

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

13/11/12

CASE No. 55888/12

(1) REPORTABLE: NO
(2) INTEREST TO OTHER JUDGES: NO
13/11/12
DATE
SIGNATURE

In the appeal of:-

**McCARTHY LIMITED t/a FORSDICKS BMW**

Applicant

and

**ANIYU ADMIN AND MAN SERVICES  
ZINNIIVILLE CC**

First Respondent

**DADA MOTORS - POTCHEFSTROOM CC**

Second Respondent

**CLEMENT MARULE**

Third Respondent

**MAINWAY MOTORS CC**

Fourth Respondent

**EMERALD SKY TRADING 345 (PTY) LTD t/a  
SMART WHEELS**

Fifth Respondent

**MPHO LESOLLE**

Sixth Respondent

**LUCY MABENA**

Seventh Respondent

**AUTO MOTOR SPORT (PTY) t/a LEO HAESE,  
CENTURION**

Eighth Respondent

**SEAGULL CAR SALE CC**

Ninth Respondent

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<b>PENG INVESTMENTS HATFIELD (PTY) LTD t/a LEO HAESE</b>	Tenth Respondent
<b>JAN MYBURGH</b>	Eleventh Respondent
<b>MOHAMMED SEEDAT</b>	Twelfth Respondent
<b>AL MEDINA MOTORS (PTY) LTD t/a FOUCHE MOTORS</b>	Thirteenth Respondent
<b>RIDWAAN CASIM</b>	Fourteenth Respondent
<b>NAZREEN CHOONARA</b>	Fifteenth Respondent
<b>BARLOW WORLD MOTORS LTD t/a CLUB MOTORS, RANDBURG</b>	Sixteenth Respondent
<b>HYDE PARK AUTO (PTY) LTD t/a SANDTON AUTO</b>	Seventeenth Respondent
<b>YUSUF MOHAMMED</b>	Eighteenth Respondent
<b>YASAAR HASSEN</b>	Nineteenth Respondent
<b>MUZDALIFAH INVESTMENTS CO t/a BARGAIN MOTOR CENTRE</b>	Twentieth Respondent
<b>GOLDEN ERA CARS (PTY) LTD</b>	Twenty-first Respondent
<b>HYDE PARK AUTO (PTY) LTD</b>	Twenty-second Respondent
<b>ARBE CAR SALES (PTY) LTD</b>	Twenty-third Respondent
<b>DAWOOD YUSUF SEEDAT</b>	Twenty-fourth Respondent
<b>SUV CARS CC</b>	Twenty-fifth Respondent
<b>MASHUDA EBRAHIM</b>	Twenty-sixth Respondent
<b>CARLTON MOTORS AND WHEEL CC</b>	Twenty-seventh Respondent
<b>EBRAHIM GHOD</b>	Twenty-eighth Respondent
<b>AUTO BAVARIA t/a ANDRE DREYER MOTORS (PTY) LTD</b>	Twenty-ninth Respondent

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**JUDGMENT**

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Van der Byl AJ:-

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## Introduction

[1] The Applicant trades as a dealer in new and used BMW vehicles in Morningside, Johannesburg.

[2] It is the Applicant's case that during July 2012 the Twenty-fourth Respondent, Mr. Dawood Ysuf Seedat ("*Mr. Seedat*"), approached the Applicant's dealership in Morningside where he had discussions with a certain Mr. Sean Harduth, the Applicant's new sales manager, and a certain Mr. Ntokobane Mogotsi, the Applicant's dealership manager. Mr Seedat represented and held himself out to be the owner of a business called "*Vereeniging Value Services*", that he was a so-called "*fleet customer*" and that he was interested in purchasing numerous vehicles which included the 1-series, 3-series, 5-series and 7-series BMW's on behalf of clients in and around South Africa.

[3] The evidence on behalf of the Applicant, furthermore, shows that when a customer purchases a vehicle from the Applicant the procedure followed is the following -

- (a) the vehicle would be identified by the customer who would then complete an "*offer to purchase form*", whereupon, the Applicant would issue an invoice to the customer;
- (b) the customer would pay on account of the invoice, whereupon, the vehicle would be delivered to the customer;

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- (c) where a bank finances the purchase of the vehicle, the invoice will be made out to the bank, whereupon, the bank will issue a release note before the vehicle will be delivered to the customer;
- (d) in the event of a "*cash deal*" or if the customer wishes to make payment by means of an "*electronic funds transfer*" the funds must first be cleared by the relevant bank and the payment must be reflected in the Applicant's bank account before the vehicle would be delivered to the customer.

[4] In terms of the "*offer to purchase form*" -

- (a) delivery will only be given to the customer once the full purchase price is paid (**clause 6**);
- (b) ownership of the vehicle shall pass to the customer only upon payment in full of the purchase price paid by the customer (**clause 7.2**).

[5] Mr. Seedat identified 55 BMW vehicles (the details of which are specified in **Annexures C1 to C4, record pp. 62 to 65**) which he was interested in purchasing. It would appear that he indicated that he preferred to pay for the vehicles by way of cheque and by way of electronic payments. He issued a series of cheques on 31 July 2012 and on 24 August 2012 and on 6 August 2012 made an electronic payment in an amount of R1,5 million.

[6] The vehicles were delivered by Messrs Harduth and Mogotsi without securing that full payment for the vehicles had taken place, being a situation in respect of which they had no authorization.

