



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 460/2014

In the matter between:

RIGHT-PATH INVESTMENTS (PTY) LTD

PLAINTIFF

and

HEBEI XINJIAN CONSTRUCTION CC

DEFENDANT

Neutral citation: *Right Path Investments (Pty) Ltd v Hebei Xinjian Construction CC*
(I 460/2014) [2017] NAHCMD 118 (20 April 2017)

Coram: OOSTHUIZEN J

Heard: 7-11 March 2016, 5-8 July 2016, 20-21 October 2016, 5
December 2016, 16 January 2017

Delivered: 20 April 2017

Flynote: Civil Action - Rei vindicatio – who bears the onus to prove – ownership – plaintiff and defendant entered into a joint venture – separation of the joint venture – presumption of ownership rests with the possessor of the movable.

Summary: The plaintiff brought an action for the return of 3 vehicles, alternatively, if the vehicles could not be returned, for the market value of the 3 vehicles to be paid. Defendant alleges that he was the new rightful owner of the 3 vehicles. This was as a result of the termination of the joint venture agreement entered into between the two individuals, which was conducted through plaintiff. Plaintiff alleges that no authorisation for the transfer of the said vehicles was given. Nevertheless, plaintiff cancelled the insurance premiums payable in respect of the said vehicles, more or less at the same time they were registered in the name of the defendant. Court considered the evidential burden and the onus of proof. Plaintiff alleges that it is the owner of the subject vehicles. Onus rests on defendant to proof entitlement to possess and fresh ownership. Defendant assisted by a rebuttable presumption of ownership.

ORDER

Having heard both counsel for the plaintiff and the defendant and having considered the case presented –

IT IS ORDERED THAT:

The Plaintiff's claim is dismissed with costs.

JUDGMENT

OOSTHUIZEN J:

Background and Pleadings

[1] Plaintiff is Right-Path Investments (Pty) Ltd, a Namibian registered private investment company with business address at 6 Amasonite Street, Eros, Windhoek.

[2] Defendant is Hebei Xinjian Construction CC, a Namibian registered close corporation doing business as a construction company with principal place of business at No 39, Bowker Street, Windhoek.

[3] The sole shareholder of the plaintiff and the sole member of the defendant respectively are Xizhong Hou and Hongzhong Jiang.

[4] In this judgment plaintiff will also be referred to as Right-Path and defendant as Hebei.

[5] The evidence is that Messrs Hou and Jiang, the latter in a representative capacity for another Chinese national, conducted business as a joint venture under the umbrella of the plaintiff since 2012.

[6] Plaintiff bought 6 vehicles. Three of those vehicles are the subject of the dispute between the parties.

[7] Plaintiff say that it bought a Ford Ranger, 3 liter double cab, 4x4 with licence number N880880W and VIN number AFATXXMJ2TBE11151 on 4 August 2011 from Novel Motor Company.

[8] Plaintiff bought a Volkswagen Transporter single cab with licence number N5869W and VIN number WV1ZZZ7JZCX008464 from Zimmerman Garage on 10 April 2012.

[9] Plaintiff bought a Land Rover Discovery 4 SDVS 6 with licence number N898898W and VIN number SALLAAAF3CA622749 on 1 June 2012 from Novel Motor Company.

[10] Plaintiff asserts ownership of the three vehicles, which it say came into the possession of defendant from the latest beginning of 2013 with full knowledge that plaintiff is the owner thereof.

[11] Plaintiff claims the return of the 3 vehicles, alternatively claims its market value.

[12] Defendant refuse to give the vehicles back and on its part asserts ownership over the vehicles.

[13] Defendant erroneously pleaded that the certificates of registration of the three vehicles constitute an unassailable title of ownership thereto.¹

[14] The Landrover Discovery, Ford Ranger and Volkswagen Transporter were registered in defendants name on 4 October 2013, 29 November 2013 and 9 December 2013 respectively. That is common cause.

[15] It is also common cause between the parties that Mr Hou of the plaintiff concluded an oral joint venture agreement with a Mr Zhao during 2011 to do business in Namibia. This agreement was eventually reduced to writing on 16 September 2012. Mr Jiang of defendant signed this agreement as the representative partner of Mr Zhao in Namibia. The joint investment venture would be operated through the plaintiff, a

¹ See *Uvanga v Steenkamp* 2016 (2) NR 465 HC at 473, paragraph [34].

