IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NUMBER 13781/2024

In the matter between

MOVIENET NETWORKS (PTY) LTD **FIRST APPLICANT**

(Registration Number: 2014/11534/07)

MOGAMBURY PATHER **SECOND APPLICANT**

and

MOTUS FORD CULEMBORG **FIRST RESPONDENT**

(Registration number: 1983/009088/06

MOTUS HOLDINGS LIMITED **SECOND RESPONDENT**

(Registration number: 2017/451730/06)

ABSA BANK LIMITED **THIRD RESPONDENT**

(Registration number: 1986/005794/06)

JUDGMENT

Date of hearing: 16 August 2024

Date of judgment: 2 September 2024

BHOOPCHAND AJ:

1. The scourge of cybercrime continues unabated. Emails are especially susceptible to its expanding tentacles. Cybercriminals can target emails at the point of posting, the point of receipt, or in transit. Recognised methods of attack are phishing and spear phishing. In phishing attacks, the cybercriminals craft a deceptive email and send it out widely, hoping to lure unsuspecting victims. In spear phishing attacks, cybercriminals target specific individuals.[1]

2. Business email compromise (BEC) is spear phishing targeting a particular organisation. The fraudster impersonates the business to lure a third party or another business employee into making a payment to their bank account. The email received can look exactly like an email from the company and be from the company's domain email address. It is growing nationally, continentally, globally and tangentially. The financial sector is the most commonly impacted and includes companies, government institutions, and individuals. Phishing emails are the most common attack vector for business email compromise.[2]

3. This is a case involving BEC affecting the sale of a motor vehicle. The Applicants apply for an interim interdict to order the First and Second Respondents to release a vehicle purchased by the First Applicant. The First Applicant, Movienet Networks (Pty) Ltd, is a private company based in Springs, Gauteng. The Second Applicant, Mogambury Pather, is a director of the First Applicant. The First Respondent, Motus Ford Culemborg, is a car dealership. The Second Respondent, Motus Holdings Limited, is the parent company of the First Respondent. The Third Respondent is Absa Bank Ltd., which provided financing for the vehicle purchased by the Second Respondent. All averments and submissions on behalf of the parties shall be attributed to them except for the instances where personnel relevant to this application are referred to by name.

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[1] The promulgation of the Cybercrimes Act 19 of 2020, effective from 26 May 2021, is the first legislative step directed at addressing the scourge.

[2] Interpol African Cyberthreat Assessment Report 2024

4. The Second Applicant visited the First Respondent on 16 January 2024 to purchase a vehicle. He was given an offer to purchase and the First Respondent's banking details by e-mail on the same day. The Second Applicant returned to the dealership on 24 January 2024 and was informed that his preferred vehicle had been sold. He settled on another vehicle offered to him at the same price of R854 792.50. The offer to purchase was sent to the Second Applicant on the same day. The Second Applicant asked the salesperson, Mr Arnold Philander ("Philander"), to confirm the bank account details of the First Respondent before making payment of the deposit of R172 502.12. Philander sent the details by email on 30 January 2024. The First Respondent's bank account number was the same as that provided on 16 January 2024. The Second Applicant emphasises that Philander revealed the deposit amount in this e-mail. Both copies of the banking confirmation letters from the First and Second Respondents' bank were dated 17 October 2023.

5. In addition to the e-mail sent by the salesperson, the Second Applicant received an e-mail from the Business Manager of the First Respondent, Mr Owen Martin (Martin), on 1 February 2024. The subject line of the e-mail listed it as an updated bank confirmation letter. The banking details were the same as the previous two, except that this confirmation letter attached to the email was dated 30 January 2024. The bank confirmation letter cautioned against fraud and provided a method for a third party to validate the letter, which had an electronic stamp printed on it. The bank, RMB Corporate Bank, denies any warranties, guarantees, undertakings, or liability for the information provided in the letter.

6. The Second Applicant duly paid the deposit into the bank account number reflected on the three bank confirmation letters on 2 February 2024. The Second Applicant attached proof of payment from his bank in the founding affidavit. The Third Respondent approved financing for the vehicle. Philander invoiced the Second Applicant for extras amounting to R3750 on the vehicle and emailed the

banking details again.[3] The Second Applicant paid the First Respondent on 7 February 2024. The bank confirmation letter had a different bank account number. The court observed that the invoice reflected the retail price as R892 521.74, and no balance was owed on the vehicle except the amount for the extras.[4] The Third Respondent had, by this time, settled the outstanding balance, less the deposit, on the vehicle in full to the First Respondent.

7. The Second Applicant states that the Third Respondent would have paid the First Respondent only after obtaining proof of insurance and the release note he signed for the vehicle. The Second Applicant states that he travelled overseas after signing the release note and arranged to collect the vehicle around 18 February 2024.

8. The First Respondent contacted the Second Applicant about fourteen days after the deposit payment to inform him that it was not reflected in their bank account. The Second Applicant wondered why Philander did not tell him that the First Respondent had yet to receive the deposit when he invoiced for the extras on 7 February 2024. The Second Applicant understood that if he generated a transfer of funds electronically before 4 pm, the funds would reflect in the receiver's bank account the next day. If generated after 4 pm, it would occur 48 hours later.

9. On 8 March 2024, the Applicants caused a letter to be sent by their attorney to the First Respondent. After providing a synopsis of the matter, identical to the allegations in the founding affidavit, the attorney demanded that the First Respondent release the Second Applicant's vehicle or refund the full deposit. The First Respondent's legal representative acknowledged the letter on 11 March 2024. A response was only forthcoming on 8 April 2024.

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3 Although referenced as an attachment, no bank confirmation letter sent by Philander on 7 February 2024 is attached to the founding affidavit.

4 FA17, founding affidavit. The retail price was reflected as R892 521.74 which was probably the financed amount that the Third Respondent paid before this invoice was issued

10. The First Respondent informed the Second Applicant through its legal representative on 8 April 2024 that he had paid the deposit to a third party. The third party had allegedly intercepted and changed the Second Applicant's email. The internal IT Department of the Second Respondent had allegedly performed a diligence investigation and concluded that there was no breach on the side of the First and Second Respondent.

11. Mark Africa (Africa), the dealer principal of the First Respondent, deposed to the answering affidavit on behalf of the First and Second Respondents. Africa denied that the emails or the bank details purportedly sent by Philander and Martin were those of the First Respondent. Africa alleged that the Applicants paid the deposit to a third party who had committed fraud. The fraud committed on the Applicants was of no consequence to the First and Second Respondents.

12. Africa alleged repeatedly that neither the First nor Second Respondents received the deposit on the vehicle. The First Respondent has the vehicle and will release it once the Applicants pay the deposit to them. Ownership had not passed to the First Applicant. Africa does not deny that the Second Applicant sought confirmation of the banking details, that the first two bank confirmation letters from Rand Merchant Bank were dated 17 October 2023, that an updated banking confirmation email was dated 30 January 2024 and sent to the Second Applicant on 1 February 2024, that the Second Applicant made a payment on the 2 February 2024, and that Philander stated the deposit amount in the email. Africa failed to answer the allegation that Martin's email sent to the Second Applicant on 1 February 2024 was forwarded several times.

