IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

.....	22 August 2022 ……
SIGNATURE	DATE

CASE NO.: 47971/2017

In the matter between:

WESBANK, a division of FIRSTRAND BANK LIMITED Plaintiff

and

MASEKO: SITEMELA ESSAU First Defendant

MASEKO: MALETSATSI Second Defendant

JUDGMENT

FORD AJ:

Introduction

[1] On 12 August 2017, First Rand Bank t/a Wesbank ("the plaintiff") instituted action against Mr. Sitemela Essau Maseko ('the first defendant") in which it sought an order confirming the cancellation of an instalment sale agreement

entered into between the plaintiff and the first defendant on 17 March 2017, the return of a 2007 BMW X5 3.0D A/T motor vehicle ("the vehicle") and ancillary relief. The first defendant and his daughter, Ms. Maletsatsi Maseko ("the second defendant") in turn instituted two counterclaims in respect of which they respectively sought:

(a) Payment of an amount of R6603.36 (six thousand six hundred and three rand, thirty-six cents);

(b) An order declaring the second defendant to be the common law owner and titleholder of the vehicle in accordance with the Regulations under Section 4 of the National Road Traffic Act, 93 of 1996;

(c) An order directing the plaintiff to restore the second defendant's status as registered title holder.

[2] This matter concerns the following controversy. The first defendant approached Autofin for finance. Autofin agreed to acquire finance for the first defendant by having him sell his vehicle to e-Motion Cars and buying it back from e-Motion Cars by way of a credit agreement issued in favour of the first defendant (for the vehicle) by the plaintiff, all the while the first defendant retains ownership of the vehicle.

[3] The first and second defendants claim, as part of their defence, that the manner in which the aforementioned transactions were concluded was unlawful, alternatively, fraudulent, alternatively reckless and that the ultimate transfer of the vehicle to the plaintiff is invalid. The questions emanating from

the issues raised by the defendants, and which this court will answer are essentially the following:

(a) Whether the first or second defendant was the owner of the vehicle at the time the first defendant sold the vehicle to Africa Spirit Trading 208 (Pty) Ltd T/A e-Motion Cars ("e-Motion Cars").

(b) If the second defendant was the registered owner, whether the first defendant had the requisite authority to enter into an agreement to sell the vehicle to e-Motion cars.

(c) Whether the sale and subsequent financing of the vehicle was lawful, having regard to the fact that the second defendant, on her version, was unaware of such transactions.

(d) Whether the first defendant knew about the sale of the vehicle to e-Motion Cars and the subsequent purchasing of the vehicle from e-Motion Cars.

(e) Whether the plaintiff knew that a sale was concluded between the first defendant and e-Motion Cars, prior to it issuing finance in favour of the first defendant for the vehicle.

(f) Whether the first defendant was duped into concluding an instalment sale agreement by means of a fraud perpetrated by third parties or an error on his part.

(g) Whether the plaintiff, in advancing credit to the first defendant in respect of the credit agreement issued by the plaintiff over the vehicle, was reckless in the sense contemplated in the National Credit Act, 34 of 2005.

The parties

[4] The plaintiff is Wesbank, a Division of Firstrand Bank Ltd, a credit provider as defined in the National Credit Act, 34 of 2005. The first defendant is Mr. Sitemela Essau Maseko, a self-employed businessman, whom the plaintiff concluded a credit agreement with. The second defendant is Ms. Maletsatsi Maseko, the daughter of the first defendant who was the registered owner of the vehicle when the vehicle was sold by the first defendant to e-Motion Cars.

The evidence

[5] The first defendant testified that in approximately 2012/2013, he was introduced to a certain Mr. Mathabate ("Mathabate") by a friend of his. Mathabate was involved in the buying and selling of residential plots. Mathabate later visited the first defendant at his home and advised the first defendant that there was a stand for sale somewhere in Johannesburg, which he (Mathabate) wished to acquire. Mathabate did not have sufficient funds to acquire the property and requested the first defendant to provide him with a loan to do so. The first defendant loaned Mathabate an amount of R250 000.00 to acquire the property. Unable to repay the loan, Mathabate approached the first defendant and, in order to offset a portion of the loan, offered to transfer ownership of his (Mathabate's) vehicle to the first

defendant. Mathabate undertook to pay the first defendant the remaining balance when he was able to do so.

[6] The vehicle was then delivered to the first defendant. Since then, the vehicle has always remained in the first defendant's exclusive possession. The first defendant testified that he used the vehicle over weekends but that he drove a more practical bakkie during the week to cart his wares about.

[7] Upon taking delivery of the vehicle, the first defendant advised the second defendant, his daughter from a previous relationship, that it was his gift to her. He testified that in the event that he passed on, he wanted her to have something of his. Consistent with this, he arranged to have the vehicle registered in her name. Under cross-examination, he conceded that the same result could have been achieved by way of a testamentary disposition.

