



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 2023 - 002870

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |

In the matter between:

KOOPKRAAG (PTY) LTD

APPLICANT

and

TAUTE BOUWER AND CILLIERS INC

FIRST RESPONDENT

CATHARINA ELIZABETH

SECOND RESPONDENT

HURSION PATHER

THIRD RESPONDENT

SHERIFF OF THE HIGH COURT, UMZINTO **FOURTH RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 15 June 2023.

INTRODUCTION

[1] This is an opposed application to set aside the sale in execution as well as an application for the rei vindicatio for the return of a motor vehicle sold on sale in execution by the fourth respondent.

BACKGROUND.

[2] The second respondent, a pensioner, relies on rental income. She leased a vehicle in issue to Mrs Schaal and Mr. Lundi who refused to pay rent and she instructed the first respondent to recover the damages she suffered. The latter obtained a default judgment against Mrs. Schaal and Mr. Lundi in the Magistrate Court Pretoria for the amount of R42 000.00 for arrear rental. The sheriff attached the vehicle and the second respondent instructed him to sell the same in satisfaction of the debt owed to her by Mrs. Schaal and Mr. Lundi and it was sold to the third respondent at an auction held on 11 October 2022.

[3] It appears that the applicant became aware of the sale of the vehicle on the 11th of September 2022. The applicant contacted the fourth respondent in this regard and the latter advised him to file an affidavit. The applicant failed to comply and instead transmitted an email to the first respondent and provided the registration of the vehicle with the view to proving its ownership of the vehicle.

RELIEF SOUGHT.

[4] The sale in execution held on 11 October 2022 is set aside.

[5] The third respondent be ordered to return the applicant's Nissan Juke, with registration number JR87BTGP, VNN SJNFBAF15NFBAF6335934 and engine number HR16073548R within 10 days of the service of this order.

[6] The first respondent be ordered to pay the costs of the application de bonis propriis on an attorney and client scale, alternatively, the second respondent is ordered to pay the costs of this application on an attorney and client scale.

APPLICANT'S FOUNDING AFFIDAVIT.

[7] The Applicant's founding affidavit has been deposed by Pierre Naude, a General Manager of the Applicant with its principal place of employment situated at 433 Rodericks Road, Lynwood, Pretoria. He stated that by virtue of his position as a General Manager, he is authorized to depose to this affidavit and has access to the applicant's files and records relevant to this application.

[8] He stated that the further purpose of this application is to seek de bonis propriis costs order against the first respondent for his actions preceding the sale of the vehicle at an auction whilst he was aware that the applicant is the owner of the same.

[9] The first respondent, acting on instructions of the second respondent, caused a rent interdict summons to be issued in the Pretoria Magistrates Court for the District of

Tshwane against the first and second defendants, Ms. Sheree Schaal and Mr. Christo Lundi. A default judgment was granted on or about the 28th of April 2022. The vehicle was under the instalment sale agreement. The first respondent, at the time of the said application, failed to disclose to the court that the applicant was the owner of the vehicle.

[10] In September 2022 he obtained information to the effect that the fourth respondent has attached the vehicle. He immediately contacted the fourth respondent informing him that the vehicle is the property of the applicant and that it cannot be sold on auction. The fourth respondent advised him to depose an affidavit confirming the ownership of the vehicle and that it is currently under an instalment sale agreement. The applicant transmitted an email to the first respondent and advised him that the vehicle belongs to the applicant and that it should be returned to Ms. Sheree Schaal. The vehicle was not returned as per request.

[11] The applicant drew the attention of the first respondent to the provisions of section 2 (1) (b) of the Security by Means of Movable Property Act 57 of 1993. Several emails were exchanged and the first respondent remained of the view that the vehicle belong to the second respondent. The applicant was not impressed by the first respondent's attitude that the vehicle has been sold and that the applicant is not entitled to any information relating to the sale. The applicant could not ascertain the purchaser until the first respondent provided it with a Vendu Roll on 1 November 2022.

[12] The basis of the applicant's complaint against the first respondent is as follows: Firstly, the applicant stated that the first respondent disregarded the law to enhance the interests of its client, the second respondent. Secondly, the first respondent failed to disclose to the court that the applicant was the rightful owner of the vehicle.

FIRST RESPONDENT'S ANSWERING AFFIDAVIT.

[13] The first respondent's affidavit was deposed by Jonatan Johanan Boucher a director at the firm of attorneys cited as the first respondent in this application. The first respondent stated that the applicant was aware of the sale in execution. The applicant was at liberty to file an interpleader at any stage and was further, advised by the fourth respondent to transmit an affidavit stating that he was the rightful owner and elected not to do so.

