



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case number: 14058/2018P

In the matter between:

<b>MAHARAJ'S COACH AND BUS HIRE CC</b>	Plaintiff
and	
<b>DEALERSHIP MIDDELBURG MAN (PTY) LTD</b>	First Defendant
<b>STANDARD BANK OF SOUTH AFRICA</b>	Second Defendant
<b>SOUTH AFRICAN LINK SAFARIS CC</b>	Third Defendant

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<b>Coram:</b>	<b>Koen J</b>
<b>Argument heard on:</b>	<b>15 June 2022</b>
<b>Delivered:</b>	<b>10 August 2022</b>

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**ORDER**

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- (a) In respect of the plaintiff's claim in convention the following orders are granted:
- (i) It is declared that the agreement concluded between the plaintiff and the first defendant in respect of the purchase of the new MAN bus is cancelled;
  - (ii) The first defendant is directed to pay an amount of R340 000 to the plaintiff together with interest thereon at the prescribed rate *a tempore morae* from date of judgment to date of payment;

- (iii) The further relief claimed is dismissed;
  - (iv) The first defendant is directed to pay one third of the plaintiff's costs of the claim in convention.
- (b) The first defendant's claim in reconvention is dismissed with costs.
- (c) In respect of all costs previously reserved, each party is directed to pay its own costs.

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## JUDGMENT

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**Koen J**

### **Introduction**

[1] This is an action in which:

- (a) the plaintiff, Maharaj's Coach and Bus Hire CC, seeks damages from the first defendant, Dealership Middelburg MAN (Pty) Limited, arising from an alleged repudiation by the first defendant, and the resultant cancellation of an agreement relating to the purchase by the plaintiff of a new 2018 26.360HB4 MAN bus (the bus); and
- (b) the first defendant, in its counterclaim, seeks specific performance of the agreement, claiming payment of the balance of the deposit alleged to have been required to be paid and remaining outstanding by the plaintiff in respect of the purchase of the bus, against which payment it be ordered to deliver the bus to the plaintiff.

[2] The disputes between the parties were initially sought to be determined by way of application proceedings commenced by the plaintiff on 12 December 2018. Various material disputes were identified on the papers, which were referred to oral evidence by Ploos van Amstel J on 21 June 2019. The costs of the application and the hearing before him, were reserved for decision by the court hearing the oral evidence.

[3] The parties thereafter applied for the matter to be referred to trial. A consent order to that effect was granted by Potgieter AJ. The wasted costs were reserved and all previous reserved costs orders remained reserved for determination by the trial court hearing the matter. Pleadings were thereafter exchanged in respect of both the plaintiff's claim in convention and the first defendant's claim in reconvention. This judgment relates to the trial which proceeded before me.

### **Background**

[4] The purchase price of the bus was the sum of R2 941 800. The acquisition of the bus was to be financed by the second defendant, the Standard Bank of South Africa. It agreed to finance the balance of the purchase price after deduction of the sum of R750 000, which the plaintiff had offered, and which the second defendant required to be paid, as a deposit. The plaintiff claims no relief against the second defendant.

[5] The disputes between the parties trace their origin to the requirement of the deposit of R750 000. It is not disputed that R340 000 was received by the first defendant in part payment of the deposit. The R340 000 was the full deposit previously required and indeed paid to the first defendant by South African Link Safaris CC, the third defendant in respect of a transaction for the acquisition of the same bus pursuant to a written offer to purchase completed and signed on 25 July 2018. The third defendant is a close corporation of Leshen Maharaj (Leshen), the son of Mr Deonarain Maharaj (Mr Maharaj) who is the driving force behind, and who at all material times represented, the plaintiff. The third defendant's application for finance for the balance of the purchase price of the bus to various financial institutions was however unsuccessful. The acquisition of the bus by the third defendant was consequently aborted. The plaintiff was then substituted in the place of the third defendant as the purchaser of the bus. It was agreed between the third defendant and the plaintiff that the R340 000 already paid to the first defendant would be 'made over' to the plaintiff and used as part payment of the deposit of R750 000. The first defendant accordingly retained the R340 000 which had been paid to it by the third defendant on that basis. The above facts are not in dispute. No relief is claimed by the plaintiff against the third defendant either.

### **The parties' contentions**

[6] The central dispute relates to the balance of the deposit in the sum of R410 000.

[7] The plaintiff alleges that the first defendant, represented by its salesman, Mr Lourens van Staden (Mr van Staden), agreed to accept an old Mercedes Benz bus ('the Mercedes bus') which the plaintiff had previously left with the first defendant for possible sale on a consignment basis, as a trade-in to cover the balance of R410 000. On the plaintiff's version it had no further outstanding obligations and it had become entitled to the delivery of the bus to it. It also contends further that the first defendant had demanded payment of the sum of R420 000 before it would deliver the bus, and that such demand was in excess of what was due to be paid, even on the first defendant's version.

[8] The first defendant denies any agreement that the Mercedes bus was accepted as a trade-in to make up the outstanding deposit amount of R410 000, and pleads that the balance of the deposit was required to be paid to the first defendant. Until such time as the plaintiff paid the deposit in full, the first defendant would be excused from delivering the bus to the plaintiff. As the deposit was not paid in full, the first defendant refused to deliver the bus to the plaintiff.

[9] It is the first defendant's refusal to accept the Mercedes bus as a trade-in, and further the demand for R420 000 when R410 000 was outstanding on the deposit, resulting in the bus not being delivered to it, which the plaintiff contends constitutes a repudiation and/or breach. Pursuant thereto it cancelled the agreement on 8 October 2018 in an email sent by its attorneys to the first defendant. It accordingly claims damages to be put in the position it would have been in had the agreement not been concluded. The first defendant in turn claims payment of the balance of the deposit, against which it be ordered to deliver the bus to the plaintiff.

### **The pleadings**

[10] Claim 1 in the plaintiff's declaration is for a declaratory order that the agreement concluded between the plaintiff and the first defendant on 19 September 2018 was cancelled, and for damages relating to instalments paid and in the future to be paid by the plaintiff to the second defendant in terms of the finance agreement concluded between them, insurance premiums paid and future insurance premiums to be paid by the plaintiff in respect of the bus, licensing fees paid and to be paid in the future by the plaintiff, and for the R340 000.00 paid in respect of the deposit. Claim 1 totalled R2 929 535.20. Claim 2, in the alternative to claim 1, was based on an alleged fraudulent misrepresentation and was for payment of the sum of R1 502 806.90.

[11] The first defendant defended the relief claimed by the plaintiff and counterclaimed. The first defendant's 'counterclaim 1' is for payment of the balance of the deposit in the sum of R410 000.00 against which it be ordered to deliver the bus to the plaintiff. Its 'counterclaim 2' is for storage costs of the bus in the sum of R233 162.50.

### **The issues persisted with in the trial**

[12] The plaintiff did not persist with its claim 2 and reduced its claim 1 to R2 436 104.58 calculated as follows:

Payments as instalments from 20/10/2018 to 20/3/20 at R87 545,05 per month	R1 575 819,00
Payments as instalments from April 2020 to June 2020 at R87 545 x 3 months	R 265 191,00
Insurance at R5 092.86 for 20/09/2018 to 01/03/2020	R 89 052.68
Licence fees – 2019	R 119 937.90
Licence fees – 2020	R 46 104.00
Deposit	<u>R 340 000.00</u>
	R2 436 104.58

[13] As there was a bare denial of the plaintiff's claim for damages, the plaintiff bears the onus to prove its damages as pleaded.

[14] The first defendant did not lead evidence on its claim for storage costs and formally abandoned this claim in its heads of argument. This judgment accordingly only deals with plaintiff's claim 1, as amended and set out above, and the first defendant's counterclaim 1 for payment of the R410 000 against which it be directed to deliver the bus to the plaintiff.

