REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2013/44435

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
_____	_____
DATE	SIGNATURE

In the matter between:

HIBERIA (PTY) LTD trading as ACT PROJECTS Applicant

And

LEON LOURENS First Respondent

THE STANDARD BANK OF SOUTH AFRICA LTD Second Respondent

JUDGMENT

NOCHUMSOHN AJ

1. This is an application ordering that the sheriff be authorised:

to recover from the respondent and take possession of a Ford Ranger Double cab motor vehicle, Engine Number S……, Registration number BW……, from 34 S…… Avenue, L……. E…….. 21, B……..;

1.2. ordering that the sheriff be authorised to recover and remove such vehicle from the respondent or anyone holding possession of the vehicle, wherever it may be found;

1.3. ordering that such vehicle be handed to the applicant within five days from the date of recovery of the said vehicle by the sheriff;

1.4. ordering that the respondent pay the costs of the application on the scale as between attorney and client.

2. The application is opposed by the first respondent only, and, although the second respondent is cited, has correctly in my view been joined and has been served with all of the papers, it has nevertheless failed to file a notice to oppose or any opposing papers of whatsoever nature.

3. Conversely, the application is opposed by the first respondent who has launched a counter-application, which is formulated in the first respondent's Notice of Motion in Reconvention to be found at page 109 of the papers, in the following words:

"1. That the applicant and first respondent's agreement regarding the payment by the first respondent of a deposit of R70 000.00 on the Ford Ranger relevant to both applications should be regarded as containing an agreement to the effect that, should the employment of first respondent with the applicant be terminated before the vehicle becomes the property of first respondent, applicant will be obliged to refund the first respondent the amount of R70 000.00 upon which applicant will be entitled to possession of the Ford Ranger being the subject of applicant's own application;

2. That the applicant be ordered to pay to the first respondent the amount of R70 000.00 whether in terms of the implied term (see

paragraph 1 above) or based on the principles of unjust enrichment;

3. *That the first respondent will be entitled to remain in possession of the Ford Ranger until payment of R70 000.00 had been made to the first respondent;*

4. *That the applicant is ordered forthwith but not later than seven working days from the date of the order to account to the first respondent regarding all amounts that the applicant had paid over as PAYE to the South African Revenue Service (SARS) regarding the salary of the first respondent for the period that first respondent had been employed by the applicant;*

5. *That the applicant be ordered to supply the first respondent with a form IRP5 reflecting the salary and PAYE that had been paid over to SARS;*

6. *Costs of application/s on a scale as between attorney and client."*

4. I am also faced with an opposed application, launched by the first respondent, for the condonation of the late filing of his:

4.1. Answering Affidavit in the main application; and

4.2. Replying Affidavit to the applicant's Answering Affidavit to his counter-application.

5. The historical facts relating to the exchange of papers are, as follows:

5.1. The first respondent had filed a Notice of Intention to Oppose the main application, but failed to deliver an Answering Affidavit within the time periods provided for in the rules of court;

5.2. Arising out of the aforesaid failure, the applicant enrolled the main application for hearing upon the unopposed motion roll for 5 March 2014;

5.3. Two days prior, and upon 3 March 2014, after the aforementioned enrolment and set down had been effected, the first respondent filed his aforesaid Notice of Counter-Application together with the Answering Affidavit in which was

embodied his case to sustain his aforementioned Counter-Application;

5.4. Consequently, upon 5 March 2014, the application was postponed *sine die* and the first respondent was ordered to pay the costs of the postponement;

5.5. The applicant's Replying Affidavit to be found at paginated page 125 was deposed to on 19 March 2014 and was presumably served at that time;

5.6. To the extent that such Replying Affidavit comprised an answer to the first respondent's Counter-Application, the first respondent filed a reply thereto at page 157 of the paginated papers, in the form of an Affidavit headed "*Affidavit in Reply to the Applicant's / Respondent's in Reconvention's Answering Affidavit",* which document was served upon the applicant's attorneys as late as 17 June 2014;

5.7. As late as 17 June 2014, the first respondent delivered a Notice of Motion (page 244 of the papers) for an Order:

5.7.1. Condoning the late filing of his Answering Affidavit to the application of the applicant;

5.7.2. Condoning the late filing of his Reply to the Answering Affidavits of the applicant / first respondent in reconvention to the Counter-Applications of the first respondent;

