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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2023-034424

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
11 October 2024	_____
DATE	SIGNATURE

In the matter between:

**HYUNDAI AUTOMOTIVE SOUTH AFRICA
(PTY) LIMITED**

Applicant

and

**SUPER GROUP DEALRESHIPS (PTY) LTD
T/A ARNOLD CHATZ**

Respondent

JUDGMENT

AUCAMP AJ

INTRODUCTION

[1] The applicant, Hyundai Automotive South Africa (Pty) Ltd, makes application for a declaratory order that it is the owner of a certain 2020 Jeep Cherokee 3.2 Trailhawk A/T, Engine number: G[...], VIN Number: 1[...] (“the vehicle”) and that possession of the vehicle be returned to the applicant at Hyundai Constantia Kloof, Hendrik Potgieter Road, Allen’s Nek, Roodepoort (“the dealership”).

[2] It is the applicant’s case that it was, and still is, the unlawful registered owner of the vehicle, which vehicle is in possession of the respondent and without the applicant’s knowledge or authority one Calyton Myburgh (“Myburgh”), its previous dealer principal, committed fraud and allowed one Celestein Dianne Kelmovitz (“Kelmovitz”) to take possession of the vehicle and in an unexplained manner the natis ownership report reflected Kelmovitz to be the owner of the vehicle from 22 December 2022 to 17 February 2023, whereafter it reflects the respondent to be the owner.

[3] The founding affidavit is deposed by a certain Jurgens Johannes Nel (“Nel”), the Regional General Manager of the applicant. Nel, in the founding affidavit, inter alia alleges:

“5. I am further the person who can depose to this affidavit as I have, given my position, personally communicated with Myburgh, relating to the merits of the applicant’s claim to ownership and the theft and fraud perpetrated against the applicant by Myburgh and have, as a result of my office:”

[4] Nel continuous to allege that:

“7. The basis upon which the applicant seeks the relief is the following:

7.1 The Vehicle was initially registered in the applicant’s name as a “stock” vehicle to be subsequently sold in the applicant’s ordinary course of business.

7.2 Mr Clayton Myburgh (the then dealer principal of the applicant) [“Myburgh”] stole the vehicle from the applicant’s premises and fraudulently assisted reregistering the vehicle in the name of a certain Celestine Kelmovitz [“Kelmovitz”]. There were no exchange of monies or official documentation at this point to constitute a sale of the vehicle.

7.3 ...

8. The above sequence of events occurred as a result of fraud and theft on the part of Myburgh and without the knowledge or consent, whether express or otherwise, of the applicant nor did Myburgh act as agent for and on behalf of the applicant or within the course and scope of his employment.”

[5] Kelmovitz subsequently sold the vehicle to the respondent.

[6] The respondent in opposition of the application delivered an answering affidavit deposed to by Natalie Joy Matticks, (“Matticks”) a Risk Manageress in the employ of the respondent. Matticks in her affidavit inter alia alleges:

“4. In as far as I rely on allegations of a hearsay nature, I have considered same and I believe same to be true and correct.

4.1 In as far as reference is made to Celestein Dianne Kelmovitz (“Kelmovitz”), I refer to her affidavit annexed hereto as annexure “A”, which is dated 15 March 2023.

4.2 Kelmovitz’s affidavit does not purport to be a confirmatory affidavit, but it provides the factual position pursuant to her purchasing the Jeep Cherokee motor vehicle (“the vehicle”) which is the subject of the dispute.”

[7] The remainder of the answering affidavit, contains allegations of a speculative nature with reference to what transpired between Myburgh and Kelmovitz and a description of the sale between Kelmovitz and the respondent.

[8] Kelmovitz in her affidavit attached to Mattick’s answering affidavit records the sequence of events as follows:

“3. I confirm that on the 22nd December 2022, I purchased a vehicle from Clayton Myburgh at Hyundai, Constantia Kloof for a purchase price of R275,000.00 (TWO HUNDRED AND SEVETY-FIVE THOUSAND RAND).

4. I annex hereto ...

5. The purchase price in respect of the said vehicle was paid in full by me as follows:

On or about the 22nd December 2022, I transferred an amount of R100 000.00 to the account of Clayton Myburgh as the vehicle was transferred into my name. On the 23rd December 2022, I transferred into

my name. On the 23rd December 2022, I transferred another amount of R100 000.00 to him, and paid him an amount of R70 000.00 in cash and the vehicle was delivered to me along with the registration papers. I had no reason to doubt that he was not legally entitled to dispose of the vehicle:

- 1. He was the Sales Manager at Hyundai;***
- 2. The deal had been negotiated at the Dealership.***
6. Prior to this, I have never had any business dealings with Clayton Myburgh.”