### **The agreement**

[15] It is regrettable that the allegations in the plaintiff's declaration were not helpful in crisply identifying the true issues in dispute between the parties. The rules regarding pleadings and practice require that the plaintiff's case be pleaded in separate distinct averments<sup>1</sup> setting out in clear concise statements the material facts upon which it relies<sup>2</sup> for the relief claimed. Instead, the declaration reads in places like extracts from the affidavits in the application, which it was conceded during argument to be. The declaration followed a narrative form, with reference to various annexures annexed thereto, which were invariably referred to with the injunction that 'the contents of [the particular annexure] be incorporated herein as though specifically averred to.' That is contrary to accepted practice.<sup>3</sup> It is not expected of a court, even in application proceedings, to have to trawl through annexures to try and determine which portions of the annexures are relevant, and to identify the possible *facta probanda*.

[16] It is crucial to identify the agreement which the plaintiff maintains was cancelled. It is necessary to identify the material terms and conditions of what was truly the transaction relating to the acquisition of the bus, because that is relevant not only to determining whether there was a repudiation, but also in determining what damages might arise from or might be recoverable following the cancellation. As a matter of law,

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<sup>1</sup> Rule 18(3).

<sup>2</sup> Rule 18(4).

<sup>3</sup> *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H, *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others* 1999 (2) SA 279 (T) at 324F-G, *Connolloy v The Southern Life Association Ltd and another* 2000 JDR 0629 (SE) para 12, *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others* 2008 (2) SA 184 (SCA) para 43 at 200, *Home Talk Developments (Pty) Ltd and others v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA) paras 28 – 29.

damages arising from a cancellation of an agreement are those that arise directly from the breach of the agreement and/or were within the contemplation of the parties at the time of the conclusion of the agreement as the reasonable and probable consequence of such breach.<sup>4</sup>

[17] The plaintiff's retort to the above criticism has been that the agreement it relies on is admitted on the pleadings. That is partly correct, but the difficulty is that what is alleged and admitted is not always consistent with the underlying documents and evidence annexed to the declaration in support of the agreement, or the damages claimed. This is particularly so where the annexures have been annexed on the basis that 'the contents of [the particular annexure] be incorporated herein as though specifically averred to.'

[18] Insofar as there is an admission of the agreement on the pleadings, the following is apposite. In prayer (a) to its declaration the plaintiff seeks a declaratory order that the agreement 'averred to at paragraph 6.1 (a) to (f) . . . [of the declaration] is cancelled.' The agreement relied upon by the plaintiff in those paragraphs is pleaded as follows:

'6.1 Accordingly and during on or about the 19<sup>th</sup> September 2018, telephonically and at Pietermaritzburg, the Plaintiff represented by Maharaj and the First Defendant represented by Van Staden had concluded a, partly written and partly oral agreement, the material express terms of which were the following:

- a) The Plaintiff would purchase the new MAN bus from the First Defendant for a purchase price of R 3, 383 070.00 (THREE MILLION THREE HUNDRED AND EIGHTY THREE THOUSAND AND SEVENTY RAND);
- b) A deposit of R 750, 000.00 (SEVEN HUNDRED AND FIFTY THOUSAND RAND) would be deducted from the purchase price referred to 5.4 (a) hereinabove which was made up of:
  - i. The R 340, 000.00 (THREE HUNDRED AND FORTY THOUSAND RAND) paid as a holding deposit by the Third Defendant to the First Defendant for the new

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<sup>4</sup> *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22, *Drummond Cable Concepts v Advancenet (Pty) Ltd* [2018] ZAGPJHC 636, 2020 (1) SA 546 (GJ) paras 9 – 10.

MAN bus as averred to at paragraph 5.4 (c) hereinabove, which amount was made over by the Third Defendant to the Plaintiff;

- ii. The R 410, 000.00 (FOUR HUNDRED AND TEN THOUSAND) trade in value placed on the Mercedes Benz bus which was in the possession of the First Defendant for resale on a consignment basis as averred to at paragraph 5.4 (b) hereinabove.
- c) The Second Defendant would pay to the First Defendant the remainder of the purchase price in the sum of R 2, 633 070.00 (TWO MILLION AND SIX HUNDRED AND THIRTY THREE THOUSAND AND SEVENTY RAND) on behalf of the Plaintiff;
- d) The Plaintiff would have to pay no further monies to the First Defendant save for those averred to in paragraph 6.1 (b) (i to ii) hereinabove to conclude the transaction;
- e) Van Staden on behalf of the First Defendant would deliver the new MAN bus on or before 20<sup>th</sup> September 2018 to the Plaintiff;
- f) The First Defendant would, upon securing the purchase price in terms of paragraph 6.1(a) to (c) above, obtain a written letter of authority from the Plaintiff to license and register the new MAN bus into the name of the Plaintiff as required by the National Road Traffic Act of 1996 ("NRTA"), with the Plaintiff to pay the license fee therefore.'

[19] In response to those averments the first defendant pleaded that an oral agreement was concluded between it and the plaintiff on or about 10 September 2018 in terms of which the plaintiff agreed to purchase the bus from the first defendant, in terms of the second defendant's approval of the plaintiff's finance, including that the plaintiff was however obliged to pay a deposit in the amount of R750 000 to the first defendant. What is significant from this plea is that it already alluded to the involvement of the second defendant as a material party to the purchase of the bus. The inter-relationship of the agreement between the plaintiff and the first defendant, the agreement between the first defendant and the second defendant, and the agreement between the plaintiff and the second defendant, all identified below, was however not dealt with further in the pleadings.

[20] The averments in the pleadings were furthermore not always fully consistent with the contents of the various annexures to the declaration, and the evidence adduced during the trial. Even if the plaintiff, in colloquial terms, 'purchased' the bus, legally the

terms of the agreements governing the purchase of the bus went much wider than a purchase and sale agreement confined to only the plaintiff and the first defendant as contracting parties.

[21] A number of documents attached to the declaration as annexures, were generated in the process of giving effect to the transaction relating to the acquisition of the bus. They include the following:

- (a) The first defendant issued a tax invoice dated 19 September 2018,<sup>5</sup> to the second defendant. This invoice is the underlying document to the agreement between the first and second defendants. The invoice reflected the full purchase price of the bus as R2 941 800 'Less Deposit' of R750 000, to which VAT of R441 270 was added, resulting in the balance required to be financed by the second defendant of R2 633 070. The invoice recorded that although the second defendant was invoiced, the first defendant would 'deliver [the bus] to' the plaintiff, being the mutual customer of the first and second defendants.
- (b) On 20 September 2018 the plaintiff and the second defendant signed a written 'Authority to release goods' (the release note).<sup>6</sup> It contains a 'Confirmation of receipt by customer' portion in which the plaintiff confirmed that it had satisfied itself as to the condition of the bus and acknowledged when the risk would pass. The passing of the risk would obviously impact on the plaintiff's obligations inter alia to insure the bus. In the release note the second defendant, following receipt of certain confirmation by the plaintiff, confirms that the first defendant may release the bus to the plaintiff, obviously on behalf of the second defendant as the second defendant would be the legal owner of the bus, with payment to be made by the second defendant to the first defendant.
- (c) On 20 September 2018 the plaintiff and the second defendant also concluded a written instalment sale agreement<sup>7</sup> in respect of the purchase of the bus, which required the financed portion of the purchase price together with finance charges and other costs, to be paid by the plaintiff to the second defendant in 36 monthly

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<sup>5</sup> Annexure 'B' to the declaration.

<sup>6</sup> Annexure 'E' to the declaration.

<sup>7</sup> Annexure 'C' to the declaration.

instalments of R87 214.63 each, commencing from 20 October 2018 and terminating on 20 September 2021.