[7] All the cheques issued, amounting to R15 875 000, were, however, stopped by Mr. Seedat.

[8] A criminal charge was laid against Mr. Seedat and he was arrested and charged with fraud and released on bail.

[9] A forensic investigation into the transaction revealed that Messrs Harduth and Mogotsi assisted Mr. Seedat in this simulated and fraudulent transaction and that, for instance, Mr. Seedat had paid an amount of R1 million into Mr. Mogotsi's bank account without any lawful cause. Messrs Harduth and Mogotsi have been suspended pending the finalization the investigation into these transactions, and disciplinary proceedings have been instituted against them.

[10] In an investigation by the Applicant to trace the whereabouts of the persons who are in possession of the vehicles it became apparent that Mr Seedat has, after taking delivery of the vehicles, sold the vehicles to numerous car dealerships in Gauteng, North-West and Mpumalanga some of which had, as I will indicate below, in turn sold the vehicles to third persons and entities.

[11] Various attempts to persuade those entities and persons to return the respective

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vehicles to the Applicant were unsuccessful, although some of the second line purchasers returned the vehicles purchased to the persons or entities from whom they had purchased the vehicles.

[12] The dealerships, entities and persons who are currently in possession of the vehicles are the dealerships, entities and persons cited as Respondents in this matter and the particulars of the vehicles in their possession are set out in the Notice of Motion, as amended.

**Relief claimed by the Applicant**

[13] As is apparent from the Notice of Motion, as amended, the Applicant seeks, in addition to the usual order of costs against those Respondents opposing the application, an order against the First to Twenty-Ninth Respondents directing the Sheriff to attach and remove such vehicle or vehicles from the respective Respondents and to deliver same to the Applicant for, as I was informed from the bar, safekeeping pending the finalization of an application or action to be instituted within 30 days as from the date of any order that may be made in accordance with the Notice of Motion.

[14] The Applicant, having considered the opposing affidavits filed by all the Respondents who elected to oppose this application and who indicated that they are no longer in possession of any of the vehicles concerned, withdrew the application against the Fourth, Eleventh, Sixteenth, Seventeenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-fourth, Twenty-seventh and Twenty-eighth Respondents.

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[15] It, furthermore, appears that no order is sought against the Eighth Respondent who seems to have returned one of the vehicles concerned to the Fifth Respondent from whom he purchased the vehicles and the Ninth Respondent who seems to have returned one of the vehicles concerned to the Twenty-third Respondent from whom he purchased the vehicle whilst the application is not opposed by the Eighteenth, Twenty-sixth and Twenty-ninth Respondents. As is apparent from the opposing affidavit of the Fifth Respondent it sold one of the vehicles to the Twenty-ninth Respondent who subsequently returned the vehicle to it, whereupon, it refunded the Twenty-ninth Respondent the money it paid for the vehicle. There is accordingly no basis for any relief to be granted against the Twenty-ninth Respondent.

[16] In the course of the hearing of this matter, it became apparent that the Twenty-fifth Respondent was, to the knowledge of the Applicant, not or no longer in possession of the vehicle the return of which was claimed from him and it was indicated on behalf of the Applicant that, despite with its initial persistence with its application against the Twenty-fifth Respondent, no order was sought also against him.

[17] I am accordingly called upon to consider the Applicant's case against the remaining 16 Respondents, being the First, Second, Third, Fifth, Sixth, Seventh, Tenth, Twelfth, Thirteenth, Fourteenth, Fifteenth, Eighteenth, Twenty-third and Twenty-sixth Respondents who are all admittedly still or, in the case of the Twenty-sixth Respondent, seems to be, in possession of the vehicles specified in the amended Notice of Motion.

**Factual averments made in opposing affidavits**

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[18] The First, Second, Third, Fifth, Sixth, Seventh, Tenth, Twelfth, Thirteenth, Fourteenth, Fifteenth, Twenty-first and Twenty-third Respondents all vehemently oppose the application that all have filed opposing affidavits.

[19] In the case of the First Respondent, **Aniyu Admin and Man Services Zinniaville CC**, it is contended in an affidavit deposed to by one of its members -

- (a) that during July 2012 he was informed by his son and daughter-in-law that they were informed by the father of his daughter-in-law, a certain Mr. Patel, that one, Dawood Seedat (who is the Twenty-fourth Respondent), who was in the Vereeniging area had acquired a number of BMW vehicles he was selling at very reasonable prices;
- (b) that he asked his son and daughter-in-law to arrange a visit to Roshnee near Vereeniging where Mr. Seedat was based in order to see whether there was a BMW that might be suitable to purchase for the First Respondent as he was looking for a vehicle, especially a BMW 320, for use in the affairs of the First Respondent;
- (c) that a meeting was, through Mr Patel, arranged in Roshnee with Mr. Seedat for the morning of Wednesday, 1 August 2012;
- (d) that, having driven from Rustenburg to Roshnee, they met Mr Patel who guided them to the address of the Mr. Seedat where he asked them to follow him in his

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car;

