IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

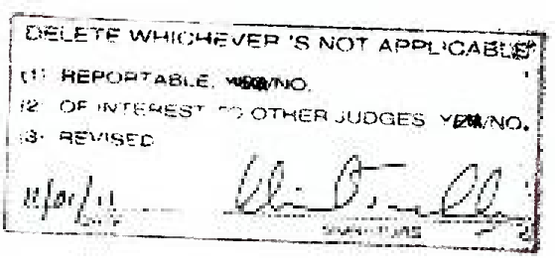
CASE NO: 38684/2009

In the matter between:

12/1/2011

ROSALINA SEFUHEDO VAZ SARAIVA FACEIRA Plaintiff

and



KEMPSTER SEDGWICK (PTY) LIMITED Defendant

JUDGMENT

Tuchten J:

1 Motor vehicle hijacking is one of the horrid facts of South African life. This case arose because a Volvo motor vehicle, bought new by the plaintiff from the defendant and brought in for repairs to its air conditioning unit shortly after the plaintiff had taken delivery, was hijacked while been driven by one of the defendant's drivers back to the defendant's premises in Pretoria after the air conditioner had been repaired. As the hijacking itself became common cause during the

trial, I shall describe the vehicle in what follows as "the hijacked vehicle". Neither party was insured. So the question is: which of the parties, both of whom are innocent of any wrongdoing relating to the hijacking, must bear the financial consequences of the loss of the hijacked vehicle.

2 The agreement of sale in relation to the hijacked vehicle was concluded in April 2009. It was partly written. The written portion consisted of the defendant's standard offer to purchase and conditions of sale and was signed by the plaintiff personally. It contained an express provision that the risk in and to the Volvo was to pass to the plaintiff upon delivery. The purchase price, R667 091,99, was paid by the plaintiff in two instalments. She took delivery of the hijacked vehicle on 11 May 2009.

3 The purchase of the hijacked vehicle was preceded by an event that took place on 5 March 2009. On that date the plaintiff's daughter, Miss Kamia Faceira, brought in to the defendant for repairs another Volvo motor vehicle ("the other Volvo"), owned by one or more members of the Faceira family. Miss Faceira, who is married and has a young child, lives with her parents in Woodhill Estates, Pretoria. The Faceira family are Portuguese speakers. The plaintiff can neither speak nor read English. Miss Faceira acted as the contact person between the

plaintiff and the defendant and dealt with the defendant on the plaintiff's behalf. The plaintiff's personal participation in the transactions she had with the defendant was limited to going to the defendant's premises to choose the hijacked vehicle.

4 The defendant has premises on Hans Strydom Drive in Silver Lakes, Pretoria at which it conducts the dealership from which the plaintiff bought the hijacked vehicle. Miss Faceira brought in the other Volvo for repairs at the same dealership. The dealership has a new car, a used car and a service department. On the premises at the time, the defendant displayed two notices[1] in fairly large bold uppercase print. The notices were identical and read:

> **PLEASE NOTE THAT WE ARE NOT LIABLE IN ANY WAY FOR LOSS, DAMAGE, THEFT OR HI-JACKING OF VEHICLES OR CONTENTS WHILE VEHICLES ARE IN OUR POSSESSION.**

5 One of these notices was displayed in the service area. The other was displayed in a customer refreshment area adjoining the new car showroom floor.

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[1] Which I shall call "the disclaimer notices".

