Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 5126/2021

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

24 November 2023 .....
DATE
SIGNATURE

In the matter between:

RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC Applicant

and

MALWANDLA SOLLY SIWEYA Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The applicant, Recycling and Economic Development Initiative of South Africa NPC, sought delivery of a motor vehicle from the respondent, Malwandla Solly Siweya.

[2] The applicant alleged that it owned the vehicle in question, an Isuzu KB motor vehicle with registration number CA[…] ('the Isuzu'), in the possession of the respondent. If the respondent did not return the Isuzu to the applicant, the latter claimed payment of damages of R215 000.00. In addition, the applicant claimed damages of R21 627.19 per month pursuant to the respondent's unlawful use of the Isuzu in the interim, from 1 December 2019 to date of return of the Isuzu to the applicant.

[3] The respondent opposed the application and denied possession of the Isuzu and delivery thereof to him. The respondent denied that the applicant had any claim to delivery of the vehicle or payment of damages from him.

[4] The applicant proved ownership of the Isuzu by way of a copy of the certificate of registration. Accordingly, the *rei vindicatio* entitled the applicant to claim the Isuzu wherever it might be located and from whomsoever might be holding it.[1]

[5] The applicant alleged that the Isuzu was made available to the respondent by his employer, Kusaga Taka Consulting (Pty) Ltd ('KTC'), a company providing management services to the applicant. Historically, the applicant made at least two vehicles, including the Isuzu, available to KTC.

[6] Subsequently, KTC agreed to return the vehicles to the applicant, one of which had since been returned by the former driver thereof, Mr Dube, to whom I refer herein under. The respondent, however, failed to return the Isuzu to the applicant.

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1 *Chetty v Naidoo* 1974 (3) SA 13 (A).

[7] The applicant relied upon a series of communications via the WhatsApp messaging platform, between a representative of the applicant, one Mr Alexander Felix Erdmann ('Mr Erdmann') and the respondent during December 2019, in which Mr Erdmann requested the respondent to return the Isuzu to the applicant.

[8] The respondent asked that the applicant sell the Isuzu to him, which the applicant declined to do. The respondent replied to the effect that he was flying to Durban that day, returning on Thursday and "… should be able to drop (the Isuzu) on Weekend".

[9] On 13 December 2019, Mr Erdmann contacted the respondent again requesting that he return the Isuzu to the applicant. The respondent replied that he "said on weekend. Am currently in Northern Cape coming back later tonight. Will drop it on Sunday".

[10] The respondent did not return the Isuzu over the weekend. Contact with the respondent on 16 December 2019, resulted in his replying that he "delayed due to my travel to Limpopo will ensure is deliver kindest regards".

[11] Subsequent communication resulted in a promise by the respondent to "confirm to you this afternoon." Notwithstanding, the respondent failed to return the Isuzu to the applicant.

[12] The respondent alleged that the Isuzu, upon his request, was delivered not to him but to his sister (Ms Ngoveni) by one Mr Jan van Wyk on behalf of the applicant.

[13] The respondent failed to provide confirmatory affidavits to his answering affidavit from his sister or from his brother, Mr Musi Siweya, (to whom the respondent also

alleged the Isuzu was handed), or from Mr Jan van Wyk who allegedly delivered the Isuzu to the respondent's brother and sister.

[14] The respondent admitted having been contacted by Mr Erdmann but alleged that the WhatsApp messages relied upon by the applicant did not emanate from his mobile phone or a device of his, and that the applicant should show proof that the WhatsApp messages were delivered to his mobile phone. The respondent then proceeded to "note" the WhatsApp messages.

[15] The respondent, however, did not deny the content of the WhatsApp messages. Paragraph 15 of the founding affidavit served to attach a copy of the WhatsApp messages. The respondent admitted the allegations in paragraph 15 and simply required proof that the messages were delivered to his phone. That was confirmed by Mr Erdmann in the confirmatory affidavit deposed to by him. The respondent also admitted contact with Mr Erdmann at the relevant date.