The second defendant thereafter paid the remainder of the purchase price in respect of the bus in the sum of R2 633 070, as reflected in the invoice, to the first defendant.

[22] As will already be apparent from the brief statement of the contents of these annexures to the declaration, any obligation to pay the instalments on the bus in order to purchase it, and to insure the bus, which are claimed by the plaintiff as damages, were not part of an agreement to which the first defendant was a party, but arose from the provisions of the instalment sale agreement between the plaintiff and the second defendant. Further, as evident from the invoice, the first defendant invoiced and sold the bus to the second defendant, for delivery on its behalf to the plaintiff. The evidence revealed that this was pursuant to a Master Supply Agreement and a Supplier Agreement between the first defendant and the second defendant. The latter were not pleaded in the declaration although the plaintiff was seemingly aware of the existence thereof, as the plaintiff's attorney's letter of 15 October 2018,<sup>8</sup> written shortly after the cancellation of 'the agreement', expressly referred to 'a standard Master Dealer Agreement.'

[23] The terms contained in other documents annexed to the declaration, for example the release note, dealing inter alia with the passing of the risk in and to the bus, were also not averred separately in the declaration, albeit that the pleadings stated that the 'contents . . . be incorporated herein as though specifically averred to.' So the contents of all these annexures, whether material and relevant or not, are part of the declaration.

[24] The material terms to which regard should be had in determining the issues arising in this action, governing the relationship between the plaintiff and the first defendant, the first defendant and the second defendant, and the plaintiff and the second defendant, must, more correctly, be sought in the body of the plaintiff's

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<sup>8</sup> Annexure 'J' to the Declaration.

declaration, the annexures thereto, and documentation introduced during the evidence. Properly interpreted they included the following:

- (a) The plaintiff was for all intents and purposes substituted for the third defendant as purchaser in the offer to purchase,<sup>9</sup> except that the reference to a trade-in, which in the context of the purchase by the third defendant was also an incorrect description, should have referred to a deposit of R750 000. The third defendant never provided a trade-in. At the time when the plaintiff's finance was approved by the second defendant, there was also no evidence of any talk between the plaintiff and the second defendant of a trade-in at a value of R750 000;
- (b) The first defendant invoiced the second defendant. The relationship between the first and second defendants is regulated, amongst others by the terms of the Supplier Agreement between them. The material terms of the Supplier agreement included the following:
  - (i) On receipt of written advice from the first defendant, the second defendant would, subject to the credit approval for the plaintiff, process the applicable transaction and prepare the necessary documentation for the plaintiff's signature;
  - (ii) The second defendant would advise the first defendant of such approval and request a tax invoice to be provided by the first defendant;
  - (iii) On receipt of the invoice, the second defendant would either approve or disapprove the tax invoice;
  - (iv) Upon approval of the invoice an authorization for the delivery of the bus to the plaintiff would be issued by the second defendant;
  - (v) Lastly, on receipt by the first defendant of the signed delivery note by the plaintiff and all other documents required by the second defendant, the second defendant would effect payment of the amount as stipulated on the tax invoice, provided that where the plaintiff has paid an initial payment to the first defendant, it would be deducted from the full purchase price and the first defendant's tax invoice would reflect the total purchase price with 'less initial payment/received on your behalf.'

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<sup>9</sup> Annexure 'A' to the Declaration.

- (vi) As regards the risk, notwithstanding anything to the contrary in any law or the Supplier agreement, the risk in the bus would transfer from the first defendant to the second defendant upon delivery to and acceptance of the bus by the plaintiff;
  - (vii) The first defendant would upon delivery of the bus pass good, valid free and unencumbered transferable right, title and interest in and to the bus to the second defendant and the second defendant would be the owner of the bus and have valid and absolute title thereto, and no person will have any basis for asserting the contrary.
- (c) The material terms of the Master Supply Agreement Supplier Agreement included the following:
- (i) The sale of the bus to the second defendant would be subject to the suspensive condition that the second defendant successfully concludes a credit agreement with the plaintiff;
  - (ii) Upon the plaintiff and the second defendant's final selection and confirmation of the bus, the first defendant would issue an invoice to the second defendant reflecting inter alia a description of the bus, the purchase price, the deposit received by the first defendant, and the plaintiff to whom delivery of the bus would be effected and who will be accepting delivery of the bus on behalf of the second defendant;<sup>10</sup>
  - (iii) If the plaintiff pays the first defendant a deposit, the actual value of such deposit had to be reflected on the invoice in reduction of the purchase price;
  - (iv) The plaintiff had to inspect the bus and take delivery, if satisfied;
  - (v) The first defendant would deliver the bus to the plaintiff acting as agent of the second defendant on the written authority of the plaintiff and the second defendant, fulfilment of the second defendant's documentation requirements, signature of the delivery note by the plaintiff, receipt by the first defendant or the second defendant of any deposit that the second plaintiff requires the plaintiff to pay prior to taking delivery of the bus on

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<sup>10</sup> Clause 4.4.

- behalf of the second defendant, and receipt by the first defendant of written confirmation from an insurance broker or insurance company that the bus is comprehensively insured at the time of delivery;
- (vi) Ownership of the bus would pass to the second defendant upon payment of the purchase price to the first defendant by the second defendant or upon delivery of the bus to the plaintiff acting on behalf of the second defendant, whichever occurs first;<sup>11</sup>
  - (vii) The first defendant inter alia warranted to the second defendant that the deposit had been paid in full by the plaintiff.<sup>12</sup>
- (d) The relationship between the plaintiff and the second defendant is governed amongst others by the instalment sale agreement and the release note. Some of the material terms thereof have already been referred to above.

[25] As much as the above agreements must each be interpreted on their own,<sup>13</sup> they are all part of a composite tri-partite transaction which incorporates the terms of the individual agreements. Alternatively, and in any event, even as separate self-standing agreements, they are interdependent. The cancellation of the agreement between the plaintiff and the first defendant unavoidably would impact the instalment sale agreement between the plaintiff and the second defendant, and also the agreement between the first and the second defendant. The cancellation of the 'purchase agreement' means the end of any right on the part of the plaintiff to claim delivery of the bus. It would also mean the end to any obligation to fund the balance of the purchase price.

[26] It is the failure to address the cascading effect a cancellation of the agreement between the plaintiff and the first defendant would have, which has led to the various problems in the *lis* before me, as I shall endeavour to show below. In particular, firstly, it has resulted in declaratory relief being sought in regard to the agreement between the plaintiff and the first defendant, as limited in its scope as that may be, which impacts on the other agreements referred to above. Secondly, damages are claimed which arise

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<sup>11</sup> Clause 7.

<sup>12</sup> Clause 8.1.8.

<sup>13</sup> *Wynns Car Care Products (Pty) Ltd v First National Industrial Bank Ltd* 1991 (2) SA 754 (A).

from terms and obligations of the other agreements referred to above, which could not continue to apply and give rise to ongoing continuing legal obligations, once the plaintiff had cancelled the agreement between it and the first defendant. It is logically impossible to rely on obligations which arose from these other agreements as being continuing, ongoing, binding obligations in law, after the plaintiff cancelled the agreement it had with the first defendant. But more about that later.

[27] The preliminary issue is whether the first defendant had repudiated the agreement, such as it may be, between it and the plaintiff. If it was to be concluded that the first defendant had not repudiated the agreement with the plaintiff, then the plaintiff's claim in convention would fail and the first defendant's claim in reconvention should succeed. That would avoid any further discussion of the interdependence of the various agreements identified above in the context of a claim for damages. If there was an unlawful repudiation, then the question arises as to the impact thereof on the other agreements.

