldn't get the truck from Mr van der Merwe."

26. I am satisfied therefore that the applicant has shown on the probabilities that Harmse alienated the vehicle contrary to the provisions of clause 6.1.1 of the sale agreement, the prohibition against alienation; and that he probably did not pay the full purchase price. Despite that, the question remains whether such is sufficient to establish that Harmse had the intention to commit theft or embezzlement. For the latter to be proven, it would have to be shown that his disposal of the property before the last instalment was paid was attended by an intention to deprive the applicant permanently of the property.

27. The applicant has not clearly denied Harmse's statement that he (Harmse) approached him and requested him to report a case of theft against van

der Merwe. All the applicant states in the replying affidavit is that if Harmse considered himself to be the rightful owner one must ask why Harmse did not report the matter to the police. There is merit in that submission, but the averment implicitly concedes that Harmse recognised that the applicant was in fact the owner. Without question, Harmse was probably in breach of contract when he delivered the vehicle to van der Merwe. However, the undenied averment in Harmse's affidavit that he discussed the matter with the applicant and sought his assistance raises doubt about whether Harmse was acting deceitfully and thereby was guilty of theft or embezzlement. Or perhaps, to put it less definitively, the averment gives rise to a dispute of fact as to Harmse's intention at the time he delivered the truck to van der Merwe. It follows that I am compelled to accept the respondents' averment that there is no reliable *prima facie* evidence that the vehicle was stolen, for which reason no criminal proceedings were instituted. In the light of that dispute of fact the matter has to be decided on the facts stated by the respondents together with those facts in the applicant's affidavit which have been admitted by the respondents.

28. The upshot of this is that it cannot be said that Mr Kobue is a person who may not lawfully possess the vehicle. He came into the possession of the vehicle as a *bona fide* purchaser for value without knowledge of any

defect in title. He came into possession of the vehicle without any conduct on his part which could be regarded as unlawful since he at that stage could not have harboured any suspicion that the vehicle had been stolen. Had the applicant shown that the vehicle was stolen the resultant position might have been different. Then the person from whom it was seized would not be entitled to possess it lawfully by virtue of having gained new knowledge of the defect in title and thus would be effectively receiving stolen property with knowledge that it was indeed stolen. Such a person could not lawfully possess it. His newly gained knowledge of the fact that the property was stolen would render him guilty of theft, or at least of receiving into his possession stolen goods in contravention of section 37(1) of the General Law Amendment Act 62 of 1955 - see *Datnis Motors (Midlands) (Pty) Ltd v Minister of Law and Order* 1988(1) SA 503(N) at 509 B - G. But that is not the case here.

29. For the foregoing reasons, I am persuaded that the applicant has not discharged his onus that Mr Kobue is not entitled to lawfully possess the truck. Accordingly, the respondents are obliged in terms of section 31(1)(a) of the Criminal Procedure Act to return the vehicle to Mr Kobue, being the person from whom the vehicle was seized in the first place. That is not to say that the applicant is without a remedy. It may be that he can succeed in a vindicatory action against Mr Kobue. The respondents, however, in terms of the statutory provision, are obliged to return the vehicle to Mr Kobue. Accordingly, the applicant is not entitled to the relief it seeks in this matter.

30. In the premises, the application is dismissed with costs.

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JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard:	24 May 2007
For the Applicant:	Adv FJ Labuschagne, Pretoria
Instructed By:	Van der Walt & Hugo Attorneys
For the Respondent:	Adv SJ Coetzee, Pretoria
Instructed By:	The State Attorney