[8] The second defendant never took possession of the vehicle which, despite the first defendant's promise and his registration of the vehicle in her name, at all times remained with the first defendant. The second defendant testified that she resided in Boksburg and made use of a lift-club to and from work. She did not reside with the first defendant, who lived in Meyersdal.

[9] In March 2017, the first defendant's business encountered unexpected cashflow difficulties which he ascribes to the fierce competition his business encountered, primarily on account of foreign traders significantly underselling products. The first defendant began exploring ways to address the cashflow problems. While doing so he came upon an advert offering assistance with

loans. He telephoned the number provided in the advertisement and spoke to a certain Mr. Michael Basson ("Basson").

[10] The first defendant and Basson arranged to meet to discuss a loan. Basson was employed by Autofin Assist (Pty) Ltd ("Autofin"). According to Basson, he explained to the first defendant that in order to secure a loan for him, the first defendant had to complete a loan application form, submit the vehicle's license registration forms, provide proof of residence and furnish Basson with bank statements. It seems that what Basson had in mind was that Autofin would approach the plaintiff on behalf of the first defendant. The first defendant would sell the vehicle to a motor vehicle dealership, who would in turn sell the vehicle to the plaintiff and the first defendant would then purchase the vehicle back from the plaintiff, via the dealership, by way of an instalment sale agreement. Upon payment of the final instalment, ownership would transfer back to the first defendant.

[11] The first defendant completed most of the information on the Autofin loan application. He says that when doing so, he was blissfully unaware of the true import of the application form and the arrangement. He did not understand that he was purporting to sell the vehicle to a motor dealership and that he would buy it back from that dealership by way of finance issued in his favour by the plaintiff. Nor did he appreciate that the amount he received was in fact the purchase price on the vehicle. He understood it to be a loan.

[12] Basson completed the remaining information in the Autofin application form. This included information about the selling price of the vehicle, the M&M

Code, the odometer reading, the service fee, the license and registration details, and the banking details of the first defendant. The first defendant explained that his bank details had been gleaned from the bank statement that he provided to Basson.

[13] The second defendant testified that the first defendant contacted her and advised her that he was applying for a loan with Autofin and that they required the vehicle registration papers, which, so she said, was security for the loan he was applying for.

[14] From the documents presented to the court, it is evident that the meetings between the first defendant and Basson took place on 6 and 7 March 2017. On 6 March 2017, a memorandum of agreement setting out the manner in which Autofin will assist the first defendant to obtain finance and on 7 March 2017, the Autofin finance application was completed. The first defendant confirmed his signature in respect of some documents and disputed it in other respects. He confirmed however that the manuscript entries appearing on the documents were his. I have carefully considered the signatures and I am satisfied that the disputed signatures are in fact those of the first defendant.

[15] The memorandum of agreement and the Autofin application for finance, made it clear that the item forming the subject of the loan and in respect of which financing is to be arranged is the BMW. The finance amount to be arranged for the first defendant, before deducting the Autofin fees, was an agreed amount of R100 000.00. The memorandum specifically directed that:

> "The client understands and agrees that if this application is successful the vehicle will be registered into the client's name and into the banks(sic) name that will facilitate the loan. The motor vehicle will be security for this loan in favour of the bank"[1]

The bank account into which the payment for the loan was to be effected, is the first defendant's banking account.

[16] On 9 March 2017, having completed the application for finance, Basson emailed the entire application, with supporting documents, to Mr. Hugo Kriel ("Kriel") a Finance and Insurance officer from EJS Trading and Sourcing CC ("EJS"). Kriel explained to the first defendant that EJS had an agreement with Basson to source leads for customers and that EJS would in turn source financing for the customer. He explained that EJS worked with various financing houses and that they approached the plaintiff for financing in respect of the vehicle. The necessary forms were prepared and signed by the first defendant on 17 March 2017. He explained that the first defendant specified acceptance of the warranty product and also applied for insurance cover with MiWay Insurance. The plaintiff confirmed that the finance application submitted by EJS on behalf of the first defendant was approved. On the same day, e-Motion Cars invoiced the plaintiff in an amount of R112 350.00 in respect of the vehicle that the first defendant on the plaintiff's version, sold to e-Motion Cars, after having Dealer Stocked the vehicle.

[17] On 24 March 2017, seven days after the application for finance, the first defendant received payment for the vehicle in the amount of R88,345.00 being the amount for what the first defendant understood was the payment for

[1] Exhibit F, p2.

the loan and the plaintiff regards as the cash amount for the sale of the vehicle less fees payable to Autofin, a deposit of R10,000.00 and license and registration fee of R1,500.00. The invoice in respect of the aforementioned transaction, namely the sale of the vehicle from the first defendant to e-Motion Cars, is dated 22 March 2017.