[14] The first respondent denies that the deponent of the plaintiff's affidavit has locus standi to bring the application on its behalf. The CIPC search shows no resolution empowering the deponent to either instruct an attorney or bring the application on its behalf.

[15] The first respondent further states that the vehicle was sold pursuant to a judgment, not a rental interdict. A tender to settle the debt was made to the applicant by Mrs Hopgood in exchange for the papers of the vehicle and the applicant elected to remain silent thereby declining the offer.

THE SECOND RESPONDENT'S ANSWERING AFFIDAVIT

[16] The second respondent's affidavit was deposed by Cathrina Elizabeth Jean Joubert and avers the applicant's deponent of the applicant's founding affidavit lacks locus standi. She further stated that the applicant failed to join Ms. Sheree Schaal, who is the judgment debtor in the main action. The latter has an interest in the matter and this application. It is evident from the letters sent by the applicant that the latter requested the vehicle to be returned to Ms. Schaal who was employed by the applicant. The applicant deliberately failed to join her because she feared that she will stop making payments inclusive of insurance payments.

[17] On the 19th of September 2022, the fourth respondent advised the applicant to file an affidavit and this was the remedy available to him in law and the applicant elected not to comply. Consequently, interpleader proceedings could not be initiated.

[18] The applicant was made aware that the attachment and sale were under a court order and warrant of execution. The applicant was advised that section 2 (1) (b) of Act 57 of 1993 is not applicable, however, he is still relying on the same.

[19] A settlement offer was made to the applicant, who refused to accept the same. The vehicle was sold at a less price due to the applicant's refusal to accept the offer.

THE APPLICANT'S SUBMISSION.

[20] Counsel for the applicant submitted as follows:

20.1. Firstly, that the respondents failed to deal with the issue of jurisdiction in their respective answering affidavits. It is trite law that a party that fails to raise jurisdiction before *litis contestatio* is deemed to have submitted to the Court's jurisdiction. The first and second defendants reside within the court's area of jurisdiction and therefore the court has jurisdiction to hear the application.

20.2. Secondly, the third respondent is currently in possession of the vehicle over which the applicant holds security and has no knowledge of the status of the vehicle and/or whether it is insured. The ownership of the vehicle could not have passed to the third respondent because the eNatis documents required for the transfer of the vehicle were never signed by the applicant.

20.3. Thirdly, the first respondent acted *mala fide* purposefully in an attempt to protect the interests of the second respondent, its client. They were aware that the applicant is the owner of the vehicle prior to the sale in execution. It is for this reason that the applicant is seeking a cost order against the first respondent on the scale between attorney and client alternatively, against the second respondent in the event the court found that the former acted within the scope of its mandate.

FIRST RESPONDENT'S SUBMISSIONS

[21] Counsel for the first respondent submitted as follows:

21.1. Firstly, that Mr. Naude, who deposed to the applicant's founding affidavit is a General Manager and not a Director of the applicant. Therefore, he does not have the authority to depose a founding affidavit on behalf of the applicant

because there is no resolution empowering him to depose to the same. A Rule 7 of the Uniform Rules notice was filed and a power of attorney, which the first applicant does not dispute, was served. The applicant failed to substantiate and/or submit written proof that Mr. Naude is authorized to act on behalf of the applicant. Therefore, the applicant failed to prove that Mr. Naude had the authority to act on behalf of the applicant.

21.2. Secondly, that Section (2) (1) (b) of Act 57 of 1993 is not applicable because default judgment has been obtained.

21.3. Thirdly, the applicant's application for the cost order has no merit. The applicant failed to make out a case in its founding affidavit that there are exceptional circumstances indicating dishonesty, malice, or serious negligence on the part of the first respondent. The first respondent, acting on the instructions of its client, acted in terms of the rules. The applicant was requested to file an affidavit to commence the interpleader proceedings and failed to do so. A tender was made to the applicant for payment of the outstanding amount and the same was declined. The applicant did not withhold information from the applicant.

THE SECOND RESPONDENT'S SUBMISSION.

[22] Counsel for the second respondent submitted that:

22.1. Firstly, the applicant's reliance on Section 2 (1) (b) of Act 57 of 1993 is misplaced because the subject matter in these proceedings was attached pursuant to a default judgment and not the landlord's hypothec.

