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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

CASE NO.: 5091/2017

In the matter between:

COTTERELL NO

First Applicant

GRIGG NO, RUSSEL IAN

Second Applicant

BHIKA ANO, ANITA

Third Applicant

And

THABO JENNINGS

Respondent

JUDGMENT

Smith J:

Introduction

[1] The applicants seek an order compelling the respondent to return to them a 2013 Mercedes Benz Vito motor vehicle (the Vito) which is in the latter's possession. The applicants assert their ownership and rely on the vindicatory

remedy, while the respondent contends that he had purchased the vehicle from the applicants' duly authorised representative, one Liebenberg, and that ownership had accordingly passed to him.

[2] The applicants are all trustees of the Ronnie's Motors Trust, a duly registered trust (the Trust). The second applicant, Russel Ian Grigg, who is also the Dealer Principal of the Trust, deposed to the founding affidavit. The Trust owns and operates various retail motor vehicle dealerships, including Ronnie's Motors in Mthatha.

[3] The respondent has also applied for several portions of the applicants' founding and replying papers to be struck out. That application was quite comprehensive and required of me to traverse numerous paragraphs containing the impugned allegations. My judgment on that application was consequently too long to allow for seamless integration with the judgment on the merits. I have accordingly chosen to write a separate judgment in respect of the striking out application. I was, however, constrained, for reasons which are obvious, first to consider and rule on the respondent's contentions regarding the admissibility of the matter impugned in the striking application before pronouncing on the issues which fell for decision in the main application. In contemplating my findings in respect of the merits I have disregarded those portions of the affidavit which I have ordered to be struck out.

The applicants' case

- [4] The person with whom the respondent is alleged to have concluded the sale agreement in respect of the Vito, namely Johannes Willem Liebenberg, was employed by the Trust as a sale manager at the Mthatha dealership.
- [5] During June 2017 the Trust discovered that Liebenberg had been systematically misappropriating motor vehicles from it. After further investigations a disciplinary hearing was held and Liebenberg was dismissed with effect from 12 June 2017.
- [6] During the course of its investigations the Trust discovered that the Vito was one of the motor vehicles that had been misappropriated by Liebenberg. The Trust also established that Liebenberg did not follow any of the usual procedures pertaining to the sale of motor vehicles. He did for example not supply details of the motor vehicles to the Trust's head office where the E-Natis documents (proof of ownership) are held. As a consequence the E-Natis documents required for vehicle registration and licensing were not released, neither was an invoice, issued. Effectively then the Trust was never informed of the purported sale of the Vito.
- [7] After discovering that the motor vehicle was in the possession of the respondent, a meeting was arranged with the respondent to determine why he was in possession of the vehicle. The meeting eventually took place at the Trust's boardroom on 18 July 2017, and according to the applicants, the following transpired at the meeting.
- [8] The respondent claimed that he had purchased the motor vehicle from Liebenberg for R 500 000. He also said that he had traded in two motor

vehicles against the purchase, namely another Vito and a 2003 Mercedes Benz Class C. Liebenberg told him that the trade-ins, plus a R 50 000 credit which he has on his account with the Trust's Mthatha workshop, would be deducted from the purchase price and he would accordingly owe a balance of R 200 000.

[9] The trade-ins were left at the Mthatha dealership with the original papers and spare keys. He did, however, not receive an invoice from Liebenberg, either in respect of the Vito or the trade-ins. The trade-ins were collected a few days later by a person who travelled from Johannesburg.

[10] Liebenberg had subsequently sent him a text message on his cell phone with the bank details into which he was required to pay the remainder of the purchase price. He eventually arranged for the sum of R 200 000.00 to be deposited into that account.

[11] He also said that the registered owner of the C-Class Mercedes Benz was his nephew, one K Klaas. Klaas authorized him to trade the vehicle in.

[12] According to the applicants a copy of the minutes of the meeting was emailed to the respondent on 26 July 2017. He did not give any indication that he disputed any aspect thereof.

[13] The Trust subsequently established that the trade-ins, namely the Vito and the Mercedes Benz C-Class were still registered in the name of Thamhllle Investments and of Klaas, respectively. Neither of these vehicles had been

acquired by the Trust and there is no record of them having been traded in as part sale transaction in respect of the Vito.

