

SOUTH AFRICA / JUDGMENT

**DKR Auto CC v Commissioner for the South
African Revenue Services (42604/2012) [2014]
ZAGPPHC 116; 76 SATC 279 (13 March 2014)
[2014] ZAGPPHC 116**

COURT

North Gauteng High Court, Pretoria

BEFORE

Murphy

CASE / FILE NUMBER

42604/2012

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IN THE HIGH COURT
OF SOUTH AFRICA, PRETORIA
(REPUBLIC OF
SOUTH AFRICA)
CASE
NO: 42604/2012

DATE:

13 MARCH 2014

In the matter

between:

DKR AUTO

CC.....Applicant

And

THE COMMISSIONER
FOR THE SOUTH AFRICAN
REVENUE
SERVICES.....Respondent

JUDGMENT

MURPHYJ

1. The applicant, DKR Auto CC, (“DKR”) made application for an order setting aside the seizure by the respondent, the Commissioner for the South African Revenue Services, (“the Commissioner”), of a Lamborghini Murcielago with identification number ZHWBE47508LA02819 (“the vehicle”). The seizure was effected on 18 November 2011 in terms of section 88(1)(c) of the Customs and Excise Act 91 of 1964 (“the Act”).

DKR brought the application to have the seizure set aside and for the vehicle to be returned to it in terms of section 89 of the Act. Alternatively, it sought to review and set aside the seizure in terms of the Promotion of Administrative Justice Act 3 of 2000.

2. On 27 February 2014 I upheld a point in limine raised by the Commissioner, dismissed the application and ordered DKR to pay the costs, including the costs of two counsel and those reserved by Fourie AJ on 27 August 2013. These are my reasons for those orders.
3. The Commissioner contends that DKR is not the owner of the seized vehicle and consequently lacks locus standi to bring the application.
4. The vehicle was detained on 23 March 2011 by officials of the Commissioner in terms of section 88(1)(a) of the Act.
5. Section 88(1) of the Act reads:

“88. *Seizure.*

- (1) (a) An officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act.”

- (b) Such ship, vehicle, plant, material or goods may be so detained where they are found or shall be removed to and stored at a place of

security determined by such officer, magistrate or member of the police force, at the cost, risk and expense of the owner, importer, ex-importer, manufacturer or the person in whose possession or on whose premises they are found, as the case may be.

(bA) No person shall remove any ship, vehicle, plant, material or goods from any place where it was so detained or from a place of security determined by an officer, magistrate or member of the police force.

- (c) If such ship, vehicle, plant, material or goods are liable to forfeiture under this Act the Commissioner may seize that ship, vehicle, plant, material or goods.
- (d) The Commissioner may seize any other ship, vehicle, plant, material or goods liable to forfeiture under this Act.”

6. At the time the vehicle was detained it was registered on the E-Natis system in the name of Mr Ryan Drake (“Drake”), but was kept at 54A Kloof Road, Bedfordview, the home of Mr. Radovan Krejcir, the husband of Ms Katerina Krejicrova, the sole member of DKR.

7. Subsequent to the detention of the vehicle there was an exchange of information and correspondence between the attorneys of DKR and the Commissioner regarding the vehicle. The Commissioner attached various books and documents as part of his investigation. Eventually, on 18

November 2011, the Commissioner addressed a letter to DKR's attorneys informing them that he had decided to seize the vehicle in terms of section 88(1)(c) and advising them inter alia of the rights of an owner in terms of section 93 of the Act.

8. Section 89(1) of the Act recognizes the right of the owner to institute proceedings to claim seized goods. It reads:

“(1) Whenever any proceedings are instituted to claim any ship, vehicle, container or other transport equipment, plant, material or goods (in this section, section 43 and section 90 referred to as “goods”), which have been seized under this Act, such claim must be instituted by the person from whom they were seized or the owner or the owner’s authorized agent (in this section referred to as “the litigant”).”

