REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

NORTH GAUTENG DIVISION, PRETORIA

15/9/16

CASE NO: 13651/2012

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

McCARTHY LIMITED *t/a* McCARTHY VOLKSWAGEN WITBANK Applicant

and

PROFPRO (PTY) LTD Respondent

JUDGMENT

MSIMEKI J,

INTRODUCTION

[1] This is an application wherein the applicant seeks an order:

"1. That the Respondent be directed to forthwith deliver to the Applicant the original Natis registration documentation of the vehicle released to the Applicant by agreement between the respondent and the Applicant on 6 May 2011 to wit a

Volkswagen 2010 T5 2.5 *TDi bearing the registration number Y[…] GP;*

2. In the alternative to prayer 1 above and in the event that it is found that the Respondent disposed of the original Natis documentation of the said vehicle, that the Respondent deliver duly obtained duplicate original Natis documentation to the Applicant; and

3. That the respondent simultaneously provide duly signed documents to effect transfer of the registration of the vehicle to the Applicant;

4. That the Respondent pay the costs of this application;

5. Further and/or alternative relief."

BRIEF BACKGROUND FACTS

[2] The respondent purchased the motor vehicle referred to in prayer 1 of the Notice of motion from the applicant which trades as a motor vehicle dealership under the name McCarthy Volkswagen Witbank for the purchase price of R413 185 02.

[3] The respondent contended that the applicant had not disclosed that the motor vehicle had been damaged prior to it taking delivery. A dispute arose between the parties. The respondent demanded refund of the purchase price it had paid while the applicant insisted that the money be paid into an attorney's trust account.

[4] On 30 September 2010 the respondent furnished the applicant with its bank account number into which the money had to be paid. This would be done against delivery of the motor vehicle together with the registration documents. In October 2010 the respondent's legal advisor, Mr Jan Van Zyl, advised the applicant that he acted for the respondent and that the money needed to the deposited into the bank account which he furnished. Following this, the applicant deposited the money into the respondent's legal advisor's account as directed. The motor vehicle, according to the applicant, despite such payment, was not returned to it.

[5] For the respondent to get a replacement motor vehicle, according to the applicant, the respondent had to return the motor vehicle, the spare keys and the Natis documents with the motor vehicle being in the condition it was in when delivery was taken. The respondent had to pay an additional amount of R20 108 46 which would become part of the amount which the applicant had deposited into its legal advisor's trust account. The

new purchase price would therefore be R441 045 48.

[6] The respondent, on 11 February 2011, advised the applicant that it had deposited the R20 108 46 additional amount into the trust account of Mr Jan Van Zyl and that Mr Van Zyl had undertaken to pay the two amounts over to the applicant as soon as the respondent's motor vehicle was delivered to replace the first motor vehicle.

[7] The respondent, on 12 February 2011, was informed that the replacement motor vehicle had been found and that the deal needed to be concluded. On 4 March 2011 the respondent advised its legal representative as well as that of the applicant that Mr Van Zyl would "decide when to pay the monies across" and that he needed to do it if, he trusted them.

[8] The oral agreement confirmed in writing on 6 May 2011, according to the applicant, ended up being cancelled on 19 May 2011 as the respondent, according to the applicant's attorneys, had "failed to effect payment of the agreed purchase price or to tender payment thereof against delivery of the vehicle".

[9] The oral agreement of 4 May 2011 was to settle the dispute. The settlement was on the basis that:

1. the respondent had to purchase the replacement motor vehicle within 7 days from the date of the return of the old motor vehicle and against receipt of proof of payment. The new purchase price would be R441 045 48.
2. The respondent, simultaneously with the delivery of the old motor vehicle, would deliver the relevant registration documentation of the motor vehicle.
3. The agreement would be cancelled if the respondent failed to pay the purchase price of the new motor vehicle within 7 days referred to above.

[10] On 6 May 2011 the respondent delivered the old motor vehicle to the applicant. The registration documents sought by the applicant were not delivered simultaneously with the old motor vehicle. No payment of the purchase price, according to the applicant, was made. The matter, according to the applicant, was then disposed of on the basis that the applicant received the old motor vehicle while the respondent, received the purchase price that was deposited into its legal representative's trust account.