13. Africa stated that the release note is a document supplied by the purchaser for the benefit of the financier, and the terms of the agreements govern the sale of the vehicle. The First Respondent assumed that the deposit would have been paid and reflected in their bank account before the Second Applicant returned from his overseas trip. There was no urgent need to monitor the bank accounts to ensure that payment had reflected therein. The First Respondent assumed that payment

would reflect before the Applicant took possession of the vehicle. The First Respondent is entitled to claim specific performance under the contract and to retain possession of the vehicle until the asset is paid fully.

14. Africa contended that the Second Applicant took no steps to telephonically confirm the First Respondent's bank account details.[5] He referred to paragraph 2.12 of the standard terms and conditions of the seller ("standard terms and conditions"), which states that the ownership of the vehicle purchased will remain with the First Respondent until the full purchase price has been paid.

15. In reply, the Second Applicant explained that he averred in his founding papers that he telephonically confirmed the bank account details with Philander and Martin before making payment, and this issue is under investigation by the South African Police Service (SAPS).[6] The Second Applicant responded to clause 2.12 of the standard terms and conditions by stating that the clause could only be invoked if delivery had been completed. The First Respondent had misled the Third Respondent that he had taken possession of the vehicle. The Second Appellant alleges further that clause 2.12 could not apply as the vehicle had been paid in full.

16. The Second Applicant considered it absurd that the First Respondent could assume that the deposit on the vehicle would be paid before he returned from his trip, considering their reliance on clause 2.12 of the standard terms and conditions. If the First Respondent relied upon clause 2.12, it would not have released the vehicle and confirmed this on its application interface with the Third Respondent.[7] The Second Applicant avers that the First and Second Respondent further misled the Third Respondent to elicit payment from the latter. In response to the allegation that there was no urgent need to monitor their bank accounts for payment of the deposit, the Second Applicant replied that the First and Second

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5 Answering affidavit at para 48.3.
6 Replying Affidavit at paras 29, 60, and 97
7 Second Applicant refers to this application as 'the podium'

Respondents did not provide any evidence that they conduct their sales in this manner, i.e., they release a vehicle before confirming payment of the deposit, and it is their norm to check after 14 days for payment.

THE FORENSIC INVESTIGATION

17. The Second Applicant appointed a Forensic Investigator specialising in cyber investigations to investigate the correspondence between himself and the First Respondent to determine whether an email compromise between the two parties led to his payment of a deposit for the vehicle into a fraudulent account. The investigator conducted a preliminary investigation and provided an undated report attached to the Second Applicant's founding affidavit. No devices were forensically analysed, and the investigation was conducted using the email correspondence supplied by the Second Applicant.

18. The investigator's methodology involved examining various digital elements in the emails. The investigator analysed header sources to trace the origin and path of the suspicious emails. The latter would show any evidence of spoofing (sending email messages with a fake sender address) from the Second Applicant's email account. The investigator then examined the email logs provided by the Second Applicant's internet service provider. The logs would be pivotal in establishing the timeline and frequency of the alleged suspicious emails. The investigator examined the IP (internet protocol) addresses associated with the emails to pinpoint the geographical location and the network used in the alleged crime. The investigator finally investigated the user agents and access patterns to identify the devices used and their characteristics, which could link a specific device or user to the alleged phishing.

19. The investigator found that the email from Mr Philander on 16 January 2024 seemed to have passed through several servers, including 'synaq.com', secureserver.net', and others. The investigator could not establish whether these

servers were legitimate or associated with the First Respondent's supposed domain.[8] The investigator checked the emails against SPF (Sender Policy Framework), DMARC (Domain Message Authentication Reporting), and ARC (Authenticated Received Chain) applications. The SPF is an email authentication method that helps identify the mail servers allowed to send email for a given domain. The ARC is an email authentication protocol designed to improve the reliability and security of email forwarding. The DMARC is a standard email authentication method to prevent attackers from spoofing an organisation and its domain. The DMARC result was none for 'header.from=motusford.co.za. This finding concerned the investigator because it differed from the return-path domain ('kgnxerox.com').

20. The SENDMARC tool uses an algorithm to rate an organisation's exposure to fraudulent email activities like impersonation, phishing, and spoofing. It evaluates the current domain's risk to the company's cybersecurity. A rating of 3 or less indicates no protection. The rating obtained suggested that the motusford.co.za name had the highest probability of being hijacked by criminals and used in fraudulent email activities.

21. The 'from' address in the first email is "Arnold Philander"<aphilander@motusford.co.za>, and the 'reply-to' address is "Arnold Philander"<invoice.dir1@gmail.com>. The investigator found it unusual and suspicious that the 'from' and 'reply-to' addresses differed, and neither matched the return path ('kgnxerox.com'). He considered that using a Gmail address for replies is often a red flag. The email passed through various IP addresses and servers. The investigator suggested that the originating IP should be checked for legitimacy and location. The authentication results indicated a pass for SPF but lacked a DMARC policy for motusford.co.za.

[8] An email address has two parts, the first, the username and the second, the domain name.

22. The investigator concluded that the mismatch between the 'from', 'reply-to', and 'return-path' addresses was highly irregular and could indicate that the sender aphilander@motusford.co.za had been compromised. There was no DMARC policy. The domain kgnxerox.com is registered on GODADDY (a domain registrar, web host, website builder and website services provider) and points to a website in Hyderabad, India. The investigator could not establish whether motusford.co.za and motus.co.za utilised the services of KGNXEROX or SYNAQ. The latter is a South African company that offers security and the Securemail 3.0 application, among others. The investigator was also unaware of whether the First and Second Respondents used the services of SECURESERVER.

23. The investigator examined the second email dated 30 January 2024 from Philander. The investigator identified the message-ID and stated that the bank confirmation documents attached to the first and second emails were the same. The investigator then looked at the email sent by Philander on 7 February 2024. The account confirmation letter reflected different banking details. The third email was for sundry items for the vehicle. The investigator compared the two bank account confirmation letters by inspecting the date of creation and document properties. The document properties for both 'bank account confirmation letter ' and 'account confirmation' suggest that the same document was used and altered. The court notes that the servers through which the email passed differ between the first and third emails.

24. The investigator then considered the email from O. Martin, who was identified as the business manager of the First Respondent. The return path was flex@kgnxerox.com instead of the sender's address. The investigator listed the servers through which the email passed. The court notes that the servers through which the email passed are almost identical to the first email except for one less pass through secureserver.net. The email from 'kgnxerox.com' passed the SPF record, meaning that the server is authorised to send emails on behalf of that domain. The domain 'motus.co.za' did not have a DMARC policy, making it harder to validate whether the email was from the domain. The email is from

OMartin@motus.co.za, but the reply-to address is different, namely 'flex@kgnxerox.com'. The sender's address and the return path are from other domains.