[18] The first defendant was unable to meet the monthly instalments in terms of the credit agreement. On 5 June 2017, he applied for debt review with National Debt Counsellors ("NDC"). NDC submitted a debt restructuring proposal to various creditors including the plaintiff, on behalf of the first defendant, in respect of a debt review plan. The plaintiff, as explained by Ms. Rene Moonsamy ("Moonsamy"), accepted the proposal after issuing a counter offer which NDC considered reasonable. Pursuant thereto, the first defendant made some payments and missed a couple of payments. The first defendant sought to dispute the signatures on the documents and the manner in which the signatures were procured. I found no merit whatsoever in those protestations.

[19] On 5 October 2017, NDC applied to the Magistrates Court for an order confirming the debt review process in terms of section 85 and 87 of the National Credit Act, 34 of 2005. This application was however withdrawn on account of the first defendant's apparent failure to have filed a confirmatory affidavit in support of the application, in time. The first defendant prepared a memo explaining his inability to honour the instalment for December 2017. He claimed that he had just moved into a new apartment and had to pay for his relocation and rent.

[20] The plaintiff had in the interim terminated the debt review process, ostensibly on grounds that the first defendant was unable to keep up with the payment arrangements. On 21 February 2018, a member of the NDC team, a certain Cherilyn, contacted the plaintiff. She spoke to a certain Caroline working in the plaintiff's call centre. The first defendant participated in the call. Caroline explained to Cherilyn that the plaintiff was not prepared to consider any arrangement other than for the first defendant to settle the full outstanding balance on the account.

[21] On 23 February 2018, the first defendant contacted the plaintiff himself. He enquired why the debt review was cancelled. He then requested whether there was a way in which he could pay off the debt but was advised that he needs to pay the full outstanding balance. Only towards the end of that conversation did the first defendant request a copy of the contract (the credit agreement).

[22] In response to the first defendant's claim that the manner in which credit was granted to him was reckless, the plaintiff called Mr. Ben Jonker, from the plaintiff's specialist collections department. Mr Jonker confirmed that the plaintiff considered the credit application and, having regard to the first defendant's declaration of income and expenses, was satisfied that the first defendant was indeed credit worthy. He concluded that on the strength of the information at the plaintiff's disposal, he was satisfied that credit was not granted recklessly, as claimed by the first defendant. He conceded that the plaintiff was not aware of the transactions between the first defendant and e-Motion Cars and that the plaintiff generally would not finance a deal that is

based on a “re-financing scheme”. He stated that when the first defendant’s debt review process was terminated, the plaintiff instituted action for the return of the vehicle.

Analysis

[23] Generally, ownership in a thing is transferred by delivery of the thing coupled with an intention to transfer ownership. Delivery may be actual (*traditio vera*) but is more often constructive (*traditio ficta*), in the sense that our law recognises other forms of delivery that do not entail actual delivery of the thing but is regarded as sufficient to constitute the element of delivery. There are various forms of constructive delivery. These include *inter alia clavium traditio*, *traditio brevi manu* (literally, delivery with the short hand), *constitutum possessorium* and attornment. There are others which are, for present purposes, not entirely relevant to the current controversy.

[24] *Clavium traditio* entails the delivery not of the actual object of the transfer but of another thing which is merely an instrument by which transferee is able to exercise control over the thing intended to be transferred. In *Unitrans Rally Motors*[2] Fischer AJ, dealing with a claim for transfer of ownership based on estoppel said:

> ‘[11] I am of the opinion that, if regard be had to not only the manner in which applicant dealt with Kok, but, in addition thereto, the extent to which Kok was entrusted with the *indicia* of *dominium* or *jus disponendi*, being the vehicle, its ignition keys, the certificate of registration and the motor-vehicle licence

[2] *Unitrans Automotive (Pty) Ltd v Trustees of The Rally Motors Trust* 2011 (4) SA 35 (FB)

> and licence disc, evidencing that the vehicle had been transferred into the name of Kok, it must be accepted that applicant had, as such, provided Kok with all the 'scenic apparatus' with which Kok was able to represent to the respondent that he was entitled to dispose of the vehicle, and that respondent was, as such, entitled to purchase same from him.'

[25] The learned Judge regarded the ignition keys, certificate of registration, motor-vehicle licence and licence disk as the instrument ('scenic apparatus') by which it enabled the transferee to exercise control over the vehicle.

[26] Transfer of ownership pursuant to *traditio brevi manu* occurs when the transferee is already in possession of the thing but at the time holds the thing other than as owner. *Traditio brevi manu* takes place when the possessor of the thing and the owner change their intention with regard to the ownership of the thing so that the possessor now intends to hold as owner. Delivery is constructive because the possessor is already in possession when he or she acquires ownership. Examples of this form of delivery are to be found under certain credit agreements (usually involving the sale of motor vehicles). In this example, a client seeking to purchase a motor vehicle from a car dealership will approach a bank to finance his purchase of the vehicle. The bank agrees to provide the client with a loan to purchase the vehicle from the dealer on the understanding that it (the bank) will lend the money to the client by paying the finance amount to the dealer (who is the owner) as the purchase price. As part of the agreement between the bank and the client, it is agreed that the bank will retain ownership until the final instalment is made. The vehicle is

then delivered by the dealer to the client who takes possession thereof with the intention of holding the vehicle on behalf of the bank. Once the final instalment is made, ownership then transfers to the client.[3]

[27] In the case of *constitutum possessorium* the transfer of ownership takes place by means of a change of intention. The thing remains in the possession of the previous owner with the only difference being that the previous owner changes his intention from an intention to own and hold on his own behalf, to an intention to transfer ownership to another and then hold on behalf of the new owner. This form of constructive delivery contains obvious dangers owing to the fact that e*x facie*, there appears to be no obvious external manifestation of the change in intention. This type of arrangement evinces a real risk that third parties may be duped by a simulated transaction.