22.2. Secondly, it is conceded that this court has jurisdiction over the second respondent and not the third and fourth respondents. Both are situated and/or carry business in KwaZulu Natal where the attachment and the execution auction took place and the applicant failed to allege that the vehicle is within this court's area of jurisdiction. The applicant bears the onus of establishing that this court has jurisdiction. The first and second respondents did not mention jurisdictional issues, and counsel concedes that this may be interpreted as consent to jurisdiction. Counsel submits that this concession does not confer jurisdiction on this court over the third and fourth respondents regarding the relief sought in the absence of a jurisdictional ground and failure by the third and fourth respondents to oppose this application does not imply that both consented to jurisdiction. The dominant consideration relating to jurisdiction is effectiveness which is lacking in the casu.

22.3. Thirdly, the applicant failed to prove ownership of the vehicle. She further submitted that a legal sale of the vehicle by the fourth respondent interfered with the plaintiff's alleged ownership thereof and rei vindicatio is not the appropriate remedy open to the applicant.

22.4. Lastly, the applicant is seeking to blame the first and second respondents for their inaction and failure to provide an affidavit to commence the interpleader procedure. The applicant has failed to make out a proper case for the court to grant a punitive cost order against the second respondent.

ANALYSIS.

[23] The parties raised several issues and I shall deal with each hereunder.

JURISDICTION.

[24] In motion proceedings, the affidavit constitutes the pleadings and the evidence. It is required that the issues and averments a party relies on must appear clearly in its affidavits. It is trite law that the applicant must make out its case in its founding affidavit and it must contain sufficient facts upon which the court may find in his favour.

[25] In *Minister of Land Affairs and Agriculture v D & Wevel Trust and others*¹

“In motion proceedings, the affidavits constitute both the pleadings and the evidence ... and the issues and averments in support of the parties' cases should appear clearly therefrom”

[26] Both the first and the second respondents did not raise the issue of jurisdiction in their respective affidavits. The issue was raised by the second respondent's counsel in her heads of arguments. I am persuaded by the submissions of the applicant's counsel to the effect that both the first and the second respondents did not make out a case in this regard in their respective affidavits. In my view, this amounts to trial by ambush. Therefore, the submissions of the first and second respondent's counsels are rejected.

LOCUS STANDI.

[27] The applicant's counsel is relying on the matter of *Ganes and Another v. Telecom Namibia Ltd*² and submitted a power of attorney. The facts of the matter the applicant is referring to, in my view, are distinguishable from the facts in casu in that the founding affidavit was deposed by Mr. Kurz, a director of the firm of the respondent's attorneys who had instructions to act on their behalf whereas in casu the founding affidavit was deposed by a General Manager of the applicant and the applicant failed to issue a resolution authorising him to represent the applicant. Therefore, I find that the facts of the matter the applicant's counsel is referring to are not similar to the facts in issue. It is imperative to mention that the court held that Rule 7 provides for the procedure to be

¹ 2008 (1) SA 184 (SCA)

² 2004 (3) SA 615 (SCA), (2004) 25 ILJ 995 (SCA), [2004] 2 ALL 609 (SAC) para 19.

adopted by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant.

[28] The first and second respondent's counsel referred me to the matter of *Cullinan Holdings Limited v Lezmin*³, which, in my view, is apposite. In this matter, the power of attorney was not in dispute. The dispute related to the authority to institute legal proceedings on behalf of the applicant as required by section 66 of the Companies Act. The applicant failed to provide such authority and the court found that the deponent of the founding affidavit had no authority to institute the proceedings on behalf of the applicant.

[29] Section 66 of the Companies Act provides as follows:

“The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform functions of any authority of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.”

[30] I am duty bound to follow the precedent laid in the matter of *Cullinan Holdings Limited* mentioned supra. The applicant failed to provide the court with a resolution authorizing the deponent of its founding affidavit to act on its behalf. Therefore, I find that the applicant has failed to demonstrate that the deponent of its affidavit has locus standi.

NON-JOINDER.

[31]] In *Absa Bank Limited v. Naude and others*,⁴ the court held as follows:

“The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of litigation which may prejudice the party that has not been joined.”

[32] The fourth respondent attached the vehicle in issue which was in possession of Mrs. Schaal pursuant to a default judgment that was granted against her and Mr. Lundi on the 28th of April 2022. The applicant in its emails to the first respondent requested that the vehicle be returned to Ms. Schaal. I am, therefore, persuaded by the

³ (4 February 2023)

⁴ 2016 (6) SA 540 (SCA)

submissions of the respondents to the effect that Ms. Schaal has a direct and substantial interest in the matter and should have been joined in this motion.

SALE IN EXECUTION.

[33] In *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others*⁵ the court held as follows.