[14] The Trust also established that the banking account details into which the R200 000 had allegedly been paid was in the name of Shipserve (Pty) Ltd, a private company with its registered office in Bryanston Johannesburg. The sole director of that company, one Griesel, has confirmed that a number of the Trust's vehicles had been acquired by that company and another company of which his wife is the sole director and shareholder. The Vito allegedly purchased by the respondent was, however, not amongst them.

[15] The Trust accordingly asserts that it remains the lawful and registered owner of the Vito and that the respondent is in unlawful possession thereof.

[16] Although the respondent indicated in his opposing affidavit an intention to counter-claim for transfer of ownership of the motor vehicle and delivery of the registration papers, nothing has come of that declaration of intent, and it must accordingly be ignored for the purpose of this application.

The respondent's case

[17] The respondent said that he was introduced to Liebenberg during 2016 by a certain Mr Clinton while the latter was assisting him with the purchase of another vehicle. Clinton introduced Liebenberg as the sales manager of the Mthatha branch of Ronnies Motors.

[18] During October 2016, he purchased a Mercedes Benz 230 from Liebenberg in respect of which he had offered to pay R40 000. Liebenberg

told him that the vehicle belonged to one K Ncoyini, and that he would communicate the offer to the latter. He reverted a few days later informing the respondent that the offer had been accepted and that he should pay the money directly to Ncoyini. He eventually delivered a cash cheque for that amount to Ncoyini.

[19] He had asked Liebenberg for the papers necessary for transfer of ownership, but despite promises that they would be provided, nothing happened. He kept on calling Liebenberg up until December 2016 when he went on holiday. He only returned towards the middle of February 2017.

[20] He had continued to “pester” Liebenberg for the papers up until April 2017 when he decided to visit the Mthatha showroom personally. It was on this occasion that he saw the Vito for the first time. He did, however, not manage to see Liebenberg on that occasion. He was told that Liebenberg had gone to Johannesburg and would only return the following week.

[21] He then called Liebenberg on his cell phone and told him that he was interested in purchasing the Vito. Liebenberg told him that the purchase price would be “around R 500 000”. He also enquired about possible trade-ins, to which respondent replied that he intended to trade in two vehicles, namely a 2005 model Vito, as well as a 2007 320 E Class. They agreed that he would take the vehicles to the dealership the following Wednesday.

[22] He indeed took the vehicles to the dealership on the Wednesday and left them with Liebenberg. Liebenberg called him the following day and confirmed that the purchase price for the Vito was R 500 000. He also told

him that he owed the sum of R 50 000.00 on his workshop account. With the credit for the two trade-ins and after having settled his account, he still needed to pay R 310 000.00. He was also required to pay R 110 000.00 as a deposit.

[23] He thereafter took the registration papers in respect of both trade-ins to Liebenberg, who made him sign ownership transfer documents in respect of both vehicles. He also thereafter sent his driver with cash in the sum of R 110 000.00 to the applicants' Mthatha premises. The driver returned with a receipt, but unfortunately he is no longer able to trace it. On 19 May 2017 his daughter Yolande paid the balance of R 200 000.00 into the applicants' account by way of electronic bank transfer.

[24] He thereafter took delivery of the Vito and was told by Liebenberg that he would call him once he had received the necessary registration documents from East London. Liebenberg did not call him thereafter and he continued to phone him in vain.

[25] He also subsequently requested the assistance of one Mr Clinton, who promised to take the matter up with Crigg. Clinton also told him that Liebenberg was not answering his phone.

[26] On one occasion when he visited the Trust's Mthatha dealership, he was introduced to one Arnold Macfarlane, who had replaced Liebenberg. He enquired from the latter regarding the ownership transfer papers of the Vito and the vehicle he had purchased from Ncoyini. Macfarlane told him that all the records had been moved to East London and that he would register his query with that office.

[27] He eventually travelled to the East London offices where he met Russel Grigg. Ncoyini was also there, together with one Mfingwana, who is director of an Mthatha panel beating business

[28] Grigg was in the company of a Melanie Nel and another unknown man. Grigg requested him to assist in tracing Liebenberg. He provided Grigg with a cell number which the latter was apparently unaware of. They tried in vain to reach Liebenberg at that number. He then gave Grigg the abovementioned version of the events regarding the transaction.