[28] In the case of attornment, the possessor intends to hold the thing on behalf of one person but then concludes an arrangement in terms of which the possessor intends to hold on behalf of another person.

[29] It is trite that ownership can, as a general rule, only be transferred by a person who is himself or herself the owner. This is, of course, subject to the application of the doctrine of estoppel, where the owner may in certain circumstances be estopped from asserting ownership.

[30] The starting point in the present matter, is for the court to determine whether the second defendant acquired ownership. If she did, then ownership could only be transferred by the first defendant if he was authorised by the second

[3] *Info Plus v. Scheelke and Another* 1998 (3) SA 184 (SCA)

defendant to do so or if the second defendant was estopped from denying his authority to do so.

[31] The questions, which I referred to above, will be answered as part of the analysis of the evidence. The first issue which this court is required to determine is the ownership of the vehicle at the time when the first defendant entered into agreements about that vehicle with third parties. The second defendant claims that she was the registered owner of the vehicle and did not sell or gave permission for the vehicle to be sold to a third party. The plaintiff contends that at all material times the first defendant was the owner of the vehicle and that ownership, despite the vehicle being registered in the second defendant's name, never passed to the second defendant. What the plaintiff's counsel was in effect arguing was that the mere registration into the name of a person, does not constitute ownership.

[32] From the established facts, it is clear that the vehicle was never *actually* delivered to the second defendant. This leaves the question, whether there was *constructive* delivery. Although the first defendant informed her of the gift and continued to register the vehicle into the second defendant's name, delivery of the vehicle never took place, nor was the vehicle delivered in any other constructive form of delivery.

[33] In *Ronel Noleen Smit v Calvin Kleinhans* [4] the Supreme Court of Appeal had occasion to deal with ownership being based exclusively on registration papers of a vehicle. The court agreed with the High Court's reasoning that Ms.

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[4] (Case no 917/2020) [2021] ZASCA 147 (18 October 2021)

Smit's reliance on the National Road Traffic Act 93 of 1996 (NRTA), for claiming ownership, was misplaced for she was an 'owner' purely for purposes of the NRTA and not an owner in the conventional sense in terms of the common law. In support of the aforementioned conclusion the High Court relied on various decisions of the SCA[5] and the decision in *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*[6]. In the *Smith* case the court specifically held, with reference to ownership claimed in respect of the NRTA provision:

> Accordingly, Ms Smit's reliance on the motor vehicle licence issued in her name to prove that she is the owner of the vehicle is misplaced. Her assertion that she was the owner as defined in s 1 of the NRTA7 does not assist her. Ownership in terms of the NRTA is confined only to the purposes of the NRTA and whatever else is regulated by the NRTA"[7].

[34] What the above authority clearly suggests is that the registration of a vehicle into a person's name does not in and of itself vest that person with ownership[8].

[35] Section 1 of the National Road Traffic Act[9] states that 'owner' in relation to a vehicle, means:

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5 *Estate Shaw v Young* 1936 AD at 239; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 SCA at 550 I-J; *S v Levitt* 1976 (3) SA 476 A

6 [1993] 1 All SA 259 (A)

7 *Ronel Noleen Smit v Calvin Kleinhans* (Case no 917/2020) [2021] ZASCA 147 (18 October 2021) par 11

8 The registration of a vehicle in a person's name is not determinative of that person's ownership of the vehicle; cf. e.g. *Info Plus v Scheeke and Another* 1996 (4) SA 1058 (W) at 1060 and *Akojee v Sibanyoni and Another* 1976 (3) SA 440 (W) at 442C-F. See also the cases distinguishing between 'statutory' ownership of motor vehicles (evidenced by certification or registration etc.) and 'common law ownership' thereof; Cf. *Van Gend v Royal Exchange Assurance and Ano* 1969 (3) SA 564 (E) at 567, citing *Pottie v Kotze* 1954 (3) SA 719 (A) (Cf: Sithole N.O and Another v Sachal & Stevens (Pty) Ltd and Another (14657/2019) [2021] ZAWCHC 194 (5 October 2021))

9 Section 1(d) of Act 64 of 2008

(a) the person who has the right to the use and enjoyment of a vehicle in terms of the common law or a contractual agreement with the title holder of such vehicle;

(b) any person referred to in paragraph (a), for any period during which such person has failed to return that vehicle to the holder in accordance with the contractual agreement referred to in paragraph (a); or

(c) a motor dealer who is in possession of a vehicle for the purpose of sale, and who is licensed as such or obliged to be licensed in accordance with the regulations made under section 4, and "owned" or any like word has a corresponding meaning.