6 When Miss Faceira took the other Volvo in for repairs, a job card was made out in her name. Miss Faceira signed the job card in the block provided for this purpose and headed "Owner Authorisation". Immediately to the left of and slightly below the owner authorisation block there appears the following:

> I, the undersigned, acknowledge that I have requested the above work to be carried out .
> **I have removed all valuables and/or weapons from the vehicle, including compact discs, and tape cassettes.**
> I acknowledge that I have read and understood the terms of the company's conditions of contract overleaf and agree bound by them [sic]. We are not liable in any way whatsoever for loss, damage theft or hijacking of vehicle or contents while vehicle is in our possession. [Emphasis as in original]

7 The conditions overleaf begin with the words:

> The following conditions apply to this dealing *and all future dealings* with Kempster Sedgwick (Pty) Ltd.
> (I) All vehicles are driven at Licensed Owner's Risk and Kempster Sedgwick (Pty) Ltd., is not responsible for any loss or damage, special, consequential or otherwise arising from any cause whatsoever in respect of any customer's vehicle or goods taken in by it for reward or otherwise, and whether for storage, service, or repair, or any other purpose, whether or not such loss or damage occurs while the vehicle or

> goods are in the premises of or under its control at the time of the loss or damage, or due to tis negligence or fault whatsoever. [Emphasis added; punctuation as in original]

8 On the day the plaintiff was due to take delivery of the hijacked vehicle pursuant to the agreement of sale, delivery had to be delayed a few hours because a pre-delivery check revealed that the air conditioner was not working properly. The hijacked vehicle had to be sent to Jet Radio, the Volvo air conditioner agent, to be regassed. Although this aspect of the evidence was disputed by Miss Faceira, I am satisfied that Hattingh, the defendant's salesman who represented the defendant in the sale of the hijacked vehicle, told Miss Faceira on the day of delivery that it had been taken to jet Radio for regassing. This information was part of Hattingh's explanation for why delivery was delayed.

9 The air conditioner in the hijacked vehicle again malfunctioned. On 26 May 2009, by prior telephonic arrangement between Miss Faceira and Hattingh, Miss Faceira took the hijacked vehicle in to the dealership for the air conditioner to be repaired. There is a dispute between Hattingh and Miss Faceira as to whether Hattingh told her that the vehicle had to be taken to Jet Radio for this purpose. I accept Hattingh's evidence on this issue as more probable. The defendant

did not do air conditioner repairs at the dealership. Giving an explanation for the need to take the vehicle off the defendant's premises made for good customer relations, which to Hattingh was important, and would explain, in advance, any delay in the completion of the repairs. Little or nothing however turns on this.

10 Miss Faceira entered the dealership through its front door and went to Hattingh's office, where she handed over to Hattingh the keys to the hijacked vehicle. Miss Faceira needed a lift home and had to wait for the defendant's driver, Mr Tjalie, to become available. At Hattingh's invitation, she went from his office to the adjacent refreshment area, which consists of a round table, three chairs and a unit along the wall on which was placed beverage machines, mugs and such like.

11 There is a dispute as to whether Miss Faceira sat down at the table. Hattingh says she did for some of the time while she was waiting and that she had a conversation there with Mr Breytenbach, a friend of Hattingh who was sitting at the table waiting for Hattingh to finish with Miss Faceira. Hattingh says he can even remember in which chair Miss Faceira sat. Breytenbach, however, who was called by the defendant, said that he sat in the very chair identified by Hattingh, that he cannot remember whether Miss Faceira sat down, that no

conversation took place between him and Miss Faceira and that they merely greeted each other.

12 Miss Faceira denied that she sat at the table. It was not put to her that she had a conversation with Breytenbach. She says that she wandered around the adjacent new car showroom. Her evidence strikes me as more probable than that of Hattingh on this issue. Hattingh explained that there were really only two things one could do in that part of the dealership to while away time: drink a beverage or look at the new cars. If Miss Faceira had wanted to drink a cup of tea or coffee, she would probably have sat down. She probably did not do so and thus would probably have strolled around the showroom looking at the new cars. But for reasons I shall give later, I do not think that anything turns on this issue either.

13 Some time later, Tjalie became available and took Miss Faceira home. Hattingh completed and signed a job card in the name of "New Cars", in form similar to that relating to the other Volvo. He did so not to regulate a contractual relationship between the defendant and a customer but to bring the repair to the air conditioner, the cost of which would ultimately be born by the dealership's workshop, within the dealership's administrative and accounting system. Tjalie then took the hijacked vehicle to Jet Radio to have the air conditioner

repaired. Another of the defendant's drivers travelled in a separate vehicle to Jet Radio, where Tjalie was collected and brought back to the dealership.