“Apart from the provisions of Uniform Rule 45A, a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution or to suspend an order. It might, for example, stay a sale in execution or suspend an ejection order. Such discretion must be exercised judicially. As a general rule, a court will only do so where injustice will otherwise ensue. A court will grant a stay of execution in terms of Uniform Rule 45A where the underlying causa or judgment debt is being disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes. As a general rule, courts acting in terms of this rule will suspend the execution of an order where real and substantial injustice compels such action”.

[34] In *Stoffberg N.O and Another v Capital Harvest (Pty) Ltd*,⁶ it was held as follows:

“The broad and unrestricted wording of rule 45A suggests that it was intended to be a restatement of the courts’ common discretionary power. The particular power is an instance of the courts’ authority to regulate its own process. Being a judicial power, it falls to be exercised judicially. Its exercise will therefore be fact specific and the guiding principle will be that execution will be suspended where real and substantial justice requires that. ‘Real and substantial justice’ is a concept that defies precise definition, rather like ‘good cause’ or ‘substantial reason’. It is for the court to decide on the facts of each case whether considerations of real and substantial justice are sufficiently engaged to warrant suspending the execution of a judgment; and, if they are, on what terms any suspension it might be persuaded to allow should be granted”.

[35] The following facts are common cause: Firstly, the first respondent, as per instructions of the second respondent obtained a default judgment in the Pretoria

⁵ 2011 (4) SA 149 at par 51-52.

⁶ (2130/2021) [2012] ZAWCHC 37 (March) at par 26.

Magistrate's court. Secondly, a warrant of execution was executed and the vehicle was attached. Thirdly, as of the 19th of September 2022, the applicant was aware of the attachment and was requested to provide an affidavit and failed to comply. Fourthly, the sale in execution proceeded on the 11th of October 2022.

[36] The applicant does not allege that the sale in execution was conducted irregularly. Neither does the applicant allege that the sheriff acted unlawfully. The applicant became aware of the sale in execution with effect from the 22nd of September 2022. He was advised by the sheriff to depose an affidavit stating that he is the owner of the vehicle and failed to do so.

REI VINDICATIO.

[37] The main objective of rei vindicatio is to restore the physical control of the res to the owner. The following three requirements must be met before rei vindicatio can be successfully invoked: firstly, the applicant must prove that he/she is the owner of the res, secondly that the res was in possession of the respondent at the commencement of the action, and lastly, that the res which is vindicated is still in existence and identifiable⁷.

[38] In his affidavit, the applicant stated as follows: "It is humbly submitted that the applicant is the owner of the vehicle and that the third respondent has the vehicle. It can further not be disputed that ownership of the vehicle could not have passed to the third respondent as Enatis documents for the transfer of the ownership were never signed by the applicant".

[39] I have mentioned earlier in this judgment that the validity of the judgment of the magistrate's court as well as the writ issued pursuant thereto is not in issue. I am persuaded by the submissions of the second respondent's counsel that the undisputed judgment interfered with the applicant's ownership of the vehicle. The applicant, in my view, unwittingly contributed to the interference by not submitting an affidavit to prove ownership of the vehicle.

[40] The applicant's assertion that it cannot be disputed that the third respondent is in possession of the vehicle stems from the fact that a Vendu Roll, which was issued to him by the first respondent, indicates that the third respondent is the purchaser of the

⁷ G Muller et al The Law of Property: Silberberg and Schoeman 6 ed (2019) at 269-270.

vehicle. A purchaser, in my view, is not necessarily the possessor and to assume that the third respondent is in possession of the vehicle falls short of establishing who the possessor was as at the commencement of this application. Lastly; the applicant's founding affidavit is silent on whether or not the vehicle is currently in existence and can be identifiable. In the premises, I find that the applicant has failed to make out a case for the relief of rei vindicatio as sought and his application falls to be dismissed.

COSTS DE BONIS PROPIIS.

[41] In *Multi-Links Telecommunications Limited v Africa Prepaid Services Nigeria Limited*, the court held as follows⁸:

“Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his pocket. The obvious policy consideration underlying the court's reluctance to order costs against legal representative personally, is that attorneys and counsel are expected to pursue their client's rights and interest fearlessly and vigorously without due regard for their personal convenience. In that context, they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal Practitioners must present their case fearlessly and vigorously, but always within the context of a set ethical rules, that pertain to them, and which are aimed at preventing practitioners from becoming party to deception of the court. It is in this context that society and the courts and professions demand absolute personal integrity and scrupulous honesty of each practitioner.”

[42] In *Minister of Land Affairs and Agriculture v. D & T Wevell Trust and others*⁹ the court held as follows:

“In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be

⁸ 2013 (4) ALL SA 346.