25. The investigator concluded that the first email from Philander with a Gmail reply-to address was highly unusual for an established business like the First Respondent to use unless the First Respondent utilised their own domain through GSuite. The email 'invoice.dir1@gmail.com' remained active as at 2 April 2024. The investigator could not determine whether the First Respondent used NAQ and SECURESERVER to manage their emails and servers. The absence of a DMARC policy on the domains motusford and motus could allow spoofing and email compromise.

26. The First and Second Respondents attached an email from Mr Ruan Junius, who has been described as their Information Technology Executive. Junius stated that once the email leaves the Motus tenant[9], the only way to get to the email body and attachments would be from the recipient. He also suggested that the group's chief information security officer be approached for input.

27. Junius stated that the first email sent by Philander was not the email received by the Second Applicant. It did not originate from the Motus tenant and was delivered at 11h10. The email was sent at 07h21. The second email, dated 30 January 2024, was sent by Philander at 07h21 and received by the Second Applicant at 07h46, i.e. twenty minutes later. In response to the Applicants forensic report, which refers to the sending domain in the Martin email as kgnxerox.com, Junius stated that the email was spoofed to include the motus email address as a display name. Junius should have elaborated on this aspect to enable the court to understand it.

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[9] An email tenant or email environment is described as an Office 365 Organization or Gmail Organization which is a sandboxed environment.

28. Junius points out that it was not the first time the First and Second Respondents had challenges with mweb.co.za accounts and fraud.[10] He reasons that malicious actors typically breach these free webmail accounts and monitor the mailbox until something of interest is delivered to the victim's inbox. The moment the email is delivered to the victim's inbox, the malicious actors make a copy and delete the email. The victim is unaware that they ever received the email. The malicious actors then manipulate and resend the content, acting as the First or Second Respondents.

29. Junius refers further to the report commissioned by the Applicants and states that if the SPF records for the sending domain are valid, the mail will be delivered without problem. He noted that all Motus accounts are protected with MFA (Multi-Factor Authentication), which allows users to authenticate themselves by clicking an email magic link or using a six-digit code as a one-time password (OTP). In addition, the First and Second Respondents use enhanced security measures such as impossible travel and suspicious activity monitors.[11]

30. The email from Junius is hopelessly inadequate. It is not an investigation of the compromised emails but a cursory commentary of selected aspects of the report commissioned by the Applicants. Junius fails to analyse the emails that are relevant to this matter. There is thus no evidence that the First and Second Respondents conducted any diligence investigation or investigated their systems as alluded to by their legal advisor. The email commentary by Junius is high on theory but lacks any evidence of an investigation of the emails or an appraisal of the First and Second Respondents systems for risk of compromise.

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[10] The Second Applicants uses an email with the 'mweb' domain name. Junius avoided levelling the same criticism against their use of the Gmail domain name.

[11] Junius did not elaborate on any of these protective measures. MFA (Multi-factor authentication) (MFA) is an electronic authentication method which requires you to log in using two different mechanisms. "Impossible travel" is a threat detection technique or risk-predicting algorithm that calculates whether sequential login attempts from different locations are realistically too far apart to travel within the defined time period. Junius did not elaborate on which suspicious activity monitors are used by the first and Second Respondents.

31. Determining where the email compromise occurred, i.e., at the sender, receiver, or in transit, requires expert investigation and evidence. The forensic report submitted by the Applicants assists the court to some extent in understanding the terminology attached to email transmission and where the weaknesses lie. At this juncture, the court need not make any definitive findings on whether the email compromise could be attributable to any party. The forensic report points to a compromise attributable to the First and Second Respondents. The latter have made little attempt to challenge any of the conclusions drawn in the report.

32. It is apparent in matters of this nature that expert opinion, properly admitted, is essential to determining where the compromise occurred. There is a dearth of case law relating to evaluating expert evidence tendered to support the primary allegations in an application or motion procedure. The evidence would constitute hearsay incapable of scrutiny by cross-examination. Rules like Plascon Evans determine the outcome of the totality of paper evidence in an application.

33. By their very nature, constitutional challenges require and permit expert opinion in affidavit form. Recently, expert opinions on affidavits have gained acceptance in road accident matters. The action procedure requires oral ventilation and provides an opportunity to challenge experts' qualifications, credibility, and the content of their views. There needs to be clear-cut procedures or rules to achieve similar goals in application procedures where expert opinion is essential or permitted to support the case presented and the relief sought. A party could request to cross-examine the expert. Ordinarily, the risk of inadmissible opinion evidence slipping through the rigours of an action procedure is significantly lower. The inadmissible expert opinion included in support of an application is evaluated in terms of the weight that can be attached rather than its exclusion for its inadmissibility at an early stage of the litigation. Sufficient reason exists for the admissibility of such expert evidence tendered in the form of affidavits to be determined at the case management stage of the pre-trial process.

THE EMAIL THREAD

34. The attachments to the founding affidavit contain an email thread that originated from Natasha Joubert on 30 January 2024. The thread's subject matter is an updated bank confirmation letter and is accompanied by an attachment to this effect. It is widely circulated to persons, including Philander and Martin, who have the domain names ‘motus’ and ‘motusford’ as part of their email addresses. Martin eventually forwarded this email to the Second Applicant on 1 February 2024. The Second Applicant astutely observed that the email had been forwarded several times before he received it.

35. As the emails in the thread included the updated banking confirmation attachment, the First and Second Respondents would have access to those emails if Joubert and the recipients had been employed. The First and Second Respondents would have been able to determine whether their account number in the bank confirmation letter had been changed. This information may have been a pointer to where the interception occurred. The First and Second Respondents should have addressed this in their answering affidavit.

36. On inquiry from this court, Counsel for the First and Second Respondents confirmed that they failed to grasp the significance of the thread and address this aspect in their answering affidavit. He submitted that this could be addressed only if the court permitted the First and Second Respondents to file a supplementary answering affidavit. Counsel for the Applicants acceded to the request. This court granted the request to enable it to benefit from that information before determining this matter.

37. The First and Second Respondents duly submitted their supplementary affidavit, and the Applicants were permitted a right of reply. In their supplementary answer, the First and Second Respondents confirmed that Joubert is an employee who holds the position of Accounts Receivable Administrator. One of her duties is to

download the banking account confirmation letter from Rand Merchant Bank, which has their bank account. Joubert, in turn, forwards the letter through email to the relevant management and sales executives. Joubert did send the emails on 30 January 2024, as she does regularly. When the bank confirmation letter is sent to third parties like their clients, they can see it was obtained recently.

38. The First and Second Respondents explained that Joubert omitted to send the email to Martin. Martin then requested the email Bradley Marthinus sent him on 1 February 2024. Martin then forwarded the email to the Second Applicant. The relevant email sent by Martin was scrutinised and found to contain the correct attachment with the correct bank account details. A copy of the email was attached for ease of reference. Martin, Marthinus, and Joubert confirmed that the attachments to their respective emails contained the correct bank account number. The other recipients confirmed that their attachment contained the correct bank account number. The First and Second Respondents offered to make the relevant emails and their systems available to the SAPS if they required access.