- (e) that they drove to a residential home a few blocks away where they went through the gate to an adjacent yard where Mr. Seedat pointed out about six to eight BMW's that were parked there;
- (f) that, his son having determined from a friend that the price of a vehicle such as one they wished to purchase would be about R385 000, Mr. Seedat indicated that he wanted R370 000 for the vehicle, but they eventually bought it for R365 000;
- (g) that they agreed that the amount be paid into a banking account held by Olympic Park Trading t/a BP, Nirvana, which is a fuel service station of Mr. Patel;
- (h) that Mr. Seedat, thereupon, handed them the vehicle's registration form (**Annexure MYH 1, record p. 997.6**) dated 30 July 2012 which relates to a BMW 3-series with engine number B2350165 and Vin number WBA3B16070NP41623, indicating that the Title Holder and Owner was "*Forsdicks, Sandton*";
- (i) that he wrote out a cheque for the amount made out to Mr. Patel's service station and deposited it into its bank account;
- (j) that he a few days later arranged with one Mohamed Sikandir, known for taking care of the registration of vehicles, to take care of the registration of the vehicle

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in the name of the First Respondent;

- (k) that Mr. Sikandir indicated that he still needed a change of ownership form to be completed by Forsdicks (the Applicant) and a copy of the identity document of its proxy;
- (l) that they then phoned Mr. Seedat who explained that it was an oversight on his part and that he would arrange for the documents to be made available;
- (m) that a few days later the documents, **Annexure MYH3**, being the change of ownership form containing the name of one "*K S Hendriks*" as the proxy of Forsdicks, and **Annexure MYH 4**, were collected from Mr. Seedat whereafter the vehicle was registered in the name of the First Respondent on 13 August 2012;
- (n) that after having received a letter from the Applicant's attorneys requesting the return of the vehicle they obtained a "*tax invoice*" from Mr. Seedat on 14 September 2012.

[20] In the case of the Second, Third, Fifth, Sixth, Seventh and Tenth Respondents, **Dada Motors - Potchefstroom CC, Clement Marule, Emerald Sky Trading 345 (Pty) Ltd t/a Smart Wheels, Mpho Lesolle, Lucy Mabena and Peng Investments Hatfield (Pty) Ltd t/a Leo Haese**, it is contended in a joint answering affidavit on their behalf by Mr. **Shiraz Mohomed Ebrahim**, the managing director of the Fifth Respondent -

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- (a) that the Fifth Respondent is a motor vehicle dealer that sells vehicles to other dealerships that does not usually do business with the public;
- (b) that towards the end of July 2012 the managing director of the Twenty-fifth Respondent, **SUV Cars CC**, Mr. **Shaheen Goolam**, phoned him and informed him that he has a number of 3-series BMW's in stock and that the Twenty-fifth Respondent would be able to give the Fifth Respondent a very good price in respect of these vehicles;
- (c) that the Fifth Respondent, thereupon, having been furnished with the original "*Certificate of Registration in respect of Vehicle*" (also known as the Natis document) in respect of each vehicle, purchased 11 of these vehicles from the Twenty-fifth Respondent on 30 and 31 July 2012 in respect of which he caused the vehicles to be registered in the name of the Fifth Respondent as owner and title holder of the vehicles;
- (d) that the Fifth Respondent, thereupon, sold -
  - (i) three of these vehicles (having engine number A5990209 and Vin number WBA3B16070NP42951, engine number A8820235 and Vin number WBA3B16090NP78866 and engine number A0880220 and Vin number WBA3B16010NN76300) to the Second Respondent, **DADA Motors**, on 30 July 2012 (who subsequently sold one of these vehicles (being the one having engine number A0880220 and Vin number

WBA3B16010NN76300) to the Sixth Respondent, **Mpho Lesolle**, who is currently in possession of the vehicle;

- (ii) three of these vehicles (being the ones having engine number B1050229 and Vin number WBA3P160XONN76344, engine number B1700162 and Vin number WBA3B160X0NN76084 and engine number A55002200 and Vin number WBA3B16010NN76250) to the Eighth Respondent, **Auto Motor Sport (Pty) Ltd**, on 1 August 2012 (who subsequently sold one of the vehicles (being the one having engine number engine number B1050229 and Vin number WBA3P160XONN76344) to the Third Respondent who is currently in possession of the vehicle) and another of the vehicles (being the one having engine number B1700162 and Vin number WBA3B160X0NN76084) to the Seventh Respondent, **Lucy Mabena**, who is currently in possession of the vehicle and the third of these vehicles (being the one having engine number A55002200 and Vin number WBA3B16010NN76250) was returned to the Fifth Respondent and it was refunded by the Fifth Respondent;
- (iii) two of these vehicles (being the ones having engine number 2960180 and Vin number WBA3B16040NP44396 and engine number 73218077 and Vin number WBA3D36030NN68950) to the Tenth Respondent, **Peng Investments Hatfield (Pty) Ltd**, on 30 July 2012;
- (iv) one of these vehicles (being the one having engine number 73708079

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and Vin number WBA3D36070NP06148) to the Twenty-ninth Respondent, **Auto Bavaria Midrand**, on 30 July 2012 who returned the vehicle to the Fifth Respondent who bought it back and is currently in its possession;

- (e) that the Twenty-fifth Respondent at the time of the sale handed him tax invoices in respect of the 11 vehicles, the original Natis documents, original motor vehicle licence and licence disc, original notification of change of ownership, Hendriks' identity document and proof that the vehicles were registered in name of the Fifth Respondent, a spare key and a service booklet (the so-called "*indicia of dominium, jus disponendi or scenic apparatus*");
- (f) that he was informed by Mr. Goolan that he purchased the 11 vehicles from Mr. Seedat.

