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NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT. PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 59938/10

DATE: 24 April 2012

IN THE MATTER BETWEEN:

T A V R

Plaintiff

and

H V R

Defendant

JUDGMENT

LEDWABA, J:

[1] The plaintiff issued summons against the defendant seeking an order on the following terms:

1.1 "Teruggawe van die Toyota Fortuner met registrasienommer DTF 066 MP en VIN-nommerAHTYZ59GX08004373.

1.2 In die alternatief, indien dit bevind word dat die Verweerder nie meer in besit is van gemelde voertuig nie, betaling in die bedrag van R296 819.92 synde die uitgawes en

aflosprys van die voertuig.

1. Betaling in die bedrag van R29 446.11 ten opsigte van die versekeringpremies namens Verweerderes betaal;

1.4 Koste van die geding.

1.5 Verdere en of alternatiewe regshulp."

[2] The defendant filed a counterclaim in terms where of she wants an order in the following terms:

2.7 "'n Bevel ingevolge waarvan die Eiser beveel word om binne 7 dae alle dokumente wat nodig is ten einde die Verweerder in staat te stel om 'n Toyota Fortuner met registrasienommer DFT 066 MP op haar naam te registreer, aan die Verweerderes te voorsien.

2.2 Koste van die geding.

2.3 Verdere en/of alternatiewe regshulp."

[3] I will commence with a summary of the background facts which are common cause between the parties and which I consider relevant for the proper adjudication of this matter.

3.1 The plaintiff and the defendant were married to each other and the marriage was absolved by the High Court on 20 June 2006.

3.2 In the settlement agreement that was made an order of court on 15 September 2006 the parties, inter alia, agreed that:

3.3.1 The parties have two minor children and the court ordered that custody (the primary residence of the children) is awarded to the defendant in casu and the plaintiff in casu had

rights of reasonable contact.

3.3.2 The defendant would keep as her property the business, Aldrine Financial Investment, as her sole property.

3.3.3 The defendant would keep the Pajero motor vehicle which was in her possession as her sole property. The plaintiff would buy from the defendant the following vehicles:

3.3.3.1 Land Cruiser

3.3.3.2 Toyota Hilux

3.3.3.3 Ford Bantam For R100 000.

3.4 From May 2007 - May 2008 the plaintiff, the defendant and the children stayed together at 6 President Street, Nelspruit. However, as to whether the parties were attempting to reconcile or whether they slept in the same bedroom was in dispute and I will deal with same later in the judgment.

3.5 From August 2007 to November 2010 the plaintiff had a love relationship with Ms Gizela Verster.

3.6 In December 2007 the plaintiff entered into a credit agreement with ABSA for the purchase of a Toyota Fortuner 3.00 D4 4x4 which was registered in the plaintiff's name on 4 January 2008. The monthly installments of the Fortuner was R5889.58 over a period of 54 months. The first payment was due and payable on 2 February 2008.

3.7 The Pajero which was awarded to the defendant in terms of the settlement agreement which was made an order of court was traded in when the Fortuner was purchased and R100 000 of the trade-in amount was used as a deposit for the Fortuner.

3.8 Possession of the Fortuner has always been with the defendant. When the defendant left the plaintiff's house in May 2008 with the children she also took the Fortuner.

3.9 The Plaintiff paid for the monthly installments and the insurance of the Fortuner.

[4] The main issue to be decided here is whether the Fortuner was donated to the defendant or not or if there was an agreement that the defendant would be liable to pay for the monthly installments and the insurance. This aspect will also be dealt with in detail later in this judgment.

[5] The plaintiff's evidence together with the evidence of Ms Gizela Verster can be summarized as follows:

5.1 The plaintiff testified that the defendant and the children came to stay with him in May 2007 because the children were going through some emotional traumas which affected their academic progress. However, he specifically told the defendant that he would not be responsible for her maintenance and he would continue to support the children. The children slept in their own bedrooms. The defendant and himself occupied different bedrooms.

5.2 He further agreed to buy ponies to the children as part of their therapy.

5.3 The defendant told him that she would be gainfully employed in January/February 2008. She further mentioned that she wanted to buy a new vehicle because the service contract of the Pajero expired and she could not afford to pay for the service of the Pajero.

5.4 The defendant requested him to buy a vehicle on his behalf and she would pay the installments and insurance of the vehicle. She is employed in February/March 2008 and she would be earning a monthly salary of about R20 000.