[28] Although no specific relief was claimed against the second defendant in that eventuality, the second defendant was cited as an interested party and it would have taken note of the relief claimed by the plaintiff against the first defendant, and presumably would have appraised itself of the possible impact such relief could have on its legal position. If it had any concerns, which might have caused it to hold a position other than that it would await the court's judgment in relation to the plaintiff's claim, and thus effectively abide by this court's decision on the relief claimed, then it could have entered the litigation. The possible impact on the second defendant of the relief claimed by the plaintiff against the first defendant might not have been spelt out in express terms by the plaintiff, but the fact that it was not spelt out does not, in circumstances where the second defendant was joined as a defendant, make it a case of non-joinder which would preclude the true issues in dispute, notably whether the first defendant's failure to deliver the bus amounted to a repudiation which could lead to a valid cancellation, being determined. It is to that issue that I then turn to consider.

### **The repudiation**

[29] The plaintiff argues that the repudiation, consisting of the first defendant's refusal to deliver the bus, was in breach of the agreement on two grounds:

- (a) The first defendant's insistence that it had not agreed to accept the Mercedes bus as a trade-in on the bus to settle the balance of R410 000; and
- (b) The first defendant's demand that the plaintiff should pay to it the sum of R420 000, as opposed to R410 000, for the bus to be released to the plaintiff.

[30] The first ground for the repudiation involves a question of fact, that is whether in respect of the balance of the deposit in the sum of R 410,000, the plaintiff's version that an agreement was concluded in terms of which the first defendant agreed to accept the Mercedes bus as a trade-in to make up the remainder of the deposit amount is correct, or whether the first defendant's version that this was never agreed, and that because the plaintiff refused to pay the remainder of the deposit, the first defendant was entitled to refuse to deliver the bus. If the plaintiff's version in this regard is correct, then there would clearly be a repudiation of the agreement, and vice versa, if the first defendant's version was accepted.

[31] Most of the evidence focussed on whether there had been such a subsequent oral agreement concluded between the plaintiff and the first defendant that the Mercedes bus would be accepted as a trade in to make up the balance of the deposit of R410 000. In brief, the evidence of Mr Maharaj was that he had a discussion with Mr van Staden on 18 September 2018 whilst the latter was travelling in his vehicle, allegedly to Polokwane, during which Mr Maharaj advised Mr van Staden that the only way the deal could work was if the first defendant accepted the Mercedes bus as a trade in to cover the R410 000 still outstanding in respect of the deposit, and Mr van Staden had said 'yes, ok, ons sal 'n plan maak.' Mr Maharaj understood that response to mean that the first defendant accepted to take the Mercedes bus as a trade in. Mr van Staden denied such a discussion on the 18 September 2018, maintaining, with reference to entries in his diary, that he was in his office on that day. He also denied

ever having agreed to accept the Mercedes bus as a trade-in, and emphasized the improbability of him concluding such an agreement.

[32] In regard to the second ground, the question arising for determination is whether the demand for R420 000 constitutes an unequivocal intention to repudiate the agreement. The material facts, as regards this ground, are not disputed. It was common cause that Mr van Staden demanded payment of the sum of R420 000 from Mr Maharaj, being the R410 000 and an additional R10 000 as directed by the directors of the first defendant allegedly in respect of an 'administration fee.' The issue is largely a question of law.

[33] It is necessary to analyse these two bases for resisting delivery of the bus separately. Before doing so it is however necessary to consider the relevant legal principles relating to repudiation briefly.

***What amounts to a repudiation in law?***

[34] A repudiation occurs when one party to a contract, without lawful grounds, conveys to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract. The other party to the contract may then elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of the repudiation to the party who has repudiated.

[35] The test for repudiation is not subjective, but objective, the emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party thought he intended to do. Repudiation is not a matter of intention, it is a matter of perception and the perception is that of a reasonable person in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance in accordance with a true interpretation of the terms of the agreement, will not be forthcoming. The inferred intention serves as a criterion for determining the nature of the threatened breach. But

the conduct from which the inference of impending non- or mal-performance is to be drawn, must be clear cut and unequivocal i.e. not equally consistent with any other feasible hypothesis. It has been said that repudiation is ‘a serious matter’ requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not likely to be presumed.<sup>14</sup>

[36] In amplification of the above, in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*<sup>15</sup> the following was said:

‘[28] The innocent party to a breach of contract justifying cancellation exercises his right to cancel it (a) by words or conduct manifesting a clear election to do so (b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement. Any conduct complying with those conditions would therefore qualify as a valid exercise of the election to rescind. In particular, the innocent party need not identify the breach or the grounds on which he relies for cancellation. It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was only discovered after, the time (cf *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) SA 809 (A) at 832C - D).’ (emphasis added)

[37] In *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and other related cases*<sup>16</sup> the following remarks were made:

‘The letter cites two of the grounds mentioned in the agreement on which Putco could rely to withdraw from it as the apparent reason for terminating the agreement. Had Putco been entitled to withdraw on the grounds mentioned it would not have affected the rights of the parties flowing from the executed part of the agreement. As it happened, Putco later abandoned any reliance on these grounds. Where a party seeks to terminate an agreement and relies upon a wrong reason *to do so he is not bound thereby, but is entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given.*’ (emphasis added)

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<sup>14</sup> *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA).

<sup>15</sup> *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) para 28.

<sup>16</sup> *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and other related cases* 1985 (4) SA 809 (A) at 832C- D.

[38] In *Stewart Wrightson (Pty) Ltd v Thorpe*,<sup>17</sup> the then Appellate Division confirmed: 'It has also been long recognised in our practice that a party purporting to terminate for an invalid reason may later justify the termination on a different and valid ground existing at the time of the termination.'

***The demand for payment of R420 000.***

[39] As regards the demand for the payment of R420 000, as opposed to R410 000, the first defendant conceded that the additional R10 000 was not due as part payment of the deposit, or as a payment preliminary to the bus being delivered to the plaintiff.

[40] In its declaration the plaintiff alleged that Mr van Staden on behalf of the first defendant subsequent to the conclusion of the agreement advised Mr Maharaj, on behalf of the plaintiff, that the first defendant's directors refused to release the bus until R420 000 was paid as a deposit, and therefore, the first defendant would be retaining the bus until such time as the R420 000 was paid by the plaintiff. It alleged further, that consequently, the first defendant had breached and/or repudiated the agreement. It construed the first defendant's demand for payment of the sum of R420 000 to secure release of the bus, as R10 000 more than was required as the deposit for the purchase of the bus by the plaintiff. This was a material breach as at no stage was it ever agreed, or even contemplated, that there would be any management fee of R10 000 payable. In paragraph 10.4 of its declaration the plaintiff refers to the cancellation of the agreement 'in light of the First Defendant's repudiation of the agreement averred to hereinabove . . .' being the basis recounted above in this paragraph.

[41] The aforesaid allegations were consistent with the evidence. It was not disputed that R420 000 was demanded before the first defendant would deliver the bus to the plaintiff. Mr van Staden indicated that he was told by the first defendant's administration department to add R10 000 as a management fee, which *'incorporate the delivery cost,*

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<sup>17</sup> *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 953G.

*registration fees, and all that*'. He testified that on 1 October 2018 he sent another SMS message enquiring from Leshen: *'Lee, have you been able to transfer the balance of the deposit of R420 000.00?'*

[42] The formal demand for delivery of the bus, made by the plaintiff's attorney on 5 October 2018, elicited a considered reply<sup>18</sup> from the first defendant's attorney that '[o]ur client is at a complete loss as to why your client suddenly pretends to not have any recollection of the deposit in the amount of R420,000-00 which deposit was supposed to be paid into our client's account to trigger release of the said bus.' The first defendant's attorney continued that 'an amount of R420,000-00 in respect of the deposit is still due and payable by your client.'