[21] In the case of the Twelfth Respondent, **Mohammed Seedat**, the Respondent admitted, having purchased one of the vehicles concerned, being BMW320i sport vehicle, having engine number A0750161 number WBA3B16080NN75919 from Motordeal CC who in turn purchased the vehicle from the Twenty-fifth Respondent, being in possession of the vehicle.

[22] In the case of the Thirteenth Respondent, **Al Medina Motors (Pty) Ltd t/a Fouche Motors**, it is contended, by way of an opposing affidavit deposed to by one **Naeem Choonara**, a member of the Thirteenth Respondent, that an entity called

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Golden Rewards t/a as Fouche Motors (that seems to be the Respondent cited as the Thirteenth Respondent) purchased the vehicle, being BMW 320i sport vehicle, having engine number A3930219 and Vin number WBA3B16070NP44134, from Mr. Seedat and that it is still in possession of the vehicle.

[23] In the case of the Fourteenth Respondent, **Ridwaan Casim**, he conceded that he purchased the vehicle claimed from him in the Notice of Motion, being the BMW320i sport vehicle, having engine number 73828085 and Vin number WBA3D36070NN99778, from the Twenty-third Respondent who in turn purchased the vehicle from Mr. Seedat and that he is currently in possession of the vehicle.

[24] In the case of the Fifteenth Respondent, **Nazreen Choonara**, it is conceded that the Respondent, having purchased the vehicle in question, BMW320i vehicle, having engine number A6110218 and Vin number WBA3B17040NP43166, from the Fourth Respondent, **Mainway Motors CC**, is presently in possession of the vehicle in question.

[25] In the case of the Eighteenth Respondent, **Yusuf Mohammed**, who is not opposing this application, it appears from the founding affidavit that he is currently in possession of one of the vehicles concerned, being BMW 320i vehicle, having engine number 73798079 and Vin number WBA3D360X0NP06211.

[26] In the case of the Twenty-third Respondent, **Arbe Car Sales (Pty) Ltd**, it is in an affidavit deposed to by its director, Mr. **Zaeem Arbe**, admitted that it purchased three

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of the vehicles in question, being BMW 528i vehicle, having engine number A3720117 and Vin number WBAXG3204CDW65664, BMW 528i vehicle, having engine number B2990153 and Vin number WBAXG3207CDW66002 and BMW 320 diesel vehicle, having engine number 72398088 and Vin number WBA3D36010NN69076, from Mr Seedat. It would, however, appear from the Fourteenth Respondent's opposing affidavit that he purchased another vehicle, being a BMW 320i sport vehicle, having engine number 73828085 and Vin number WBA3D36070NN99778, from the Twenty-third Respondent. It is also contended in contradictory terms (**record p. 930, para 14.2 and record p. 941, para 27**) and that it is currently in possession of two of those vehicles, being BMW 528i vehicle, having engine number A3720117 and Vin number WBAXG3204CDW65664 and BMW 320 diesel vehicle, having engine number 72398088 and Vin number WBA3D36010NN69076. No explanation, as far as I could ascertain, seems to be afforded what happened to the BMW 528i vehicle, having engine number B2990153 and Vin number WBAXG3207CDW66002. I have accordingly for purposes of this application to accept that the Twenty-third Respondent is still in possession of the three vehicles in question until such time as he discloses what happened to the third of the vehicles it, according to the opposing affidavit, purchased.

[27] As far as the Twenty-six Respondent is, **Mashuda Ebrahim**, concerned who elected not to oppose this application, it would seem that according to the investigation instituted by the Applicant that he is in possession of one of the vehicles, being BMW 335i, having engine number 9227783 and Vin number WBAPM560X0NN35523.

**Submissions made by counsel on behalf of the Respondents opposing this**

.../...

**application**

[28] Having focussed on the requirements to be established by an applicant for an interim interdict (*Harms, Civil Procedure in the Supreme Court, at A5.7*), it was submitted by counsel on behalf of the Respondents opposing this application -

(a) that the Applicant failed to establish a *prima facie* right, though open to some doubt (*Webster v Mitchell 1948 (1) SA 1186 (W) at 1189*), in that, particularly -

(i) it failed to prove that ownership of the various vehicles have not passed to Mr Seedat and that he and the other Respondents, as first and further line receivers were, therefore, free to transfer ownership from the one to the other;

(ii) it was in any event in the circumstances estopped from claiming the return of the vehicles on the basis of the *rei vindicatio* as it represented, through its employees, Messrs Harduth and Mogotsi, negligently or otherwise to all third parties that ownership had in fact passed to Mr Seedat;

(b) that the balance of convenience favours the Applicant.

[29] I deal *seriatim* with each of these submissions.

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**Ownership of the vehicles in question**

[30] It is clear from the founding papers that the Applicant that it was at all relevant times the owner of the vehicles which Mr. Seedat succeeded in obtaining delivery.

