



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

Case No. **045305/2023**

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: 10/01/2024

JULIAN  **YENDE**

24 JANUARY 2024

In the matter between:

LELOBA PLANT HIRE & LOGISTICS (PTY) LTD

Applicant

And

**THANDI GRATITUDE MASHISHI
AMATHABETHE KA DUDUKANE PROJECTS CC
JPS TOURS CC t/a JPS TOURS**

First Respondent
Second Respondent
Third Respondent

JUDGMENT

YENDE AJ

Introduction

[1] The Applicant is LELOBA PLANT HIRE & LOGISTICS (PTY) LTD, a private company with limited liability incorporated in terms of the laws of the Republic of

South Africa, and more specifically Companies Act 71 of 2008, with registration business address at 306 Lois Avenue, Newlands, Menlyn, Gauteng Province.

[2] The First Respondent is THANDI GRATITUDE MASHISHI, an adult person with full legal capacity, presently appointed as director and/or member of the Second Respondent, residing at 33 Via Veneto Street, Lombardi East, Shere Agricultural Holding, Pretoria East, Gauteng Province.

[3] The Second Respondent is AMATHABETHE KA DUDUKANE PROJECTS CC, a close corporation with registration CK2010/ 060828/23, incorporated in terms of the company Laws of the Republic of South Africa, with business address at 33 Via Veneto Street, Lombardi East, Shere Agricultural Holding, Pretoria East, Gauteng Province.

[4] The Third Respondent is JPS TOURS CC t/a as JPS TOURS, a close corporation with registration 1999/055715/23, incorporated in terms of the company Laws of the Republic of South Africa, and more specifically the Close Corporations Act 69 of 1984, with registered business address at Postal Box 241, Groblersdal, 0474, Limpopo Province.

[5] This matter concerns an opposed application for *rei vindicatio* in respect of three buses leased by the applicant to the third Respondent, which the first respondent allegedly effected change of ownership into her personal name without the competent authority of the Applicant. Only the first and second respondents opposed this application. To give crisp perspective to this judgment I consider it prudent to give a brief genealogy of the parties herein as well as the genesis of the is litigation.

[6] There is a relationship of consanguinity and affinity between the parties in this litigation. The director of the applicant is the father of one Mr Mpako "Neo" Mashishi

who is married to the first respondent, making the director of applicant a father in-law of the first respondent. The first respondent is also the sole director of the second respondent. The first respondent and the director of the third respondent are united by ties of consanguinity as father and daughter, thus the director of the third respondent is the father in-law of Mr Mpako Neo Mashishi.

The Factual matrix.

[7] The “family/ extended family” as mentioned *supra*, are involved in the transportation business. Late in 2019 the third respondent had secured a scholar transportation contract with the Limpopo Department of Education to transport school children between the school and their place of abode. Conditional to this scholar transportation tender/contract was proof of ownership of buses. The third respondent did not own the required buses as a result the third respondent and applicant entering into the lease agreement authorizing the transfer of the required buses to the third respondent for the duration of the lease agreement¹.

[8] It is apposite to mention that the third respondent took possession of the buses and operated same as agreed, and commenced the business operation of transporting scholars in terms of the awarded scholar transportation tender. It is important to restate the relevant clause(s) of the lease agreement that facilitated and authorized the change of ownership of the three buses from the applicant to the third respondent. The relevant clause(s) are the following²;

[1] *“1.1The LESSOR hereby lets, and the LESSEE hereby hires, the BUSES for a period of 3 (Three) years commencing on the 16 day of January 2020 and terminating on the 31 day of December 2022, notwithstanding the date of the signing of this agreement;*

¹ (Caselines paginated pages. 02-4 to 02-05.-Founding affidavit pgs. 1-5) DELE ATT REF TO CASE)

² (FA1 –Lease agreement /Caselines paginated pgs. 03-1 to 03-4)