5.7.3. Costs of the application, only if opposed.

5.8. Attached to such Notice of Motion, is an Affidavit deposed to by the first respondent, in which he sets out his reasons for seeking condonation;

5.9. The application for condonation is opposed by the applicant, to which end, the applicant deposed to an Affidavit in opposition thereto upon 4 July 2014, the same having been delivered upon 9 July 2014;

5.10. Save to say that the first respondent's grounds upon which the condonation is sought, are flimsy, to say the very least, I do not intend to deal any further with such grounds in this judgment. Whilst the excuses raised for the non-compliance of the court rules in relation to the delivery of the said Affidavits, are feeble, the Affidavits themselves embody the heart and soul of the first respondent's case;

5.11. Whilst no fault whatsoever can be imputed to the applicant for the late delivery of the said applications, and, whilst it is clear to me that the first respondent has been nothing short of dilatory, without good reason, for the late delivery of such affidavits, I do nevertheless have a discretion, which I intend to exercise in favour of the first respondent;

5.12. Were I to dismiss the application for condonation the effect of such order would effectively be to disallow the presentation by the respondent of either his defence or his Counter-Application;

5.13. In the interests of justice, it would be preferable to permit the first respondent's version to be placed before me, notwithstanding the inadequate explanations set out in the first respondent's Affidavit in support of his application for condonation;

5.14. Accordingly, the application for condonation is granted. However, there is no reason to visit the applicant with the costs in respect of such application.

5.15. The applicant was significantly prejudiced by virtue of the delays occasioned by the late filing of the first respondent's papers. Whilst I have granted the application for condonation, I do nevertheless find that the applicant was entitled to oppose such application, as it did. Accordingly, I deem it appropriate to part from the usual principle whereby costs follow the event, in specifically ordering that notwithstanding the granting by me of the application for condonation, the first respondent is

hereby ordered to bear the costs of the applicant in relation to such application for condonation.

6. Turning to the merits of the application, it appears to be common cause between the parties that:

6.1. the first respondent was an employee of the applicant;

6.2. the first respondent was dismissed from the applicant's employ during or about October 2013;

6.3. at the time of his dismissal, the first respondent was in possession of the Ford Ranger motor vehicle being the subject matter of the application;

6.4. the vehicle was made available to the first respondent by the applicant as part of his employment;

6.5. the vehicle was registered in the name of the applicant;

6.6. the vehicle had been financed by the second respondent, who in such capacity was registered as the titleholder;

6.7. the applicant entered into the finance agreement with the second respondent (page 14 of the papers), paragraph 1.1 of which provides that the second respondent is the owner and that the applicant would only become the owner once all instalments have been paid and all duties in terms of the agreement had been fulfilled. In terms of paragraph 1.4 of the agreement, the applicant bore all the risk in and to the vehicle from date of signature of the agreement;

6.8. The applicant bore the liability for payment of the finance charges under the agreement with the second respondent and has made such payments throughout;

6.9. The principal debt owing by the applicant to the second respondent in accordance with the Instalment Sale Agreement amounted to R477 316.80 inclusive of interest at 7.75% per year and a deposit of R70 000.00 was paid by the first respondent to the second respondent at the time of conclusion of the said Instalment Sale Agreement.

7. On the applicant's version:

7.1. At paragraph 16 of the Founding Affidavit, it was *at all times understood that the first respondent would not become the owner of the motor vehicle and that his possession of the motor vehicle would be contingent upon his continued employment with the applicant;*

7.2. The first respondent caused annexure "C" to the Founding Affidavit to be delivered, comprising his attorney's letter dated 1 October 2013, under which the first respondent indicates that he had paid R70 000.00 as a deposit on the vehicle and expected that this money be refunded to him, and until such time as the money was paid back to him, he would retain possession of the vehicle;

7.3. The applicant categorically states (paragraph 20 of the Founding Affidavit) that there was no agreement to the effect that the first respondent would be refunded the R70 000.00;

7.4. The applicant says that it was at the first respondent's request that he be provided with a "*status"* company vehicle and that the first respondent would be prepared to contribute towards the cost of being able to drive such a motor vehicle;

7.5. Consequent upon such demand, the applicant's attorney responded to the first respondent's attorney and confirmed that R70 000.00 had been placed by the applicant in his trust account and invested in accordance with Section 78 (2A) of the Attorneys Act, which amount would be held as security for the first respondent's claim, and would be paid out if the matter became settled or upon the first respondent obtaining a court order compelling the applicant to make payment of this amount. It is clear from such correspondence, that the applicant did not concede that it was liable to refund the R70 000.00.