[29] Grigg requested him to make a statement to the Hawks and lay a charge of fraud against Liebenberg. He responded, however, that the transaction was not fraudulent and there was accordingly no basis for laying a charge. Grigg then encouraged him to keep the vehicle safely in his possession and to ensure that it was properly insured.

[30] He eventually made a statement to a Police officer in Mthatha, who told him that since Liebenberg did not steal the Vito from him, there was no basis on which he could lay a criminal charge against him. The police officer thus refused to take a statement from him.

[31] He denied that the applicants did not issue an invoice in respect of the Vito and annexed a document purporting to be an invoice. He said that this document was delivered to a guest house in his absence soon after he had sent an email to the applicants' attorneys on 17 August 2017. This document, however, contains numerous anomalies which cast doubt on its authenticity.

One of those is that it does not contain the Trust's banking details. Mr Kincaid, who appeared for the respondent, has conceded that the document is on the face of it a forgery.

[32] The respondent nevertheless asserts that he had validly purchased the vehicle from the Liebenberg, the duly authorized sales manager who was acting within the course and scope of his employment with the applicants. He had accordingly taken lawful delivery of the vehicle and ownership had duly passed to him.

The legal principles

[33] In order to succeed with the vindicatory remedy (*rei vindicatio*) the plaintiff must prove that they are the owners of the Vito, that it is still in existence and identifiable, and that the respondent is in possession of it at the time that action was instructed. (*Van Der Merwe & Another vs Taylor NO and others* 2008(1) SA 1 at para. 114)

[34] An owner seeking to rely on the *rei vindicatio* need prove no more than he or she is the owner and the other party is in possession of the thing. In *Nedbank vs Mendelow NNO* 2013(6) SA 130, at para. 135, the Supreme Court of Appeal held that where there is no real intention on the part of the owner to transfer ownership, then a purported transfer of immovable property has no effect. Even where there is an underlying valid agreement to pass ownership, there must nonetheless be a genuine intention to transfer ownership.

[35] If the underlying agreement is tainted by fraud or some other defect it vitiates consent and ownership does not pass. (*Preller & others vs Jordaan* 1956 SA 482 (A)).

[36] In *Chetty vs Naidoo* 1974(3) A.D the court held that the right to exclusive possession is an incident of ownership. The necessary corollary being that the owner may claim his property “wherever found, from whomever holds it”. The owner, in instituting vindicatory relief, need only prove ownership, and the onus is then on the possessor to allege and establish a lawful basis for possession and some enforceable right against the owner. (See also: *Woerman & Schutte NNO vs Masondo & others* 2002 (1) SA 811 (SCA)).

Discussion

[37] Mr Kincaid, who appeared on behalf of the respondent, argued that irresoluble disputes of fact have arisen on the papers, and since the applicants did not apply to refer those disputes for viva voce evidence, the matter must be decided on the respondent’s version and must accordingly be dismissed.

[38] He submitted furthermore that those disputes relate to the core issue which falls for decision, namely that of ownership which underpins the vindicatory relief.

[39] He argued that the applicants had been aware at the time of launching the application that there are bound to be serious disputes of fact on the

papers. They nevertheless elected to proceed with the application and must accordingly be taken to have assessed the risk that the matter may be dismissed. (*Room Hire Company (PTY) LTD vs Jeppe Street Mansions (PTY) LTD* 2008 (5) SA 151 (J), at 1162).

[40] He also urged the court to decline the applicants' invitation to adopt a robust approach and determine the disputed issues on the probabilities without referral for oral evidence.

[41] He cited several authorities in support of his submission that the court should be loath to make serious findings of fact on the probabilities. In this regard he relied on *Da Mata vs Otto* NO 1972 (3) SA 835 (A) where the court reiterated the dangers of deciding issues of probabilities on affidavit. In *Reynolds NO vs Mecklenburg (PTY) LTD* 1996 (1) SA 75, it was held that such an approach would be justified only when the absence of bona fides in relation to every relevant dispute of fact is abundantly clear and altogether manifest and substantially beyond question, that a court is justified in disbelieving the affidavit evidence of one of the parties".

[42] The most helpful summary of the correct approach to be adopted by courts when faced with disputes of facts in motion proceedings is the following dictum of Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) of para. 26, where the learned judge commented as follows:

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities... It may be different if the respondent's version of consists of bald or uncreditworthy denials, raises

fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”

[43] The logical starting point would obviously be to consider whether the facts put up by the respondent indeed raise genuine disputes of facts. To do so they must raise genuine and bona fide disputes regarding the issues which fall for determination. These issues would of necessity be those that the applicants were required to establish in order to succeed with their vindicatory claim.