39. Two aspects of the supplementary affidavit were immediately apparent and problematic for the First and Second respondents. The first is that Martin was copied in on the emails sent by Joubert. The allegation that Joubert omitted to copy Martin into the email thread is wrong. Secondly, the First and Second Respondents stated that they scrutinised Martin's email to the Second Applicant and found that it contained the correct attachment and bank details. This contradicts the allegation by Junius, who stated that he could not access the body of the email and any attachments once the email left the Motus tenant.

40. The Applicants also noted that Joubert copied the email to Martin. They also note that the content relating to Martin confirms that the Second Applicant had contacted the First Respondent to confirm their banking details. The remainder of the Applicant’s replying affidavit does not merit attention as it does not address the issue.

41. The First and Second Respondents were expected to conduct a credible search of the emails emanating from the 30 January thread begun by Joubert. They had a whole list of recipients, all of whom were their employees, who received the emails from Joubert. An inspection of their computers, either systematically or randomly, was expected. However, the First and Second Respondents failed to do this, raising questions about their due diligence in protecting their emails and assessing weaknesses in their cybersecurity.

CASES OF CYBERCRIME

42. The Supreme Court of Appeal dealt with an appeal involving BEC and cybercrime.[12] The Appellant was a law firm and acted as a conveyancer for transferring a property purchased by the Respondent. There was no attorney-client relationship between the Appellant and Respondent. The Respondent's claim was for pure economic loss caused by an alleged wrongful omission. The Respondent suffered loss, not due to any failing in the Appellant's system, but because hackers had infiltrated her email account and fraudulently diverted her payment for the Appellant into their account.[13] It was open to the Respondent, who had enlisted the assistance of personnel at her bank, to assist her in verifying the Appellant's bank details. The Respondent could not explain why she did not do so. The Respondent had ample means to protect herself. Moreover, any warning by the Appellant of the risk of BEC would have been meaningless because, by then, the cybercriminal was already embedded in the Respondent's email account. Consequently, the risk had already materialised.[14]

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12 Edward Nathan Sonnenberg Inc v Judith Mary Hawarden (421/2023) [2024] ZASCA 90 (10 June 2024), Hawarden v Edward Nathan Sonnenbergs Inc (13849/2020) [2023] ZAGPJHC 14 (16 January 2023). ZAGPJHC/2023/14

13 ENS-Hawarden (supra) at para 20

14 ENS-Hawarden at para 20

43. In the ENS-Hawarden case, the SCA avoided attributing liability for the Appellant's failure to warn Ms Hawarden as it would have profound implications for the attorneys' profession and all creditors who send their bank details by email to their debtors. The ratio of the high court judgment that all creditors in the position of the Appellant owed a legal duty to their debtors to protect them from the possibility of their accounts being hacked is untenable. The high court's judgment requires creditors to protect their debtors against the risk of interception of their payments. The high court should have declined to extend liability in this case because of the real danger of indeterminate liability.[15] The SCA cited and relied upon the case of Country Cloud.[16] The Constitutional Court recognised the risk of indeterminate liability as the main policy consideration that militates against the recognition and liability for pure economic loss. It is settled that where a plaintiff has taken, or could reasonably have taken, steps to protect itself from or to avoid loss suffered is an important factor counting against a finding of wrongfulness in pure economic loss cases. In these circumstances, the plaintiff is not "vulnerable to risk", so it is reasoned that there is no pressing need for the law of delict to step in to protect the plaintiff against loss.[17]

44. The SCA concluded that the Respondent weighed up her options and elected, whilst at the bank, to forego a bank guarantee for a cash transfer. As the Respondent had ample means available to her, she must, in the circumstances, take responsibility for her failure to protect herself against a known risk.[18]

45. A survey of the outcome of cases of cybercrime adjudicated by our courts confirms the prevalence of the problem. [19] An increasing number of persons are

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15 ENS -Hawarden at para 21

16 Cloud Country Trading CC v MEC, Department of Infrastructure Development, Gauteng [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) para 24. (Citations omitted)

17 Country Cloud (supra) at para 51

18 ENS-Hawarden at para 26

19 Gerber v PSG Wealth Financial Planning (Pty) Ltd (36447/2021) [2023] ZAGPJHC 270, paragraph 100, Mosselbaai Boeredienste (Pty) Ltd t/a Mosselbaai Toyota v OKB Motors CC t/a Bultfontein Toyota (A43/2021) [2024] ZAFSHC 95 (7 March 2024), Galactic Auto Pty Ltd v Andre Venter [2019] ZALMPPHC 27, Fourie v Van der Spuy & De Jongh Inc 2020 (1) SA 560 (GP), André Kock en Seun Vrystaat (Pty) Ltd v Snyman N.O 2022 JDR 1792, FBHartog v Daly and Others 2023 JDR 0189 (GJ)

defrauded by a method similar to that used in this application, i.e., where emails are hacked, and attachments containing banking details are changed for financial gain by cyber criminals. The common thread in the judgments listed in the footnote is that the purchaser is responsible for confirming whether the bank account details attached to an email are correct. The purchaser must ensure that payment is made to the seller and not to a fraudulent third party. The purchaser remains liable to pay the debt if payment is made into the bank account of a third party. [20]

46. This application is distinguishable in a few material respects from the cases referred to, especially the ENS-Hawarden appeal decided by the SCA. The ENS case involved a delictual claim for pure economic loss premised upon a wrongful omission. The application before this court is for an interdict, interim in form but final in substance. The Second Applicant states that he contacted two of the First Respondent's personnel for confirmation of the banking details before he made payment of the deposit on the vehicle. The bank confirmation letter was sent to the Second Applicant on four occasions. It subsequently transpired that the fourth email with the invoice for extras added to the vehicle contained the correct bank confirmation letter.

47. The First and Second Respondents in this application felt no obligation to check whether the deposit made on 2 February 2024 reached their account. The First and Second Respondents proceeded to finalise the sale by issuing the release note and accepting the financed amount from the Third Respondent after reflecting that there was no retail price balance on the invoice issued five days after the Second Applicant paid the deposit. The inference can be drawn from the latter is that the First Respondent accepted that the deposit had been paid. Contrary to the preceding, the First Respondent, in answer to it, assumed the deposit would be paid before the Second Applicant returned from his trip.

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[20] Mosselbaai Boeredienste supra at paragraph 41 et seq

48. There is no evidence before this court that the First and Second Respondents conducted a due diligence investigation of their personnel or their systems to exclude any compromise on their side. The evidence properly before the court is that the First and Second Respondents' domain names were susceptible to cyber interception. The answers provided on behalf of the First and Second Respondents create the impression that they adopted a lacklustre approach to the prevailing situation. They took fourteen days to inform the Applicants that the deposit had not been received. They took a month to reply to the letter the Applicants attorney sent. Much of the answers on material aspects seem contradictory, and much more are bare denials of the averments made in the founding affidavit.

49. If this court accepts that there was a legal duty on the Applicants to confirm that the banking details of the First and Second Respondents were correct, can it make an adjunct finding that the First and Second Respondents are liable for the rerouted deposit in interdictory application proceedings even if it decides to grant final relief. The court deals with his question later in this judgment.