[9] I don’t believe that the affidavit of Mattick is of any assistance in the resolution of the issues before me. Matticks’s evidence, from a probative value, is relevant only in relation to the transaction between Kelmovitz and the respondent. It has no probative value to the transaction between Myburgh and Kelomovitz. Furthermore, the validity of the sale between Kelmovitz and the respondent is entirely dependent upon a valid and binding transaction having been concluded between the applicant and Kelmovitz. The affidavit of Kerlmovitz however is relevant to these proceedings.

[9] The respondent submits that the application is incapable of resolution on these papers by virtue of the existence of irreconcilable disputes of fact. Consequently, so the argument goes, the application should be dismissed, alternatively be referred to trial. As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party’s allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers or that *viva voce* evidence would not disturb the balance of probabilities appearing from the affidavits. In *Cape Town City v South African National Roads Agency Ltd*¹ Binns-Ward and Boqwana J observed that:

“In **South African Veterinary Council and Another v Szymanski 2003 (4) SA 42** (SCA) (2003) (4) BCLR 378) para 24 it was suggested in passing that “denials that are ‘so far-fetched or clearly untenable that the Court is justified

¹ 2015 (6) SA 535 (WCC) at 608F – I

in rejecting them merely on the papers' constitute a separate category of 'uncreditworthy denials' from those which do not raise 'a real, genuine or bona fide dispute of fact'." With respect, we doubt whether there is in fact a basis for such a distinction: a denial that is so far-fetched or clearly untenable as to be rejected on the papers cannot provide the evidential basis for a genuine dispute of fact. We read the distinction drawn by Corbett JA in *Plascon-Evans supra* at 634I – 635C as having been made on a different basis, viz as between the effect of the failure by the respondent who makes a bald denial to an inherently credible allegation by the applicant and fails to apply to cross-examine the applicant, as being insufficient, within the ambit of the general rule, to raise a genuine dispute of fact and, by way of an exception to the general rule, the rejection of the respondent's evidence where its allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. In both of the posited situations, whether within the general rule, or by way of an exception to it, the effect will be the same – the respondent's averments will not be sufficient to bar the applicant from obtaining final relief on the papers. In the current matter the City needed to persuade us to disregard Sanral's denial in terms of the exception to the *Plascon-Evans* rule."

[10] It has been held² that a court should, in deciding disputed facts in application proceedings, always be cautious about deciding probabilities in the face of conflicts of facts in the affidavits. This is so because affidavits are settled by legal advisers with varying degrees of experience, skill and diligence, and a litigant should not pay the price for an adviser's shortcomings. Nevertheless, the courts have recognised reasons to take a stronger line to avoid an injustice.³ Mere assertions of witnesses do not of themselves need to be believed and testimony which is contrary to all reasonable probabilities or conceded facts (i.e testimony which no sensible man can believe) goes for nothing, while the evidence of a single witness to a fact, there being nothing to throw discredit on it, cannot be disregarded.

[11] There is no possibility of a dispute of fact between the version presented by

² *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011 (1) SA 8 (SCA) at 14D - F

³ *Buffalo Freight supra* at 14E – H referring to *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 869D - E

Nel and Matticks. This is so, because the evidence of Matticks, for present purposes has no probative value. There is however a possible dispute of fact between the versions presented between Nel and Kelmovitz. It is submitted on behalf of the respondent that Nel's evidence constitutes hearsay evidence in that the evidence presented is really that of Myburgh and that no confirmatory affidavit of Myburgh is provided. For the reasons that follow, a determination of whether the evidence of Nel constitutes hearsay evidence and/or whether same should be allowed as admissible, is unnecessary. Be that as it may, the only material difference between the versions of Myburgh and Kelmovitz, for present purposes, is where the transaction was concluded. According to Nel, "... [*Myburgh*] *stole the vehicle from the applicant's premises and fraudulently assisted reregistering the vehicle in the name of a certain ...*" Kelmovitz in contrast testifies that "*I confirm that on the 22nd December 2022, I purchased a vehicle from Clayton Myburgh at Hyundai, Constantia Kloof,...*". The applicant interprets Kelmovitz's evidence as conceding that the vehicle was purchased from Myburgh and not from the applicant. The applicant's interpretation in this instance is inaccurate as it disregards the totality of her evidence on this issue, being that she bought it from Myburgh at Hyundai, Constatia Kloof.

[12] The applicant, the owner of the dealership employed a certain Myburgh as sales manager or dealer principle. The affidavits filed in this application seem to vacillate between these two positions, however I am of the view that, for present purposes, the differences are immaterial. Both positions, I assume for present purposes are associated with the authority to bind the applicant as principal in terms of a valid and binding sale agreement of the vehicles at the dealership.