Namibian registered company. Mr Hou would hold two thirds of the shares in plaintiff and Mr Zhao one third.

[16] The three vehicles were bought by Right-Path for use in the joint venture business. The joint venture included construction activities. The vehicles were bought from funds in the bank account of Right-Path.

[17] It does not seem that the parties are ad idem as to what caused the joint venture's relationship to go sour, but that it soured they concur. Mr Hou (Right-Path) and Mr Jiang (defendant) agreed to separate their investments (according to both) in approximately April 2013.

[18] Starting in April 2013 and according to both Mr Hou and Mr Jiang they negotiated a separation agreement in Windhoek. Mr Hou (represented by Mr Jiang Chun Ming) and Mr Jiang negotiated the separation agreement.

[19] According to Mr Hou the 37% shareholding in Right-Path would be returned to him. Mr Jiang have no dispute therewith and say it was done.

[20] Mr Hou would pay N\$ 3 million to each of the three construction corporations of Mr Zhao and Jiang (which he apparently did). Mr Jiang have no material issue with this either.

[21] Mr Hou would have no further interest in the construction corporations and activities. Mr Jiang have no issue with this either.

[22] Defendant, who started with adducing evidence, amended its plea before Mr Jiang was excused by the court. Paragraph 2.3 of the plea was amended to read:

'The Plaintiff, being duly represented by Mr Jiang Chun Ming ("Old Man")("Cousin of Mr Hou"), he (Mr Ming), being authorised by Mr Xizhong Hou, by virtue of an oral

agreement entered into by and between Plaintiff (represented by Mr Ming) and Defendant (represented by Mr Jiang), authorised the transfer of ownership of the said three motor vehicles into the name of the defendant as clearly indicated in Annexure “HXC1”, “HXC2” and “HXC3”.

[23] Plaintiff objected to the amendment, but the court ruled as follows:

23.1 On Wednesday 9 March 2016, the Defendant’s last witness testified and was cross-examined. Defence counsel indicated that he has no re-examination. The witness was not excused immediately. I looked through notes and considered questions, if any, I want to put to the witness. The witness then asked my permission to say something. I allowed him. He started to explain the surrounding circumstances leading to the transfer of the vehicles. At some stage I advised that I am only required to make findings on the issues before me and stand the matter down in order to grant him the opportunity to raise and discuss matters with Defendant’s instructed counsel, Mr Brand, in order to give instructions whether he want to expand Defendant’s case to include the surrounding circumstances.

23.2 At 14h30 when the hearing proceeded, Mr Brand applied for an amendment of sub-para 2.3 in Defendant’s plea in terms of Rule 52(9).

23.3 Sub-paragraph 2.3 of the plea read as follows:

“The Plaintiff authorised the transfer of ownership of the said three motor vehicles into the name of Defendant as clearly indicated in Annexure “HXC1”, “HXC2” and “HXC3”.

23.4 Plaintiff never replicated thereto.

23.5 On 3 September 2015, the witness, Mr Jiang’s witness statement was signed by him and filed by the Defendant’s attorneys.

23.6 Certain portions therein, and specifically portions of paragraphs 3, 4, 6 and 8, were objected to by the counsel for the Plaintiff on 9 March 2016. These objections were foreshadowed by a letter from the Plaintiff's attorneys on 18 February 2016.

23.7 On 17 September 2015 a draft pre-trial order was filed by the parties. Duly signed by their representatives. Under issues of fact to be resolved at the trial, subparagraph 1.2, an ostensibly agreed issue was "Whether the defendant is the owner of the vehicles by virtue of the agreement entered into between the defendant and the plaintiff."

23.8 Rule 26 regulates and provides for a pre-trial conference and order. Rule 26(10) provides that issues and disputes not set out in the pre-trial order will not be available to the parties at the trial, except with leave of the managing judge or court granted on good cause shown.

23.9 Plaintiff was aware at all relevant times from early September 2015 that Defendant intends to rely on a separation agreement between Plaintiff's Mr Hou and Defendant's Mr Jiang. Moreover, Plaintiff was aware from at least the beginning of June 2015 (Defendant's plea being filed on 29 May 2015), that Defendant relies on authorisation by Plaintiff to transfer the 3 vehicles.

23.10 Plaintiff did not take any timeous exception to the plea of the Defendant on either vague and embarrassing grounds, nor that it does not disclose a triable cause of action.

