THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 917/2020

In the matter between:

RONEL NOLEEN SMIT **APPELLANT**

and

CALVIN KLEINHANS **RESPONDENT**

Neutral citation: *Ronel Noleen Smit v Calvin Kleinhans* (case no 917/2020) [2021] ZASCA 147 (18 October 2021)

Coram: PETSE AP, and MOLEMELA, MBATHA JJA and KGOELE and POTTERILL AJJA

Heard: 06 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 18 October 2021.

Summary: Vindication of property by non-owner – *rei vindicatio* not available to non-owner – bona fide possessor entitled to reclaim possession of property by way of a possessory remedy.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Mnqandi AJ, Dawood J concurring, sitting as court of appeal):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and in its place is substituted the following:

'1 The appeal is dismissed.

2 There is no order as to costs.'

JUDGMENT

Potterill AJA (Petse AP and Molemela, Mbatha JJA and Kgoele AJA concurring):

[1] During June 2017 the appellant, Ms Ronel Noleen Smit (Ms Smit), concluded a written instalment sale agreement (the agreement) with General Motors South Africa Financial Services (GMSA) in terms of which she purchased from GMSA a Chevrolet Utility 1.4 2017 model with registration number HYR 627 EC (the vehicle). In terms of clause 4.1 of the agreement GMSA retained the ownership[1] of the vehicle whilst Ms Smit undertook to bear all risks of loss or damage in and to the vehicle.[2] When Ms Smit concluded the agreement she was in a romantic relationship with the respondent, Mr Calvin Kleinhans (Mr

[1] Clause 4.1 of the agreement states: 'We will remain owner of the Goods until you have paid all the amounts due under this Agreement'.

[2] Clause 2.5 states: 'All risk in and to the Goods will pass to you and remain with you when you take delivery of the Goods or when the risk leaves the Supplier of the Goods, whichever is the earlier'.

Kleinhans). Simultaneously with the conclusion of the agreement, Ms Smit concluded an oral agreement with Mr Kleinhans.

[2] The undisputed terms of the oral agreement were that Mr Kleinhans would have the exclusive use and enjoyment of the vehicle for his personal benefit, but subject to him paying R5 000 to Ms Smit on the 15th of every month which amount was equivalent to the monthly instalment payable to GMSA by the latter. Mr Kleinhans also undertook to insure the vehicle and pay the yearly license costs, all fines accrued in respect of the vehicle and the costs for servicing the vehicle. It was further agreed between the parties that failure by Mr Kleinhans to observe any one of these terms would constitute a material breach of the oral agreement, entitling Ms Smit to the immediate restoration of possession of the vehicle.

[3] During early to mid-2018 the relationship between these two parties broke down irretrievably. With no meaningful communication between them, there was a resultant silence pertaining to the fate of the vehicle. This was the beginning of Ms Smit's woes. Mr Kleinhans' payments to Ms Smit became erratic and in July 2018 only R2 500 of the monthly amount payable was paid. Mr Kleinhans also flatly refused to return the vehicle to Ms Smit despite demand by the latter for him to do so. As a result, Ms Smit instituted legal proceedings against Mr Kleinhans in the regional court Port Elizabeth for the return of the vehicle. Mr Kleinhans opposed the application, but the regional court ordered that the vehicle be returned to Ms Smit and also granted ancillary relief.

[4] In coming to the aid of Ms Smit, the regional court reasoned that by virtue of being the registered owner of the vehicle, she was the lawful owner thereof. Therefore she was entitled to vindicate it by invoking the *rei vindicatio*. And

because Mr Kleinhans was admittedly in possession of the vehicle, concluded the regional court, Ms Smit had therefore discharged the onus resting on her.