THE ISSUE FOR CONSIDERATION

[13] The issue for consideration in this application is however, whether transfer of ownership in and to the vehicle was effected between the applicant and Kelmovitz. For present purposes, I am satisfied to assume that Myburgh, as dealer principal or sales manager, was authorised, to have sold the vehicle and concluded the transaction with Kelmoviz on behalf of the applicant.

THE COMMON CAUSE FACTS

[14] The agreed relevant factual chronology as recorded in the joint practice note is as follows:

14.1 Myburgh, in his capacity as Dealer Principal of the applicant, was in possession of the vehicle from early December 2022 and advised the applicant that the vehicle was in for repairs.

14.2 Prior to 22 December 2022, the applicant was registered as the owner and title holder of the vehicle.

14.3 On 22 December 2022, Myburgh, sold the vehicle to Kelmovitz and the vehicle was subsequently registered in her name.

14.4 Between 25 January 2023 and 7 February 2023 Myburgh, via email correspondence, continued to assure the applicant that he is in possession of the vehicle and would return the vehicle to the applicant after it had been repaired.

14.5 Notwithstanding the assurances and the change of ownership to Kelmovitz on 22 December 2022, the vehicle was 'purchased' by the respondent and the vehicle was registered into the name of the respondent on 17 February 2023.

14.6 The applicant became aware of the fraud / theft when it was placed in possession of the Enatis Vehicle Ownership Query Form and when it discovered that the vehicle was for sale by the respondent on 24 February 2023.

THE APPLICANT'S SUBMISSIONS

[15] It is submitted on behalf of the applicant that the applicant is and remains the owner of the vehicle, notwithstanding the fact that the vehicle is in the possession of the respondent. The applicant claims that Myburgh, the applicant's previous dealer principal, without the knowledge and/or authority of the applicant, committed a fraud by having allowed one Kelmovitz to take possession of the vehicle and in an unexplained manner the natis report reflected Kelmovitz as the owner of the vehicle from 22 December 2022 to 17 February 2023, whereafter it reflects the respondent to be the owner. In summary, the applicant alleges that Myburgh, its head of

business at its branch, acted fraudulently and was not authorised to place Kelmovitz in possession of the vehicle.

[16] The applicant relies on the *rei vindicatio* to reclaim possession of the vehicle. For an owner to succeed he must prove that (a) he is the owner of the vehicle, (b) that the other party is in possession of the vehicle at the time of the commencement of the application and (c) that the vehicle is still in existence and clearly identifiable.⁴ If the person claiming vindication can prove all the requirements, the onus then shifts to the person claiming a right to retain the vehicle to establish such right.⁵ It makes no difference whether the possessor is bona fide or mala fide. The owner of the movable property found in possession of a third party may recover it from any possessor without having to compensate him. This principle applies even where the possessor came into possession of the item in good faith and gave value for it.⁶

[17] The respondent, in the alternative, seeks to fend off the applicant's claim by relying on the principle of estoppel. As far as and in relation to the issue of estoppel the applicant has referred this court to *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd*⁷ wherein it was held that:

“Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner. Consistent with this, it has been authoritatively laid down by this Court that an owner is estopped from asserting his rights to his property only –

(a) Where the person who acquired his property did so because, by the culpa of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner of was entitled to dispose of it; or

(b)

As to (a), supra, it may be stated that the owner will be frustrated by estoppel upon proof of the following requirements -

⁴ Silberberg and Schoeman's, *The Law of Property*, 5th Edition at pages 243 and 244

⁵ *Dreyer and Another NNO v AXZA Industries (Pty) Ltd* 2006 (5) DA 548 (SCA)

⁶ *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A); *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A)

⁷ 1976 (1) SA 441 (A) at 452A - G

- (i) There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it. A helpful decision in this regard is *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 244 (W), with its reference at 247 to the entrusting of possession of property with the indicia of dominium or jus disponendi.
- (ii) The representation must have been made negligently in the circumstances.
- (iii) The representation must have been relied upon by the person raising estoppel.
- (iv) Such person's reliance upon the representation must be the cause of his acting to his detriment."

[18] In *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter*⁸ it was held that:

"Our law is that a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and if in addition the representee acted reasonably in construing the representation in the sense in which the representee did so... Nevertheless, if a representation by conduct is plainly ambiguous, the representee would not be acting reasonably if he chose to rely on one of the possible meanings without making further enquiries to clarify the position."