⁹ 2008 (2) SA 184 (SCA)

expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.”

[43] The applicant's founding affidavit states that “a series of emails were exchanged” and failed to deal with the same. The applicant expected the respondents to go through those emails and speculate their relevance. This, in my view, is trial by ambush as envisaged in the matter mentioned supra and the application falls to be dismissed on this ground alone. I shall, however, continue to deal with allegations as contained in the applicant's founding affidavit to investigate further whether or not the applicant has made out a case for the relief sought.

[44] The applicant had the first discussion with the sheriff, who advised him to depose an affidavit as provided for in Rule 44(2) of the Magistrate's Court rules proving ownership. The applicant elected not to comply. Instead, the applicant elected to engage the first respondent for no apparent reason. Whilst the applicant was wasting time and resources engaging the first respondent the sheriff proceeded with the sale in execution.

[45] The applicant, in my view, was desperate to halt the sale in execution and was under the illusion that the first respondent will succumb to the pressure he exerted on him and unlawfully halt the sale in execution as per its instruction instead of going through what it perceived to be a lengthy and cumbersome procedure of interpleader proceedings. Therefore, the applicant missed the opportunity to resolve the matter by simply deposing to an affidavit. The first respondent again issued him with a Vendu Roll and further offered to settle the account and the applicant declined the same.

[46] The subject matter is that this application was attached pursuant to a default judgment granted by the Pretoria Magistrate's Court on 28 April 2022. It appears the applicant is not aggrieved by that decision because he is not challenging that judgment and its validity inclusive of the writ issued pursuant to that judgment. The first respondent was correct in advising the applicant that the provisions of section 2 (1) (b) of Act 57 of 1993 were not applicable because the cause of action in casu is not arrear rental.

[47] The applicant further stated that the first respondent failed to inform the court that the applicant is the owner of the vehicle in issue which was under an instalment sale

agreement. The applicant's allegation, in my view, is unsubstantiated. The applicant failed to demonstrate that during the proceedings in the Magistrate's Court, the respondent was aware that the applicant was the owner of the vehicle and withheld the information.

[48] In my view, the first respondent took efforts to assist the applicant and the latter misinterpreted the law and/or decided not to heed the advice. The applicant now seeks to shift the blame to the first respondent whom he did not give formal instructions to act on its behalf ignoring the fact that the first respondent was acting on the lawful instructions of the second respondent and had a duty to safeguard her interests. The liability of the second respondent for a punitive cost order is logically dependent on the actions or inactions of the first respondent. Therefore, I am not persuaded that the applicant made out a case for the relief he sought against both the first and second respondents.

COSTS.

[49] The first respondent's counsel submitted that a punitive cost order should be granted against the applicant on an attorney and client scale alternatively costs be awarded against the applicant's attorney of record on an attorney and client scale, jointly and severally the one paying the other to be absolved. The reason advanced for this application is that the applicant acted on the advice of its attorney. The second respondent's counsel submitted a punitive costs order is appropriate in the circumstances of this matter.

[50] It is trite law that costs must follow the results. Firstly, the first respondent in its answering affidavit is silent on the issue of costs against the applicant's attorneys. The issue was first raised in the heads of arguments by the first respondent's counsel. I, consequently, find that this amounts to a trial by ambush which should not be allowed.

[51] It may be correct that the applicant acted on instructions of its attorney, however, I am alive to the possibility that the applicant might have pressured its attorney of record to recover the vehicle promptly. Therefore, I am not persuaded by the submission made by the first respondent's counsel and the same is rejected.

[52] The applicant placed the first and second respondents out of pocket and caused them a great deal of inconvenience by simply failing to depose an affidavit proving ownership. Therefore, I am of the view that a punitive cost order is appropriate.

[51] Therefore, the applicant's application is dismissed with costs on an attorney and client scale.

ORDER

1. The application is dismissed.
2. The applicant is ordered to pay the costs of this application on an attorney and client scale.

**JM MOGOTSI
ACTING JUDGE OF THE HIGH
COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

APPLICANT'S COUNSEL:	ADV AA BASSON
APPLICANT'S ATTORNEYS:	TIM DU TOIT & CO INC
FIRST RESPONDENT'S COUNSEL:	ADV M COETZEE
FIRST RESPONDENT'S ATTORNEYS:	TAUTE, BOUWER & CILLIERS INC
SECOND RESPONDENT'S COUNSEL:	ADV NC HARTMAN
SECOND RESPONDENT ATTORNEYS:	HOPGOOD ATTORNEYS INC