[43] The first defendant argued that the R10 000 difference between the outstanding deposit amount of R410 000 and the request to pay R420 000 did not feature, and was never relied upon in the evidence of Mr Maharaj to constitute any breach or repudiation of the agreement, but only *'came afterward,'* with which Mr Maharaj agreed. Specifically, Mr Maharaj conceded that when the repudiation was accepted and the agreement was cancelled on 8 October 2018, no mention had been of the stipulation for the additional R10 000 and that the cancellation or acceptance of repudiation was not based thereupon. The plaintiff's attorney's correspondence when cancelling the agreement because of the first defendant's breach or repudiation, also did not specifically rely on the first defendant's demand for an additional R10 000 as a basis for cancellation of the agreement. It simply referred to the first defendant's failure to have delivered the bus.

[44] The plaintiff's reliance on the first defendant's demand for payment in the amount of R420 000 as opposed to R410 000 might be belated, and even opportunistic. But that is irrelevant. Whether the first defendant might have released the bus if R410 000 was paid by the plaintiff is also no answer to its demand that R420 000 was required to be paid before delivery of the bus would occur, when that amount was not due. Nor does

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<sup>18</sup> Notwithstanding the agreement already having been cancelled in an email to the first defendant directly on 8 October 2018.

Mr van Staden's reply assist, when confronted with the demand for an additional R10 000 and the request to pay R420 000, that '*But if he had paid me the R410 000.00 I would have released the bus. It is as simple as that.*' It is not as simple as that.

[45] The proper enquiry is whether the repeated demand for payment of R420 000 before delivery of the bus would be effected, was legally claimable in terms of the agreements. If it was not, then it is also no defence to the claim for cancellation that the plaintiff could have but never tendered to make payment in the amount of R410 000.

[46] To an objective observer, the first defendant was not prepared, and even after cancellation confirmed that it was not prepared, to have delivered the bus to the plaintiff unless the amount of R420 000 was first paid to it as 'the deposit.' A possible willingness to release the bus if the amount of R410 000 was paid, as expressed by Mr van Staden, is, at best, a subjective willingness and not objectively discernible. And the test for a repudiation is objective.

[47] Accordingly, the first defendant repudiated or breached the agreement and the law entitles the plaintiff to cancel, as it did.

***Did the first defendant's refusal to accept the trade-in as part of the deposit constitute a repudiation?***

[48] In the light of my aforesaid conclusion that the demand for R420 000 before the bus would be delivered constituted a breach or repudiation pursuant to which the plaintiff could cancel, it is unnecessary to consider the voluminous evidence that was focused on this issue. I accordingly refrain from doing so.

**The plaintiff's alleged damages**

[49] The question then arises as to what damages the plaintiff can recover arising from the cancellation.

***The instalments paid pursuant to the terms of the instalment sale agreement***

[50] In terms of the instalment sale agreement between the plaintiff and the second defendant, the plaintiff was required to pay instalments of R87 214.63 per month commencing from 20 October 2018 with the last payment due on 20 September 2021. This instalment sale agreement is separate and distinct from the agreement concluded between the first defendant and the second defendant in terms of the Master Supply Agreement. The first defendant obviously was not a party to the instalment sale agreement. There would however not have been an instalment sale agreement absent an agreement between the first and second defendants with the second defendant agreeing to finance the balance of the purchase price, and an agreement between the plaintiff and the first defendant in terms whereof the first defendant would sell the bus to the second defendant.

[51] In terms of the Master Supply Agreement the plaintiff, as customer, purchased the bus from the first defendant on behalf of the second defendant. Ownership of the bus would pass to the second defendant by delivery to the plaintiff on behalf of the second defendant. The plaintiff would only become owner of and with full title to the bus once all the instalments had been paid.

[52] After it became apparent that there was a dispute regarding whether the first defendant would accept the Mercedes bus as a trade-in, Mr Maharaj instructed the second defendant to cancel 'the agreement.' That could only be the instalment sale agreement, because the second defendant was not a party to the purchase agreement between the plaintiff and the first defendant. Yet, the second defendant stipulated a cancellation fee of R2 500. It is not clear on what basis it would be entitled to do so. The second defendant also requested a consent to cancellation of 'the agreement' from the first defendant. Insofar as the plaintiff identifies the agreement it cancelled to be that between it and the first defendant, it is unclear on what basis the second defendant, who is not a party to that agreement could insist on a written consent from the first defendant as a precondition to a cancellation of the agreement between the plaintiff and the first defendant. Similarly, insofar as the plaintiff sought to cancel the agreement it had with the second defendant, which is the instalment sale agreement, it is unclear on

what basis the second defendant could insist on the consent of the first defendant to such cancellation because the first defendant was not a party to the instalment sale agreement.

[53] All of the above points to the fact that the true transaction relating to the acquisition of the bus, was much wider than pleaded by the plaintiff and involved an inter-dependence of the various agreements. Notably, if one was cancelled, it would also impact on the others, and that would also affect any claim for damages.

[54] Insofar as the plaintiff cancelled the agreement it had with the first defendant, and seeks declaratory relief relating to the cancellation of that agreement, it is unclear if the declaratory relief sought is confined to the agreement of purchase between the plaintiff and the first defendant, what 'deal' the plaintiff requested the second defendant to cancel, other than the 'deal' consisting of the instalment sale agreement, or potentially the set of interdependent but separate agreements which I have alluded to above. The set of agreements would however not require consensual cancellation (or any payment as a pre-condition to cancellation) if there was an actionable breach or repudiation which would entitle the plaintiff to cancel them regardless.

[55] The request to cancel the deal because the plaintiff had not received delivery of the bus was conveyed to Mr Naidoo of the second defendant in a letter dated 9 October 2018. In the said letter, Mr Maharaj stated that the first instalment of R87 000 was due on 20 October 2018, he recorded that the plaintiff had not received the new bus, and he requested the second defendant to cancel the agreement (and, insofar as it was a competent fee to be charged), that the plaintiff's account with the second defendant could be debited with the cancellation fee of R2 500. The aforesaid letter was followed up with another letter addressed to the second defendant on 10 October 2018 wherein the plaintiff's attorney very tellingly stated that:

'Our client had no alternative but to cancel the transaction and has given me your (sic) bank the authority to attend to the necessary in that regard.

We enquire from you as to what steps your bank has taken to either claim release of the new vehicle alternatively reverse the transaction, as it is the *de facto owner* of the financed vehicle. With respect, your bank simply cannot play a passive role in this matter and expect our client to pay the instalments that may fall due while the dispute remains unresolved.

It would therefore be appreciated if you are (sic) kindly advise us of your bank's intentions immediately upon receipt hereof to enable our client to assess its position and pursue its right in relation to the cancellation of the contract. Notwithstanding the above, we require an undertaking from your bank that it will *not process the debit order sent by our client as and when it falls due.*'

(emphasis added)

[56] The legal position, and the consequences which should follow from a cancellation due to the failure to deliver the bus, expressed by the author of this letter, are largely correct. The evidence of Mr Govender, the representative of the second defendant, although ultimately not particularly helpful, was also consistent with what the author of the aforesaid letter contemplated as the consequences that should follow. Mr Govender confirmed that there would be various relationships between a party such as the plaintiff who wishes to acquire a specific vehicle, the second defendant partly financing such transaction and paying the first defendant dealership, and the second defendant simultaneously concluding a separate agreement with the plaintiff as purchaser in the form of an instalment sale agreement.<sup>19</sup> He was asked whether in circumstances where the bus was never delivered, the instalment sale agreement did not remain incomplete, and whether the failure to give delivery of the bus is not also a breach thereof. Likewise, whether it would amount to a breach of the agreement between the second defendant and the first defendant.<sup>20</sup> He testified that he assumed that if the transaction was cancelled, the dealership would have kept the bus and the administration office of the Vehicle and Finance Unit would have refunded Mr Maharaj the money, and further, that the finance amount paid to the first defendant would have to be paid back to the second defendant. He indicated that if the transaction was

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<sup>19</sup> Mention was made of a *tripartite* agreement but ultimately Mr Govender said that there are two separate agreements.