23.11 This matter commenced on 13 February 2014. Pleadings were closed by the middle June 2015.

23.12 Paging through the court file I have no reason to be overly impressed by any of the involved legal practitioners diligence and promptness.

23.13 When this trial commenced, I ruled that the Defendant should adduce evidence first.

23.14 Plaintiff could listen and cross-examine first. Defendant could not sprang surprises on Plaintiff which Plaintiff would not be able to address by way of objection or cross-examination.

23.15 I refer to inter alia Rule 1(3) and (4) which I have considered with the relevant case management rules and Rule 52(9) of the High Court Rules.

23.16 Although the insertion of the phrase “being duly represented by Mr Jiang Chun Ming (“Old Man”)(“Cousin of Mr Hou”), he (Mr Ming), being authorized by Mr Xizhong Hou, by virtue of an oral agreement entered into by and between Plaintiff (represented by Mr Ming) and Defendant (represented by Mr Jiang), between the words “The Plaintiff” and “authorised the transfer ...” in sub-paragraph 2.3, is inelegant in my view, the Court allows the amendment.

23.17 I am unimpressed with the assertions of surprise, new case, whole new ball game, prejudice and the like.

23.18 Mr Jiang shall be led by Mr Brand to substantiate the addition and Plaintiff's Mr Barnard is entitled to cross-examine thereon. Mr Hou is present to supply instructions.

23.19 It is not for the Plaintiff to rely on its own remissness and inaction and pretend prejudice.

23.20 Until now I could not hear a denial of the “separation agreement” between the two main role players.

23.21 Although not pleaded, the when and the where of the agreement are obvious.

23.22 Subject to further argument concerning costs occasioned by the amendment if need be, I shall grant costs occasioned by the amendment of one half day against the Defendant.

23.23 Mr Jiang to proceed with evidence.'

[24] Mr Jiang then continued with his evidence in support of the amendment and provide the court with exhibit "A", a summary of his evidence in support of the amendment. Exhibit "A" differ from the parts objected to by the plaintiff in his initial witness statement to the extent that Mr Jiang clarified that his agreement with Mr Hou was through Mr Ming who represented Mr Hou for Plaintiff.

[25] For purposes of this case (and in view of the pre-trial report) it is accepted that Mr Hou as sole shareholder to be after Mr Jiang and Mr Zhou transferred their 37% shareholding in Right-Path to Mr Hou, had the authority to act on behalf of Right-Path and to mandate Mr Ming to act on his behalf.

Evidence and Applicable Law

[26] Plaintiff, the joint venture company, owned the three vehicles in question for purposes of the joint venture business which included construction.

[27] Counsel for the Plaintiff pointed out that it was never put by Defendant to Mr Hou that he authorised the transfer of the subject vehicles. It was however, the evidence of Mr Jiang in the presence of Mr Hou. Mr Hou denied that he authorised the transfer of the subject vehicles.

[28] The parties have an issue over whether it was agreed that the three motor vehicles would remain the property of the plaintiff and would be returned to plaintiff, as well as with the 50% members' interest in two property owning close corporations.

[29] According to Mr Hou he had not consented to the transfer of ownership in the three motor vehicles to the defendant and did not authorise Mr Ming or any of Plaintiff's employees to transfer the said motor vehicles. Mr Hou, however has testified that he authorised Mr Ming to act on his behalf during the separation negotiations. Mr Hou

testified that he was not present during the negotiations and when the separation agreement was reached.

[30] According to Mr Jiang it was agreed that the three motor vehicles would be transferred to the Defendant with Mr Ming (representing Mr Hou and/or Plaintiff).

[31] The evidential burden to prove ownership of the vehicles rests on the plaintiff in a vindicatory action. The evidential burden to prove the right to be in possession of the vehicles rests on the defendant.²

[32] The evidence of the defence and the evidence of the plaintiff concerning transfer of ownership in the three vehicles are mutually destructive.

[33] Applied to this case with the necessary changes, '*National Employers*' means that the defendant can only succeed with its claim to ownership of the three subject vehicles if it satisfied the court on a preponderance of probabilities that its version is true and accurate and therefore acceptable. Needless to say, the aforementioned will as of necessity imply that the version advanced by the plaintiff is therefore false or mistaken and falls to be rejected. The court should measure the defendant's version against the general probabilities.³

[34] Defendant however is assisted by the rebuttable presumption in law that the possessor of a movable thing is also the owner thereof.⁴

[35] The two witnesses for the defendant, as well as Mr Jiang himself, testified that during the end of August 2013 beginning of September 2013, Mr Ming (also the

² *Shukifeni v Tow-In-Specialist* 2012 (1) NR 219 HC at 224 and 225, paragraphs [18] to [23]. See also *Gamikaub (Pty) Ltd v Schweiger* 2008 (2) NR 464 (SC) at 471 and 472, paragraphs [12] and [13].

³ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440 E – G, cited with approval in *Van der Berg v Motor Vehicle Accident Fund* 2009 (2) NR 551 (HC) at 564 and 565, paragraph [54].

⁴ *Marine Time Incorp v MFV 'Rybak Leningrada' ('North Star')* 1996 NR 162 HC at 165 C – D, citing with approval the case of *Zandberg v Van Zyl* 1910 AD 302. In turn this raises a presumption of entitlement to possession, see *Graham v Ridley* 1931 TPD at 479.

employee of Right-Path and Mr Hou's representative) delivered the original registration documents of the Volkswagen Transporter, Ford Ranger and Landrover Discovery to the employees of defendant, Ms Lin Sun and Paulus Wilbard, who then in turn have reregistered same in the name of defendant.

[36] It was never put to any of the defendant's witnesses in cross-examination that the above cannot be true as the registration documents were already in the possession of Mr Jiang as representative of Mr Zhao.

[37] The allegation that the three vehicles' registration papers was at all relevant times in the possession of Mr Jiang, was new and not contained in any of Mr Hou's witness statements.

[38] It was, however common cause that the three mentioned vehicles were under the control and possession of Mr Jiang as representative partner of Mr Zhao at all relevant times.

[39] Another fact which favour the defendant is contained in Exhibit "C3" (HJ3 to Mr Jiang's first witness statement, which comprises two documents to wit "C3", the email, and a tax statement addressed to the defendant for payment of insurance premiums).

[40] Exhibit "C3" is an email send by Liz Ji (of the plaintiff) to the insurance broker on 5 September 2013. The text of the mail read as follows:

'Dear Ancois,

Due to the two partner went their separate way, There are three vehicles will be transfer to others.

please help to remove the following three vehicles

Land Rover, Ford 3.0, Volkswagen

Please kindly stop to sent the premiums to the bank this month, and make this effective from 01/10/2013.

Thank you for your help and patience.

Kind regards

Liz Ji'

[41] Of this email Ms Liz Ji testified that Mr Hou only asked her to stop the insurance of the three vehicles, and did not give a reason. She said that when she said to the insurance broker that the Discovery, Volkswagen and Ford Ranger will be transferred to others she said it to supply a reason, but she in fact was not told by Mr Hou that it would be sold and that is why she must stop the premiums. Mr Hou gave a similar explanation.

[42] In context however, knowing that the vehicles are in possession of defendant and being used in the construction activities of the defendant (which was put to Mr Jiang in cross-examination by plaintiff), while saying it is still the property of the plaintiff (and valuable), it does not make commercial sense to stop the insurance concerning the three vehicles. In this respect, it is more probable that the insurance cover is terminated for the reason that plaintiff's commercial interest therein came to an end and therefore more probable that Mr Hou, through Mr Ming, agreed to the change in ownership of the three vehicles to the defendant.

[43] Plaintiff's argument that the evidence of Mr Jiang as contained in exhibit "A" was again that he, Mr Jiang, and Mr Hou agreed that the subject vehicles would be transferred to defendant, whereas in the same exhibit he (Jiang) contradictory said he reached the agreement with Mr Ming, viewed in the context of exhibit "B", pp 65 and 66, where Mr Hou did not even mention Mr Ming as his representative, goes nowhere.

[44] In the context of this case, the plaintiff had to rebut the legal presumption that defendant, being in possession of the subject vehicles, is the owner thereof. This was

not done. Despite postponement to a date elected by plaintiff, in order to call Mr Ming, he did not testify.

[45] The evidence adduced by the defendant's witnesses concerning the transfer of ownership in the subject vehicles, being more probable⁵ than the evidence adduced by plaintiff, is accepted and the version of the plaintiff is rejected as false or mistaken.

[46] Plaintiff's claim is dismissed with costs.

GH Oosthuizen
Judge

⁵ *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A - D: Cited with approval in *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz MegaBuilt v Kurz* 2008 (2) NR 775 (SC) at 790B-C.