THE ISSUE

[11] The issue to be resolved is whether the matter was legally disposed of as contended for by the applicant. The respondent holds an opposite view stating that payment to Mr Jan Van Zyl by the applicant does not constitute payment to the respondent which did not sanction such payment.

[12] The respondent, in its answering affidavit, contends that the applicant caused an amount of R430 000 00 to be paid into an account (not trust account) controlled by Mr Jan Van Zyl. It is the respondent's contention that:

1. The payment was made into the account of Jan Van Zyl contrary to the direct instruction given by it in annexure "MK11" to the answering affidavit.
2. It did not agree with the applicant that the amount or any amount be paid to Jan Van Zyl, and that
3. "the amount was paid by the applicant to Jan Van Zyl to be held by him, on behalf of the applicant, to be dealt with as directed by the applicant and not the respondent".

[13] The respondent further contends that:

1. The purchase consideration should have been paid to the respondent. This as evidence will show was superseded by Jan Van Zyl's direction.
2. Jan van Zyl did not have a trust account as he was not a practicing attorney. This is contradicted by the respondent as I shall later show;
3. Jan Van Zyl caused the funds to be dissipated prior to the return of the motor vehicle. The applicant does not appear to have been aware of this.
4. That Jan Van Zyl is unable to refund the money to the applicant or deal therewith as directed by the applicant. This appears to be the case.

[14] The respondent states that the applicant, in depositing the money into Mr Jan Van Zyl's account repudiated the agreement which repudiation the respondent did not accept.

[15] This brings us to the issue whether Mr Jan Van Zyl duly acted for the respondent as its agent. Mr Jan Van Zyl, according to the respondent, did not act for the respondent

but for the applicant.

[16] On 23 August 2010 Mr Jan Van Zyl advised the applicant:
"Ek bevestig dat ek namens Mnr Kotze hierin optree". Mr Kotze is the deponent to the respondent's answering affidavit. He is Marius Alwyn Kotze.

[17] On 19 October 2010 as evidenced by annexure "KDP6" on page 89 of the papers, Mr Van Zyl says:
"Ek bevestig ook weereens, soos in vorige e-posse dat ek namens Marius hierin optree en dat ek die nodige mandaat het om *die aangeleentheid te finaliseer."*

[18] An e-mail dated 25 August 2010 from the applicant to Mr Jan Van Zyl clearly demonstrates that Mr Jan Van Zyl acted for the respondent and not the applicant. The e-mail clearly refers to "your client".

[19] A further e-mail dated 11 November 2010 from the applicant to Mr Jan Van Zyl also demonstrates that Jan Van Zyl, indeed, acted for the respondent and not the applicant.

[20] Another e-mail from the applicant to Mr Jan Van Zyl dated 15 November 2010 refers to *"to your clienf'* again demonstrating the relationship between Mr Van Zyl and the respondent. An e-mail dated 16 November 2010 from the applicant to Mr Van Zyl reveals the same relationship between the respondent and Mr Van Zyl. Again, reference is made to *"to your client".*

[21] A very important e-mail is dated 3 December 2010 from the applicant this time, to the respondent. The e-mail refers to *"your Legal Advisor' .* The respondent never denied that Mr Jan Van Zyl acted on its behalf. The e-mail starts: "Mr Kotze".

[22] The last paragraph of an e-mail dated 10 December 2010 refers to *"your legal representative".* Again, the e-mail is addressed to the respondent by the applicant. The relationship between the respondent and Mr Jan Van Zyl is again not denied.

[23] Mr Jan Van Zyl in an email dated 10 February 2011 addressed to the applicant says:

"Hi Pieter,

I have discussed the matter with Marius and my instructions are as follows:".

This shows beyond doubt that Mr Van Zyl acts for the respondent.

