

SOUTH AFRICA / JUDGMENT

Mayibuye Business Enterprise CC v Mogale and Others (7775/2021) [2023] ZALMPPHC 55 (25 July 2023) [2023] ZALMPPHC 55

COURT

Limpopo High Court, Polokwane

BEFORE

SS Mthimkulu

CASE / FILE NUMBER

7775/2021

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA
(LIMPOPO DIVISION,
POLOKWANE)

Case Number: 7775/2021

REPORTABLE: NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

DATE:

25/07/2023

In

the matter between:

MAYIBUYE
BUSINESS ENTERPRISE CC
APPLICANT
AND
MASHILO
DAVID MOGALE
FIRST
RESPONDENT
MIAMI
LODGES CC
SECOND
RESPONDENT
THE
MEMBER OF THE EXECUTIVE
THIRD
RESPONDENT
COUNCIL
OF THE DEPARTMENT OF
TRANSPORT
AND COMMUNITY SAFETY
LIMPOPO
PROVINCE

JUDGMENT

MTHIMKULU SS AJ:

INTRODUCTION:

- [1] This is an application wherein the Applicant applies that the 1st and 2nd Respondents be ordered to return a Toyota Hino Super F Series with registration number: BLS[...] (“BLS HINO”) to the Applicant. The Applicant further applies for ancillary orders that the 1st and 2nd Respondents be ordered to hand over the registration certificates of the vehicles allegedly purchased by the Applicant and that the 1st and 2nd Respondents be ordered to sign all the necessary documents to effect transfer of the said vehicles into the name of the Applicant. The Applicant’s claim is premised on the rei vindicatio.
- [2] The Applicant further seeks a cost order against the 1st and 2nd Respondents jointly and severally, the one paying the other to be absolved.

COMMON CAUSE FACTS:

- [3] In February and July 2009 respectively, the Applicant entered into written loan agreements with the second respondent as well as with Butani Transport CC (“Butani”). The Applicant entered into similar written agreements (“Loan Agreements”) with the second Respondent, as well as with Butani.

[4] The terms of the agreements were that:

- The second Respondent and Butani would loan vehicles to the Applicant.
- The loan agreement would endure for as long as the second Respondent and Butani's respective lease agreements with the financial institutions endured.
- The Applicant would make payment of the stipulated monthly instalments into the second Respondent's and into Butani's nominated bank accounts.
- If at the expiry of the agreements the Applicant was interested in purchasing the vehicles, a separate sale agreement would then be entered into by the parties.

[5] It is common cause that the Applicant has been in possession of the BLS Hino from 24 July 2009. The BLS Hino was impounded by the 3rd Respondent on 23 February 2021. The 1st Respondent subsequently obtained possession of the BLS Hino from the 3rd Respondent.

[6] It is common cause that neither the second Respondent nor Butani handed over the certificates of registration in respect of the vehicles to the Applicant. It is further common cause that the First Respondent is currently in possession of the BLS Hino.

ISSUE TO BE DETERMINED:

[7] The issue to be determined is whether the Applicant relying on the *rei vindicatio* has proved ownership of the vehicles ('items').

THE LAW: REI VINDICATIO:

[8] The owner of a thing has a right to possess, use, enjoy, destroy or alienate it. In the event that any of these acts are infringed, in any manner whatsoever, he or she has an appropriate legal remedy in the form of a *rei vindicatio*.

[9] A person relying upon his vindicatory rights must establish ownership of the thing and that the person against whom the relief is sought, was in possession of the thing when the proceedings were instituted.[1] Simply put, in order for an owner to succeed in a *rei vindicatio*, he must prove that: (i) he is the owner of the thing; (ii) that the other person was in possession of the thing at the time of the commencement of the application; and (iii) that the item in question is still in existence and clearly identifiable.[2] In *Van der Merwe and Another v Taylor NO and Others*[3], the Constitutional Court confirmed the legal requirements for this particular remedy.

[10] In a *rei vindicatio* the person relying on vindication has to prove all the requirements in order to succeed. If the person claiming vindication can prove all the requirements, the onus then shifts to the person claiming a right to retain the thing (in casu the vehicles) to establish such a right.[4] Of importance pertaining to this remedy is that it does not make any difference whether the possessor is *bona fide* or *mala fide*. The owner of the movable property found in the possession of a third party may recover it from any possessor without having to compensate him. Even from a possessor in good faith who gave value for it.[5]

APPLICATION OF THE LAW TO THE FACTS:

[11] The Applicant in its founding affidavit alleges that it is the owner of the BLS Hino, Trailer, and Screen.[6] It bases its allegation on the loan agreements that were concluded in

2009. The Applicant refers to the loan agreements it entered into with the second Respondent and Butani. Butani was represented by the first Respondent at the time.

[12] The loan agreements entered into, catered for a possible future sale agreement being concluded in respect of the vehicles. The relevant clauses in the loan agreements pertaining to this possible future sale reads as follows:

“4

(a) Should, at the expiry of this agreement, the Borrower be interested in purchasing the items as referred to in Annexure A annexed hereto, the parties specifically agree that a separate sale agreement will be entered into between the parties. The purchase price of the items as referred to in Annexure A will be the amount of R1000.00 (one thousand rand only), which amount will be paid as may be agreed between the parties”.

[13] The clause required a separate sale agreement to be entered into between the parties to conclude a sale of the items. The first and second Respondents deny that any sale was concluded. Upon a proper consideration of the Applicant's founding affidavit the Applicant does not allege that a separate sale agreement was entered into between the parties, and therefore a sale was concluded. The Applicant alleges that it paid the purchase price of R1000.00 to the Second Respondent and Butani. The payment of a purchase price on its own does not constitute a sale.

[14] The wording of clause 4 (a) of the loan agreement is clear, in that, in order for a sale to be concluded, the parties specifically agreed that a separate sale agreement will be entered into between the parties and a purchase price of R1000.00 will be paid as may be agreed between the parties (my emphasis).

[15] As I alluded to earlier on in this judgment the Applicant's founding affidavit is silent on the sale between the parties. The Applicant however attempts to introduce the allegations about the sale in its replying affidavit. The Applicant has failed to make out its case on ownership in its founding paper. An attempt to do this in a replying affidavit is not permitted and is prejudicial to the first and Second Respondents. It is for this reason that the allegations of a sale having taken place between the Applicant, Butani and the second Respondent in the replying affidavit is struck out.

CONCLUSION:

[16] In the premise, the Applicant has not established the relief it seeks premised on the rei vindicatio.

ORDER:

[17] The application is dismissed with costs.

SS MTHIMKULU

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for

hand-down is deemed to be 16h00pm on 25 July 2023.

DATE OF HEARING: 23

March 2023

DATE JUDGMENT DELIVERED: 25 July 2023

APPEARANCES: Attorney for the Applicant: BECKER ATTORNEYS Counsel for the Applicant: ADV. JP MORTON Email Address: becker@beckerinc.co.za Attorney for the first Respondent: FAIRBRIDGES WERTHEIM BECKER Counsel for the first Respondent: ADV. S FREESE Email Address: akika@fwbattorneys.co.za

[1] Chetty v Naidoo 1974(3) SA 13(A).

[2] Silberberg and Schoeman's, The Law of Property, 5th Edition on page 243 and 244.

[3] 2008

(1) SA 1(CC).

[4] Dreyer and Another NNO v AXZS Industries (Pty) Ltd 2006

(5) SA 548 (SCA).

[5] Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd

[1992] ZASCA 208; 1993

(1) SA 77 (A) at 82.

[6] Para 6.8 of the Founding Affidavit.

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