14 Later that day, Tjalie was again taken to Jet Radio to fetch the hijacked vehicle. At about 14h50, while returning to the dealership, Tjalie was hijacked about 200 metres from its entrance.

15 Tjalie said in evidence that he noticed a Polo hatchback flicking its lights at him. The Polo was at or near the entrance to the dealership on the other side of the road, facing in the direction opposite to that in which Tjalie was travelling. Because the Polo was so near the dealership, he thought the driver of the Polo was connected with the dealership and slowed down. The Polo then veered over to Tjalie's side of the road and halted, blocking Tjalie's forward passage. Two occupants of the Polo then emerged, leaving the driver and possibly one further occupant within the Polo. One of the former occupants of the Polo, a man of about 30, approached the driver's window of the hijacked vehicle. Tjalie lowered his window to see what the man wanted. The man thrust his arm through the open window and tried to open the driver's door of the hijacked vehicle. Tjalie saw that the man was armed with a firearm thrust inside the man's belt with the butt visible. At this point Tjalie realised he was being hijacked. A tussle of

sorts ensued, with the hijacker trying to keep Tjalie in the vehicle and Tjalie trying to escape. Tjalie succeeded in escaping, ran to the dealership and informed staff at the dealership that he had been hijacked. The police were notified. The hijacked vehicle, which had neither been insured nor fitted with a tracking device by the plaintiff, was never recovered. The defendant authorised its security services provider to offer a reward for its return. I think that the defendant was even prepared to buy the hijacked vehicle back from the hijackers, if this could be achieved. But the vehicle was never seen again by the plaintiff or the defendant.

16 Tjalie had received certain instructions about how he should conduct himself when driving a customer's vehicle. He had to drive such a customer's vehicle directly to where it was to go and not deviate from his route for his own purposes. He was not allowed to stop along the way for his personal purposes. He was not allowed to pick up passengers or to stop to render assistance to anyone in need. So it could be said that when he lowered his window to speak to the man whose Polo vehicle had just blocked the path of travel, he was acting in breach of his instructions. I shall accept in favour of the plaintiff that Tjalie did indeed in this respect act in breach of his instructions.

The pleadings and the pre-trial agreements

17 The plaintiff, in her amended particulars of claim, pleaded the sale agreement,[2] the return of the hijacked vehicle to enable the defendant to repair the airconditioner, the defendant's asserted inability to return the hijacked vehicle and the value of the vehicle which, the plaintiff claimed, the defendant was, by reason of its professed inability to return the hijacked vehicle, liable to pay the plaintiff.

18 The defendant in its plea admitted the sale agreement but said that it was partly oral and partly written and put up the written portion of the sale agreement. It became common cause at the trial that the written part of the sale agreement was as I have described it in paragraph 2 above.

19 In response to the allegation that the vehicle was returned to have the air conditioner fixed, the defendant pleaded as follows:[3]

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[2] Which the plaintiff said was concluded orally between the plaintiff acting personally and the defendant, represented by Hattingh.

[3] When I quote from the defendant's plea in this part of the judgment, I omit the paragraph numbering.

> [T]he parties agreed that the [hijacked] vehicle would be driven to the premises of Jet Radio in Lynwood, and back to the defendant's premises, in order to inspect and/or repair the faulty air conditioner.
> [I]t was at all relevant times properly brought to the attention of the Plaintiff, alternatively the Plaintiff's daughter, further alternatively both the Plaintiff and the Plaintiff's daughter that:
>
> the vehicle would be kept at the Defendant's premises and driven by the Defendant's staff for the reasons as set out herein above, entirely at the Plaintiff's risk;
>
> the Defendant would not be liable in any way for the loss of the vehicle or damage thereto, due to theft or hijacking thereof.