[31] In contending that ownership had not passed to Mr Seedat on delivery, the Applicant relies on -

- (a) the usual procedure followed by it when a customer purchases a vehicle from it (**record pp. 43 and 44, para 40 of the founding affidavit**) in terms of which delivery of a vehicle purchased takes place only when the purchase price has been paid, either in cash or, if financed by a bank, on delivery by a bank of a release note;
- (b) clauses 6 and 7.2 of a so-called "*offer to purchase form*" in terms of which ownership in a vehicle purchased will pass only upon payment of the purchase price in full;
- (c) the fraud perpetrated by Mr. Seedat and the deception and fraud perpetrated by the Applicant's employees who had no authority or right to enter into any transaction other than the one concluded in accordance with the usual procedure prescribed by the Applicant without first securing full payment before releasing the vehicles.

.../...

[32] Mr Seedat (against whom the application was, as already indicated, withdrawn because it has been shown that he is no longer in possession of any of the vehicles) elected to file an opposing affidavit in which he -

- (a) concedes that he indeed purchased the vehicles, that he paid R1,5 million by way of electronic transfer and that he issued various postdated cheques for the balance of the purchase price;
- (b) alleges that he paid the balance in cash at various times whereafter the vehicles were released to him and that the cheques (which were issued merely to assist the Applicant to commence the invoicing process necessary to allow the transactions to be commenced) were "*stopped*".

[33] The majority of counsel appearing on behalf of the Respondents did not seriously rely on the allegations contained in Mr. Seedat's opposing affidavit to the effect that ownership must have passed to Mr. Seedat on account of the contention that the transaction was indeed a cash transaction.

[34] I believe that Mr. Seedat's allegations relating to the payment of the balance of the price (which in effect and in my view unrealistically accuse his co-perpetrators or other employees to have themselves appropriated the money paid) are, on the probabilities, for various reasons (with which I do not intend to deal at the moment), so untenable that it can be rejected with confidence on the papers.

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[35] Some submissions were made on behalf of the Respondent that the evidence on the Applicant's version show that the transaction was a credit transaction, but are not premised on any factual allegations made by the Applicant or Respondents and, even if that is the situation, such submissions cannot in view of the provisions of the agreement, at least on a *prima facie* basis, be accepted (***Info Plus v Scheelke 1998 (3) SA 184 (SCA) at 190()***).

[36] The allegations on which the Applicant has based its ownership cannot, except for various speculative contentions, not be factually challenged by the other Respondents.

[37] I am in the circumstances satisfied that the Applicant has *prima facie* established that ownership had not passed to Mr Seedat and still vests in the Applicant.

### **Estoppel**

[38] The contention on behalf of the Respondents in this regard is in effect that the Applicant, having allowed Mr. Seedat to take possession of the vehicles and having supplied him with the original Natis documents and change of ownership forms, together with the spare keys and service books, enabled Mr. Seedat to represent to the first line Respondent and even the second and third line Respondents that he and even the second and third line purchasers could sell the vehicles and transfer ownership to any purchaser and that, therefore, the Applicant is estopped from claiming that there was no intention to transfer ownership of the vehicles in consequence of the fraud

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perpetrated by Mr Seedat in apparent cahoots with the two employees concerned.

[39] As is apparent from a long line of decided cases a party relying on estoppel must show, the onus resting on him or her, that such a plea complies with the principles which have been appositely set out by Holmes JA in ***Oakland Nominees (Pty) Ltd v Gelria Mining & Inv Co (Pty) Ltd 1976 (1) SA 441 (A)***, particularly, at **452A-G** as follows:

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

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

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

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

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See also: **Grosvenor Motors (Potchefstroom) Ltd v Douglas 1956 (3) SA 420**

**(A) at 427E**

**Quenty's Motors (Pty) Ltd v Standard Credit Corp Ltd 1994 (3) SA**

**188 (A) at 198G**

**Info Plus v Scheelke 1998 (3) SA 184 (SCA) at 194F**

[40] **In Electrolux (Pty) Ltd. v. Khota and Another, 1961 (4) SA 244 (W) at 247**

referred to in the **Oakland Nominees case, supra**, the approach to the problem is set out as follows at **247B-E**:

*"To give rise to the representation of dominium or jus disponendi, the owner's conduct must be not only the entrusting of possession to the possessor but also the entrusting of it with the indicia of the dominium or jus disponendi. Such indicia may be the documents of title and/or of authority to dispose of the articles, as for example, the share certificate with a blank transfer form annexed, as in West v. De Villiers, 1938 CPD 96, and the other cases referred to therein; or such indicia may be the actual manner or circumstances in which the owner allows the possessor to possess the articles, as for example, the owner/wholesaler allowing the retailer to exhibit the articles in question for sale with his other stock in trade. . . . In all such cases the owner*

*'provides all the scenic apparatus by which his agent or debtor may pose as entirely unaccountable to himself, and in concealment pulls the strings by which the puppet is made to assume the appearance of independent activity. This amounts to a representation, by silence and inaction . . . as well as by conduct, that the person so armed with the external indications of independence is in fact unrelated and unaccountable to the representor [in casu applicant] . . . or otherwise.'"*

[41] **In OK Bazaars (1929) Ltd v Universal Stores Ltd 1973 (2) SA 281 (C)** being

a case where, as in *casu*, fraud was involved and the issue of estoppel by representation was raised, Corbett J (as he then was) indicated the following at **286E**:

.../...