9. Section 93(1) provides that the Commissioner may, on good cause shown by the owner of a seized vehicle (or other seized goods), direct that it be delivered to the owner subject to the payment of any duty, the charges incurred in the connection with the seizure and such conditions as the Commissioner may determine.
10. It is common cause between the parties that only the owner of the vehicle or the person from whom the vehicle was seized has locus standi to institute proceedings to claim the vehicle in terms of section 89 of the Act.
11. DKR sets out its version of the history of the ownership of the vehicle in the founding affidavit. The Commissioner has cast doubt about the accuracy, completeness and authenticity of the explanation and the various transactions in relation to the vehicle.
12. According to DKR, the first registered owner of the vehicle in South Africa was Scara Technologies. Annexure FA2 to the founding affidavit is an official certificate of registration reflecting that the vehicle was “built up” and registered in the name of Scara Technologies on 12 October 2010. According to Krejicrova, the deponent to the founding affidavit, Scara Technologies pursuant to a written loan agreement borrowed R20 million from Groep Twee Beleggings (Pty) Ltd, (“Groep Twee”) of which Krejicrova was a director and the sole shareholder.
13. The loan of R20 million, paid in cash, was concluded on 29 September 2010, one month before the vehicle was registered in the name of Scara Technologies. In terms of clause 4.2 of the loan agreement, Scara Technologies “ceded” the vehicle, as yet not registered in its name, to Groep Twee as security for the repayment of the loan. Krejicrova further averred that when Scara Technologies could not repay the loan, Groep Twee became the owner of the vehicle. She did not state in the founding Affidavit when Scara Technologies defaulted. But it is recorded in Annexure JG03 to the answering affidavit, an E-Natis query, that the

vehicle was registered in the name of DKR on 29 October 2010, a mere 17 days after it was registered in the name of Scara Technologies and one month after the conclusion of the loan for R20 million, despite clause 3 of the loan providing for the first instalment to become due and payable on 15 January 2011.

14. There is no record or documentary evidence indicating that the vehicle was transferred from Scara Technologies to Groep Twee. As stated, it was registered in the name of DKR just over two weeks after its first registration in the name of Scara Technologies. Krejicrova claims that Groep Twee sold the vehicle to DKR for an amount of R3,5 million. She does not state when this sale was concluded, but presumably it was done (if at all) some time in October 2010. Krejicrova is the sole member of DKR and the only shareholder of Groep Twee. The purchase price for the vehicle, she averred, was paid by creating a loan account in favour of Groep Twee against DKR.
15. On 21 February 2011 DKR sold the vehicle to Drake for R2,8 million. The written agreement, annexed as annexure FA5 to the founding affidavit, provides that the purchase price for the vehicle was payable on or before 10 October 2011. Drake was expressly granted the right to register the vehicle in his name, but the vehicle was to be “stored” at the home address of Krejcir and Krejicrova “in the interim”. Drake agreed to sign a blank change of ownership back in favour of DKR to enable DKR to re-register the vehicle should the purchase price not be paid by 10 October 2011. The vehicle was registered in the name of Drake on 11 March 2011. One may assume therefore that ownership was transferred to Drake according to Krejicrova by reason of a complete sale on credit, a real agreement and delivery in the form of *traditio longa manu* or *constitutum possessorium*.
16. The Commissioner detained the vehicle, removed it from the Krejcir home and took it into custody on 23 March 2011.
17. The detention of the vehicle made it impossible to sell the vehicle, and thus Drake was supposedly unable to raise the purchase price by selling the vehicle on, as may have been the original intention. Despite Drake having until 10 October 2011 to pay the price, DKR, or someone acting on its behalf, re-registered the vehicle in the name of DKR on 17 August 2011.
2011. DKR contends that since it again became the owner of the vehicle from that date it has *locus standi* to institute proceedings to claim the vehicle.
18. The Commissioner’s investigation revealed that the vehicle was imported into the country during April 2009 from the United Kingdom. The exporter was Clive Sutton Ltd, a car dealer. The importer was recorded in the relevant documentation as Mrs Leanne Kistan of Northriding, Johannesburg. The value of the vehicle was reflected as being £16 000 (or the then equivalent of R212 899), when its value in the sales documentation was stated to be £160 000. The import documentation described the vehicle as a complete vehicle capable of carrying passengers and was not a “built up” vehicle as recorded in the first E-Natis registration. Ms Kistan has deposed to an affidavit stating that neither she nor anyone she knows purchased the vehicle and imported it into South Africa.