5.5 He then agreed to buy her a vehicle of her choice. The terms of the oral agreement between the plaintiff and the defendant are set out in paragraph 6 of the plaintiff's particulars of claim as follows:

5.5.1 "Gedurende die eerste week van Desember 2007 en te Nelspruit, het die verweerderes

die eiser genader en 'n mondelingse ooreenkoms met horn te siuit met die volgende relevante uitdruklike, alternatiewelik stilswyende, alternatiewelik inbegrepe terme:

5.5.1.1 Die Verweerderes se Mitsubishi Pajero voertuig se diensplan het verval en kon die Verweerderes nie slaag om vir finansiering vir 'n soortgelyke nuwe voertuig te kwalifiseer nie.

5.5.1.2 Die Verweerderes wou graag 'n Toyota Fortuner aankoop en aangesien die Eiser wel vir finansiering kon kwalifiseer, het die partye ooreengekom dat die Mitsubishi Pajero ingeruil sou word as deposito op die aankoop van die Toyota Fortuner.

5.5.1.3 Die Eiser sou die Fortuner aankoop, finansiering bekom in sy eie naam daarvoor bekom en die finansierings paaielemente dra, maar sou die uitsluitlike gebruik van die voertuig aan die Verweerderes toestaan onderhewig aan die voorwaarde dat die verweerderes die maandelikse finansierings-paaielemente aan die Eiser sou terug betaal en verder onderhewig daaraan dat sy onmiddelik sou sorg dat die voertuig omvattend verseker word deur haar eie versekering uit te neem en te betaal ten opsigte van die voertuig.

5.5.1.4 Indien die verweerderes die voertuig se uitstaande balans ten voile afgelos het op die voertuig en die versekering op die voertuig stiptelik betaal, sou eiendomsreg by aflos van die skuld op die voertuig in die Verweerderes se naam oorgaan.

5.5.1.5 Indien die Verweerderes sou versuim om enige paaielement van die versekering of die finansierder stiptelik elke maand aan die Eiser te betaal, sou die Eiser geregtig wees om die ooreenkoms tussen die partye te kanselleer, om die voertuig in besit te neem, tee is vir terugbetaling van alle bedrae reeds deur die eiser betaal in terme van paaielemente en versekeringspremies en die voertuig by aflos van die uitstaande balans aan die finansierder, eiendomsreg van die voertuig in sy naam te registreer."

[6] Contrary to the plaintiff's version on the purchasing of the Fortuner, the defendant's version

is that the Fortuner was given to her by the plaintiff in December 2007 as a present for her birth day and she vehemently denied the terms of the alleged oral contract that the plaintiff mentioned.

[7] The plaintiff, further to support his evidence, testified that even when they were still staying in the same premises i.e before May 2008 he did demand payment of the insurance and the installments from the defendant by way of sms. On 22 October 2008 he sent a demand by e-mail, see page 1 of the bundle.

[8] On 8 December 2007 he paid the defendant an amount of R10 000 because the defendant threatened him. When the money was deposited into the account he noted 'Rica dreig' as a reference to show that he was threatened.

[9] The plaintiff strongly denied that when the defendant stayed with him from May 2007 - May 2008 they were trying to reconcile and that they shared the same bedroom.

[10] He further said even if they stayed together there was no love relationship between them and he was in love with Ms G V. In December 2007 he went on holiday to Balito in Kwazulu-Natal for about 10 days with Ms V and left the defendant and the children behind. In April 2008 he again went on holiday again with Ms G V .He denied that he ever went to Balito with the defendant in December 2007.

[11] Ms V when she testified confirmed that she went on holiday with the plaintiff in December 2007 and again for six weeks with the plaintiff in about April 2008.

[12] The defendant in her evidence denied that in December 2007 she threatened the plaintiff when she demanded payment of the R10 000. She said the plaintiff promised to pay her R10 000 when they were staying together for the errands that she made for the children. She said because the money in her bank account was depleting in December 2007 she insisted that the plaintiff should pay her R10 000.

[13] The defendant further said when they stayed together they were working on a reconciliation and they had an intimate and affectionate relationship. She also said in December 2007 she went on holiday to Balito with the plaintiff and she gave a detailed description of the unit where they were staying. She further said in 2006 after the divorce she went on holiday to Cape Town with the plaintiff.

[14] The defendant further said the Fortuner was the plaintiff's choice and if she had a choice she would have chosen a 'bakkie' because she would use it to load the ponies. She further said when they were still married the plaintiff used to shower her with donations. She mentioned a BMW X 5, Range Rover and a wrist watch of about R17 000. She did not deny that the service contract of the Pajero had expired.

[15] She said when stayed with the plaintiff she was not working and she could not afford the monthly installments of about R6000, excluding insurance, for the Fortuner because she would earn a salary of about R7500 when she starts with her employment in about March 2008.