[24] E-mail "KDP19" dated 11 February 2011 from Mr Jan Van Zyl to the applicant demonstrates that Mr Van Zyl acted for the respondent. Again, in the last paragraph reference is made to *"I* am *taking instructions and shall revert to you* as *soon* as *possible".*

[25] Another e-mail dated 12 February 2011 by the applicant to the respondent states: *"Beste Marius".* Reference is made to *"your prokureur'* and this is not denied.

[26] The respondent, in an e-mail dated 4 March 2011, advises the applicant and Mr Van Zyl that Van Zyl can *"decide when to pay the monies across"* adding *"If you trust them do it".* Here, the respondent demonstrates the relationship between the respondent and Mr Van Zyl who can pay the money if he trusts *"them",* meaning the applicant. This is the money which was to be the purchase price of the new motor vehicle.

[27] Nobody is left in doubt as to on whose behalf the money was kept by Mr Van Zyl. The e-mails attached e.g.: that of 4 March 2011 (annexure "KDP22"), clearly shows that Jan Van Zyl held the money on behalf of the respondent and that Marius Kotze directed how Jan Van Zyl should deal with the money.

[28] Marius Kotze himself, in the e-mail to the applicant and Van Zyl,dated 11 February 2011 referred to R20 108 46 which he paid into Jan Van Zyl *"se trustrekening" .*

[29] The applicant in its e-mail to the respondent dated 26 January 2011, in its last paragraph, refers to the R420 000 00 *"wat ons in jou Prokureur se trustrekening inbetaal het ...*".

[30] The respondent in paragraph 31 of its answering affidavit states:

"31. Pursuant to a telephonic discussion between Pieter Smit and myself on 6 May 2011 I agreed to release the vehicle to the applicant on the basis that:

31.1. The Applicant's legal representatives would recover the amount

paid by it to Jan Van Zyl;

31.2. I would assist therein;

31.3. I would be entitled to acquire a replacement vehicle upon recovery of the money paid to Jan Van Zyl;

31.4. I did so by reason of the fact that I felt that if the Applicant directs its resources at litigating with Jan Van Zyl rather than with the Respondent it would be more constructive."

[31] Marius Kotze, the sole director of the respondent, in his e-mail to the applicant and Van Zyl, dated 4 March 2011 (annexure "KDP22") says:

"1. You decide when to pay the monies across. If you trust them then do it."

This directly contradicts what he says in paragraph 31 of his answering affidavit.

[32] Advocate Kellerman ("Mr Kellerman"), for the applicant, submitted that the respondent, duly represented, gave instructions to Jan Van Zyly to act on its behalf. According to Mr Kellerman, it cannot be correct that the applicant paid Jan Van Zyl contrary to the instructions that were given to it by the respondent. It also, according to Mr Kellerman, cannot be correct that the applicant repudiated the agreement as contended by the respondent and submitted on its behalf. Having regard to the evidence I am inclined to agree.

[33] The evidence at the disposal of the Court, in the form of communications that took place between the applicant and the respondent as well as their legal representatives demonstrates that the respondent's version is highly improbable and does not deserve to be believed.

[34] Advocate T. Colyn ("Ms Colyn"), for the respondent, submitted that there were factual disputes although there was nothing in the form of heads of argument that disclosed that. Her argument was that the respondent did not receive the replacement motor vehicle. I wanted to know if the respondent had paid for such replacement motor vehicle and her answer thereto was that the respondent had not paid. Her submission was that the applicant, after the return of the old motor vehicle, ought to have replaced it. It is not clear as to how this should have happened when the respondent had not made payment as agreed.

[35] Ms Colyn agreed that if Mr Jan Van Zyl had the money the applicant did not have it. She, however, expected the applicant to replace the old motor vehicle even though the respondent had not yet paid for the replacement motor vehicle. This is obviously strange in the light of her earlier concession.