8. Conversely, the first respondent:

8.1. denies that the R70 000.00 was paid by him towards the purchase price so that he could drive a ”*status"* vehicle and contends, at paragraph 8 of the Answering Affidavit (Page 115), that there was an explicit agreement to the effect that the vehicle, once paid for in full, would become his exclusive property;

8.2. raises that the applicant had been unjustly enriched at his expense and that it would be inequitable if restitution is not made to him in respect of the deposit paid by him for the vehicle;

8.3. Whilst the first respondent concedes at page 120 that the applicant would pay all of the incidental costs, such as registration, licensing, insurance, maintenance and repairs and of course the monthly instalments, he insists that when the vehicle was to be paid up in full, it would be transferred into his

name and he would become the owner thereof. He goes on to say at paragraph 17 (page 121) that:

> "*We did not contemplate the possibility at the time that I would either be dismissed or would resign and as to what the position would be should my employment come to an end. If this had been discussed I would have insisted that one of two situations be agreed upon: Either I would be given the opportunity to purchase the Ford Ranger for the outstanding amount with Standard Bank or my R70 00.00 would be repaid to me upon which I would have returned the vehicle to the applicant."*

9. It seems that the first respondent calls upon me in his Counter-Application to import an implied term into the agreement to the effect that in the event of his employment with the applicant coming to an end at a time prior to payment in full to the second respondent, that he, the first respondent, then be given an option to purchase the vehicle for the outstanding amount owing

to the second respondent or that his R70 000.00 would be returned to him, upon which, he would have returned the vehicle to the applicant.

10. Simply put, the applicant vigorously denies that there ever was any such agreement to the effect that the R70 000.00 would be refunded in the event of the first respondent's employment being terminated at a time prior to payment in full to the second respondent. The applicant's case is that irrespective as to when and how the employment of the first respondent would have come to an end, upon the termination of such employment, the first respondent would forfeit his right to possess the vehicle or re-claim his R70 000.00.

11. Upon a proper interpretation of the finance agreement, it is clear that the applicant bears all of the risk in and to vehicle until such time as same is paid for in full. It is likewise crystal clear from the terms of such agreement that ownership in and to the vehicle would vest in the applicant, upon payment in full to the second respondent.

12. There is no basis for any finding to support the importation of such implied term into the agreement between the applicant and first respondent, to the effect that the first respondent would be vested with such option to purchase, alternatively a right to be refunded his R70 000.00, in the event of his employment being terminated prior to payment in full to the second respondent. Accordingly, I find that there was no such implied term.

13. It becomes a red herring as to whether or not there was indeed an agreement between the applicant and first respondent to the effect that upon payment in full to the second respondent, the first respondent would become the owner and the vehicle would be transferred into his name. Whilst this version contended for by the first respondent is vehemently denied by the applicant, such circumstances did not present themselves, given that the employment of the first respondent with the applicant was terminated at a time prior to payment in full to the second respondent. Hence, it is not necessary for me to make any finding in connection therewith.

14. Absent the importation of such implied terms into the agreement reached between the applicant and the first respondent, the ownership of the motor vehicle falls to be determined, purely in accordance with the Instalment Sale Agreement entered into between the applicant and the second respondent. In terms thereof, the second respondent, remains the titleholder and owner of the vehicle, until such time as it is paid for, in full, whereupon, ownership vests in the applicant, who remains liable to the second respondent for the discharge of all financial obligations thereunder.

15. There is no reason to find against the applicant, in its contentions that the vehicle belonged to the applicant, and, the first respondent was given the use thereof during the tenure of his employment with the applicant, as part of his conditions of employment. It is clear that this version is the correct version, which I accept without hesitation. That being the case, any right that the first respondent held to remain in possession of the vehicle, came to an abrupt end immediately upon the termination of the first respondent's employment with the applicant. It was disingenuous of the first respondent

to have tendered the return of the vehicle, only against a refund of the sum of R70 000.00, as set out in the letter written by the first respondent's attorney, Odendaal & Kruger, to the applicant dated 1 October 2013 at page 19 of the papers. Clearly, the first respondent was not vested with any right of retention in respect of the vehicle, as bargained for in the said letter.