[16] She said the plaintiff only contacted her for the payment of the insurance monies for the Fortuner in October 2008 and when the Fortuner was purchased she never applied for the

insurance.

[17] She stated that their attempt to reconcile was negatively affected when she discovered that the plaintiff has a relationship with Ms Verster.

[18] The other important aspect that I need to deal with relates to the two letters in Exhibit A on pages 19 and 20 from Barnard & Khan Attorneys to D N Van Schalkwyk Dated 6 June 2008 (first letter) and a letter on pages 34 and 35 of Exhibit A from Shapiro & Shapiro attorneys addressed to the defendant dated the 11 of March 2009 (second letter).

[19] The first letter deals with settlement negotiations meeting concerning the sharing of the movable property that was held on 5 June 2008. What of importance is clause 8 of the first letter and it reads as follows:

" Die aangeieentheid ten opsigte van die Toyota Fortuner het die partye ooreengekom dat ons Klient sal toesien tot die betaling van die maandelikse paaieemente tot en met die voertuig afbetaal is waarna die voertuig op u klient se naam oorgedra sal word. U klient sal toesien tot die betaling van die maandelikse versekering ten opsigte van hierdie voertuig en onderneem om sodanige inligting aan ons klient deurte gee." (own underlining)

[20] The plaintiff denied that his attorney reflected the settlement agreement correctly. The defendant testified that when the aforesaid settlement negotiations were held she left because she was of the view that her attorney did not carry out her instructions.

[21] The contents of the second letter reads as follows:

"21.1 Ons tree op namens u vorige eggenoot Mnr Tobias Albertus van Rhyn in hierdie aangeieentheid en dit is ons instruksies om u soos hieronder uiteenigesit word, mee te deel, soos ons hiermee doen:

21.2 Gedurende ongeveer Desember 2007 het u en ons klient 'n mondelingse ooreenkoms aangegaan in terme waarvan:

21.2.1 Ons klient 'n sekere Toyota Fortuner 3 L 4x4 motorvoertuig by wyse van afbetalingsverkoopsooreenkoms met Absa Bank Beperk aangekoop het

21.2.2 U het 'n Mitsubishi motorvoertuig ingeruil vir die aankoop van die voormelde Toyota motorvoertuig. Die netto opbrengs voortspruitend uit die inruil van die gemelde Mitsubishi motorvoertuig het 'n bedrag van R135 000,00 beloop.

21.2.3 Ons klient aanspreeklik sou wees vir die betaling van die maandelikse paaieemente betaalbaar ten opsigte van die gemelde Toyota motorvoertuig.

21.2.4 U sou aanspreeklik gewees het vir die betaling van die maandelikse versekeringspremies met ingang van die 1ste dag van die maand nadat u 'n betrekking bekom het en 'n inkomste begin verdien het ten opsigte van die gemelde Toyota motorvoertuig.

21.3 U het gedurende Februarie 2008 'n betrekking bekom en aan die einde van Februarie 2008 'n inkomste begin verdien. As suiks was u in terme van die voormelde ooreenkoms aanspreeklik vir betaling van die maandelikse versekeringspremies ten opsigte van die voormelde Toyota Motorvoertuig met ingang van 1 Maart 2008. Die maandelikse versekeringspremies het 'n bedrag van R989,52 per maand beloop.

21.4 Tot datum hiervan moes u 'n totale bedrag van R12863J6 ten opsigte van die versekeringspremies van die voormelde Toyota motorvoertuig, betaal het.

21.5 Tot datum hiervan weier en/of versuim u om die betrokke versekeringspremies te betaal.

21.6 Inaggenome die voormelde het u die voormelde ooreenkoms tussen u en ons klient gerepudieer, welke repudiasie ons klient hiermee aanvaar. As gevolg hiervan kaselieer ons klient hiermee die voormelde ooreenkoms.

21.7 Inaggenome die voormelde is ons klient geregtig op lewering van die voormelde Toyota motorvoertuig.

21.8 Teen lewering van die gemelde Toyota motorvoertuig, tender ons klient hiermee betaling van die voormelde bedrag van R12 863.76 wat u aan ons klient verskuldig is ten opsigte van die versekeringspremies ten opsigte van die gemelde Toyota motorvoertuig wat u geweier en/of versuim het om te betaal en wat as gevolg hiervan ons klient moes betaal het.

21.9 Tensy die voormelde Toyota motorvoertuig binne 14 dae na ontvangs hiervan deur u aan ons klient terugbesorg word, sal ons klient geen ander alternatief he nie as om die nodige aksie teen u in te stel vir die lewering daarvan, sonder enige verdere korrespondensie en op u koste.