20 In response to the allegation of professed inability of the defendant to return the hijacked vehicle, the defendant pleaded that:

> [O]n 26 may and at approximately 14h30 the Plaintiff's vehicle was hijacked by three people unknown to the Defendant.
> The Plaintiff's vehicle was hijacked without any negligence on the Defendant's part.
> The Defendant did everything within its abilities to safeguard the Plaintiff's vehicle against damage or loss in that:
>
> the Defendant's driver attended to the vehicle at all relevant times;
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> the Defendant's driver was forced at gunpoint to abandon the vehicle.

21 Two pre-trial conferences were held by the parties. At the second such conference, held on 30 November 2010, the parties minuted the issues for decision by the court, certain common cause aspects and their agreement on the onus of proof.

22 The issues which the parties submitted for decision by the court are:

22.1 Whether the defendant's inability to return the hijacked vehicle to the plaintiff was due to the defendant's negligence;

22.2 If the court finds that the defendant's inability to return the hijacked vehicle was due to its negligence, whether the "owner's risk/exemption clauses"[4] relied upon by the defendant formed part of the agreement between the parties;

22.3 If the court finds for the plaintiff on the first issue and for the defendant on the second issue, whether the disclaimer clauses exempted the defendant from responsibility for the loss of the hijacked vehicle in the circumstances under which the loss occurred.

23 The common cause aspects included the following:

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[4] Which I shall call "the disclaimer clauses".

23.1 "That the plaintiff's daughter was her duly authorised representative";[5]

23.2 That the value of the hijacked vehicle when it was hijacked was R584 466,66.

24 The parties agreed that the defendant bore the onus of proving that the loss of the hijacked vehicle occurred without negligence on the part of the defendant rested on the defendant and that the onus of proving that the disclaimer clauses "did not form part of the agreement between the parties" rested on the plaintiff.

Evaluation

25 Counsel for the defendant submitted that what was in issue was a contract of deposit. I do not agree but I do not think that it matters in this case how one characterises the agreement. This is not a case where goods were handed over for safekeeping. But deposit is not the only contract which involves the assumption of responsibility for the

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[5] It was clear from the minute of the second pre-trial conference and the way the trial developed that the scope of the agreement that the plaintiff's daughter was the plaintiff's agent was confined to the incident in which the hijacked vehicle was delivered to the defendant for repairs to the air conditioner. It is a necessary implication of that agreement that knowledge by the plaintiff's daughter of the contents of the disclaimer notices is to be imputed to the plaintiff.

safe keeping of goods delivered pursuant to the contract.[6] To my mind the delivery of the hijacked vehicle to the defendant for repairs to the air conditioner is analogous to the return of goods to a contractor for the purpose of remedying a defect.[7] It seems to me implicit in the agreement of sale that if the defendant accepted the return of the hijacked vehicle for the purpose of remedying a defect, then (always subject to the fate of the defence raised with reference to the disclaimer clauses) the defendant would, *mutatis mutandis*, attract the obligations of a depositary. Furthermore, the parties agreed at the second pre-trial conference that if the defendant proved that its inability to return the hijacked vehicle was not due to its negligence, this would be a complete defence to the plaintiff's claim.

26 The third issue may swiftly be disposed of: it was not suggested during argument that if the disclaimer clauses were contractually binding, that fact would not of itself absolve the defendant. The way is accordingly clear to consider the remaining two issues.

27 The plaintiff's daughter, Ms Kamia Faceira, gave evidence. She is a first language Portuguese speaker who was educated in England. My impression was that her command of the English language is not

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6 *LAWSA* vol 8 Part 1 para 174 sv *Deposit*.