[19] From the aforesaid the applicant concludes that the respondent failed to show that a legitimate transaction took place between Myburgh and Kelmovitz and fails to show how Kelmovitz could possibly have thought that she was doing an above board transaction with Myburgh when (a) on her version, she knew the car belonged to the applicant, (b) the Natis documents showed that the applicant was the owner and title holder of the vehicle and (c) she stated that she purchased the vehicle from Myburgh and not the applicant and (d) she paid Myburgh in three tranches and not the applicant.

⁸ 2004 (6) SA 491 (SCA) at 495A – C and 496D -E

THE RESPONDENT'S SUBMISSIONS

[20] The respondent alleges that Myburgh was employed with the Constantia Kloof branch of the applicant. He was employed as such during or about July 2021. He was appointed as the dealer principal, which essentially is the head of the business or the general manager at the dealership in question. His role was to oversee the business operations at the branch in question. He was further, partly responsible to monitor and control the availability of vehicles, parts, stock. The respondent describes Myburgh as “the boss” of the dealership.

[21] The applicant placed Myburgh in this position and he was inter alia placed in a position to sign all necessary documents in order to effect registration into the name of other parties. Together herewith, other personnel at the branch would perform a function of assisting in keeping track of stock levels and a stock controller at a particular branch would monitor the stock levels. In the present instance, a certain Martine Mare, assisted herein.

[22] The vehicle was subsequently registered into the name of Kelmovitz on 22 December 2022 as evidenced by the Enatis ownership report for the period 24 November 2022 to 17 February 2023. Pursuant thereto, Kelmovitz, on or about 13 February 2023 sold and gave possession of the vehicle to the respondent.

[23] The respondent continues to argue that the respondent purchased the vehicle from the applicant as represented by its dealer principal or “boss”, a person who sells vehicles on a daily basis. Furthermore, that Kelmovitz approached the respondent on 13 February 2023 whereafter the respondent performed certain HPI checks on the National Vehicle Database in respect of the vehicle. The checks did not reveal any theft records or police interest, the absence of which caused the respondent to conclude that there were no issues attached to the vehicle. As a consequence, the sale of the vehicle to Kelmovitz was concluded.

[24] In the alternative, the respondent argues that the respondent is and remains the owner of the vehicle and contends that the applicant should be estopped from

insisting that it, the applicant is the owner of the vehicle and disputing Myburgh's authority to have legally sold the vehicle to Kelmovitz on account of the fact that at all relevant stages, Kelmovitz dealt with the dealer principal of "the boss" of the applicant.

THE DISCUSSION

[25] Only one of the requirements in respect of the applicant's *rei vindicatio* is at issue, that being the applicant's ownership in and to the vehicle and whether same was validly transferred to Kelmovitz. In order for the transaction between the applicant and Kelmovitz to have become perfecta, and for ownership to have passed from the applicant to Kelmovitz, the purchase price must have been paid in full. Holmes JA in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another*⁹ held:

"... The general rule is that –

(a) in a sale for cash, ownership does not pass until the price is paid, even if delivery has meantime [been] given."

[26] There appears to be no dispute that the purchase price was R275,000.00. However, and on the evidence of Kelmovitz, three payments were made, two payments of R100,000.00 and one of R70,000.00. This a total amount of R270,000.00 was made and not R275,000.00. Consequently, the full purchase price was not paid and ownership in and to the vehicle did not pass from the applicant to Kelmovitz. Equally, Kelmovitz could not have given transfer of ownership in and to the vehicle to the respondent. It follows that the applicant is and remains the owner of the vehicle and the that it is entitled to have same returned to it.

THE ORDER

1. It is declared that the applicant is the owner of the vehicle described as:

2020 JEEP CHEROKEE 3.2 TRAILHAWK A/T

Engine number: G[...]

⁹ 1973 3 SA 685 (A)

VIN Number: 1[...]

["the vehicle"]

2. The respondent is directed to forthwith return the vehicle to the applicant at Hyundai Constantia Kloof, Hendrik Portgieter Road, Allen's Nek, Roodepoort, alternatively to disclose to the applicant the whereabouts of the vehicle, the person(s) or entities to whom the vehicle was given and all documents relating to the vehicle.

3. Should the respondent fail to deliver the vehicle to the applicant within 24 hours from date of service of this order on the respondent, the Sheriff of this Court is authorised to attach and remove the vehicle from the premises of the respondent or any other premises wherever the vehicle is to be found and return it to the applicant.

4. The respondent is ordered to pay the applicant's costs; such costs to be taxed on Scale B.

**S AUCAMP AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Applicant: Adv S McTurk
Instructed by Remon Gerber Attorneys Inc
Ref: AMH1/0106/RGerber/ny

For the Respondent: Adv JW Kloek
Instructed by Ross Munro Attorneys
Ref: Mr R Munro/sd/S182/109