Whereas "title holder", in relation to a vehicle means that:

(a) The person who has to give permission for the alienation of the vehicle in terms of a contractual agreement with the owner of such vehicle; or

(b) The person who has the right to alienate the vehicle in terms of the common law, and who is registered as such in accordance with the regulations under section 4.

[36] In *Marks & Lamb Classic Cars CC v Kona*, Yacoob AJ (as she then was) dealt with the question of ownership as it relates to a certificate of registration. She held as follows[10]:

[10] (80288-17) [2019] ZAGPPHC 3 (16 January 2019) par 16-17

> "The possession of the registration papers is *prima facie* proof of ownership. However, the possession of papers is not conclusive proof of ownership. A motor vehicle is not immovable property, the sale and transfer of which is governed by statute. There is no requirement that the change of ownership of a motor vehicle be registered for transfer to take place.
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> The only statutory requirement regarding motor vehicles is that they be registered and licenced, in terms of the National Road Traffic Act, 93 of 1996. This does not regulate the transfer of ownership of motor vehicles. The definitions of "owner" and "title holder" in the National Road Traffic Act make this clear - both refer o rights in terms of contract and the common law."

[37] The requirements to effect a valid transfer of ownership of movables was further analysed in *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander*[11] where Jansen JA held as follows:

> "Blote ooreenkoms kan dus nie eiendomsreg oordra nie – traditio (oorhandiging) moet ook geskied; en omgekeerd, blote oorhandiging is ook nie voldoende nie – dit moet gepaard gaan met 'n ooreenkoms tussen oorhandiger en ontvanger dat daarmee eiendomsreg gegee en geneem word."

[38] In respect of movable property, ownership in movable property is transferred upon delivery of the *res* coupled with either payment of the purchase price, or the provision of security, or the giving of credit. In *Trust Bank van Afrika Bpk v Western Bank Beperk & Andere NNO*[12], the court found that ownership of a

[11] 1980 (3) SA 917 (A) at 922E – F
[12] 1978 (4) SA 281 (A)

thing only passes where the owner delivers it to another with the intention of transferring ownership and the other takes the thing with the intention of acquiring ownership.

[39] The remarks by Milne JA in Concor Construction (Cape) (Pty) Ltd v Santambank Ltd[13] are equally insightful:

> "In *Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and Others* 1976 (4) SA 464 (A) at 489H it was held that '…ownership cannot pass by virtue of the contract of sale alone: there must, in addition, be at least a proper delivery to the purchaser of the contract goods…"

[40] I agree with Mr. Bruwer, the evidence as to who the common law owner of the vehicle was at the point when the first defendant met with Basson, in March 2017, clearly points to the first defendant as the owner of the vehicle. He took delivery of the vehicle from Mathabate, the vehicle was in his possession and control at all times and he used the vehicle exclusively. The second defendant never took ownership of the vehicle. The second defendant, in order to prove ownership of the vehicle, had to do more than merely referring to a certificate of registration to claim ownership. She failed to do so. Accordingly, the counterclaim, in which she sought an order declaring herself to be the common law owner and titleholder of the vehicle, must fail.

[41] In light of the finding above, it follows that the first defendant had the requisite authority deal with the vehicle in any manner he chose to do. The plaintiff's case is that the first defendant sold his vehicle to e-Motion Cars whereas the

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[13] 1993 (3) SA 930 (A) at 933C – H

first defendant on the other hand claims that he never sold the vehicle but merely sought to handover the registration and licensing papers, in lieu of security for the loan he made from Autofin. I will address the contrasting versions later herein, save to state that in whatsoever manner the first defendant dealt with the vehicle, he could do so by virtue of the fact that he, and not the second defendant, was in fact the true owner of the vehicle.

[42] In order to properly follow the evidentiary proposition on which the plaintiff's claim against the first defendant is based, it is important to follow a comprehensive timeline of events:

(a) Early in March 2017, the first defendant contacted Basson enquiring about a loan;

(b) On 6 and 8 March 2017, the plaintiff met with Basson and completed a number of documents in relation to an application for finance pertaining to the vehicle the first defendant was the owner of;

(c) On 9 March 2017, Basson emails Kriel the information pertaining to the first defendant's application for finance[14];

(d) On 14 March 2017, the first defendant applies for insurance in respect of the vehicle[15];

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[14] Exhibit E, p.4
[15] Exhibit E, p.62

(e) On 16 March 2017, Basson emails Kriel a breakdown of the sales transaction[16] listing the items as follows:

SELLING PRICE:	R112, 000.00
DEPOSIT:	R10,000
FINANCE AMOUNT:	R102 000.00
AUTOFIN FEE:	- R12, 996.00
PROVISIONAL LICENSE FEE:	- R1500.00
DEKRA:	+R850.00
CASH OUT TO CLIENT:	**=R88,354.00**

(f) On 17 March 2017:

(i) Kriel meets with the first defendant who signs the finance application forms, which Kriel in turn submits to the plaintiff;

(ii) the plaintiff approves finance in favour of the first defendant in the amount of R112,000.00[17];

(iii) e-Motion Cars invoices the plaintiff R111, 350.00 in respect of the vehicle, holding itself out to be the owner of the vehicle[18];

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16 Exhibit E, p.72
17 Exhibit E, p.37
18 Exhibit E, p.31

(iv) the plaintiff issues a remittance advice in favour of e-Motion Cars for an amount of R115,080.00 in respect of the first defendant[19];

(g) On 22 March 2017;

(i) the first defendant purportedly sold his vehicle to e-Motion Cars for R98.245.61[20]. An invoice to this effect was prepared by e-Motion Cars and signed by the first defendant as seller;

(ii) the vehicle is transferred from the second defendant into the name of the first defendant at 09h03am[21];

(iii) the vehicle is transferred from the first defendant to the name of e-Motion Cars at 09h00am[22];

(v) the vehicle is transferred from e-Motion Cars into the name of the plaintiff at 09h03am;

(h) On 23 March 2017, the first defendant signs a SARS VAT24 form in which the selling price of the vehicle is listed as R112 000.00[23];

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19 Exhibit E,p.47
20 Exhibit E, p.71
21 Exhibit E, p.69
22 Exhibit E, p. 67
23 Exhibit E, p.70

(i) On 24 March 2017, e-Motion Cars paid the first defendant an amount of R88,354.00 for the sale of the vehicle[24] which payment the first defendant understood to be the loan he applied for from Autofin;

(j) On 3 May 2017, the first defendant's account is debited by R3,352.43 in favour of the plaintiff[25];

(k) On 4 June 2017, the first defendant's account is debited by R3,250.94 in favour of the plaintiff, which debit order is returned unpaid[26];

(l) On 5 June 2017, the first defendant applied for debt review with National Debt Counsellors ("NDC") and a notice to that effect was sent to all the first defendant's creditors[27];

(m) The NDC proposal was accepted pursuant to a counter-offer made by the plaintiff, which NDC considered reasonable;

(n) The first defendant made a couple of payments then defaulted, resulting in the debt review process being terminated;

(o) The first defendant contacts the plaintiff in February 2018, to enquire why the debt review process was terminated;

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24 Exhibit G
25 Exhibit B, p.D21
26 Ibid, p.D21
27 Exhibit B, p.D29

(p) The plaintiff had by then already instituted the present action.

[43] In order for ownership to pass from one party to another, when dealing with movable property, there must be an intention on the part of the transferer to transfer ownership of the movable property, followed by actual delivery, to the transferee, with a concomitant intention on the part of the transferee to accept delivery of the movable property and thus to acquire ownership.

[44] In terms of the typical arrangement, involving transfer of ownership in respect of motor vehicles acquired by means of an instalment sale agreement, the motor dealership, as the owner of the vehicle would handover possession of the vehicle to the credit applicant, who intends to purchase the vehicle and then hold the vehicle for the credit provider (the bank) and to acquire ownership on payment of the final instalment.

[45] The paperwork in the present matter (credit application) between the plaintiff and the first defendant was consistent with that typical arrangement. It was on this basis, that the plaintiff approached this court to give effect to its rights in terms of the credit agreement. The credit agreement between the first defendant and the plaintiff indicated an intention for the first defendant to take possession of the vehicle and to hold it on behalf of the plaintiff with the intention ultimately to acquire ownership himself, until payment of the final instalment. However, as has been demonstrated on the facts set out above, that typical arrangement was not consistent with the true state of affairs in the present matter. In truth, the first defendant was in fact and in law the owner and not the dealership (e-Motion Cars). For ownership to have been transferred to the plaintiff it could either be achieved through the medium of e-Motion Cars, with concomitant delivery to it or directly from the first defendant to the plaintiff (with concomitant delivery). In either event, delivery would have to be a constructive form of delivery, since on any scenario, actual delivery was absent. If ownership had been transferred to the plaintiff, then delivery would have had to be constructive as well. The question this court has to

determine is whether there was in fact delivery in any constructive form, from the first defendant to e-Motion Cars or from the first defendant to the plaintiff.

[46] The difficulty with the entire arrangement involving the sale and subsequent apparent re-purchasing of the vehicle, is that on any construction of the facts, delivery constructive or otherwise never takes place. In the absence of delivery having taken place, the plaintiff could never have acquired ownership and would consequently, not be entitled to the relief sought in this action. This is so because a claim for the return of the vehicle is only available to an owner of the vehicle.