50. It is apposite at this juncture to record that the founding and replying affidavits abound with allegations of criminal conduct by the First Respondent's personnel. These allegations are irrelevant to the relief sought by the Applicants. The court understands that the Applicants have laid a charge with the SAPS. The correct authority best investigates those matters, and recording the allegations will not weigh down this judgment.

RIGHTS OF APPLICANTS IN A FINANCED SALE AGREEMENT

51. Once a deposit is paid to secure a purchase, finance approved, and the necessary documents and proof of insurance are provided, the seller invoices the financier. The financier provides a release note that has to be signed by the purchaser and seller. A survey of the court and tribunal cases indicates that the financier issues

a release note, which signifies the purchaser's acceptance of delivery on behalf of the financier. At this point, the financier pays the outstanding amount on the purchase price. One would expect vehicle ownership to then pass from the seller to the financier.

52. Proving property ownership requires establishing physical and mental elements.[21] One of the incidents of ownership is the right of exclusive possession of the vehicle. It is the nature of ownership that possession of the vehicle should normally be with the owner unless another person is vested with some right enforceable against the owner.[22] Financing a vehicle under instalment sale agreements endows the purchaser with the right to exclusive possession of the vehicle.[23] The Applicants in this application would have had the right to possess the vehicle on making the monthly payments with the right to acquire ownership of the assets once payment to the Third Respondent was completed.[24]

53. The possession of registration papers is prima facie proof of ownership. However, the possession of registration documents is not conclusive proof of registration. In the registration process, the Third Respondent would have been reflected as the title holder of the vehicle and the First Applicant as the owner. The latter would not have disturbed the legal fact that vehicle ownership would have passed from the First Respondent to the Third Respondent.

54. The First and Second Respondents downplay the significance of the release note, brushing it off as a document signed by the purchaser for the benefit of the financier. They allege further that the sale is governed by the standard terms and conditions, which permit them to retain ownership and possession of the vehicle until the full purchase price has been paid. The latter means that the deposit of R172 502. 12 payable by the First Applicant for the vehicle purchased has to be

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21 Van Der Merwe and Another v Taylor NO and Others (CCT 45/06) [2007] ZACC 16; 2007 (11) BCLR 1167 (CC); 2008 (1) SA 1 (CC) (14 September 2007) at para 117

22 Chetty v Naidoo 1974 (3) SA 13 (AD) at 20 A-C

23 Estate Shaw v Young 1936 AD at page 239

24 Estate Shaw v Young 1936 AD at page 239

reflected in their bank account before ownership and possession can be transferred.

55. The Applicants aver that ownership has passed to the Third Respondent and that the First and Second Respondents hold possession of the vehicle as a lien to pay the deposit.

56. It is against the preceding background that the court considers the relief sought by the Applicants.

INTERIM INTERDICT

57. The Applicants seek the following order:

"The First Respondent be ordered to release the Applicant's vehicle within 5 days of this order pending the outcome of the SAPS case."

58. The allegations supporting the order sought are brief.[25] The Applicants seek the right to possession of the vehicle, not ownership. They allege that ownership has passed to the Third Respondent. The Second Applicant states that he filed a complaint with the SAPS, provides the case number and states that the matter is under investigation. There is no explanation as to how the right of the First Applicant to obtain possession of the vehicle through an interim interdict can be determined finally by a criminal investigation that could extend into perpetuity and produce an inconclusive outcome. Neither do they explain how a criminal investigation will resolve the question of liability for the deposit owed on the vehicle. There are also no details about the charge filed with the police and whether it relates to the interception of the deposit by cybercriminals or whether it relates to the criminal conduct alleged against the personnel of the First and

[25] Paragraph 33 et seq.

Second Respondents. Nor is it clear how the release of the vehicle from the possession of the First Respondent will preserve or restore the status quo.

59. The First and Second Respondents argue that the relief sought entails two separate and distinct proceedings. There is a civil claim based on a contract for the delivery of a motor vehicle. The final procedure envisaged by the Applicants will end in proceedings in a criminal court that determines sanction and conviction. Whatever the outcome of the SAPS case is, it will not determine the civil rights relating to possession and ownership of the vehicle. The First and Second Respondents argue that the relief sought cannot be resolved through the mechanisms of a criminal investigation.

60. The First and Second Respondents also have an issue with the first part of the order sought, i.e., the reference to the "release" of the vehicle and the reference to the "Applicant's vehicle". They protest that it is unclear what "release" of the vehicle entails, where the release should take place, and to whom the release should be made. The ownership of the vehicle is in dispute and can only occur upon full payment. The First and Second Respondents argue that the Applicants have not made out a case for either interim or final relief, nor have they established the necessary elements to grant an interdict. They argue that an order cannot be given on the formulation sought by the Applicants in the notice of motion. The relief sought is final in form. The court agrees.

61. The court asked the Applicants' Counsel to cite authority to support the grant of the type of relief sought. This was not forthcoming. The parties were allowed to research and address this aspect. The Applicants cited the case of Moredubi v Barker, a judgment of the North Gauteng Division of the High Court.[26] In that matter, the court was asked to grant an interim interdict to restrain two respondents from removing the Applicants as directors pending a disciplinary enquiry and the winding up of another Respondent. The Applicants argued that the

[26] Moredubi v Barker and Others (21392/2020) [2022] ZAGPPHC 481 (22 June 2022)

relief sought in the Moredubi matter was interim to the conclusion of a disciplinary hearing and winding up of a company. The winding-up process could take a long time to conclude. The interim relief granted was premised upon a process that could endure over an unspecified period or indefinitely. They argue that the court granted the interim relief and natural justice prevailed.

62. In Moredubi v Barker, the application for an interim interdict was formulated as part A of the two-part application. The extent of the relief sought in part B was not specified. The Applicants, the successful party in that application, were granted leave to supplement part B of their papers, probably to specify the civil procedure that would follow the outcome of the disciplinary process. The court does not accept that the facts related to the procedure chosen for final relief in the Moredubi matter are of any assistance to the Applicants in this application.

63. Counsel for the First and Second Respondents could not find any authority to support the type of relief sought by the Applicants in this case. They argued that the cases cited by the Applicants are cases in which the final relief sought is substantially the same and dependent upon the same right sought to be protected by an interim interdict.

64. The application for interim relief thus falters in the preliminary step, and Interim relief, as formulated by the Applicants, cannot be granted.

FURTHER AND /OR ALTERNATIVE RELIEF

65. The Applicants argue that where the relief sought is not entirely competent, the court can refine it under the option of further and/or alternative relief as prayed for in their notice of motion. The Applicants cited the case of Divine Inspiration Trading 130 (Pty) Limited v Aveng Greenaker-LTA (Pty) Ltd and Others (Divine

Inspiration) to support this contention.[27] The cited paragraph relies upon Port Nolloth Municipality v Xhalisa.[28] for the notion that such a prayer can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion (or summons or declaration) where that order is indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given).