7 Compare *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 A 435C

perfect, especially in regard to nuances of grammar and idiom. But for the issue whether Hattingh had told her that the hijacked vehicle would be taken away from the dealership to have the air conditioner repaired and one other aspect of her evidence, with which I shall deal shortly, she impressed me as honest and reliable. I accordingly accept that, as she testified, she is ignorant of the concept of a contract as that term is used in our law and was not aware that when she brought the other Volvo to the defendant for repairs and signed the jobcard, she was concluding a contract of any kind with the defendant. Agency as a legal concept was not canvassed with her when she gave evidence but I have no doubt that she does not understand that either.

28 The aspect of Ms Faceira's evidence which initially gave me concern related to her awareness of the disclaimer notices. She said that she was not aware of the existence of the disclaimer notices or what was written on them. I am however persuaded that what she meant was that she accepted that the disclaimer notices were, or that one of them was, within her field of vision at some stage when she was in the dealership, that she could have read what was written on the disclaimer notice if she had wanted to do so, but that she had not looked for the notices, did not appreciate that they were there or what their significance was and did not read what was written on them. I accept that this evidence of hers was true.

29 Counsel for the defendant submitted that the plaintiff was bound by Miss Faceira's signature to the job card in respect of the other Volvo in relation to the disclaimer clauses in the sense that Miss Faceira's knowledge of the existence of the disclaimer clauses on that job card should be imputed to the plaintiff. Counsel also relied heavily on the provision in the standard conditions overleaf on the job card that the standard conditions applied to the job in question and, in addition, "all future dealings" with the defendant.

30 The difficulty I have with this submission is that the evidence of Hattingh on behalf of the defendant and the provisions of the job card itself show that in relation to the other Volvo, Miss Faceira contracted as principal. There is accordingly no basis for imputing to the plaintiff Miss Faceira's knowledge in regard to the transaction relating to the other Volvo. Furthermore, I accept that Miss Faceira had no idea that when she signed the job card, she was entering, or offering to enter, into a contract with the defendant or that the job card contained provisions of a contractual nature, whether relating to the disclaimer clauses or otherwise. She said she did not read the document and I believe her. Of course, under the doctrine of quasi-mutual assent, she is bound by what she signed but that is beside the point.

31 I accordingly conclude that the provisions of the job card relating to the other Volvo do not help the defendant to establish that the disclaimer clauses are contractually binding on the plaintiff.

32 Subject to the defendant's submissions on the effect of the provisions in the job card relating to the other Volvo, counsel were agreed that the plaintiff would be bound by the disclaimer clauses unless the plaintiff showed that Miss Faceira had not read them or that the defendant had not done all that was reasonably necessary to bring them to the plaintiff's (ie Miss Faceira's) attention.[8]

33 Miss Faceira's evidence, which I accept, was that she did not read what was written on the disclaimer notices. Hattingh testified that he did not draw Miss Faceira's attention to either of the disclaimer notices. The question which remains is thus whether the defendant did all that was reasonably necessary to bring them to Miss Faceira's attention.

34 There is however an anterior question. To bind the plaintiff to the provisions of the disclaimer notices it was, in my view, necessary to bring the disclaimer notices to the attention of Miss Faceira *before* the contractual arrangement relating to the repair of the air conditioner

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[8] Compare Christie, *The Law of Contract in South Africa*, 5th ed 180

was concluded. What happened in that regard *after* that contractual arrangement was concluded is for this enquiry irrelevant.

35 When Miss Faceira brought the hijacked vehicle in for the repair, she entered the dealership through its front door and walked to Hattingh's office adjacent to the refreshment area and the new car showroom. If she had been looking for the disclaimer notice in the refreshment area, she would have been able to read it from Hattingh's office. But there was to my mind no reason why a reasonable person in Miss Faceira's position *would* have read it. This case is quite different from the case, to take one example, where it is apparent from a disclaimer notice prominently displayed in the area to which one goes to book one's car in for a service that the service provider only does business on the basis of the provisions of the disclaimer notice. Miss Faceira was not asking the defendant to enter into a new contract with her or her mother. She was bringing the hijacked vehicle back to have a defect remedied under the sale agreement. There was nothing in the sale agreement to warn the new car buyer that the defendant invariably did business on the basis of the disclaimer clauses. Indeed, the evidence was that there was no disclaimer notice visible to prospective customers entering the dealership through the front door.

