

SOUTH AFRICA / JUDGMENT

Affinity Consumer Data (Pty) Ltd v Singh-Hewlett (2023-102629) [2023] ZAGPJHC 1366 (24 November 2023) [2023] ZAGPJHC 1366

COURT

South Gauteng High Court, Johannesburg

BEFORE

H A van der Merwe

CASE / FILE NUMBER

2023-102629

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AFRICAIN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

Case Number: 2023-102629

In

the matter between:

AFFINITY
CONSUMER DATA (PTY) LTD
Applicant
And
DR
SINGH-HEWLETT, SHIRE
Respondent**JUDGMENT**

HA VAN DER MERWE, AJ:

- [1] This is an urgent application in which the applicant seeks an order that the respondent deliver to it an X7 BMW motor vehicle (the vehicle).

- [2] The applicant's cause of action is the rei vindicatio. That means that if the applicant can show that it is the owner of the vehicle and that the respondent is in possession of the vehicle, then the applicant is entitled to the order it seeks, unless the respondent can put up a right to possess the vehicle.[1] It is common cause that the respondent is in possession of the vehicle.
- [3] The applicant seeks final relief. The rules in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 3 SA 623 (A) at 634H - 635C are therefore applicable.
- [4] The respondent resists the applicant's case on the basis that her husband, Mr Hewlett, gave the vehicle to her as a gift during or about 2019. The respondent and Mr Hewlett have separated since and are in the throes of a divorce, but at the time when the vehicle was given to her, they were still living together.
- [5] Ms Goodenough for the applicant argued that the applicant has shown that it acquired ownership of the vehicle, having purchased it for cash from a dealer in motor vehicles during
2019. She further argued that the respondent does not deny the applicant's (initial) ownership. Once it is accepted that the applicant was the owner of the vehicle, then it takes matter nowhere for the respondent to rely on Mr Hewlett having given the vehicle to her as a gift, as he was not the owner. For Mr Hewlett to pass ownership in the vehicle to the respondent, the respondent had to show that Mr Hewlett, acting on behalf of the applicant, intended to pass ownership of the vehicle to the respondent. As the respondent did not make those allegations, the applicant is entitled to the order it seeks, so Ms Goodenough's argument went.
- [6] Mr Vally for the respondent argued that the issue is not whether Mr Hewlett acted as an agent for the applicant when he gave the vehicle to the respondent as a gift. The issue was whether the applicant is the owner of the vehicle in the first place. It does not matter that Mr Hewlett may or may not have been authorised to pass ownership in the vehicle, on behalf of the applicant, to the respondent. All the respondent has to do to defeat the applicant's claim, so Mr Vally argued, was to deny the applicant's ownership in a manner that raises a bona fide dispute of fact, according to the rules in *Plascon-Evans*.
- [7] The issue I am to decide is therefore this: does the answering affidavit raise a bona fide dispute of fact on the applicant's claim to be the owner of the vehicle?
- [8] Ms Goodenough fairly conceded that, applying the rules in *Plascon-Evans*, I am to take it for granted that in 2019 Mr Hewlett gave the vehicle to the respondent as a gift. Accepting that as fact does not however bring an end to the matter, for, if, as stated above, I also accept that the applicant was the owner of the vehicle at the time when Mr Hewlett gave it to the respondent as a gift, it does not amount to a transfer of ownership from the applicant to the respondent. For ownership to pass from the applicant to the respondent, Mr Hewlett must have acted on behalf of the applicant at the time.[2]

[9] The applicant alleges to be the owner of the vehicle in its founding affidavit. This allegation is denied in the answering affidavit in clear terms, but to raise a bona fide dispute of fact, it is required of the respondent to do better than just a bare denial.

[10] The respondent concedes in the answering affidavit that the vehicle is registered in the applicant's name, but this she says, was according to Mr Hewlett, "for tax purposes". Registration of a motor vehicle is not conclusive evidence of ownership,[3] so it remains to consider the facts on the true intention of Mr Hewlett at the time, i.e. did he intend for the applicant to become the owner, or did he intend to make the respondent the owner, when the vehicle was bought from the dealer. According to her evidence, all her and Mr Hewlett's personal assets (save for their marital home) were also transferred to the applicant, for the same reason. Elsewhere in her affidavit she alleges that the applicant is Mr Hewlett's alter ego and agent provocateur. Her evidence is also that Mr Hewlett was at the time the sole director and shareholder of the applicant. (These allegations are

denied by the applicant, but as stated above, the rules in Plascon-Evans compel me decide this application on those facts). She further points out that in other litigation between her and Mr Hewlett, the vehicle featured, but Mr Hewlett did not then state that the applicant was the owner of the vehicle, even when the respondent referred to the vehicle as hers.

[11] Ms Goodenough argued that the allegations to the effect that the applicant is Mr Hewlett's alter ego, or agent provocateur, do not go far enough to make out a case for the corporate veil to be lifted or for a case in terms of section 20(9) of the Companies Act 71 of 2008. In this Ms Goodenough is probably on solid ground, but that is not the pertinent question I am to decide.