[2] *1.2 On the expiry of the said period of 3 (Three) years, if the LESSEE does not off hire the buses, the lease shall continue to operate on a month to month basis, both parties being obliged and entitled to give the other two calendar months' notice of termination of the lease during the further period, unless the lease is extended by agreement between the parties;*

CONDITIONS OF AGREEMENT

[3] *2.1 The OWNER shall change ownership of the buses into JPS Tours during the period of this contract/agreement of 36 months, thereafter the LESSEE (JPS TOURS) will have to be re-registered back to the owner (Leloba Plant Hire and Logistics) The 4 X Mercedes bens buses will be changed ownership as agreed....³).*

[9] It is apposite to observe that the Lease Agreement was duly signed by the parties to the agreement on the 16 January 2020 and accordingly remains valid for the duration of the lease contract.

Factual Matrix.

[10] I now turn to the applicant's germane submissions. The applicant averred that in terms of the duly signed Lease Agreement the third respondent was at all material times fully aware that upon the completion of the lease contract, ownership of the buses would have to revert to the applicant, as had been agreed between the parties in terms of the Lease Agreement⁴.

³ Ibid (pgs. 03-2)

⁴ Ibid (pgs.03-2)

[11] The applicant alleges that on 18 July 2022 the first respondent unlawfully effected the change of ownership of two buses into her personal name and later on the 16 March 2023 also unlawfully effected change of a third bus into her personal name with the knowledge and the authority of the applicant⁵.

[12] The applicant averred that the first respondent has effectively stolen his buses, at the time when buses were held by the third respondent pursuant to the legal dictates of the lease agreement between the applicant and the third respondent. That there exists no *bona fide* and legal underlying cause for the transfer of the buses from the third respondent to the first respondent. That in terms of the duly signed lease agreement the third respondent was never authorized to transfer the ownership of the buses into the name of the first respondent⁶.

[13] The applicant averred that as a sole director of the applicant, he never authorized nor requested the first respondent to approach the third respondent to obtain the ownership documents of the buses, let alone authorized the transfer of the ownership of the buses into the name of the first respondent⁷. The applicant further averred that his son Mr Mpako "Neo" Mashishi was stunned by the conduct of the first respondent and that he was unaware of the reason why the first respondent effected change of ownership of the buses into her personal name⁸. The applicant denied that he ever authorized his son who was not even a director nor a shareholder of the applicant to change the ownership of the buses into the first respondent's personal name⁹.

[14] I now turn to the first respondent's opposite submissions. The first respondent contends that, this application is a knee-jerk reaction following an urgent spoliation application which was brought by the first respondent against her estranged husband,

⁵ (Founding affidavit paragraph 35)

⁶ (Founding affidavit paragraph 81)

⁷ (Founding affidavit paragraph 39)

⁸ (Founding affidavit paragraph 41)

⁹ (Founding affidavit paragraph 42)

Mr Mpako Mashishi, being the controlling mind behind the applicant. The spoliation application succeeded, and the first respondent's possession of the buses in question was restored on the 14 April 2023 pursuant to an order to that effect.

[15] The first respondent alleges that the buses in question are used by the first and second respondents to execute Government tenders to transport minor children to school, the first respondent being the director and the shareholder of the second respondent.

[16] The first respondent contends that the applicant, her father-in-law is simply a **front** and that the **controlling mind behind** the applicant is her husband. It is further contended by the first respondent that her husband being the controlling mind of the applicant, clearly gave her **tacit or implied, if not expressed, permission** to transfer the buses into her name.

[17] The first respondent alleges that the applicant's son closed the proverbial taps on her and the children born of their marriage since January 2023, clearly conveying his dissatisfaction with the fact that the first respondent wants a divorce. Part of his process was to dispossess the first respondent, alternatively the second respondent, of buses used to give execution to a Government tender.

Evaluation.