66. Van Loggerenberg refines the proposition that further or alternative relief can be granted by stating that "relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefor has been fully canvassed, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of 'further and/or alternative relief".[29]

67. In the following paragraph of the Divine Inspiration judgment,[30] the court cites the case of Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd, which held that:

"The prayer for alternative relief is, to my mind, redundant and mere verbiage in modern practice. Whatever the Court can validly be asked to order on papers as framed can still be asked without its presence. It does not enlarge in any way "the terms of the express claim."[31]

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27 Divine Inspiration Trading 130 (Pty) Limited v Aveng Greenaker-LTA (Pty) Ltd and Others (2015/10455) [2016] ZAGPJHC 99 (13 May 2016) at paragraph 11

28 Port Nolloth Municipality v Xhalisa 1991 (3) SA 98 (C) at 112D

29 Erasmus, Superior Court Practice, at B1 - 130A

30 Divine Inspirations supra at paragraph 12

31 See also Chao v Gomes (2010)/16410)[2012] ZAGPHC 103 (21 May 2012),

68. The court in Divine Inspiration found favour with the dictum in Mgoqi v City of Cape Town,[32] which cautioned against allowing the relief to be pushed through written or oral argument whilst the same is not in the notice of motion or the founding affidavit. The Applicants had the option to apply for the amendment of the Notice of Motion to include the relief it sought but opted not to. This can be potentially prejudicial to the other parties who may have entered a notice of intention to oppose based on the prayers sought. The court adjudicates the dispute as defined and formulated in the papers.[33]

69. This court aligns itself with the proposition that it is empowered to refine the nature of the relief sought without relying upon the further and/or alternative clause traditionally included in all notices of motion. The problem is that this application is fraught with other insurmountable difficulties, which militate against the grant of the order formulated by the Applicants or any other competent order.

VINDICATORY RELIEF

70. Both the Applicants and the First and Second Respondents identify the application as one for vindicatory relief.[34] That is correct. The Applicant's claim is vindicatory. For a vindicatory claim, the applicant must establish that it is the owner or co-owner of the *res;* the vehicle in question.[35] The *rei vindicatio* also requires the Applicant to show that the First and Second Respondents have the property and that the asset is identifiable and still exists.[36] The vehicle's identity and whether it still exists is not an issue. The First and Second Respondents confirm possession of the vehicle.

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32 2006 (4) SA 355 (C) at 362F-363B. See also Queensland Insurance Co. Ltd v Banque Commerciale Africaine, 1946 AD 272 at p. 286 and Hirchowitz v Hirchowitz 1965 (3) SA 407 (W)

33 Fischer v Ramahlehle 2014 (4) SA 614 (SCA) at 620 C-F

34 Paragraph 50 of the founding affidavit and paragraph 9.1 of the answering affidavit

35 Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A) at 82A; Concor Construction (Cape) (Pty) Ltd v Santambank Ltd 1993 (3) SA 930 (A)

36 Van Der Merwe and another v Taylor NO and others 2008 (1) SA 1(CC) at para 113-114

71. The pertinent question is whether this court can grant vindicatory relief, supposing all the requirements are met, if the Applicant has not specifically sought the relief in its notice of motion. The corollary is whether vindicatory relief can be sought and granted in an application procedure. Again, the parties were allowed to address these issues with further submissions.

72. The First and Second Respondents identify vindicatory relief as an action in rem, i.e., directed against property. They see no reason why the relief cannot be granted on motion proceedings, provided there is no dispute regarding the elements that must be proved. They argue that in this matter, there is a material dispute on the fundamental aspect of ownership, which cannot be adjudicated on motion proceedings. Ownership, of course, only passes if two requisites are met: there must be an intention to pass ownership and an intention to receive ownership.[37] and the object (res) must be delivered. Ownership in movables requires payment of the purchase price and delivery of the goods.[38]

73. The Applicants suggest that the question the court should address is when ownership passed and who ownership passed to before the First Respondent assumed an automatic but irregular lien over the vehicle. The Applicants are arguing against themselves as the answer to the question would preclude them from relying upon this remedy.

74. The Applicants argue that they purchased the vehicle from the First Respondent and paid the required deposit of R172 502.12. They submit that ownership passed to the Third Respondent when the First Respondent confirmed that the Applicant had met all the conditions to release the vehicle by submitting the signed release note. The release note triggered the invoice balance payment of R858 327.50, which the Third Respondent financed. The Applicants submit further that the Third Respondent remains the vehicle owner until the financed amount with interest is

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37 Concor, supra at 933 C- J

38 De Wet v Santam BPK 1996 (2) A 629 (A) at 683D – J.

fully settled by the First Applicant. Ownership of the vehicle then reverts to the First Applicant.

75. The Applicants submit that when the release note was signed, the First and Third Respondents were satisfied that the Applicants could take possession of the vehicle. The Applicants cite the case of Nedbank Limited vs Nonkululeko Bukweni N.O in support[39]. Paragraph 11 of the judgment does not assist the Applicants. The onus is on the holding party to establish an enforceable right (such as a right of retention or a contractual right) to continue to hold against the owner. The First Respondent is in possession and relies upon a contractual right, i.e., clause 2.12 of the standard terms and conditions, to assert vehicle ownership. They invite the Applicants to pay the deposit and obtain delivery of the vehicle. The cited passage in Bukweni does not constitute authority for the proposition that a vehicle release note passes ownership from the First Respondent to the Third Respondent. The contract between the Applicants and the Third Respondent is not before the court, and the Third Respondent has not elected to participate in this application.

76. Applicant's position, as reflected in their supplementary note, does not assist them in obtaining vindicatory relief. Ownership of the vehicle, as the position stands, lies between the First and Third Respondent. If there were no difficulties associated with the payment of the deposit for the vehicle, immediate ownership of the vehicle would have vested in the Third Respondent until the Applicants had paid off the financed amounts. It would be for the Third Respondent to claim vindicatory relief if it is the vehicle's owner.

77. If the Applicants chose a vindicatory action as the civil procedure to finally determine their final rights, they would not be entitled to interim possession of the vehicle. Granting them possession of the vehicle would render the envisaged vindicatory action superfluous. The vindicatory action is unavailable to the Applicants as they cannot prove vehicle ownership.

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[39] Nedbank Limited v Bukweni N.O (1970/2022) [2023] ZAECMKHC 116 (24 October 2023) at paragraphs 10-14

HAVE THE APPLICANTS MADE A CASE FOR FINAL RELIEF?

78. Granting the Applicants possession of the vehicle would amount to final relief. That much is acknowledged by the First and Second Respondents. The Applicants seek an order for the First Respondent to release the Applicants' vehicle. The nature of the relief sought is that of a mandatory interdict. A mandatory interdict is an order requiring a party to do some positive act to remedy a wrongful state of affairs for which it is responsible or to do something which it ought to do if the complainant is to have his rights.[40]

79. A good starting point is an overview of the affidavits filed in this application. The real dispute relates to liability for the deposit payment on the vehicle. The First and Second Respondent acknowledge that the First Applicant has paid a deposit. It was not paid to them but rather into the bank account of a fraudulent third party. Had the First Respondent received the deposit in its bank account, there would have been no application, and the First Applicant would have possessed the vehicle it preferred to purchase. The First Respondent has received the financed amount of the deal, possesses the vehicle, and claims a contractual right to retain ownership.