[16] The applicant relied upon the respondent's agreement to deliver the Isuzu to the applicant in terms of the WhatsApp messages of December 2019, which agreement did not depend on the respondent being in possession of the vehicle. Accordingly, the respondent's breach of the WhatsApp agreement allegedly resulted in the applicant sustaining damages.

[17] Turning to the issues at hand, a respondent answering to a founding affidavit may admit, deny or confess and avoid the applicant's averments. Noting an allegation is not one of the available options in terms of the rule. Furthermore, noting an allegation does not amount to a denial of that allegation. Accordingly, noting an allegation ought to be construed as an admission of that allegation.

[18] It is well established that a litigant's mere denial in general terms of an allegation without engaging with that allegation, is not sufficient to constitute a *bona fide* dispute of fact.[2] A court is entitled, in circumstances where a litigant does not deal adequately with averments made on the papers, to take a robust common sense approach to the averments. The respondent before me did not truly grapple with or deny the applicant's detailed averments regarding the WhatsApp messages. The respondent admitted contact by Mr Erdmann, admitted the content of the WhatsApp messages, and did not deny the WhatsApp messages but merely noted them.

[19] In the light of the respondent's admission of contact by Mr Erdmann, his noting of the WhatsApp messages and admission of the content of the WhatsApp messages, the allegation that the applicant should provide proof that the messages were sent to his mobile phone were contradictory and incongruous. The respondent in fact admitted receipt of the WhatsApp messages given that he admitted contact by Mr Erdmann.

[20] The SCA in *Wightman t/a J W Construction v Headfour (Pty) Ltd,*[3] stated that "a real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."

[21] Given the manner in which the respondent dealt with the critical allegations regarding the WhatsApp communications and his receipt or otherwise of those messages on his mobile phone, (facts that lay purely within his knowledge), the respondent failed to answer "seriously and unambiguously" to those allegations. The respondent did not lay a basis for disputing the veracity or the accuracy of the

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2 *Soffiantini v Mould* 1956 (4) SA 115 (E).

3 *Wightman t/a J W Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) [13] ('*Wightman*')

applicant's averments or that the messages received from the respondent's mobile telephone or alternate device, were in fact sent by him.

[22] The respondent necessarily possessed knowledge of the messages and was able to provide an answer or evidence to the contrary if the applicant's allegations were not true or accurate. Instead of doing so, the respondent chose to base his argument regarding the WhatsApp messages on an "ambiguous denial."[4]

[23] In the circumstances, the respondent's averments regarding the WhatsApp messages were insufficient to constitute a denial and did not amount to a genuine and *bona fide* dispute of fact in respect of the WhatsApp communications received and / or sent by him.

[24] Furthermore, the respondent must be taken to have admitted the WhatsApp messages.

[25] This court dealt in *Jansen van Rensburg v Kitchen Brand*[5] with the admissibility of WhatsApp messages. The learned acting judge[6] referred to the unreported judgment of the SCA in *Kgapaoa v Matlala*[7] in which the SCA dealt with the legal value of WhatsApp communication messages and accepted that agreements concluded by way of WhatsApp messages were valid.

[26] Furthermore, the learned acting judge[8] referred to *Spring Forest Trading 599 CC v Woolbury (Pty) Ltd t/a Eco Wash & Another,*[9] in which the SCA confirmed the legal

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4 *Wightman supra*.
5 *Jansen van Rensburg v Kitchenbrand* 2021 JDR 2494 (GJ) ('Kitchenbrand').
6 *Kitchenbrand id* para [31].
7 *Kgapaoa v Matlala* 2019 JDR 2365 (SCA).
8 *Kitchenbrand* note 5 above para [32].
9 *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Eco Wash & Another* 2015 (2) SA 118 (SCA).

validity of the use of email and a typescript name as a signature, when varying or cancelling a contract that contained a non-variation clause.

[27] The test for admissibility is relevance. Digital messages are admissible if they are relevant.[10] The applicant relied on the WhatsApp communications as being relevant not only to show the respondent's possession of the Isuzu but also to demonstrate his agreement to deliver or return the Isuzu to the applicant wherever the Isuzu might be. Accordingly, the applicant relied upon the agreement concluded by WhatsApp messages, that the respondent would deliver the Isuzu to the applicant.