16. Accordingly, I find that the applicant is entitled to the relief sought in the Notice of Motion and that the vehicle must be returned to the applicant, forthwith. The applicant has been so entitled to the return of the vehicle from the date of termination of the first respondent's employment and has been frustrated by the first respondent in all of this time, in the exercising of its rights against the first respondent in this regard. The consequence of the aforegoing will become relevant in relation to the unjust enrichment claims and the costs order which I will make in relation to all of these proceedings, herein-below.

17. Whilst there is no evidence to support the first respondent's contentions for the importing of his sought after implied terms into the agreement, I am nevertheless compelled to consider what the position would have been had his employment with the applicant been terminated within a day or two after the completion of the Instalment Sale Agreement with the second respondent. I am left without any doubt in my mind, that in such circumstances, the applicant would undoubtedly have been unjustly enriched to the extent of R70 000.00, on the assumption that the vehicle would have been returned to it immediately. In those circumstances, the first respondent would have enjoyed a claim against the applicant under the laws of unjust enrichment.

18. It was clearly within the contemplation of the parties that at the time the Instalment Sale Agreement was entered into and the first respondent contributed his deposit of R70 000.00, that the first respondent would remain in the employ of the applicant beyond the date of payment in full by the applicant to the second respondent.

19. The Instalment Sale Agreement was entered into upon 28 May 2012 and the first respondent's R70 000.00 would have been paid to the second respondent on or about that day. The Instalment Sale Agreement provided for payment of R7 955.28 each, at one monthly intervals, commencing upon 1 July 2012 and terminating upon 27 May 2017. Thus the expiry date of such agreement was 27 May 2017, and as stated, I find that it was within the contemplation of the parties that at the time of the entering into of the transaction, the first respondent would remain in the employ of the applicant, beyond such expiry date.

20. Factually, the first respondent was dismissed by the applicant and his employment came to an end during October 2013, some three years and eight months prior to the expiry date of the Instalment Sale Agreement and some seventeen months after the date of entering into of such Instalment Sale Agreement.

21. Whilst I do find that the applicant has been unjustly enriched, to the prejudice of the first respondent, the quantum of such unjust enrichment cannot

equate to the said payment of R70 000.00. Had the first respondent remained in the employ of the applicant up until the expiry of the Instalment Sale Agreement on 27 May 2017, there would certainly have been no obligation upon the applicant to refund the R70 000.00 or any part thereof to the first respondent at that time.

22. Therefore, the fairest mechanism for the quantification of such unjust enrichment would be by dividing the R70 000.00 by the total number of payments provided for in the Instalment Sale Agreement (58 months) and multiplying same by the number of months for which the Agreement ran its course up until the termination of the respondent's employment i.e. R70 000.00 divided by 58 equals R1 206.89 per month x 15 equals R18 103.44. Thus if one deducts the aforesaid R18 103.44 from the amount paid by the first respondent of R70 000.00, one arrives at a figure of R51 896.55, to which the applicant would have been unjustly enriched, had the vehicle been returned to it immediately against the termination of the first respondent's employment in October 2013.

23. However, I am equally compelled to take into account the evidence of the applicant, offered at paragraph 84 of the Replying Affidavit to be found at page 143 of the papers, where the applicant says "*the first respondent has been unjustly enriched as he has had the use of a motor vehicle for which the applicant is paying since October 2013 through to date of hearing of this matter at a cost of approximately R9 840.00 per month..... Applicant has a claim against the first respondent for these damages, and it is partly for this reason that the applicant did not pay over the R70 000.00 directly to the first respondent because of such Counterclaim."*

24. We are now one year down the track, since the time of the dismissal of the first respondent, who, to date, remains in possession of the vehicle, whilst the applicant bears all of the financial obligations in respect thereof at a cost of R9 840.00 per month. R9 840.00 per month, multiplied by 12 months for the period 1 November 2013 to 31 October 2014, amounts to some R118 080.00, to which extent there may be a basis for the applicant to assert that the first respondent has been unjustly enriched. Balanced as against such unjust enrichment, is the fact that the vehicle would have depreciated

further in value over this past year, which may serve to exacerbate any claim for unjust enrichment against the first respondent in the hands of the applicant. Whilst no such claim is brought in these proceedings, nevertheless same must be conceptualised, albeit on a hypothetical basis. This is in order to assess the validity of the first respondent's Counterclaim to payment of R70 000.00 (based upon unjust enrichment) which for the reasons set out above, could, in any event, not reasonably exceed R52 000.00. The latter amount must be offset against the obvious financial prejudice suffered by the applicant, which, as demonstrated, exceeds the financial prejudice suffered by the first respondent, by far. Accordingly, I find that the first respondent's counterclaim for repayment of R70 000.00 fails, both *ex contractu,* as there is no evidence to support the implied term to the Agreement bargained for, as well as in accordance with the laws of unjust enrichment, for the reasons set out above.