[47] In order for the plaintiff to have succeeded in this action, it had to demonstrate that a valid transfer of ownership was effected when the first defendant sold the vehicle to e-Motion Cars, as its subsequent acquisition is dependent on that fact. The first purported transfer of ownership holds enormous consequence for the plaintiff for the following reason. If no valid ownership was effected, then the initial and subsequent transfer, to the plaintiff, were invalid. From the commencement of the transactions that the first defendant was engaged in, *to wit*.: the transfer of the vehicle from the second defendant to the first defendant, the transfer of the vehicle from the first defendant to e-Motion Cars, the transfer of the vehicle from e-Motion Cars to the plaintiff, the first defendant retained ownership and possession of the vehicle exclusively.

[48] The timeline of the transactions plays a pivotal role in assisting this court to plainly assess the intention of the parties in relation to when and whether actual transfer of ownership took place. The apparent sale of the vehicle by the first defendant to e-Motion Cars takes place on 22 March 2017. Yet, e-Motion-Cars already sold the vehicle to the plaintiff on 17 March 2017. At the

time when e-Motion Cars sold the vehicle to the plaintiff it was neither the actual nor the purported owner of the vehicle. It could only have become the *bona fide* owner after the actual sale of the vehicle to it, by the first defendant had taken place. The financing of the sale by the plaintiff took place on the understanding that e-Motion Cars and not the first defendant was the owner of the vehicle. Given the fact that the *purported* sale of the vehicle to e-Motion Cars takes place after the first defendant had already concluded an instalment sale agreement with the plaintiff in respect of the vehicle, it could never have been the intention of the first defendant to transfer ownership of the vehicle, which is necessary to actuate the finance agreement and effecting of a payment for the vehicle to e-Motion Cars. On the evidence before me it is apparent that the plaintiff operated under the bona fide belief that the vehicle in respect of which it was providing finance for, belonged to e-Motion Cars, whereas at the point when the instalment sale agreement was concluded, the first defendant was in fact the owner of the vehicle and not e-Motion Cars. The first defendant's purported sale of the vehicle to e-Motion Cars after a credit agreement in his favour was already granted by the plaintiff, apart from militating against the notion that there was a genuine transfer of ownership, also struck me as suspicious.

[49] The first defendant's retention of ownership rendered all subsequent transfers invalid. Contrary to what the authorities provide, in the transactions pertaining to the vehicle and involving; the first defendant, e-Motion Cars and the plaintiff, there does not appear, certainly not on the evidence before me, to be a real intention on the part of the first defendant to deliver the vehicle to e-

Motion Cars, with the intention of transferring ownership to it or that e-Motion Cars took possession of the vehicle with the intention of acquiring ownership. In fact, the vehicle remained in the possession of the first defendant from the time he took ownership thereof from Mathabate.

[50] Moreover, when the first defendant met with Basson and concluded a memorandum of agreement, that agreement did not refer to e-Motion Cars at all. There could therefore not have been an intention on the part of the first defendant as at 17 March 2017, to have effected transfer of ownership to e-Motion Cars.

[51] The first defendant, on the plaintiff's version sold his vehicle to e-Motion Cars for R88,354.00. He then bought the vehicle back from e-Motion Cars, by way of an instalment sale agreement for R112 000.00. The sale of the vehicle from the first defendant to e-Motion Cars takes place 5 days after e-Motion Cars had already sold the vehicle to the plaintiff. It defies logic as to why a person would sell his vehicle to a party at a substantially lesser amount, simply to buy it back from that party at a higher price.

[52] The manner in which the purported sale and transfer of the vehicle has been perpetrated is congruent with the first defendant's case. The first defendant's evidence was that he approached Basson for a loan. At no point during his interaction with Basson was it disclosed to him that he would in fact be selling his vehicle to a third party, for a lesser amount and that he would then buy back the vehicle from that same party by way of an instalment sale finance agreement at a much higher price. Mr. Bruwer submitted that the first

defendant was at all times aware that the loan was to be derived from the financing of his vehicle and that this position was explained to him, when he met with Basson and Kriel. Moreover, the documents that the first defendant signed were indicative of the fact that the first defendant must have known that he was in fact applying for finance for his vehicle.

[53] The first defendant's apparent participation in the conclusion of the paperwork to facilitate the instalment sale agreement and the debt review process does not validate the purported transfer of ownership between the first defendant and e-Motion Cars and between e-Motion Cars and the plaintiff and e-Motion Cars at all.

[54] Mr. Webbstock, appearing for the first defendant, requested me to take particular note of the fact that the first defendant is not well educated and that his grade-4 education would have placed him at an enormous disadvantage in having to assess and appreciate the nature of documents that he was presented with. In fact, Jonker testified that it would have taken him, a seasoned person in this field, some 10 minutes or so to have read through the documents. When it was pointed out to him that the first defendant was given far less time to read the documents and that he would not have been in a position to appreciate what he was required to sign, he responded that he cannot offer an opinion in that regard, save to state that the nature of the papers the first defendant was required to sign would have been explained to him.