[28] Thus, the WhatsApp message are directly relevant to the issues at hand and are admissible.

[29] Turning to the respondent's allegation that the Isuzu was delivered to his sister and was in her possession, the respondent provided a statement by one Mr Bafana Dube ('Mr Dube'), a colleague of the respondent who also received delivery of an isuzu vehicle in circumstances akin to those of the respondent. Mr Dube stated in his statement relied upon by the respondent, that the respondent received delivery of the Isuzu. Mr Dube, upon request by the applicant, returned the vehicle delivered to him, to the applicant.

[30] The respondent did not provide any documentary evidence of delivery of the Isuzu to his sister in his answering affidavit. Nor did the respondent furnish any evidence that the Isuzu was handed over to his sister by Mr Jan van Wyk or that Mr Herman Erdmann agreed to the respondent's alleged request that the Isuzu be made available to his sister. The respondent did not furnish confirmatory affidavits from his brother to whom the vehicle was allegedly delivered together with his sister, or his sister

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10 *State v Baleka* as referred to in *Kitchenbrand* id at [33].

or Mr Jan van Wyk. No explanation was furnished by the respondent in his answering affidavit for the absence of those necessary confirmatory affidavits.

[31] The matter was called before me on Monday, 20 February 2023. New legal representation appeared on behalf of the respondent requesting that the matter stand down or possibly be postponed. I allowed the matter to stand down for hearing until Thursday, 23 February 2023 at 10h00, at which time I heard the matter. The respondent's legal representatives, on the evening of 22 February 2023, uploaded a supplementary affidavit by the respondent on caselines. The supplementary affidavit came to the attention of the applicant's legal representatives after the close of business on Wednesday, 22 February 2023, at a time when it was not possible for them to contact the respondent's previous legal representatives in respect of certain averments made in the respondent's supplementary affidavit.

[32] The last paragraph of the supplementary affidavit referred to confirmatory affidavits of the respondent's brother and sister respectively, attached to the supplementary affidavit. The confirmatory affidavits sought to confirm the delivery and possession of the Isuzu as alleged by the respondent in his answering affidavit.

[33] The admission of a supplementary affidavit is an indulgence to be sought from and given by a court on good cause shown by the party seeking the indulgence. One of the essential requirements of good cause is an explanation from the party seeking the indulgence, the respondent, as to the delay in providing the confirmatory affidavits, some two years after the fact.

[34] The respondent did not explain his failure to provide the confirmatory affidavits under his answering affidavit. Nor did the respondent explain why the confirmatory affidavits were furnished two years later. The respondent saw fit to simply annex the

confirmatory affidavits without explanation and to do so after business hours. As a result, the respondent prevented the applicant from investigating the confirmatory affidavits and deprived the applicant of a fair procedure.

[35] A two year delay in providing a confirmatory affidavit to an allegation that is material to the determination of a matter, is not acceptable. The absence of any explanation whatsoever for the failure to make those affidavits available as annexures to the answering affidavit, the absence of any explanation for the delay of two years and the extremely late provision of those confirmatory affidavits, results in it not being just for this Court to exercise its discretion in favour of the respondent.

[36] Accordingly, the confirmatory affidavits of the respondent's brother and sister are not admitted and I do not take cognisance thereof for purposes of determining this matter.

[37] The applicant attached to its replying affidavit, confirmatory affidavits of Mr Herman Erdmann, Mr Alex Erdmann and Mr Jan van Wyk, supporting the applicant's version that the applicant did not agree to deliver the Isuzu to the respondent's sister and denying that the Isuzu was delivered to the respondent's sister. Accordingly, the applicant produced positive evidence that there was no agreement to deliver the vehicle to the respondent's sister and confirming that the vehicle was not delivered to the respondent's sister but to the respondent.