25. Turning to the first respondent's second leg of the relief sought in his counterclaim, it should be noted paragraph numbers 4 and 5 of the Notice of Motion in reconvention, overlaps.

26. It is common cause that the first respondent was an employee of the applicant and that the applicant dismissed the first respondent during or about October 2013.

27. There is no reason for the first respondent to have been deprived an IRP5 form, reflecting his salary and the amount of PAYE that would have been paid over to SARS. Indeed the handing over of such form is a legislative requirement and there is no reason offered by the applicant for its failure to have so performed.

28. Whilst the applicant says at paragraph numbers 81 and 86.2 that it has tendered such documentation to the first respondent, it is clear that for whatever reason the first respondent has not been placed in possession of an IRP5 form.

29. The first respondent is entitled to receive an IRP5 form, cannot submit his tax return to SARS without same and, conversely, the applicant is duty-bound to deliver IRP5 forms to the first respondent for the period during which he was in the employ of the applicant.

30. It does not avail the applicant to rely on a tender, without a suitable explanation for the non-delivery of such forms. No matter how heated the tensions may or may not be between the applicant and the first respondent, all that needed to be done, was for the IRP5 forms in question to be delivered by the applicant's attorneys to the first respondent's attorneys. Whilst there are on-going labour disputes between the parties which are not capable of resolution in this court, there is no reason to deny the first respondent his relief in relation to the seeking of an order for the delivery of his IRP5 forms.

31. Accordingly, I find that the applicant is duty-bound to deliver IRP5 forms to the first respondent immediately. To such end, and to a limited extent, the first respondent succeeds in his counter-application. However, the bulk of the Answering Affidavit and papers relating to the counter-application deal with the first respondent's claim for payment of R70 000.00 and all of such papers, throughout, are unnecessarily prolix and are riddled with irrelevant material, inconsequential subject matter, irrelevant annexures, all of which has little or no bearing upon the issues at stake. To this end some kind of

punitive costs order as against the first respondent would be apposite. The counter-application encompasses only a few paragraphs relevant to the IRP5 forms, in relation to which the first respondent has been successful in this judgment. Perhaps 20% of the content of the papers deals with the IRP5 forms, whereas 70% to 80% of the unnecessarily lengthy papers deals with the prior claim. Accordingly, the respondent should be entitled to no more than 20% of a taxed bill of costs in relation to the counter-application.

Accordingly, I make the following Order:

1. The condonation of the late filing of the first respondent's Answering Affidavit and the first respondent's Affidavit in reply to the Applicant's Answer to the Respondent's Counter-Application are condoned.

2. The first respondent is ordered to bear the costs of the said application for condonation, on an opposed basis, taxed by the applicant on the scale as between party and party.

3. The Sheriff of the Court is authorised to recover from the first respondent and to take possession of a Ford Ranger Double cab motor vehicle, engine number SA2KPCC43950, registration number BW94MKGP, from 34 Strathford Avenue, Lakefield Extension 12, Benoni, or wherever else same may be found.

4. The Sheriff shall be authorised to recover and remove such vehicle from the first respondent or anyone holding possession of such vehicle, wherever it may be found.

5. Such vehicle shall be handed to the applicant by the Sheriff within five days from the date of recovery of the said vehicle by the Sheriff.

6. The first respondent shall pay the costs of the main application, taxed on the scale as between attorney and client.

7. The applicant is ordered to forthwith deliver to the first respondent IRP5 forms for the period during which the first respondent was in the employ of the applicant.

8. The applicant is ordered to bear 20% of a Bill of Costs to be taxed by the first respondent in respect of the opposed Counter-Application, on the scale as between party and party.

NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant:	Advocate L Hollander
Instructed by:	MJ Hood & Associates
On behalf of the Respondent:	Attorney Johan Schaefer
Date of Hearing:	30 October 2014
Date of Judgment:	30 October 2014