<sup>20</sup> Mr Govender confirmed that the only agreement that exists between the first defendant and the second defendant is the master supply agreement.

cancelled on 8 October 2018, he doubted whether any instalments would have had to be paid by the plaintiff. Regarding the contention that the plaintiff could not be expected to pay the instalments where it has not taken delivery of the bus, Mr Govender agreed that this is 'an issue that could be raised.' Finally, as regards the instalments paid, he acknowledged that the instalments would comprise part capital and part interest.

[57] Mr Govender was referred to the plaintiff's letter addressed to the second defendant requesting that the agreement be cancelled, for which the second defendant required a cancellation fee of R2 500 to be paid. He confirmed that it was the instalment sale agreement that had to be cancelled. But then the question arises as to on what basis the second defendant could lawfully demand a consent to the cancellation from the first defendant, as some sort of a pre-condition to the cancellation of the instalment sale agreement, as the first defendant was not a party to the instalment sale agreement. All of this demonstrates that the agreement between the plaintiff, first defendant and second defendant was not properly pleaded.

[58] No credible basis has been advanced to establish any obligation that the plaintiff 'had to pay', or had to carry on paying the instalments in respect of the instalment sale agreement, after it, on its version, cancelled 'the agreement.'

[59] Furthermore, the plaintiff has not paid all thirty six instalments provided for in the instalment sale agreement, but only some. It did not pay some of the later instalments. I was advised from the bar during argument that the plaintiff had received some sort of indulgence from the second defendant regarding the non-payment of instalments as a result of the Covid-19 pandemic, but that it subsequently ceased paying instalments because it could not afford to pay them (the unpaid instalments). There was no indication that the second defendant took legal steps to enforce payment of the instalments. That is not surprising, as the second defendant would probably be unable to prove a legal entitlement to instalments in respect of a bus never delivered to its customer.

[60] That begs the question why the plaintiff made and continued making any instalment payments to the second defendant at all. It never took delivery and never had possession of the bus.

[61] In the declaration the plaintiff simply averred that it 'has had to pay instalments' for the bus. But nothing has been pleaded to establish that the plaintiff faced an unassailable claim in law by the second defendant for payment of these instalments. Indeed, the contrary is the case. The instalment sale agreement was a reciprocal agreement. If the plaintiff did not receive the bus, that is the first defendant had not released the bus to the plaintiff as mutual customer on behalf of the second defendant, then the second defendant should not have made any payment to the first defendant, and if it had, then it could not raise instalments against the plaintiff, but would have to demand the return of whatever capital payment it had paid to the first defendant, from the first defendant. But it could not continue claiming the instalments from the plaintiff, and if it did claim payment of the instalments, the plaintiff could successfully, and should have raised the defence that the bus had not been delivered to it, and that it was excused from the payment of any instalments.

[62] The plaintiff's claim for damages, represented by such instalments as it paid to the second defendant until those ceased, accordingly was not established and falls to be dismissed.

***Insurance premiums paid in respect of the bus***

[63] In its declaration the plaintiff similarly alleged that it 'has had to pay insurance over the new MAN bus to ensure that it protects its interests as per the ISA<sup>21</sup> with the Second Defendant from September 2018 to date.'

[64] It is to the terms of the Instalment Sale agreement and Release note that one must then turn to determine whether the plaintiff was obliged to pay the insurance premiums, and hence whether it has suffered damages by doing so which it can recover

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<sup>21</sup> Instalment Sale Agreement.

from the first defendant. Paragraph 9.5 of the Instalment Sale agreement, relating to 'Conditions' requires that 'You [the plaintiff] insure the Goods *as required by us.*' (emphasis added) Clause 10 thereof providing for insurance with Standard Insurance Limited, was not completed. Nor were any insurance premiums reflected in paragraph 5.2.5 of the instalment sale agreement. The standard insurance with Standard Insurance Limited was therefore not taken up by the plaintiff.

[65] According to annexure 'D' to the declaration the plaintiff instead seemingly secured insurance with Bryte Insurance Company, through Westwood Insurance Brokers (Pty) Ltd in respect of the bus, for a value of R2 942 000, from 20 September 2018. That amount accords with the full purchase price of the bus excluding Vat, in the sum of R2 941 800 reflected in the invoice originally issued by the first defendant to the third defendant. The amount of the insurance premiums is not stated in annexure 'D', but was not disputed to be R5 092.86 per month.

[66] The question however remains whether that insurance was 'required.' The obligation to insure must, in accordance with the terms of the agreement, and can at common law, only be from the time that the risk of loss or damage to the bus would pass to the plaintiff, and the plaintiff acquired an insurable interest, or as may otherwise contractually be agreed.

[67] The passing of any risk is expressly regulated in the portion of the Release note signed by Mr Maharaj. The release note is annexed to the declaration as annexure 'E.' Its terms are averred to be incorporated as if specifically set out in the declaration. The relevant portion thereof provides as follows:

'2 Passing of Risk

2.1 The customer understands that when the customer takes delivery of the goods, the customer takes all risk in the goods. The customer confirms that the supplier has clearly explained to the customer that taking the risk in the goods means that the customer must insure the goods as from the day that the risk passes.

2.2 The customer will be liable, if the customer does not insure the goods correctly, and if anything happens to it or should any damage or harm be caused to it even if the customer leaves the goods in the supplier's possession.'

[68] Mr Govender, of the second defendant, confirmed that the risk in the bus was only to pass when the plaintiff took delivery. The plaintiff never took delivery of the bus. Accordingly, as the risk seemingly did not pass, there was no insurable interest for the plaintiff to insure, and accordingly, there was no obligation to pay insurance.<sup>22</sup>

[69] When the bus was not delivered by the first defendant, the insurance on the bus should have been cancelled forthwith. It is telling, once again, that the plaintiff ceased making payment of the insurance premiums post 1 March 2020. I understood that this was for reasons similar to those which resulted in the payment of the instalments being stopped. There is no reason why the payment of the insurance premiums could not likewise have been stopped from the outset. Post cancellation of the agreement and the instalment sale agreement the plaintiff could have had no expectation whatsoever of taking delivery of the bus. Accordingly, there would be no need for any insurance.

[70] If it was to be argued that prudence or otherwise reasonably dictated that insurance had to be put in place from 20 September 2018, in the expectation that delivery of the bus could be imminent pursuant to the demand that the bus be delivered by the first defendant, then it is clear that by the time 'the agreement' was cancelled on 8 October 2018, whatever legal right the plaintiff might previously have had to claim delivery of the bus, had ceased. As regards any insurance costs incurred during the period of expectation of such a possible delivery, no evidence was adduced as to what the insurance premium for such limited period, if payable, would have been. Such evidence could have been adduced, for example from the insurance broker. In the absence of such evidence the plaintiff has not established its damages even in respect of the limited period from 20 September 2018 to the date of cancellation, that is if there

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<sup>22</sup> The plaintiff also never of its own volition left the bus in the possession of the first defendant for the purposes of clause 2.2 – certainly that was never suggested in the evidence.

was even a basis to conclude that the risk in and to the bus had somehow passed, despite delivery to the plaintiff not having occurred, during that period.

[71] No legal basis has been advanced on which the plaintiff was legally obliged to insure the bus where it had never been delivered to the plaintiff. All the more so where the plaintiff had cancelled the agreement and hence terminated any right to ever receive delivery of the bus. The claim for these insurance premiums as damages accordingly was not established.