[5] Dissatisfied with this outcome, Mr Kleinhans appealed to the Eastern Cape Division of the High Court, Grahamstown (the high court). The high court upheld the appeal and, as a result, set aside the order of the magistrate's court, substituting it with an order dismissing the application with each party to pay their own costs. The high court held that contrary to the conclusion reached by the magistrate's court Ms Smit was not the common law owner of the vehicle. Therefore, the *rei vindicatio* did not avail her. The high court reasoned that Ms Smit's reliance on the National Road Traffic Act 93 of 1996 (NRTA) was misplaced for she was an 'owner' purely for purposes of the NRTA and not an owner in the conventional sense in terms of the common law. In support of this conclusion the high court relied on various decisions of this Court.[3] The high court also made reference to the decision of this Court in *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* [1993] 1 All SA 259 (A) in which the following was stated (at 259A-B):

'Since its claim is vindicatory in its nature, ownership was an essential averment which had to be adequately proved by it.'

Consequently, the high court concluded that in a claim based on *rei vindicatio* it was incumbent upon a party asserting ownership to prove such assertion.

[6] As already mentioned, the high court upheld the appeal with no order as to costs. This appeal, with special leave granted by this Court, is against that order.

Issues to be decided

[7] At the core of this appeal is the question whether Ms Smit, as a bona fide possessor, can rightfully invoke the *rei vindicatio* to claim the return of the

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

vehicle. And if the *rei vindicatio* can not avail her, whether Ms Smit had, on the facts alleged by her, established that she had a stronger right to possess the vehicle and therefore entitled to its return as a consequence of the breach of the oral agreement between the parties.

Rei vindicatio

[8] The objective of the *rei vindicatio* is to restore physical control of the property to the owner, with ownership forming the basis for such a claim. Three requirements must be met for the *rei vindicatio* to be successfully invoked.[4] In this case it is common cause that the vehicle existed and that it was in the possession of Mr Kleinhans, thus leaving Ms Smit to prove ownership. In addition, it is incumbent upon her to prove that Mr Kleinhans' right to be in possession of the vehicle was lawfully terminated.[5]

[9] One of the incidents of ownership, said Jansen JA in *Chetty v Naidoo* 1974 (3) SA 13 (A), 'is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever is holding it. It is inherent in the nature of ownership that possession of the *res* should be normally 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.'[6]

[10] In terms of the written agreement between GMSA and Ms Smit the latter is not the owner of the vehicle; GMSA retained ownership of the vehicle until all the amounts owed in terms of the agreement have been paid in full. Although Ms

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[4] See G Muller et al *The Law of Property: Silberberg and Schoeman's* 6 ed (2019) at 269-270 state that the three requirements that the owner has to prove are: (a) he/she is the owner of the thing; (b) the thing was in the possession of the defendant at the commencement of the action; and (c) the thing which is vindicated is still in existence and clearly identifiable.
[5] *Chetty v Naidoo* [1974] 3 All SA 304 (A); 1974 (3) SA 13 (A) at 15E-F.
[6] At 20B-C.

Smit is the bona fide possessor of the vehicle, and bears all the risk of loss and damage in respect of the vehicle in terms of the agreement, her possessory right did not entitle her to re-claim the vehicle through the *rei vindicatio* as she was not vested with full ownership of the vehicle.

[11] Accordingly, Ms Smit's reliance on the motor vehicle licence issued in her name to prove that she is the owner of the vehicle is misplaced. Her assertion that she was the owner as defined in s 1 of the NRTA[7] does not assist her. Ownership in terms of the NRTA is confined only to the purposes of the NRTA and whatever else is regulated by the NRTA. It therefore follows that the various judgments upon which Ms Smit relied in support of her contentions that she was the owner of the vehicle and could therefore rightfully invoke the *rei vindicatio* are clearly wrong. However, the conclusion that the *rei vindicatio* does not avail Ms Smit is not necessarily the end of the matter. Rather, it raises the question as to whether Ms Smit had established under the rubric of her prayer for further or alternative relief that she is entitled to have the vehicle's possession restored to her.