[36] Ms Colyn conceded that the respondent would get the replacement motor vehicle upon receipt of the money from Mr van Zyl. Her submission was that the respondent should have been given the new replacement motor vehicle. Asked about payment of the purchase price therefor, she answered she could not respond. Indeed, simple logic dictates that the replacement motor vehicle would be given upon the return of the old motor vehicle together with the necessary documents and the payment of the purchase price. The refund for the old motor vehicle was paid by the applicant as directed by Mr Jan Van Zyl. The respondent paid the R20 045 000 to Mr Jan Van Zyl who retained and dissipated both amounts. The applicant did not receive the purchase price. It would not be proper to expect the applicant to replace the old motor vehicle without receipt of the money for the new motor vehicle. This is the aspect that Ms Colyn could not properly deal with in her response to the Court's question.

[37] Ms Colyn submitted that the applicant ought to have proceeded by way of an action. The evidence at the disposal of the court does not support such submission. The respondent's version is so improbable that it can be dismissed merely on the papers. (See: **Plascon Evans Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) 623 at 624F and Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E-G).**

[38] Ms Colyn further submitted that the applicant needed to call its representatives as witnesses and that they ought to be cross-examined. I do not agree. Mr Pieter Herculaas Smit, who also represented the applicant, has deposed to a confirmatory affidavit which, in my view, is sufficient.

[39] Ms Colyn conceded that Mr Jan Van Zyl acted for the respondent and that one would be justified in accepting that he, indeed, did act for the respondent.

[40] Ms Colyn was constrained to concede that there .was no e-mail or document which disclosed that the respondent protested that the money be paid into Mr Jan Van Zyl's bank account. Again asked if indeed the respondent deserved to get the replacement motor vehicle without paying for it Ms Colyn answered: *"Bizarre as it may sound that is the agreement'.* Of course, this sounds bizarre. Asked as to what happened to the money that was paid to Mr Van Zyl, she answered that *"the money had gone missing from the trust account".* This again, tells us more about Mr Jan Van Zyl's trust account.

[41] Mr Kellerman submitted that the applicant has made out a case for the relief that it seeks. I agree.

[42] The applicant applied for condonation for the late filing of its replying affidavit. The explanation that has been given, in my view, is plausible. There was no opposition thereto and condonation ought to be given and is hereby granted.

[43] Evidence has established that:

1. The respondent purchased the motor vehicle from the applicant which sold it to the respondent.
2. The respondent was unhappy with the motor vehicle and demanded that the purchase price it had paid to the applicant be refunded. The money was paid into Mr Jan Van Zyl's bank account.
3. For purposes of settling the dispute it was agreed that the respondent would return the motor vehicle with its registration documents to the applicant.
4. The money that the applicant had paid into Mr Jan Van Zyl's bank account was to be paid back to the applicant.
5. The respondent was to add to the money R20 108 46. The money was deposited into Mr Jan Van Zyl's bank account.
6. the two amounts would be paid to the applicant as the purchase price for the new replacement motor vehicle which the applicant would provide the respondent with.
7. The two amounts were never paid to the applicant which then cancelled the agreement.
8. Mr Jan Van Zyl had instructions to act on behalf of the respondent.
9. The applicant was entitled to deal with Mr Jan Van Zyl as the only mandated

agent of the respondent. His actions became the respondent's actions.

10. Mr Jan Van Zyl received the money that was paid into his bank account on behalf of the respondent.
11. The applicant is entitled to the registration documents of the motor vehicle which must be given to it.
12. This, in any event, would be in accordance with what the respondent had initially demanded.

[44] The applicant, in my view, has duly demonstrated that it is entitled to the final interdict that it seeks. The application consequently, should succeed.

[45] In the result, the following order is made:

1. **The respondent is ordered to forthwith deliver to the applicant the original Natis registration documents of the motor vehicle released to the applicant by agreement between the respondent and the applicant on 6 May 2011 to wit a Volkswagen 2010 TS 2.5 TDI bearing registration number Y[…]GP;**
2. **The respondent, in the event that it has disposed of the original Natis registration documents of the said motor vehicle, is ordered to deliver duly obtained duplicate original Natis documents to the applicant;**
3. **The respondent is ordered to simultaneously provide duly signed documents to effect transfer of the registration of the motor vehicle to the applicant;**
4. **The respondent is ordered to pay the costs of this application.**

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M. W. MSIMEKI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION OF THE HIGH COURT,

PRETORIA