### ***Licence fees***

[72] The first defendant registered the bus with the Motor Vehicle Licencing Authorities, with the second defendant as 'title holder' and the plaintiff as 'owner' on 25 October 2018, that also being reflected as the 'Ownership start date' on the eNaTIS documentation, annexed as annexure 'K' to the declaration. Again, it was averred in the declaration that 'the contents of annexure "K" be incorporated herein as though specifically averred to.' The aforesaid facts are therefore part of the averments in the pleadings.

[73] The foundation of the plaintiff's claim in regard to licence fees is formulated as follows in the declaration: the first defendant 'unlawfully and fraudulently registered the bus in the name of the Plaintiff and the Second Defendant on the National Information Traffic Management System and obtained an eNaTIS document in respect thereof, a copy of which is attached hereto and marked as annexure "K," which was issued on 25 October 2018; and a 'licence fee of R180.00 (ONE HUNDRED AND EIGHTY RAND) was paid for the licencing of the new MAN bus in the name of the Plaintiff and the Second Defendant after the cancellation of the agreement by the First Defendant.'

[74] The basis of the claim for the ongoing licence fees is then pleaded as follows: 'The Plaintiff has had to pay licence fees to the Department of Transport ("the Department") in respect of the new MAN bus in view of the fact that should it not do so, the Department was unwilling to release licence discs in respect of the other buses owned and operated by the

Plaintiff which caused it significant prejudice. Resultantly, the Plaintiff was obliged to pay a licence fee of the new MAN bus despite the fact that it never intended taking ownership or beneficial possession thereof subsequent to the cancellation of the sale and has since never had possession, use and enjoyment thereof.'

[75] Earlier in the declaration, in support of its allegation that the licence fees had to be paid because the licencing authority would not issue licences in respect of other busses operated by the plaintiff, the plaintiff annexed the notice of motion in case number 2361/19P as annexure 'N' to its declaration, again praying 'that the contents of annexure "N" be incorporated herein as though specifically averred to.' In that notice of motion the plaintiff claimed the following relief as against the first defendant, the second defendant, the MEC for Transport: KZN, the MEC for Transport: Gauteng and the National Minister of Transport, as the first to fifth respondent respectively:

'1.

- 1.1 That the licencing transaction whereby the motor vehicle described as a 2018 MAN 26.36 D HB4 bus with a chassis number: AAMHB41808PX35773 and the engine number: 505470212B4704 which was licensed in the name of the Applicant as the owner and the Second Respondent, as a titleholder, a copy of which transaction is annexure "A" hereto, be and is hereby declared null and void and cancelled.
- 1.2 That the Third, Fourth and Fifth Respondents be directed to restore the licence status of the motor vehicle referred to in paragraph 1.1 hereinabove to its previous status on the e NaTIS system is reflected in annexure "B" hereto.
- 1.3 That the decision of the Third and Fifth Respondents not to issue the Applicant with any further licence discs and/or renewals in view of outstanding licence fees for the motor vehicle referred to in paragraph 1.1 hereinabove be and is hereby reviewed and set aside.
- 1.4 That the Third and Fifth Respondents be directed to issue the renewal licence discs to the Applicant for the motor vehicles referred to in annexures "C1 to C4" hereto.
- 1.5 That the Third and Four Respondents be directed to issue the Applicant with the renewal licence discs upon application by it for motor vehicles owned by it upon compliance with all legal requirements for such renewal licence discs in accordance with the relevant provisions of the National Road Traffic Act of 1996.
- 1.6 Costs of the application in the event of opposition hereto.

1.7 Such further and alternative relief that the above Honourable Court may deem appropriate.

2.

KINDLY TAKE NOTICE that the relief sought in paragraphs 1.4 and 1.5 hereinabove shall operate as Interim Interdict Orders pending the finalisation of this application.<sup>23</sup>

[76] As regards the quantification of its claim in respect of licence fees, the plaintiff in its declaration (see paragraph 15.4(e)) avers that:

'The Plaintiff has paid the licence fee for the year 2019 in view of the First Defendant's fraudulent registration of the new MAN bus in its name as averred to at paragraph 12.1 (a) to (c)<sup>24</sup> hereinabove in the amount of R 119, 937.90 (ONE HUNDRED AND NINETEEN THOUSAND NINE HUNDRED AND THIRTY SEVEN RAND AND NINETY CENTS) as reflected in annexure "O" hereto;'

and

'Future licence fees that will be due and payable by the Plaintiff to the MEC and the Department for 2020, in respect of the new MAN bus in the amount of R 52, 000.00 (FIFTY TWO THOUSAND RAND).'

[77] Annexure 'O' to the declaration is a copy of a bank statement from Standard Bank in respect of a business current account operated by the plaintiff. It also shows a reduced size copy of a cheque no 113208 drawn on that bank account, although the payment by that cheque is not reflected as a separate entry on the statement, for an amount of R119 937.90 dated 9 July 2019 and payable to what seems to be 'KZN Transport Revenue'.<sup>25</sup>

[78] The damages claim persisted with in respect of the licence fees, as set out earlier in this judgment, are as follows:

Licence – 2019

R 119 937.90

<sup>23</sup> According to the court file, on 29 May 2022, Bezuidenhout J adjourned the application *sine die*, ordering the applicant to pay the wasted costs. The application does not appear to have been taken any further and no interim relief was persisted with.

<sup>24</sup> Being what is set out above.

<sup>25</sup> The last word of the payee's identity is obscured by a bank stamp, but it looks like 'Revenue.'

Licence – 2020

R 46 104.00

It is not clear what happened to the licence fee of R180 alleged in the declaration. It is seemingly not part of the claim? Nor is it clear how the licence fee of R52 000 alleged in the declaration became R46 104. Presumably the amount alleged in the declaration might have been an estimation of the licence fee for 2020, because the alleged payment for 2020 possibly had not yet been made when the declaration was signed. No documentary proof of payment of that amount was annexed. But be that as it may.

[79] The factual position is that the bus was registered in the name of the plaintiff after it had cancelled the purchase agreement with the first defendant. Whether such registration was fraudulent or not, but *a fortiori* if it was unlawful and fraudulent, the plaintiff could never be held liable to the licencing authority for ongoing licence fees in respect of the bus where the underlying agreement had been cancelled. At most there might be some administrative fee relating to the reversal of the registration. At best, for the purposes of the plaintiff's claim, liability could arise for the initial 'licence fee' of R180 if proof of payment thereof was provided, or for some administrative fee. But this was not case.

[80] The plaintiff was entitled to apply for the registration of the bus to be reversed ab initio, alternatively for it to be deregistered retrospectively from the date of registration. The cancellation of the agreement preceded the date of registration. Whether effected fraudulently or innocently, in the light of the cancellation of the agreement prior to registration, the plaintiff did not face an unassailable claim by the licencing authority for licence fees from 20 October 2018 until 31 March 2019, and certainly not for 2019 and 2020. Again, it seems that the licence fees for 2021 were not paid by the plaintiff, and rightly so. Which begs the question why the licence fees for the years prior to 2020 were not similarly simply not paid.

[81] The licencing authorities could not hold the plaintiff to ransom, on the plaintiff's version effectively extorting payment of any licence fees in respect of the bus, which the plaintiff never received delivery of and, pursuant to the cancellation, no longer had any intention ever to take delivery of, on pain of not being issued licences in respect of other

buses operated by the plaintiff. If the licencing authorities did so, then it was incumbent on the plaintiff to resist such conduct and apply for urgent appropriate interim relief, which it did not do, and to pursue it to finality. The solution was not to effectively condone such unlawful behaviour by the licencing authorities, to succumb to its unlawful and extortionist demands, in the comfort of then seeking an indemnity in respect of such payments as a damages claim against the first defendant.

[82] The claim for damages comprising the licence fees accordingly falls to be dismissed.