21.10 Ons verneem graag van u as 'n saak van dringende aard in die verband.

21.11 Geliewe ontvangs hiervan te erken."(own underlining).

[22] The plaintiff denied that he instructed Shapiro & Shapiro attorney's to write to the defendant and further said they just wrote the letter based on the contents in his file.

[23] During arguments the plaintiff's counsel submitted that the onus was on the defendant to prove that the plaintiff donated the Fortuner to her.

[24] The legal position is that the plaintiff should prove that there was a contract and that there was no donation. In my view, the onus is on the plaintiff even if the defendant denies the

existence of the contract between the parties see *Sadie v Annandale* 1992 (2) SA 240 (OPD) at 243 E.

[25] According to the documents in the bundle it is common cause that the Fortuner was registered in the name of the plaintiff and that he became the owner therefore sometime in 2010 when he settled the amount due to ABSA Bank.

[26] Regarding the alleged oral contract that the plaintiff alleged in his particulars of claim, which contract he must prove, I think there are material and important aspects which needs to be considered to determine if the plaintiff succeeded in proving on the balance of probabilities that the alleged contract existed and that the Fortuner was not donated to the defendant.

[27] There are mutually destructive versions before the court. The test enunciated in *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) is applicable.

[28] It is common cause that the Fortuner has always been in the defendants possession and that the plaintiff paid the purchase price and the insurance premiums for the Fortuner.

[29] The evidence clearly shows that the plaintiff is affluent and when he was staying together with the defendant before they divorced he used to buy her expensive presents.

[30] On the issue of the R10 000 which was deposited into the defendants account with reference, 'Rica dreig' despite different versions regarding the circumstances under which the money was paid, in my view, the defendant did exert some pressure on the plaintiff before the money was paid,

[31] Importantly, if the plaintiff and the defendant had some quarrel regarding the R10 000 before the money was paid, I think it is highly unlikely that the Plaintiff would a few days thereafter enter into an alleged contract involving a huge amounts with the defendant when the defendant was unemployed. Also considering that the parties had unresolved issues, mentioned in the first letter, on how they had to share the property acquired during the existence of their marriage. I fail to understand how would the parties enter into a contract that the plaintiff refers to involving money if there were still unresolved issues.

[32] What is further interesting about the plaintiff's version is that after the defendant was employed from February 2008 until May 2008 he did not insist that she must pay the installments and the insurance premiums as allegedly agreed upon.

[33] The other factor that weakens the plaintiff's version, in my view, is that in the email sent to the defendant in October 2008, he only claimed the insurance premiums and he said nothing about the arrears of the monthly installments.

[34] The first and the second letter only mentions the insurance premiums. The plaintiff could not give an acceptable reason why the arrear installments were not claimed.

[35] The question of who went to Balito with the plaintiff for the festive season cannot, in my view, determine or assist in determining whether the alleged contract regarding the Fortuner existed or not.

[36] What is not in dispute is that when the defendant discussed the love relationship between the plaintiff and Ms Verster it caused some unpleasantness and the defendant had to leave

the plaintiff's house. I therefore think that when the plaintiff and the defendant lived together they entertained that they may live together as husband and wife again, unfortunately it did not work out.

[37] The plaintiff was not a credible witness, because he kept on changing his version during cross examination. He could not explain why did he not use all the money for the trade-in value of the Pajero as a deposit and in the amounts he claims the amount he gained after paying the deposit of R100 000 is disregarded. The plaintiff's version is not probable.

[38] The defendant was, in my view, a credible witness. Her explanation about their attempt to reconcile, even though some versions were not put to the plaintiff, is reasonable and acceptable.

[39] Her version that the plaintiff chose the vehicle to purchase and gave it to her was out of benevolence is probable and acceptable. Her counter claim should succeed.

[40] I therefore make the following order:

42.1 The plaintiff's action is dismissed.

42.2 The defendant's counter claim succeeds.

42.3 The plaintiff is ordered to provide and sign all documents that are necessary for the registration and transfer of ownership of the Fortuner with registration number DFT 066 MP to the defendant within 14 days of this order, failing which the sheriff in the area where the defended is resided is authorized to sign the relevant documents for the registration and transfer of ownership of the vehicle to the defendant.

42.4 The plaintiff is ordered to pay the costs of the defendant in respect of the action and

counter claim proceedings.

AP LEDWABA

JUDGEW THE HIGH COURT

HEARD ON: 13 April 2012

FOR THE PLAINTIFF: Adv T P Kruger

INSTRUCTED BY: Linhout Prokureurs, Pretoria

FOR THE DEFENDANT: Adv C F J Brand

INSTRUCTED BY: Frey & Slabber Ing, Pretoria