[12] When the answering affidavit is read as a whole and in a fair manner, it seems to me that the respondent does deny the applicant's claim to be the owner of the vehicle in a manner that raises a bona fide dispute of fact. When she states that the registration of the vehicle in the name of the applicant was for "tax purposes", when read in context, is reasonably capable of being understood to mean that Mr Hewlett's true intention was not for the applicant to be the owner of the vehicle. To say it was done for tax purposes, can be taken to mean that what was intended was to create the appearance that the applicant was the owner of the vehicle, while in reality that was not the case. The respondent could have stated her case in clearer terms, but it would be unduly robust, in my view, to read her affidavit in such a way as to exclude an interpretation that is favourable to her case. Typically, when an affidavit is drawn in deliberately ambiguous language, it is done to provide the deponent with wiggle room when their evidence is in due course tested under cross-examination. It does not seem to me that the respondent was employing this tactic in the way in which the answering affidavit was drawn. There is a difference between (a) facts that are in and of itself ambiguous; and (b) what should be clear facts, but which are presented in an ambiguous manner. Here, it seems to me, on the material I have in front of me, that (a) is the case rather than (b). After all, the issue is Mr Hewlett's true intention in 2019 when the vehicle was bought, which, from the respondent's perspective, can only be addressed with circumstantial evidence as

she could not know from her personal knowledge, what went on in Mr Hewlett's mind.

[13] Ms Goodenough argued that when one spouse gives the other a motor vehicle as a gift, it does not follow that the giving spouse intends to make the receiving spouse the owner, as it may as well signify only the intention to give the receiving spouse the use of the vehicle, or it may be a means of compliance with a maintenance duty. This submission seems to me to be consistent with the natural order of things, but as with Mr Hewlett's intention dealt with above, the ambiguous nature of the evidence does not warrant a rejection of the respondent's version, because as before, it is the facts that are inherently ambiguous, not necessarily the manner in which the facts are presented in the answering affidavit.

[14] In my view, a more robust approach to the respondent's affidavit should be resisted. In *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 5 SA 300 (SCA) Leach JA found:

"[21] These factors — particularly collectively — do cast a measure of doubt on the appellants' version, which is certainly improbable in a number of respects. However, as the high court was called on to decide the matter without the benefit of oral evidence, it had to accept the facts alleged by the appellants (as respondents below), unless they were 'so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers'. An attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the appellants is so far-fetched and improbable that it can be rejected without evidence.

[22] As was recently remarked in this court, the test in that regard is 'a stringent one not easily satisfied'. In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence has been led and tested by cross-examination, things turn out differently from the way they might have appeared at first blush. As Megarry J observed in a well-known dictum in *John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John* [1970] 1 Ch 345 ([1969] 2 All ER 274 (Ch)) at 402 (Ch) and 309F (All ER):

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'" (footnotes omitted)

[15] The parties are agreed that if I am to find that there is a bona fide factual dispute then the matter should be referred to either oral evidence or to trial, as opposed to being dismissed. On the question of whether the applicant is the owner of the vehicle, although the issue can be formulated crisply, it involves all manner of other questions, such as Mr Hewlett's role in relation to the applicant and the measure of control he exercised over it. A referral to trial therefore seems to me to be the appropriate order.

- [16] Ms Goodenough pointed out that as I found that the application is urgent, it would be incongruous to refer it to trial, as that would mean that it would not be resolved for quite some time. The incongruousness is undeniable, but urgency and the resolution of factual disputes on motion are two very different enquiries. The presence of urgency cannot turn what would otherwise be a bona fide factual dispute into something different.
- [17] The parties did not pertinently address me on costs, should the matter be referred to trial. It seems to me therefore that costs ought to be reserved for decision by the trial court.
- [18] I make the following order:
- a. The application is referred to trial;
 - b. The notice of motion shall stand as the applicant's simple summons;
 - c. The notice of intention to oppose shall stand as the respondent's notice of intention to defend;
 - d. Thereafter the rules applicable to actions shall apply;
 - e. The costs of the application are reserved for determination by the trial court.

H A VAN DER MERWE

ACTING JUDGE OF THE HIGH COURT

Heard on: 21 November 2023

Delivered on: 24 November 2023

For the applicant Adv Goodenough

Instructed by Calvin Carl Viljoen Attorneys Inc

For the respondent Mr Vally

Instructed by Shaheed Dollie Inc

[1] Chetty v Naidoo 1974 (3) SA 13 (A) 20A-D

[2] Ownership can only be transferred by the owner. See: Van der Merwe v Webb (1883) 3 EDC 97 102; Mngadi v Ntuli 1981

(3) SA 478 (D); ABSA Bank Ltd t/a Bankfin v Jordashe Auto CC 2003

(1) SA 401 (SCA) [17]

[3] Akojee v Sibanyoni 1976

(3) SA 440 (W) 422C-F

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