19. Further investigation established that the funds paid for the vehicle (£160 000 plus incidental costs of £8100) to Clive Sutton Ltd originated from a company named DKR Invest Praha, which name resembles that of the applicant, DKR Auto CC. The funds seem to have been transferred to Clive Sutton Ltd from a bank in Prague, Czech Republic, the home country of Krejcir.
20. The Commissioner maintains that the vehicle most probably was acquired by Krejcir for his use, but that he has sought to disguise his interest in it by resorting to the transactions set out in the founding affidavit; which the Commissioner suspects are not genuine. He sets out in some detail the relationship between Krejcir and one Casciani who, the record shows convincingly, was the person who initially dealt with Clive Sutton Ltd, and did so on behalf of Krejcir.
21. It is unnecessary for this court to make a definitive finding regarding the true ownership of the vehicle. The narrower question for determination was whether DKR had established its locus standi for the purpose of these proceedings.
22. It is common cause that the vehicle was not detained and removed from DKR. On its version, Drake was the owner of the vehicle when the Commissioner detained it. Assuming that DKR did in fact acquire ownership in October 2010, it sold the vehicle on credit to Drake on 21 February 2011, intended to transfer it to him, allowed him to register it in his name and effected delivery most probably by *constitutum possessorium*. When Drake opted to “sell” the vehicle back to DKR in August 2011, the vehicle was in the custody and possession of the Commissioner, and by virtue of section 88(1)(bA) of the Act there existed a prohibition on the removal of the vehicle from the place where it was detained. Consequently, when Drake purported to sell the vehicle back to DKR (the purchase price presumably being in the form of the release from his obligation to DKR) he could not have transferred ownership back to DKR because he was not in a position to make delivery.
23. Ownership in a movable corporeal thing is conveyed in law by delivery, i.e. by transfer of possession and control. The transferee must be placed in a position to exercise factual control over the property. If Drake was indeed the owner in March 2011 when the vehicle was detained, as DKR contends, he then lost the capacity to transfer ownership to DKR when the Commissioner took factual control of the vehicle.
24. Counsel for DKR submitted that transfer of ownership to DKR could have occurred by way of constructive delivery, possibly accomplished by the registration of the vehicle in the name of DKR in August 2011. Our law recognizes a limited number of instances of constructive

delivery, none of which apply in this case. Both *traditio longa manu* and *constitutum possessorium* require the transferor (Drake) to remain in possession after the sale, which was clearly not the case here. *Traditio brevi manu* would have required DKR to have been in possession when the re-sale took place in August 2011, which it was not. The only possibility then would be attornment, being a situation where delivery is effected by an agreement between the holder of the property (in this case the Commissioner) and the two parties to the sale.

Attornment can only be effected by a tripartite agreement between the parties that the holder will hold on behalf of the transferee. There must be a mental concurrence of all three parties, usually achieved by the instruction of the transferor to the holder that ownership has been transferred to the transferee. It is common cause that Drake did not inform the Commissioner that he had re-sold the vehicle to DKR and hence delivery could not have been effected by attornment. In the premises, ownership was not transferred from Drake to DKR on 17 August 2011.

25. In the final analysis, the case put up by DKR in support of its claim of ownership does not establish that it is in fact the owner. There is no other evidence confirming its ownership. It has accordingly not discharged the onus on it to prove its locus standi. It has shown no sufficient, personal and direct interest permitting it to claim the vehicle or to review the Commissioner's decision to seize it.

26. For those reasons I upheld the point in limine and granted the order I did.

JR MURPHY

JUDGE OF THE HIGH COURT

Date Heard: 27 February 2014

For the Applicant: Adv v.d. Heever

Instructed By: Faber Goertz Ellis Austin Inc.

For the Respondent: Adv MP vd Merwe

Instructed By: State Attorney, Pretoria

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA 27 February 2014 CASE NO: 42604/2012

BEFORE THE HONOURABLE JUSTICE MURPHY

REVENUE SERVICES.....Respondent

HAVING HEARD counsel(s) for the party(ies) and having read the documents filed of record and by agreement between Applicant and Respondents 1 and 2

IT IS ORDERED

1. The point in limine is upheld.
2. The application is dismissed with costs, such costs to include the costs of two counsel including the costs reserved by the court on 27 August 2013.

BY THE COURT F*E0ISTRAB

I Att: Faber Goertz Ellis Austin Inc.

HIGH COURT TYPIST: BvZ

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