80. The first question that arises is whether the First Respondent is responsible for the state of affairs that has eventuated in this matter. The First Applicant purchased a vehicle and was provided on three separate occasions with the banking details of the First Respondent, the last being an updated bank confirmation letter. All three had the same bank account number.

81. The Second Applicant states in the founding affidavit that he sought confirmation of the banking details from the First Respondent before paying the deposit. The First and Second Respondents did not deny this allegation. In his replying affidavit,

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[40] Erasmus, Superior Court Practice, D6-3, Service 21-2023

the Second Applicant, in response to the assertion that he should have telephoned the First Respondent to confirm the banking details, alleged that the confirmation was sought telephonically and is part of the complaint he lodged with the SAPS. The court notes that this allegation was not made in the founding affidavit, and the First and Second Respondents did not have the opportunity to admit or refute this allegation. However, the First and Second Respondents did not deny that the Second Application had sought confirmation of the banking details, and their response in the supplementary answering affidavit confirms that confirmation was sought from both Philander and Martin.

82. The deposit was paid on 2 February 2024. The Second Applicant alleged that the deposit should have been reflected in the First Respondent's bank account on the next day if the deposit was made before 4 pm and within 48 hours if the deposit was made after 4 pm. The First Respondent proceeded to invoice the First Applicant on 7 February 2024 to change the towbar and provide a set of rubber mats for the vehicle. The First Respondent issued a release note for the vehicle, which the First Applicant had signed. The Third Respondent settled the financed amount for the vehicle. Delivery and possession of the vehicle would have passed to the First Applicant before the Second Applicant departed on an overseas trip.

83. It is apparent that the First Respondent should have checked their bank account to ascertain whether the deposit was paid but took further steps to conclude the sale agreement with the First Applicant. The First and Second Applicants assumed the deposit would have been paid before the Second Applicant returned from his trip. The release note was provided for the Second Applicant's signature and onward tender to the Third Respondent. They contend that the release note did not disturb the agreement terms between them and the First Respondent. There was no urgent need to monitor their bank accounts to ensure payment was made. They allege that the fact that fraud was perpetrated against the First Applicant has no consequence for them.

84. The First Respondent informed the Second Applicant that they had yet to receive the deposit fourteen days after it was paid. The First Respondent had to be put to terms by the Applicant's attorney on 8 March 2024 before they responded one month later, alleging baldly that their investigation revealed a third party had defrauded the Applicants. They further alleged that they had done a diligent investigation, which showed no compromise in their systems.

85. It beggars belief that the First and Second Respondents would not check their bank accounts timeously to ascertain whether the deposit was paid, considering that their bank confirmation letter cautions their clients (and the Applicants) of prevailing fraud. Even more astonishing is their assertion that any scam perpetrated upon the Applicants is of no consequence to them. Yet, the First and Second Respondents communicated what they described as a bona fide offer to the Applicants to reduce the deposit amount by R30 000 in response to a letter issued by the attorney for the First Applicant.

86. The First and Second Applicants state that they did an investigation that shows a third party defrauded the Applicant and a due diligence investigation that revealed no compromise in their systems. The court was not favoured with any reports confirming either of these investigations. The court does have a credible report from an independent forensic investigator that points to a compromise on the side of the First and Second Respondents. The First and Second Respondents elected to attach a cursory email response of their Information Technology Executive to the forensic report commissioned by the Applicants. The IT Executive deferred to the cybersecurity officer to investigate the matter further. The content of the email, which states that the IT Executive could not retrieve the body of the emails sent to the Applicants and the attachments to it, was contradicted in the supplementary answering affidavit when the attachments to the email sent by Joubert were accessed.

87. The court believes that speed of response is essential if there is any chance of preventing cybercrime and intercepting cybercriminals. Detecting that a deposit

was not reflecting fourteen days after it had been made is completely inadequate in an environment where fraud is becoming increasingly pervasive. The First and Second Respondents were acutely aware of the incidence of cybercrime, as is evidenced by the letter of caution accompanying their bank confirmation letters. There is no evidence in their papers that they inquired about the redirected deposit at their bank. There is also no evidence that they performed any credible investigation to assess whether their personnel or systems were compromised. If they did, they did not favour the court with supporting evidence. They had ample time to do so but chose to delay their answering affidavit until the eve of the hearing. The court rejects their explanations about the delay in detecting that the Applicant's deposit was not paid into their bank account as contrived and unsustainable.

88. The court finds that the First and Second Respondents were responsible for the wrongful state of affairs. On considering the evidence provided by the Applicants on a balance of probabilities, the court finds that the email compromise probably occurred on the side of the First Respondent. The Applicants have no duty to protect them from any compromise on their side.

89. Following the findings in the preceding paragraph, the First and Second Respondents would have been obliged to do something they ought to have done if the Applicants were to enjoy their right to possess the vehicle, i.e., the duty to deliver or make it available for delivery once the release note was signed. There was a legal duty on the First and Second Respondents to check timeously to ensure that the deposit was paid and to check if there was any chance of intercepting and foiling the cybercrime that occurred. This is the other side of the coin that requires the purchaser to exercise due diligence to ascertain that amounts due to the seller are paid into the seller’s correct bank account.

90. The defence raised by the First and Second Respondents relates to the contractual obligation of the Applicants to pay the purchase price in full before possession passes from them to the Applicants. The contractual obligation in the

standard terms and conditions does not prohibit vehicle delivery or possession thereof. It relates to ownership of the vehicle. The right the Applicants seek to obtain is their right to possess the vehicle. No clause in the contract avoids the transfer of possession to the purchaser. In the context of a financed sale, the right to ownership of the vehicle resides between the seller and the finance house, in this instance, the Third Respondent. The fact that the Applicants have paid their monthly instalments thus far and the acceptance of the financed amount by the First and Second Respondents would indicate that ownership of the vehicle had passed to the Third Respondent. In the circumstances, the First and Second Respondent would have a claim for a money amount from the Applicants. An ancillary question that requires to be answered is whether the First Respondent has a greater right to possession of the vehicle than the Applicants, the latter qualifying to possess the vehicle once the deposit has been paid. The answer must be negative for all of the reasons already provided in this judgment that relate to the First Respondent being responsible for the situation that has arisen.

91. The court then determined whether the Applicants have satisfied the requirements for granting final relief. It has been held that a court should pay regard to the substance rather than the form of the relief sought to determine whether an application for an interdict is interlocutory or final. The determination also influences the question as to whether the interdict granted is appealable or not.[41] It is competent for the court to make this determination, and the court will proceed to do so. As alluded to, the First and Second Respondents realise that much. In exercising its discretion, the court notes that the difficulty of enforcing a mandatory interdict is not applicable in the circumstances of this application.