[18] It is apt to observe that both the applicant and the third respondent are a private company with limited liability. Ostensibly a competent authority to execute action must be contained in the form of a company's resolution and /or a mandate to perform such an act. A Lease Agreement was entered into between the applicant and the third respondent with regard to the buses. The facts in this application are in fact common cause. Having said that, the need to delve into the facts beyond what I have

adumbrated *supra* as I would under a different set of circumstances ordinarily do, does not exist. I have decided not to refer the matter for oral evidence but to deal with the crisp issue being the legal competency of Mr Mpako “Neo” Mashishi to effect the change of title of ownership of the three buses to the first respondent.

[19] The applicant disputed that he ever authorized his son who is not even its member nor a shareholder to dispose of the buses in the manner alleged by the first respondent.

[20] The first respondent’s defense that her husband being the controlling mind of the applicant, clearly gave her tacit or implied, if not expressed, permission to transfer the buses into her name lacks legal basis in the absence of a ***declarator of alter ego*** on the part of Mr Mpako “Neo” Mashishi in respect of the applicant. For such a declaration, substantive evidence is required to be led. In this application, insufficient evidence was put forward by the first respondent no direct nexus was alleged nor proven in respect of Mr Mpako Mashishi and the applicant.

[21] The first respondent has failed to bring a substantive application and / or a declaratory action with regard to the allegations of *alter ego* on the conduct of the Mr Mpako “Neo” Mashishi in respect of the applicant. To prove that he held the legal competency to authorize the transfer of the buses to her.

[22] I found no legal authority to the effect that a person who is not a member of a company with limited liability like the applicant can willy-nilly dispose of the company assets without the underlying legal authority and/or company resolution to do so.

[23] As adumbrate *supra* the applicant and the third respondent had deemed it meet to enter into a Lease Agreement in respect of the three buses in order to facilitate the change of ownership of the three buses from the applicant to the third respondent and

clause(s) 1.1 dealt with the period in terms of which the buses would be leased to the third respondent and clause(s) 2.1 being a conditional clause dealt specifically with what should happen at the end of the lease agreement. In other words, at the end of the lease the three buses' ownership title would return to the applicant. It appears from the lease agreement that the transfer of ownership in the buses was temporary for the duration of the lease agreement. At the end of the lease agreement, the third respondent was obliged to transfer the ownership back to the applicant. The lease agreement did not authorize the third respondent to transfer ownership of the buses to any third party.

[24] The first respondent has dismally failed to demonstrate in law how it is and/or was permissible for her to acquire the title of ownership of the busses without the authority of the applicant including that of the third respondent as envisaged in the Lease Agreement.

[25] The first respondent does not dispute the fact that the applicant and the third respondent had entered into a Lease Agreement regarding the buses in question and there is no averment by the first respondent to the effect that she acquired the ownership of the buses in terms of the lease agreement through the third respondent.

[26] The applicant does not dispute the E-Natis documents, which the first respondent relies on as being the *prima facie* owner of the buses. It disputed the legal threshold in terms of which the first respondent acquired the ownership of the buses in question. In other words, no competent legal authority was bestowed on Mr Mpako "Neo" Mashishi to dispose of the applicant's three buses in the manner he did. Conversely, it logically follows that the first respondent could not acquire legal title of ownership in respect of the three buses in the manner she did.

Applicable Legal framework.

[27] It is trite that the jurisdictional facts which an applicant seeking to obtain vindicatory relief has to show are: (i) that the applicant is the owner of the property (movable or immovable) see, *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*¹⁰; and (ii) that the respondent is in possession of that property see *Chetty v Naidoo*¹¹.

[28] In respect of the *rei vindicatio*, Jansen JA stated the following in *Chetty v Naidoo*:¹²

“It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* – the *onus* being on the defendant to allege and establish any right to continue to hold against the owner But if he goes beyond alleging merely his ownership and the defendant being in possession ..., other considerations come into play. If he concedes in his particulars of claim that the defendant has an existing right to hold (e.g., by conceding a lease or a hire-purchase agreement, without also alleging that it has been terminated..) his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then *ex facie* the statement of claim he must at least prove the termination, which might, in the case of a contract, also entail proof of the terms of the contract.” [Emphasis added.]