[38] The facts referred to above make it apparent that there was no genuine or *bona fide* dispute of fact in respect of the delivery or possession of the Isuzu. The respondent's version that the Isuzu was delivered on behalf of the applicant to his sister was farfetched, untenable and palpably implausible.[11]

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[11] *Wightman* note 3 above.

[39] In the circumstances, the respondent's version that the vehicle was delivered to his sister, fell within the provisions of *Wightman*[12] as being capable of rejection on the papers. Hence, I am justified in rejecting the respondent's version on the papers before me, as I do.

[40] Whether or not the WhatsApp messages impliedly served as an admission of the respondent's possession of the Isuzu, those messages manifestly evidenced an agreement by the respondent to deliver the Isuzu (whether or not it was in his possession) to the applicant. The latter is entitled to rely upon the respondent's agreement to deliver the Isuzu, as indeed it does

[41] In the result, the respondent's obligation to return the Isuzu to the applicant in terms of the WhatsApp agreement is valid and enforceable whether or not the Isuzu was delivered to the respondent by the applicant initially. Accordingly, the applicant is entitled to the order sought by it that the respondent deliver the Isuzu to the applicant.

[42] In the event of the respondent's failure to deliver the Isuzu to the applicant within five days of the delivery of this judgment, and the Sheriff is unable to effect delivery to of the Isuzu to the applicant, the latter alleged that it was entitled to damages.

[43] The respondent denied the applicant's entitlement to damages but did not place the quantum claimed by the applicant in dispute. The applicant is entitled to damages pursuant to the respondent's failure to abide by the agreement to deliver the Isuzu to the applicant, or if the respondent fails to deliver the Isuzu to the applicant consequent upon the order herein.

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12 Id.

[44] The quantum equates to the value of the Isuzu to the applicant.[13] That is the amount that the applicant would have received if the respondent had complied with his obligations under the agreement to deliver the Isuzu to the applicant.

[45] The applicant established the value of the Isuzu as its insurance value, being an amount of R215 000.00.[14] The respondent did not genuinely dispute the amount of the applicant's damages.

[46] Additionally, the applicant alleged that the respondent had been enriched and the applicant impoverished by the respondent's unlawful use of the vehicle in the interim. The applicant relied upon the reasonable rental costs of the vehicle, being the sum of R21 627.19, from 1 December 2019 to date of return of the Isuzu to the applicant. The applicant is entitled to the damages incurred by it pursuant to the respondent's continued unlawful use of the Isuzu.

[47] In the circumstances, the applicant is entitled to the relief sought by it in the notice of motion.

[48] By virtue of the aforementioned, I grant the following order:

1. The respondent is ordered to deliver the Isuzu motor vehicle having registration number CA […] ('the Isuzu') to the applicant within five days of the date of this judgment.

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13 *Rossouw NO v Land and Agricultural Development Bank of South Africa* [2013] ZASCA 106 at para [13].

14 CaseLines 005-25.

2. In the event of the respondent failing to deliver the Isuzu to the applicant as ordered in paragraph 1 above, the Sheriff of this court is authorised and directed to effect delivery of the Isuzu to the applicant.

3. In the event of the respondent failing to deliver the Isuzu to the applicant as ordered in paragraph 1 above and the Sheriff failing to effect delivery of the Isuzu to the applicant as ordered in paragraph 2 above, the respondent is ordered to pay R215 000.00 to the applicant, together with interest at the prescribed rate *a tempore morae* until date of payment.

4. The respondent is ordered to pay R21 627.19 per month from 1 December 2019 to date of delivery of the Isuzu to the applicant, alternatively to date of payment of R215 000.00 to the applicant by the respondent, whichever is the first occurring.

5. The respondent is ordered to pay the costs of the application.

CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 24 November 2023.

FOR THE APPLICANT:	Mr G Cooper
INSTRUCTED BY:	Cliffe Dekker Hofmeyr Inc
FOR THE RESPONDENT:	Mr Luthuli
INSTRUCTED BY:	T T S Attorneys Inc
DATE OF THE HEARING:	20 & 23 February 2023
DATE OF JUDGMENT:	24 November 2023