[55] I have observed the first defendant closely when he testified. The first defendant is not a sophisticated person. Although he was able to express himself in English with relative ease, I was not convinced that he, appreciated the nature of the documents he signed and what they meant. His handwriting struck me to be at the same level as one who is at an elementary school level. In light of my observations, I must agree with Mr. Webbstock in his assessment of the first defendant in particular as it related to his ability to appreciate the nature and extent of the various documents he signed and processes he was engaged in, including the debt review process. And even if he did, as alluded to earlier, his appreciation or participation does not alter the legal position.

[56] The first defendant went to see Basson because he wanted a loan. He instead ended up with him selling his vehicle to a third party and buying the vehicle back from that same third party through an instalment sale agreement at a price, considering the interest allotment, almost more than double the amount he supposedly sold the vehicle for. The evidence points very strongly to the fact that the first defendant was subjected to a simulated transaction.

[57] In *Roshcon (Pty) Ltd v Anchor Body Bulders CC and Others*[28], the Court referred approvingly to what Innes J said in *Zandberg v Van Zyl 1910 AD 302, at 309*, in respect of the test to be applied when considering an agreement which may or may not be said to be a simulation. It said the following:-

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"The foundation of our law in regard to simulated transactions is the classic statement by Innes J in *Zandberg v Van Zyl* that:

'Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is: not what in form it purports to be. The maxim then applies plus valet quod agitur quam quod simulate concipitur. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than what it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down."

[58] In *CSARS v NWK*[29] Lewis JA postulated the and expanded the test as follows:

"In my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a transaction to achieve an objective other than the one

[29] 2011 (2) SA 67 (SCA) para 55

> ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of the transaction …."

[59] In order to assess the degree to which a simulated transaction might be at play, it is, having regard to the above authorities, the duty of the court to:

(a) give effect to what the transaction is and not what in form it purports to be;

(b) satisfy itself as to the real intention definitely ascertainable, which differs from the simulated intention; and

(c) enquire into the commercial sense of the transaction.

[60] In determining what the true transaction is in the present circumstances, one must have regard to what the reason was why the first defendant sought to engage Basson. He did so to acquire a loan. This version is uncontested. Basson then presented the documentation that the first defendant had to complete, ostensibly under the guise of applying for a loan. At no point was it disclosed, certainly not with the accuracy and clarity it deserved, that the first defendant is to sell his vehicle to a third party at a lower price and buying it back from that same party at a higher price through an instalment sale agreement.

[61] The second leg of the enquiry is thus easily discernible. The intention was for the first defendant to secure a loan and not to sell his vehicle. The latter enquiry is the death knell of the assessment. There is no conceivable

commercial sense in the first defendant selling his vehicle for R88,354.00 and buying it back, by way of an instalment sale agreement, from the same party he purportedly sold it to for an amount with interest to the tune of R200,952.40.

[62] In light of my findings below, it is not necessary for me to deal with the issue pertaining to whether the plaintiff advanced credit recklessly. The conclusion of a credit agreement between the plaintiff and the first defendant is invalid because no valid transfer of ownership, which is integral to the subsequent transfers, had taken placed between the first defendant and e-Motion Cars, or between e-Motion Cars and the plaintiff.

[63] In so far as the monetary element of the first defendant's counterclaim is concerned, I must agree with Mr. Webbstock that the plaintiff was not entitled to receive payments from the first defendant in respect of a credit agreement that arose in circumstances where no valid transfer of ownership had taken place.

[64] Whilst I have sympathy for the position the plaintiff finds itself in, being the innocent party, I cannot ignore the underlying *causa* that gave rise to this transaction. The plaintiff was not aware of the nature and extent of the transactions between the first defendant and e-Motion Cars and it may be possible for it to institute action to recover any damages suffered in purchasing a vehicle from a dealership who was not the owner of the vehicle at the time.

[65] Given the fact that the parties have all achieved varying degrees of success in this matter, I am of the view that each party should pay its own costs.

Order

[66] In the result, I make the following order:

(a) The plaintiff's claim against the first defendant is dismissed;

(b) The first defendant's relief as prayed for in the counterclaim against the plaintiff is granted, only to the extent that the plaintiff is ordered to pay the first defendant an amount of R6603.36 (six thousand six hundred and three rand, thirty-six cents);

(c) The second defendant's counterclaim against the plaintiff is dismissed;

(d) Each party to pay its own legal costs.

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B. FORD
Acting Judge of the High Court
Gauteng Division of the High Court,
Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 22 August 2022 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 August 2022.

Date of hearing: 26, 27, 28 and 29 July 2022
Date of judgment: 22 August 2022

Appearances:

For the plaintiff:	Adv. A. P. Bruwer
Instructed by:	C.F. Van Koller Inc (Germiston)
For the defendants:	Mr. M. Webbstock
Instructed by:	JC Van Der Merwe Attorneys (Germiston)