¹⁰ 1993 1 All (SA) 259 (A), 1993 (1) SA77 (A) p.82C.

¹¹ 1974 All (SA) 304 (A) ,1974 (3) SA 13 p 20b-g.

¹² *Ibid* p20b-g

[29] The right to ownership has been described as the most comprehensive right a person can have in respect of a *res*, see *Gien v Gien*¹³.

[30] In *BLC Plant Company (Pty) Ltd v Maluti-A-Phofung Local Municipality*,¹⁴ Mathebula J referred to *Gien* and stated further that:

“This right is enshrined in section 25(1) of the Constitution of the Republic of South Africa Act 108 of 1996. In matters of this nature for an owner to succeed in his action, he must prove on a balance of probabilities the following viz: - ownership, the property is still in existence and clearly identifiable and lastly that the defendant has possession or detention of it. This right is carefully protected by the courts.” [my emphasis.]

[31] In the context of the lease agreement where the transfer of ownership in the buses was only temporarily, the applicant “retained” ownership in the buses as such, the applicant is entitled to institute the *rei vindicatio*. The third respondent’s inaction to oppose the application and the file an opposing affidavit supports the foregoing. It follows then that the applicant’s contention was not gainsaid in any manner.

[32] In conclusion, I am satisfied that the applicant has met the jurisdictional requirements of *rei vindicatio*. For the reasons adumbrated *supra*, I find that the first and second and respondents have not discharged the onus of proving a legal and lawful ownership of the three busses. I find that the applicant has not authorised the transfer of the three buses to the first respondent. The applicant and the third respondent had entered into a valid lease agreement in terms of how the transfer of title of ownership of the buses had to be facilitated and how the title of ownership to the said buses had to revert to the applicant at the end of the Lease Agreement.

¹³ 1979 (2) SA 1113 (T) at 1120 C.

¹⁴ [2018] ZAFSHC at para 4.

[33] The defence by the first respondent to the effect that her husband being the controlling mind of the applicant, clearly gave her tacit or implied, if not expressed, permission to transfer the buses into her name is rejected as same had not been proven in terms of the required legal precepts. It is not a *bona fide* real and good defense.

[34] Consequently, I am constrained to make the following order;

Order

[1] The First and /or Second Respondent is directed to restore to the applicant the possession of the buses identified as Mercedes-Benz buses, registration number FHW 402 L; FHW 392 L and Mercedes- Benz Panorama registration number FSV 360 L;

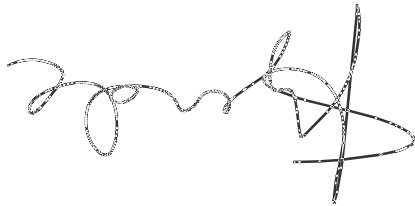
[2] The First Respondent is directed to restore and transfer the ownership title of the aforementioned buses to the Applicant within 14 (Fourteen) days of the granting of this order, and to sign all the necessary documents to give effect to the transfer of ownership title of the aforementioned buses;

[3] The sheriff of this Court or his/her Deputy is authorized to take possession of the aforesaid buses, in the event that the First respondent and/or the Second Respondent refuses, fail to comply with the Order at Paragraph 2 above, restore possession of the buses to the applicant ;

[4] The Sheriff of this Court or his/her Deputy is authorized to sign all the necessary documents to effect the restoration and transfer of the ownership title of the aforesaid buses to the applicant, in the event that the first respondent and/or second

respondent refuses and/fail to comply with the Order at paragraph 2 above, and restore ownership title of the buses to the Applicant;

[5] The First and/or Second Respondent is directed to pay the cost of this application on a party and party scale, jointly and severally liable.



J YENDE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

*This judgment was prepared by **YENDE AJ**. It is handed down electronically by circulation to the parties/their legal representatives by e-mail and uploaded on Caselines electronic platform and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed **24 January 2024**.*

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