[44] Has the respondent been able to raise real disputes regarding any of those issues? In my view not.

[45] In support of their claim of ownership the applicants have put up the registration certificate of the vehicle and the E-Natis documents which provide irrefutable proof of ownership, at least at the time of the purported sale transaction. This assertion has not been disputed by the respondent. In fact his claim to ownership rests on the veracity of that assertion, since he claims his ownership on the basis of a transfer of ownership at the time when he purchased the Vito from Liebenberg. The other two requirements, namely the existence of the thing and the possession thereof by the respondent, are also not in issue.

[46] In my view the applicants’ averments regarding Liebenberg’s fraudulent activities and misappropriation of the Trust’s vehicles had also been established on a balance of probabilities. Other than a bare denial and an assertion that Liebenberg represented the Trust at all material times, the

respondent was simply not in a position to deny these allegations. The facts put up by the applicants are also irrefutable. They have established that no invoice had been issued in respect of the vehicles or the trade-ins, that no payments had been received from the respondent by the Trust, and there has not been any attempt to register the Vito in the respondent's name.

[47] In response to these assertions the respondent has alleged that he gave his driver R 110 000 in cash to pay to the Mthatha dealership as a deposit. He was, however, unable to produce a receipt and did not take a supporting affidavit by the driver. The R200 000 which was allegedly paid by his daughter was paid into an account which was obviously not that of the Trust and there was again no supporting affidavit by the daughter.

[48] But even if one considers the issue of Liebenberg's fraudulent conduct on the basis of the abovementioned legal principles, then the version put up by the respondent together with the admitted or undisputed facts alleged by the applicants, nevertheless compels the ineluctable inference that the transaction was not a *bona fide* one.

[49] The fact that no monies were generated in respect of any of the vehicles, the cash payment of R 110 000.00, which was never received by the trust, the payment of R200 000 into account which was unrelated to the Trust, and the failure by Liebenberg to deliver the E-Natis documents, all point compellingly to a fraudulent intention, at the very least, on the part of Liebenberg. On these facts it is clear that he never intended to sell the Vito on behalf of the Trust, but that he had misappropriated it and had sold it to the respondent for his own benefit.

[50] Mr Kincaid submitted that it would not be appropriate for the court to impute fraudulent complicity on the part of the respondent on the papers. That may well be so, but it is in any event not necessary for me to make such a finding of complicity on his part.

[51] The high watermark of the respondent's case is that he was a *bona fide* customer who dealt with a sales representative who had ostensible authority to sell the vehicle on behalf of the Trust. The transaction was therefore a valid one and ownership of the vehicles had accordingly passed to him upon delivery of the vehicle. He is in effect asserting that the Trust is estopped from relying on Liebenberg's fraudulent conduct.

[52] Is this a valid defence to a vindicatory claim? In my view not. Such a finding would be contrary to the legal principles as enunciated in the abovementioned authorities.

[53] It is in addition also passing strange that the respondent place reliance on the forged invoice when on his own version it was delivered to him during August 2017, well after he had already been informed that the transaction was tainted by fraud.

[54] I am accordingly of the view that the applicant has established all the legal requisites for vindicatory relief on a balance of probabilities and that the respondent has failed to establish any legal right to possess the vehicle. The application must accordingly succeed.

Order

[55] In the result the following order issues:

(a) The respondent is ordered to deliver a 2013 Mercedes Benz Vito with registration letters and number H[...] (formerly N[...]), chassis number WDF63970323811082 and engine number 64289041429674 (hereinafter "the motor vehicle") to the Sheriff of this court, together with all registration and other documentation relating to the vehicle, and all appurtenances and equipment forming part of the vehicle, within 24 (twenty four) hours of the service of this order on the respondent.

(b) Failing compliance with paragraph (a) of the order, that the Sheriff of this court be authorized and ordered to take possession of the motor vehicle described in paragraph (a) wherever he may find it, and that the Sheriff is authorised to retain possession of the motor vehicle until it is delivered to the applicants or their duly authorised representative.

(c) The respondent is ordered to pay the costs of the application.

J.E SMITH

JUDGE OF THE HIGH COURT

Appearances

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