### ***Repayment of the R340 000***

[83] Reference has been made earlier to the R340 000 deposit paid by the third defendant to the first defendant, having been 'made over' as part payment of the deposit required to be paid in respect of the instalment sale agreement concluded by the plaintiff with the second defendant, as also reflected on the invoice issued by the first defendant to the second defendant.

[84] The plaintiff seeks to recover this amount as part of its damages,<sup>26</sup> on the following basis:

'The sum of R 340 000 (THREE HUNDRED AND FORTY THOUSAND RAND) paid by the Third Defendant to the Plaintiff as a holding deposit of the new MAN bus . . . was ceded by the Third Defendant to it as per the contents of annexure "P" hereto. The Plaintiff prays that the contents thereof be incorporated herein as though specifically averred to.'

[85] Annexure 'P' is headed '*Cession of claim or right of action*' and provides that the third defendant, as cedent 'hereby cedes, transfers and makes over to the cessionary, the cedent's right, title and interest in and to the said claims referred to above.' The 'said claims' are described in the preamble to the written cession as the claim the third defendant has against the first defendant 'for refund of R340,000 relating to a deposit paid to them for a vehicle that was not purchased (hereinafter referred to as "the said claim").'

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<sup>26</sup> Paragraph 15.4(g) of the declaration.

[86] On the evidence of Mr Maharaj and Leshen, the R340 000 paid by the third defendant as a deposit to the first defendant in respect of the offer to purchase the bus, which purchase was aborted when the third defendant did not qualify for finance for the balance of the purchase price, and which undoubtedly, if matters ended there would have given rise to a valid claim by the third defendant for repayment against the first defendant, was extinguished by the third defendant agreeing to make that payment over as partial payment by the plaintiff of the deposit required in terms of the purchase agreement for the bus when the plaintiff came to be substituted as purchaser. The third defendant thereafter no longer had any claim against the first defendant, but only a claim against the plaintiff for payment of the R340 000, otherwise it could not be said to have made that payment over to the plaintiff as a part payment of the deposit due by the plaintiff to the first defendant. The evidence was to the effect that the plaintiff had not yet paid the R340 000 to the third defendant, but it was not suggested that it would not be due by the plaintiff to the third defendant.

[87] The third defendant accordingly had no claim remaining against the first defendant for payment of the R340 000, to cede to the plaintiff on 20 November 2018, being the date the cession was signed. Significantly, the cession expressly provides, and again this annexure to the declaration is attached on the basis that '[t]he Plaintiff prays that the contents thereof be incorporated herein as though specifically averred to', that:

'It is understood and agreed that the cedent does not warrant the validity of the said claim and shall not be liable for damage to the cessionary in respect of any fees, costs or charges that may be incurred in prosecuting the said claim or for any damage that may be sustained by the cessionary in the event of the said claim proving irrecoverable for any reason whatsoever.'

The concluding paragraph of the cession confirms that the plaintiff as cessionary 'accepts the said cession upon and subject to the terms and conditions of this agreement.'

[88] As a ceded claim of the third defendant's claim against the first defendant, being pursued by the plaintiff as cessionary, the claim for the R340 000 must fail. However, as a part payment of the deposit the plaintiff was required to provide and being the basis on which the first defendant retained the R340 000, following cancellation of the purchase agreement, the R340 000 should be restored to the plaintiff. That basis, to claim a refund of the R340 000, although not specifically pleaded as such, was in my view sufficiently ventilated at a factual level as to permit this court to order the payment of that amount to the plaintiff, but subject to a possible adjustment regarding interest and costs.

[89] Interest was claimed in respect of the damages claim as 'Interest at the prescribed rate *a tempore morae*.' No adjustment regarding the prayer for interest accordingly seems required, but to the extent that it might, I intend making it clear that the first defendant must pay the sum of R340 000 to the plaintiff, but that mora interest thereon shall run from the date of this judgment.

### **Conclusion**

[90] The correct legal position appears to be that the entire transaction, comprising the various agreements relating to the purchase of the bus, was cancelled. That obviously includes a cancellation specifically of the separate agreement, such as it was, between the plaintiff and the first defendant, being the declaratory relief claimed by the plaintiff. That cancellation would also affect the agreement between the first and second defendants, and the agreement between the plaintiff and the second defendant. No similar declaratory relief has however been claimed against the second defendant in regard to the agreement between it and the plaintiff, or of the agreement between it and the first defendant. The agreement between the plaintiff and the first defendant, as I endeavoured to show above, does not on its own represent the entire transaction relating to the acquisition of the bus. That agreement was however the foundation and *raison d'être* for the existence of the agreement between the first and second defendants, and the instalment sale agreement between the plaintiff and the second

defendant. When the agreement between the plaintiff and the first defendant was cancelled, the plaintiff cannot legally claim that the second defendant would have ongoing unassailable claims for instalment payments against it in terms of the instalment sale agreement. Nor was there a valid basis for the continued payment of insurance premiums in respect of the bus, where the risk had not passed to the plaintiff. I am however restricted in the relief that I may grant to the declaratory relief that was claimed. The other consequences that should follow, should be obvious.

[91] It follows that the plaintiff is entitled to the following relief against the first defendant:

- (a) An order declaring that the agreement concluded between the plaintiff and the first defendant in respect of the purchase of the new MAN bus is cancelled;
- (b) Payment of the sum of R340 000;
- (c) Interest on the sum of R340 000 *a tempore morae* at the prescribed rate from date of judgment to date of payment.

The further relief claimed falls to be dismissed.

[92] It also follows that the claim in reconvention falls to be dismissed.

### **Costs**

[93] The outcome of the claim in reconvention was dependent upon whether a repudiation and subsequent valid cancellation could be established by the plaintiff. The plaintiff has succeeded in doing so, but with reliance on the ground that the demand for payment of the sum of R420 000, when only R410 000 was on the first defendant's version legally claimable, amounted to a repudiation. That disposed of the dispute between the parties, without the need to make a determination as to whether there was an agreement that the Mercedes bus would be accepted as a trade in for the balance of the deposit in the sum of R410 000. Most of the evidence was devoted to attempting to decide that issue, which in the light of the findings in this judgement, became unnecessary to decide. The plaintiff however had to persist with its contentions in regard to the demand for the additional R10,000 amounting to a repudiation, as this was

not conceded by the first defendant when it could have done so. To that extent the plaintiff enjoyed success.

[94] But the plaintiff's success was limited as it only succeeded with an order for repayment of the sum of R340 000 and then not on the basis on which it was pleaded. Its claim for damages, which was substantial, was otherwise unsuccessful.

[95] Much uncertainty arose because of the imprecise manner in which the plaintiff's cause of action was pleaded in some respects. It seems to me, in the exercise of my discretion on costs, having regard to the extent of success enjoyed by both parties in regard to what was a difficult matter, time spent on issues in evidence, and the ultimate judgement, that the plaintiff should be entitled to one third of its costs of the claim in convention, and the costs in defending the first defendant's claim in reconvention. In respect of all reserved costs, each party is directed to pay its own costs.

### **Order**

[96] The following order is granted:

- (a) In respect of the plaintiff's claim in convention the following orders are granted:
  - (i) It is declared that the agreement concluded between the plaintiff and the first defendant in respect of the purchase of the new MAN bus is cancelled;
  - (ii) The first defendant is directed to pay an amount of R340 000 to the plaintiff together with interest thereon at the prescribed rate *a tempore morae* from date of judgment to date of payment;
  - (iii) The further relief claimed is dismissed;
  - (iv) The first defendant is directed to pay one third of the plaintiff's costs of the claim in convention.
- (b) The first defendant's claim in reconvention is dismissed with costs.
- (c) In respect of all costs previously reserved, each party is directed to pay its own costs.

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Koen J

## APPEARANCES

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