*"Estoppel by negligence is a well-known concept, both in our law and English law. In our law the leading case on the topic is Union Government v National Bank of SA Ltd., 1921 AD 121. The basic requirements of such an estoppel would seem to be -*

- (i) negligent conduct on the part of one person, A, which is calculated to lead another, B, into the mistaken belief of a certain state of facts;*
- (ii) such a belief on the part of B, presumably caused by A's conduct; and*
- (iii) conduct by B to his prejudice induced by this belief."*

and at **287H**:

*"As in the present instance, cases of estoppel by negligence often involve the fraudulent conduct of a third party and the complaint against the person sought to be estopped is that his negligence permitted or facilitated the fraud. In this situation our Courts have rejected, as being too broadly stated, the so-called 'facilitation theory', viz. that wherever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it ... It has, on the contrary, been held that such cases must be adjudged by the ordinary general principles relating to estoppel by negligence; and, of course, the fraudulent intervention of a third party is an important factor in determining whether the conduct of the person sought to be estopped proximately caused the other's mistaken belief and resultant loss; and whether this result was reasonably foreseeable .. "*

[42] From these principles it follows that, in order to be successful with their plea of estoppel by representation, the Respondents must prove -

- (a) that the Applicant represented, negligently or otherwise, by way of, *inter alia*, the *indicia of dominium* (or as it is also called the "*jus disponendi*" or "*scenic apparatus*") that Mr Seedat was the owner of or entitled to dispose of the vehicles in question;

.../...

- (b) that the representation by the Applicant was the proximate cause of them having acted to their detriment by purchasing the vehicles which are currently in their possession.

[43] I fail, in the absence of any clear indications from any of the Respondents, to see on a *prima facie* basis, how and why any of the remaining Respondents believed that the Applicant represented that Mr. Seedat was the owner or entitled to dispose of the vehicles in question and, if so, that such representation was the proximate cause of them having purchased any of the vehicles.

[44] It would appear that as far as -

- (a) the First Respondent is concerned, he, having received information that Mr. Seedat has various vehicles for sale at reasonable prices, purchased the vehicle parked some where in a vacant piece of land and paid the purchase price into a banking account of some one other than Mr. Seedat and, although he noticed that the owner and title holder is the Applicant, did so without suspecting or raising any questions as to the clandestine nature of the transaction or giving any explanation as to why he accepted that Mr Seedat was entitled to sell the vehicle in question;
- (b) the Fifth Respondent is concerned, its managing director purchased on behalf of the Fifth Respondent the 11 vehicles concerned from the Twenty-third Respondent on the managing member's say so that he purchased the vehicles

.../...

from Mr Seedat and, notwithstanding the fact that the documents submitted to it indicating that the Applicant is the owner and title holder of the vehicles, did not raise a question as to the authorization of Mr. Seedat to have sold the vehicles to the Twenty-third Respondent or attempted to indicate why he believed that Mr. Seedat was entitled to sell the vehicles either as his own or on behalf of the Applicant;

- (c) the Second, Third, Fifth, Sixth, Seventh and Tenth Respondents are concerned, no affidavits were filed in which any indication is given as to their perception as to whether or not they believed that either Mr Seedat or the Fifth Respondent was entitled to sell the vehicles, particularly, where the vehicles must have been registered in name of the Fifth Respondent;
- (d) the Twelfth Respondent is concerned, no indication is given as to how or why he could have reason to believe that the Applicant represented that Mr Seedat was the owner of or entitled to sell the vehicle to Motordeal CC (as a matter of fact there is no indication that he even knew that somewhere along the line Mr Seedat must have sold the vehicle;
- (e) the Thirteenth, Fourteenth, Fifteenth, Eighteenth and Twenty-third Respondents are concerned, there is similarly no indication given by any of these Respondents as to how and why they could have any reason to believe that the Applicant represented that Mr Seedat was the owner of or entitled to sell the vehicle.



[45] The plea of estoppel seems rather to be raised based on inferences drawn from -

- (a) the fact that, particularly, in the case of the First and Fifth Respondents, the change of ownership form containing the name of one "*K S Hendriks*" as the proxy of Forsdicks;
- (b) the fact that the *indicia* of *dominium* or scenic apparatus were handed to Mr. Seedat.

[46] As far as "*Hendriks*" is concerned, the Applicant explained in reply -

- (a) that the change of ownership forms referred to are not original rue certified copies;
- (b) that Mr. K S Hendriks is employed by the Applicant as "*Admin clerk more specifically the licensing and registration clerk for the dealership*" and that during the Applicant's investigation of the transaction he made a statement (**record p. 1017, Annexure A**) in which he denied having signed any change of ownership form.

According to the statement of Mr. Hendriks he recalled that he was approached on 2 August 2012 by one Mohamed Kaloo who requested the original Natis documents of a certain Porsche and a BMW 750I be handed to him. He refused, but Mr. Kaloo then phoned Mr. Mogotsi who instructed him to give Mr Kaloo the original Natis documents.

.../...

He denies having been involved in having signed any change of ownership form in respect of any of the 55 vehicles delivered to Mr. Seedat.

[47] As far as the *indicia* of *dominium* or scenic apparatus are concerned, it appears at least on a *prima facie* that the documents must have been handed, without any authority to do so, to Mr Seedat by his alleged co-perpetrators, namely, Messrs Harduth and Mogotsi. I am accordingly unpersuaded that the Applicant can in the circumstances be blamed for having been responsible for any representation that may have been made to any of the Respondents. Some submissions were made that the Applicant can in the circumstances be held vicariously liable for the actions of its employees. I am not satisfied that this is a situation, assuming for a moment that the principle of vicarious liability can find application in these circumstances, where the employees acted within the scope and course of their employment. They seem to have defrauded their employee, the Applicant.