36 A "come back" buyer of a new car, for present purposes a customer who brings the vehicle back to Hattingh at the dealership to have a defect remedied, would have no reason to believe that the defendant wished to impose the terms of the disclaimer notices on their contract. There was nothing drawing the customer's attention to the disclaimer notices unless and until he or she went to the refreshment area or the service area. The notice in the service area is 20 metres away, up steps in height 1,25 metres, from the room divider separating the refreshment area from the new car showroom and is only visible at all from some positions between the new car showroom and the service area but not visible at all from others.

37 The contractual arrangement in relation to the repairs to the air conditioner was concluded, at the latest, when Miss Faceira handed the keys of the hijacked vehicle to Hattingh. Up to that moment she would physically not have been able to see the disclaimer sign in the refreshment area. It is quite fortuitous that she went to the refreshment area and, in my view, legally irrelevant that she did so because by then the contractual arrangement in relation to the repairs to the air conditioner had already been concluded.

38 So, in my view, the evidence establishes that far from having done everything reasonably necessary to bring the disclaimer sign to the

attention of a come back customer in the position of Miss Faceira, the defendant did nothing at all in this regard.

39 I accordingly hold that it has been proved that the disclaimer clauses did not form part of the contractual arrangement in relation to the repair of the air conditioner.

40 I turn to consider whether the defendant has proved that its inability to return the vehicle was not due to the negligence of the defendant or of anyone whose negligence can be imputed to the defendant - in this case its driver, Tjalie.

41 The test for negligence is as laid down in *Kruger v Coetzee*[9] where Holmes JA said[10] the following:

> For the purposes of liability *culpa* arises if -
> (a) a *diligens paterfamilias* in the position of the defendant -
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
> (ii) would take reasonable steps to guard against such occurrence; and
> (b) the defendant failed to take such steps.

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9 1966 2 SA 428 A

10 at 430E-G

> This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.

42 In argument, it was submitted on behalf of the plaintiff that the defendant had failed to establish the absence of negligence because of the following:

42.1 Tjalie should have realised when the Polo started veering into his path of travel that he was being hijacked and thus failed to realise at the earliest possible moment that he was being hijacked;

42.2 Tjalie had, when confronted by the hijacker at his drivers' door window, lowered the window rather than keep the window up;

42.3 Tjalie had made his escape from the vehicle rather than try to drive the vehicle away from the scene of the hijacking, either by mounting the pavement and driving around the Polo or reversing;

42.4 The defendant failed to provide its drivers with specific training about what to do in a hijack situation;

42.5 The defendant should have sent another of its drivers to accompany Tjalie in the hijacked vehicle or should have sent another of its drivers in another vehicle to accompany Tjalie.

43 I have said that hijacking is one of the horrid facts of South African life. What makes this crime so horrifying is that it is invariably, in the South African experience, accompanied by the threat of potentially fatal violence. So the victim of a hijacking in this country knows that his or her life is in great immediate danger.

44 It is in my judgment self-evidently true that the life of a hijack victim is immensely more valuable than the vehicle which is in the process of being hijacked. Now although the reasonable motorist in this country is constantly aware of the possibility of being hijacked, the reasonable person in context of the present case is neither possessed of military or other training to enable him or her to meet the force of the hijacker with superior force nor armed with the necessary weapons to enable him or her to engage the hijacker or hijackers in a gun fight.[11]

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[11] I do not imply that the reasonable person, armed and trained to resist hijackers with force, should, when being hijacked, always fight back. It depends on the circumstances.

