

SOUTH AFRICA / JUDGMENT

Padayacee v Hussein and Another (9902/2018) [2019] ZAKZDHC 26 (1 November 2019) [2019] ZAKZDHC 26

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Bezuidenhout

CASE / FILE NUMBER

9902/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case No. 9902/2018

In

the matter between:

KARINA

VEROSHA PADAYACEE

Applicant

and

MAHOMED

IMERANE HUSSEIN

First

Respondent

H

MOHAMED

Second

Respondent

JUDGMENT

BEZUIDENHOUT J

- [1] Applicant seeks the return of a 1936 model Ford registration number [...] together with some further relief. She granted her father Gonaseelan Nair the authority to bring the application on her behalf. She however, also deposed to an affidavit confirming this and is also the applicant in this matter. Her father deposed to the affidavit setting out the facts of the matter. First respondent filed a notice to oppose, his attorneys withdrew thereafter and he did not file an answering affidavit. Second respondent filed an answering affidavit and is opposing the relief claimed.
- [2] Nair borrowed the sum of R60 000.00 from first respondent who then kept the Ford as security for repayment of the loan. It is not deputed that the vehicle was that of his daughter. The sum of R60 000.00 which was advanced to Nair during March 2018 was repaid during May and June 2018 together with interest and fully paid up by 22 June
2018. First respondent however, refused to return the said vehicle. From correspondence attached to the founding affidavit it is clear that first respondent did not dispute that the vehicle had to be returned, kept on stating that he would do so and up until 8 August 2019 promised the return of the vehicle. It was only on 23 August 2018 that first respondent informed Nair that the vehicle had been sold to second respondent. He then indicated that one Lionel Pillay authorised the sale of the vehicle and an affidavit by the said Lionel Pillay indicating that he was authorised by Nair (it is common cause he is the Neville referred to) to do so is attached to the founding affidavit. Pillay however, in another affidavit disputes that he attested to the said affidavit and that it is his signature thereon. On 22 August 2018 applicant reported the vehicle stolen to the Sydenham Police.
- [3] Second respondent alleges that he lent money to first respondent and accepted the motor vehicle as part payment of this loan at a value of R150 000.00. The motor vehicle was delivered to him by first respondent with all the necessary documentation and was transferred into his name during May 2018. He is therefore the rightful owner thereof.
- [4] It was submitted on behalf of second respondent that there was a dispute of fact relating to the affidavit of Pillay whether he signed it and had been authorized to sell the vehicle. The motor vehicle registration form is attached to the founding affidavit and it is apparent there from that applicant is the owner of the said vehicle. Second respondent has not attached any documentation indicating that the vehicle has indeed been registered into his name. Second respondent also provides no information about the loan to first respondent, what the amount thereof was, but merely a bold allegation that the vehicle was given to him as part payment of such loan. On the papers it is not disputed that the vehicle was not returned to applicant by first respondent.

- [5] The question that arises is whether indeed there is a real and genuine dispute of fact. On the papers it is apparent that applicant is the owner of the vehicle. It is not disputed that a loan was made to Nair by first respondent and that the vehicle was given as security and had to be returned. In the affidavit of Pillay, he indicates he was granted permission by Neville to sell the vehicle. Neville is not the owner of the vehicle. Further, he does not state that he was granted any forms or documentation to effect transfer of the vehicle. It is also not disputed that applicant never signed any transfer documents in respect of the said vehicle. In my view, there is no real dispute of fact. Even if the affidavit of Pillay is accepted it merely states that he was granted permission to sell the vehicle and nothing further. He does not refer to transfer documentation at all. There is further the affidavit of Captain Pillay stating that the identify document used to transfer the vehicle to second respondent is fraudulent. It has been submitted that this affidavit should not be allowed as if should have formed part of the founding papers. However, in the founding papers it was stated that a criminal case had been opened on 22 August 2018. It merely sets out that the matter was investigated and that the identity document attached to the transfer documents is fraudulent. In my view it is a response to the averment by second respondent that he had all the necessary documentation but failed to attach any of it to his affidavit.
- [6] Applicant on a balance of probabilities proved that she is the owner of the vehicle and that either first or second respondent is in possession thereof. She is therefore entitled to the return thereof as it is not disputed that the loan by Nair was paid up. Second respondent has failed on a balance of probabilities to proof that he was lawfully in possession of the vehicle. He attached no documents to substantiate his claim to the vehicle. It would have been very easy for him to do so if he had such documents.
- [7] First respondent by not returning the vehicle, committed theft. The affidavit of Pillay is dated July 2018 but the vehicle according to second respondent was transferred during May 2018 at that time first respondent was still holding the vehicle as security and was to return the vehicle. The vehicle can therefore be taken form where it is.
- [8] It has been submitted that paragraph 1 of the order only refers to first respondent and not second respondent and, the relief can therefore not be granted as the vehicle is with second respondent. The only indication that the vehicle is with second respondent is his bold averment to that effect. The prayer needs to be amended to state “alternatively second respondent”.

Order:

An order is granted in terms of Prayers 1, 2, 3 and 4 of the notice of motion as amended.

DATE OF HEARING : 16 October 2019

DATE OF JUDGMENT : 01 November 2019

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Prepared on 12 October 2026 · Esheria