92. To obtain final interdictory relief, the Applicants have to satisfy a triad of requirements, namely a clear right, the occurrence or reasonable apprehension of an injury and a refusal to act in fulfilment of a breach of such right in the case of

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41 Knox D'Arcy Ltd v Jamieson 1995(2) SA 579 (W) at 600G-602E, Cipla Agrimed (PTY) Ltd v Merck Sharp Dohme Corporation 2018 (6) SA 440 (SCA)

a mandatory interdict, and the absence of any other satisfactory remedy.[42] A final interdict, on the other hand, is a court order based upon the final determination of the parties' rights to the litigation.

93. An applicant must possess a clear right before a court can grant a final interdict. The right must exist in law. Secondly, the applicant must factually substantiate the right with evidence. The Applicant bears the burden of proof and must demonstrate the existence of the right on a balance of probabilities

94. The Applicants claim a right to possession, not vehicle ownership. The right to possession of a vehicle in a financed purchase is recognised in our law. As the First Respondent is responsible for the state of affairs that has eventuated, the First Applicant is entitled to its right to possess the vehicle. The Second Applicant alleges that the right it has emanates from the common law, the Consumer Protection Act 68 of 2008 and the South African Automotive Industry Code of Conduct. The right is to obtain timely vehicle delivery and to be spared from unconscionable conduct by the First and Second Respondents concerning the sale. The Applicants paid the deposit, their financiers paid the purchase price balance, proof of insurance was provided, and a release note was issued.

95. The First and Second Respondents deny that any rights of the Applicants have been infringed. They deny any obligation to release possession of the vehicle in circumstances where the Applicants have failed to pay the purchase price in full. In their answer, the First and Second Respondents largely failed to engage the averments made by the Applicants under this requirement, brushing them off as being argumentative.

96. The First and Second Respondents concentrated on the aspect of ownership. They alleged that they had a contractual right of ownership that entitles them to vehicle possession. The First and Second Respondents repeatedly suggested that the

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[42] Setlogelo v Setlogelo 1914 AD 221

Applicants pay the deposit and the vehicle is theirs. The Applicants allege that they paid the deposit in the manner specified by the First Respondent. The Applicants have established that they have a clear right to possess the vehicle, and the First Respondent is unlawfully denying them possession. The Second Applicant would have taken possession of the vehicle on or about 7 February 2024 had he not gone overseas and had the First Respondent fitted the extras ordered for the vehicle.

97. The second requirement to obtain a final interdict is the occurrence or reasonable expectation of an injury. The injury referred to does not encompass physical harm or financial loss alone but includes interfering with the Applicant's rights, causing prejudice or invasion. The injury must either be continuing or imminent. A final interdict will not be granted for an injury already committed. The injury need not be irreparable; even potential prejudice can be considered. The applicant must establish a reasonable apprehension of injury based on well-grounded facts that a reasonable person would experience. While the apprehension need not be indisputable, it should be reasonable on a balance of probabilities, ensuring that the applicant's fear of injury is substantiated

98. The court has dealt with the injury, i.e., proof of some act done resulting in interference with the Applicants rights, in the deliberation above. The First and Second Respondents continued possessing the vehicle, constituting an ongoing injury. The prejudice caused to the Applicants has also been considered. It relates to the prejudice to the Applicants who continue paying the monthly instalments to the Third Respondent. The profitability of their business has been affected, as well as the Applicant's ability to pay the instalments and cover their other debts. The Applicants are unable to enjoy the use of the vehicle. The asset continues depreciating. The Applicants also fear that the First Respondent may alienate the vehicle or that the First Respondent's personnel are using the vehicle. The injury outweighs any prejudice that the First and Second Respondents will suffer. They sit with a substantial payment of the purchase price to offset any wear and tear and depreciation on the vehicle.

99. The third requirement to obtain a final interdict relates to whether any other ordinary or satisfactory remedy is available to the applicant. The court will not grant an interdict if alternative forms of redress would adequately address the circumstances. Alternative remedies can involve various legal options, such as claims for damages, sequestration of the respondent's estate, police protection, or binding orders. Damages can be a viable alternative if the infringement of the rights can be quantified monetarily, ensuring adequate compensation. Certain exceptions exist, such as when the respondent lacks assets or money, the injury is a continuous violation of rights, or it is difficult to assess the damages caused

100. Although other remedies may be available to the Applicants, including a claim for damages, it is apparent from the tenor of the founding affidavit that they want possession of the vehicle they purchased.[43] They do not wish to use other means beyond any that permit them to obtain their preferred vehicle. A claim for damages premised upon the ongoing injury may be difficult to assess. Apart from vindicatory relief, no other satisfactory remedy will enable them to take possession of the vehicle. As long as the Third Respondent declines to assert its right to ownership, the Applicants cannot prevail with a right to vindicate the vehicle.

101. The First and Second Respondents deny that the Applicants have no other satisfactory remedy. They aver that the Applicants acknowledged and utilised other remedies available to them. The fact that the SAPS and the Motor Industry Ombudsman have sat with the investigation for over six months suggests that they believe there is no merit to the complaint levelled against the First and Second Respondents. In the present instance, the applicant has a satisfactory alternative remedy, namely an action for the recovery of the purchase price paid by it to the Third Respondent (plus interest thereon), alternatively an action for damages in the amount of the purchase price, together with an action for damages for any

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[43] Hotz v UCT 2017 (2) SA 485 (SCA) at para [36]

consequential loss which might be claimable by the Applicants against the Third Respondent arising from the failure to afford the Applicants the use of the vehicle at the time when the Third Respondent undertook that the vehicle would be handed over

102. The court does not align with the suggestions made on behalf of the First and Second Respondents. They are not in accord with the relief sought by the Applicants to have the vehicle they purchased.

103. Finally, the issue remains: who is liable for the outstanding deposit? Does the resolution of this issue hinder the court in granting final relief? Can an application for interdictory relief resolve the question of liability for the rerouted deposit? As much as the court has mulled over this issue, it cannot find any precedent or legal principle that answers these questions or directs it to exercise its discretion to grant final relief in the context of interdictory proceedings to the Applicants. The judgment thus far should serve as a cue for the parties to persist with negotiations or resort to alternative dispute means to resolve the impasse or cancel the sale. An interdict is not the appropriate means to achieve the relief sought by the Applicants.

104. The urgency of this application was no longer an issue. The court had been assigned to hear the matter, and the parties were given ample opportunity to ventilate their cases fully. The court is also satisfied that the deponents to the affidavits are properly authorised to depose to their respective affidavits and that the legal standing of the First Applicant is evident in the body of the founding affidavit. Furthermore, the court condones the late filing of the answering affidavits of the First and Second Respondents. Both parties sought punitive costs against each other. The court declines to order punitive costs. In the premises, the court makes the order that follows.

ORDER

105. The application is dismissed with costs, including the costs of Counsel. Counsel's fees are to be determined on the 'B' scale.

Ajay Bhoopchand

Acting Judge of the High Court

Western Cape Division

02 September 2024

Judgment was handed down at 10h00 on Monday, 2 September 2024, and delivered to the parties by email.

Applicants Counsel: A Moodley

Instructed by L Mafetsa Attorneys, Sandton

First and Second Respondents Counsel: R Randall

Instructed by Scalco Attorneys, Northcliff.