45 It follows that the reasonable person in the position of Tjalie, confronted by an armed gang of hijackers neither offers resistance nor tries to escape by driving away the vehicle which is the target of the hijackers. The risk that he or she will be shot while doing so is simply too great. It then follows that the only appropriate course available is to escape from the vehicle at the earliest opportunity or, if this is not possible, to negotiate the handing over of the vehicle to the hijackers in exchange for the life and liberty of the victim or victims.

46 I think that the reasonable person in Tjalie's position might have realised earlier than Tjalie did, ie at the moment that the Polo started veering over to Tjalie's side of the road, that a hijacking was in progress. But one must make allowance for reaction time. Tjalie's evidence, which I accept, is that things happened very fast and a very brief period of time elapsed between the moment when the Polo's lights were flicked and the moment when the hijacker stood at Tjalie's window. The reasonable person in Tjalie's position, although knowing that hijackings are part of the South African experience, will experience a moment of incomprehension, a feeling that this cannot be happening to me, and of indecision. Nevertheless, I must bear in mind that the onus is on the defendant to exclude negligence, so I shall proceed from the basis that there is a reasonable possibility that Tjalie should have realised at the earlier moment that he was being

hijacked. What would the reasonable person have done in those circumstances?

47 In my judgment, the reasonable person in Tjalie's position would have done exactly what Tjalie did. He or she would not have tried to drive the vehicle away but would have appreciated that the instruction from the defendant not to stop and not to lower one's window did not or ought not to apply to the hijack situation because either step could reasonably have been interpreted as resistance by the hijackers and have led to the death of the hijack victim. The reasonable person would have tried to communicate with the hijackers, to negotiate the hand over of the vehicle to the hijackers and to make his or her escape at the earliest possible opportunity, abandoning the vehicle to the hijackers. Having so escaped, the reasonable person would report the hijacking to the police without undue delay.

48 It thus follows, in my judgment, that the defendant has discharged the onus of proving that Tjalie acted without negligence in relation to the hijacking.

49 From this conclusion it follows that the defendant's failure to provide its drivers with specific training about how to deal with hijack situations did not contribute to the loss of the hijacked vehicle. The reasonable

person in the defendant's position would have trained its drivers to respond to hijackings in precisely the way that Tjalie did.

50 Finally, I deal with the submission that the defendant ought to have sent another person to travel with Tjalie in the hijacked vehicle or should have sent another vehicle to travel with Tjalie. The argument was that the defendant should have sent another of its drivers to act as backup. The uncontradicted evidence of Mrs Bell, the dealer principal in charge of the dealership, was that this was the first hijacking, as far as she was aware, of a customer's vehicle while in the possession of the defendant. She said that she had been associated with the defendant for 13 years, that she and her fellow managers held regular conferences at which they shared experiences and that during that period no report had been made to her of any similar incident save for one case of theft.[12] In my view, the South African situation is far from that where it would be negligent for a motor dealer in the defendant's position to allow a customer's vehicle to be driven by one of its drivers alone, ie without a backup passenger or a backup vehicle, whether along a thoroughfare in an urban area at midday or otherwise.[13] Our situation does not, to apply the test in

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12 That theft was the subject of a judgment in *Versveld v Kempster Sedgwick (Pty) Limited*, unreported, 18 March 2004, WLD case no 15268/02.

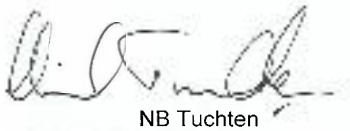
13 This conclusion is fact specific. I should not be taken as laying down a rule of general application.

item a(ii) of *Kruger v Coetzee*, require a person in the position of the defendant to take either of such steps to guard against the danger of being hijacked. Furthermore, unless the backup was armed and trained in resisting the violence presented by hijackers, the presence of such a backup would have made no difference.

51 It follows, in my judgment, that the defendant has succeeded in proving that it acted without negligence in relation to the loss of the hijacked vehicle.

Order of court

52 There will be judgment for the defendant with costs, such costs to include the costs of the summary judgment application which were reserved for the decision of the trial court.



NB Tuchten
Judge of the High Court
11 January 2011

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