In ***Minister van Veiligheid & Sekuriteit v Phoebus Apollo Aviation BK 2002 (5) SA 475 (SCA)*** the Court has dealt with the actions of dishonest policemen who have stolen money they recovered from robbers who had robbed that money. The Court held that, judged objectively or subjectively, those actions did not fall within the course and scope of their duties as they embarked on an unauthorised jaunt for their own benefit with intention of stealing from their own employer.

**Balance of convenience**

.../...

[48] In this regard it was contended on behalf of the Respondents -

- (a) that the Applicant initially sought final relief in respect of which this requirement is not an element, but in terms of its amended Notice of Motion now seeks interim relief which placed the Respondents in a position where this requirement could not be ventilated;
- (b) that the loss that the Respondents will suffer in the event of the interim order being granted exceeds any loss the Applicant may suffer as it will in the end, if the Applicant's claim is sustained, still be entitled to the return of the vehicles.

[49] In my opinion these considerations are unfounded.

[50] The question of the balance of convenience was indeed raised in the founding affidavit (**record p. 51, para 58**) to which, except the Twelfth, Thirteenth, Fourteenth, Fifteenth and Twenty-third Respondents, the Respondents elected not to respond to. The Twelfth, Thirteenth, Fourteenth, Fifteenth and Twenty-third Respondents, having indicated that should this Court find that interim relief is claimed, did respond extensively thereto.

[51] As far as the loss that each party may suffer is concerned, I am satisfied that the vehicles will, to the substantial loss and prejudice of the Applicant, devalue should the Respondents be allowed to retain possession until such time as the proposed application or action is finalized and may even be damaged or transferred to other

.../...

parties who are not parties to these proceedings.

### **Other grounds raised**

[52] In the case of the First Respondent it was also contended, albeit not seriously, that the Applicant also failed to establish the requirements of irreparable harm and the absence of any other adequate remedy. In my view there is no merit in these submissions. As I have indicated in relation to the balance of convenience, the Applicant will, no doubt, assuming that a clear right can eventually be established, suffer extensive losses as the vehicles may have been damaged or transferred to other receivers and will, due to prolonged use, substantially devaluated. The fact that it may have a claim against its errant employees can, bearing in mind that the loss suffered is in excess of 15 million, hardly be regarded as an adequate remedy.

[53] Some mention was also made of the fact that the Applicant bought six of the vehicles back from the Twenty-fifth Respondent which, so it was contended, raises the question why would it have done that if it is its contention that it retained ownership. The circumstances under which these vehicles were purchased by the Applicant is duly explained (**record pp. 698 to 699, para s 15, 16, 17, 18, 19 and 20 and record p. 703A**) from which it appears that the vehicles had been obtained by the Applicant's Used Vehicle Manager not realizing that these vehicles were the vehicles fraudulently obtained by Mr Seedat.

[54] I need in conclusion to mention that various helpful and well-reasoned

.../...

submissions were made by counsel appearing on both sides, but in view of the fact that I was dealing with this matter as an urgent matter, I mean no disrespect to counsel in so far as I did not deal with all the submissions they have made save to say that I indeed considered all the submissions made. Should it, however, in due course become necessary to deal with any of those issues I will of course do so.

[55] This brings me to the question of costs

### **Costs**

[56] The parties were all in agreement that costs should follow the result and that, where applicable, such costs should include the costs attendant upon the employment of two counsel.

### **Order**

[57] For the reasons set out in this judgment the following order is made:-

1. **THAT** the application in respect of the Twenty-fifth Respondent be dismissed with costs.
2. **THAT** the First, Second, Third, Fifth, Sixth, Seventh, Tenth, Twelfth, Thirteenth, Fourteenth, Fifteenth, Eighteenth, Twenty-first, Twenty-third and Twenty-Sixth Respondents be ordered to forthwith return to the Applicant -

...

2.1 in the case of the First Respondent, BMW 320 vehicle, with engine number B2350165 and Vin number WBA3B16070NP41623;

2.2 in the case of the Second Respondent -

(a) BMW 320i vehicle, having engine number A8820235 and Vin number WBA3B16090NP78866;

(b) BMW 320i vehicle, having engine number A5990209 and Vin number WBA3B16070NP42951;

2.3 in the case of the Third Respondent, BMW 320i vehicle, having engine number B1050229 and Vin number WBA3P160XONN76344;

2.4 in the case of the Fifth Respondent -

(a) BMW 320i sport vehicle, having engine number A6000177 and Vin number WBA3B16000NP42709;

(b) BMW 320i sport vehicle, having engine number AO780161 and Vin number WBA3B160X0NN76120;

(c) BMW 320i vehicle, having engine number A55002200 and Vin number WBA3B16010NN76250;

(d) BMW 320d, having engine number 73708079 and Vin number

.....