[12] Undoubtedly, Ms Smit is the bona fide possessor of the vehicle. However, she relinquished physical possession to Mr Kleinhans pursuant to the parties' oral agreement. Ms Smit is, in terms of the agreement with GMSA, entitled to be in possession of the vehicle; but Mr Kleinhans was, in turn, entitled to be in possession of the vehicle in terms of the oral agreement. For Ms Smit to be successful in her claim for the return of the vehicle she must prove that she is entitled to possession (ie *ius possidendi*) and that her right to possession is stronger than that of Mr Kleinhans.[8] Although Ms Smit did not have the physical

[7] Section 1 of the National Road Transport Act 93 of 1996 defines 'owner' insofar as is relevant to this case as:
'(a) the person who has the right to the use and enjoyment of a vehicle in terms of . . . a contractual agreement with the title holder of such vehicle.'
[8] 27 *Lawsa* Second Ed para 118; Also see H Mostert et al *The principles of the Law of Property in South Africa* (2010) para 4.4.2.3.

possession of the vehicle (detention), she did have the *ius possidendi* derived from the agreement with GMSA. To succeed in her claim, Ms Smit bore the onus to prove that Mr Kleinhans had breached the parties' oral agreement.

[13] It was submitted in the heads of argument filed on behalf of Mr Kleinhans that there was a genuine dispute of fact on the papers pertaining to whether there was a breach of the oral agreement. Consequently, it was contended that the matter could not be decided on the papers without referral to oral evidence to resolve the dispute. The approach to determining whether there is a factual dispute was explained in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (AD) at 634H-I as follows:

'. . . It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation.'

[14] In her founding affidavit Ms Smit stated that: '. . . I concluded the deal in question and the motor vehicle was subsequently delivered in my absence to the Respondent'. In his answering affidavit, Mr Kleinhans said: 'The Respondent collected and/or took possession of the vehicle from GMSA, Williams Hunt Moffet, on or about 21 June 2017, after the Applicant signed the instalment sale agreement with GMSA Financial Service'. Yet, in the replying affidavit Ms Smit then contradicts herself saying: 'I deny that the vehicle was never delivered to me or that I never took possession of the vehicle. I maintain that the vehicle was delivered to me when I purchased it and I accepted delivery thereof in person'. Ms Smit alleged that the monthly instalment that should have been paid over in July was R5 227.58 and in the reply she does not answer to the averment by Mr Kleinhans that the monthly instalment was R4 831.16 per month. Ms Smit baldly

denied the further term of the oral agreement as alleged by Mr Kleinhans that once the vehicle has been paid for in full, it would become his sole property. In support of this averment Mr Kleinhans alleged that he had modified the vehicle because it was ultimately going to become his property once it was fully paid for.

[15] In *Fakie N O v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) this Court stated the following regarding disputes of facts in motion proceedings (para 55):

'That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings, and in the interests of justice courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. . . .'

Despite the shortcomings and what appears at face value to be contradictions in the affidavits, I am satisfied that final relief can be granted without recourse to oral evidence on the basis of the facts averred in the founding affidavit that have been admitted by Mr Kleinhans together with the facts alleged in the latter's answering affidavit.[9] Thus, referral to oral evidence would be inappropriate because '[a] real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. . .'.[10] Mr Kleinhans did not meaningfully address the short payment of the instalment for July 2018 so as to raise a real and genuine dispute of fact on the papers.[11]

[16] It remains to express our gratitude to Mr S Grobler SC who, together with Ms R Mofokeng, argued the appeal at the request of this Court because Mr Kleinhans had run out of funds. Consequently, his attorneys were constrained to

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[9] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 and the cases therein cited.

[10] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) para 13.

[11] See in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 TPD at 1163-1165; *Da Mata v Otto NO* 1972 (3) SA 585 (A) at 882D-H.

withdraw and indicated that there would be no appearance on behalf of Mr Kleinhans at the hearing of the appeal. We are grateful to counsel for coming to the assistance of the Court in keeping with the best traditions of the Bar and for their concise and lucid heads of argument.

[17] Accordingly, the following order is made:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and in its place is substituted the following:

'1 The appeal is dismissed.

2 There is no order as to costs.'

S POTTERILL
ACTING JUDGE OF APPEAL

Appearances:

For appellant:	V Madokwe (heads of argument prepared by A Beyleveld SC with him V Madokwe)
Instructed by:	Mandy Miller Attorneys, Port Elizabeth Honey Attorneys, Bloemfontein
For respondent:	No appearance
For amicus:	S Grobler SC (with him R Mofokeng)