WBA3D36070NP06148;

- 2.5** in the case of the Sixth Respondent, BMW 320i vehicle, having engine number A0880220 and Vin number WBA3B16010NN76300;
- 2.6** in the case of the Seventh Respondent, BMW 320i vehicle, having engine number B1700162 and Vin number WBA3B160X0NN76084;
- 2.7** in the case of the Tenth Respondent -
- (a) BMW 320i sport vehicle, having engine number A2960180 and Vin number WBA3B16040NP44396;
- (b) BMW 320 diesel vehicle, having engine number 73218077 and Vin number WBA3D36030NN68950;
- 2.8** in the case of the Twelfth Respondent, BMW 320i sport vehicle, having engine number A0750161 number WBA3B16080NN75919;
- 2.9** in the case of the Thirteenth Respondent, BMW 320i sport vehicle, having engine number A3930219 and Vin number WBA3B16070NP44134;
- 2.10** in the case of the Fourteenth Respondent, BMW 320i sport vehicle, having engine number 73828085 and Vin number WBA3D36070NN99778;

.../...

2.11 in the case of the Fifteenth Respondent, BMW 320i vehicle, having engine number A6110218 and Vin number WBA3B17040NP43166;

2.12 in the case of the Eighteenth Respondent, BMW 320i vehicle, having engine number 73798079 and Vin number WBA3D360X0NP06211;

2.13 in the case of the Twenty-third Respondent -

(a) BMW 528i vehicle, having engine number A3720117 and Vin number WBAXG3204CDW65664;

(b) BMW 528i vehicle, having engine number B2990153 and Vin number WBAXG3207CDW66002;

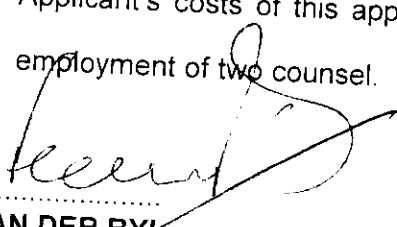
(c) BMW 320 diesel vehicle, having engine number 72398088 and Vin number WBA3D36010NN69076;

2.14 in the case of the Twenty-sixth, BMW 335i, having engine number 9227783 and Vin number WBAPM560X0NN35523.

3. **THAT**, in the event of any of the Respondents referred to in paragraph 2 of this order failing to return any of the vehicles specified in the said paragraph 2 within three days as from the date of this order, the Sheriff be directed and authorized to attach and remove any such vehicle from the relevant Respondent and to deliver such vehicle to the Applicant.



4. **THAT** paragraph 2 of this order be operative as an interim order, pending the finalization of an application or action, to be lodged or instituted within 30 days as from the date of this order by the Applicant, for an order declaring the respective vehicles to be the exclusive property of the Applicant and directing that such vehicles be released to the Applicant so as to deal therewith as it deems fit.
5. **THAT** the Applicant be ordered to keep the vehicles referred to in paragraphs 2 and 3 of this order at a safe place until such time as the application or action envisaged in paragraph 4 of this order has been finally determined.
6. **THAT** the First, Second, Third, Fifth, Sixth, Seventh, Tenth, Twelfth, Thirteenth, Fourteenth, Fifteenth, Twenty-first and Twenty-third Respondents be ordered to pay, jointly and severally, the one paying the other to be absolved, the Applicant's costs of this application, including the costs attendant upon the employment of two counsel.

  
P C VAN DER BYL  
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

ADV B ROUX SC  
ADV W T B RIDGARD

On the instructions of

LOUBSER VAN DER WALT INC  
375 Charles Street  
Brooklyn  
PRETORIA  
Ref: R P van Wyk/mc/W1467  
Tel : 012 460 1915/6

.../...

ON BEHALF OF THE 1<sup>ST</sup> RESPONDENT

ADV J J MEIRING

On the instructions of

ABBA PARAK INC  
Ref: GH0/ANI/FORS/LIT1049/AP  
Tel: 011 830 1410

c/o JOHAN JOOSTE ATTORNEYS  
159 Koos De La Rey Street  
PRETORIA NORTH  
Ref: J Jooste  
Tel: 082 859 8544

ON BEHALF OF THE 2<sup>ND</sup>, 3<sup>RD</sup>, 5<sup>TH</sup>, 6<sup>TH</sup>, 7<sup>TH</sup> AND 10<sup>TH</sup>  
RESPONDENTS

ADV J G WASSERMAN SC  
ADV M MOSTERT

On the instructions of

DASOO ATTORNEYS  
208 Maltzan Street  
Pretoria West  
PRETORIA  
Ref: Mr Dasoo/SMA.191  
011 684 1468

ON BEHALF OF THE 12<sup>TH</sup>, 13<sup>TH</sup>, 14<sup>TH</sup>, 15<sup>TH</sup> AND  
23<sup>RD</sup> RESPONDENTS

ADV H B MARAIS SC  
ADV D L WILLIAMS

On the instructions of

Z SALOOJEE ATTORNEYS

c/o A W JAFFER ATTORNEYS  
557 Carl Street  
Pretoria West  
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Ref: MS/038/LIT/ZS  
Tel: 016 422 498/2616

ON BEHALF OF THE 25<sup>TH</sup> RESPONDENT

ADV J H de V BOTHA

On the instructions of

MONTE COETZER INC  
Ref: Mr M P Coetzer/av  
Tel: 011 492 1450

c/o RONTGEN & RONTGEN ATTORNEYS  
HB Forum  
13 Stampvrug Street

.../...