IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/AP/38/2019**

In the matter between:

SEKHOBE NTENE **APPELLANT**

AND

FREE STATE MANAGEMENT
TRADING ENTITY **RESPONDENT**

Neutral Citation: Sekhobe Ntene v Free State Management Trading Entity (CIV/A/38/2019) [2021] LSHC 43 (22 APRIL 2021)

JUDGMENT

CORAM: **MOKHESI J**
DATE OF HEARING: **09 MARCH 2021**
DATE OF JUDGMENT: **22 APRIL 2021**

SUMMARY

CIVIL PRACTICE: Appeal against the decision of the Magistrates' Court not to order the leading of *viva voce* evidence- principles applicable considered and applied- computer-generated evidence and considerations of the standard of proof.

ANNOTATIONS

Legislation:

Motor Vehicle Theft Act No. 13 of 2000

Authentication of Documents Proclamation No. 73 of 1957

Books:

Theophipoulos, Van Heerden and Boraine **Fundamental Principles of Civil Procedure 3 ed (2015)**

L H Hoffmann and D T Zeffertt **The South African Law of Evidence 4 ed.**

Cases:

Takalimane v Serobanyane LAC (2011 – 2012) 222

National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA): [2009] 2 ALL SA 243 (SCA)

Room Hire Co. (Pty), Ltd v Jeppe Street Mansions (Pty); Ltd 1949 (3) SA 1155 (T.P.D)

Mahomed v Malk 1930 T.P.D 615

Makoala v Makoala LAC (2009 – 2010) 40

South African Football Association v Mangope (JA 13/11) [2012] ZA LAC 27: (2013) 34 ILJ – 311 (LAC)

Dique v Viljoen (14218 2007) [2007] ZAGPHC 2006 (14.09. 2007)

Standard Bank of S. A. Ltd v Sewpersadh and Another 2005 (4) SA 148 (C. P. D)

S v Holshausen 1984 (4) SA (A)

Nurlis v South African Bank of Athens 1976 (2) SA 573 (A)

Rex v Trupedo 1920 AD 58

S v Ndiki 2007 (2) ALL SA 185 (Ck)

Tseliso Lempe v Rex (1997-1998) LLR-LB 195

Trustees for the time Being of the Delsheray Trust and Others v ABSA Bank Limited [2014] 4 ALL SA 748 (WCC) (9 October 2014)

[1] This is an appeal against the judgment of the Chief Magistrate North, delivered on the 22nd day of October 2019. The genesis of this matter is straightforward. For purposes of convenience, parties will be referred to as they were in the court a *quo* – the appellant as the respondent and the respondent as the applicant). On the 2nd June 2015, the respondent was charged with the crimes of theft of a motor vehicle, tampering with its chassis and engine numbers, in terms of the Motor Vehicle Theft Act No. 13 of 2000 ('the Act'). He was released on bail. It is alleged that the vehicle was stolen from one Benjamin Moshe who is the applicant's employee, at Botshabelo, in the Republic of South Africa.

[2] The respondent's prosecution was aborted by the dismissal of the case for want of prosecution on the 23rd October 2018. It must be stated that when the respondent was initially charged, apart from being released on bail, the vehicle the subject matter of this appeal was released to him "for safekeeping" contrary to a clear prohibition against such a course as provided under S. 14 (3) of the Act (see: also **Takalimane v Serobanyane LAC (2011 – 2012)** 222 at 225 para. 9). However, be that as it may, when the case was dismissed, the learned Magistrate invoked the provisions of S. 14 (3) of the Act which is to the effect that despite the fact that the case against the respondent was dismissed for the lack of prosecution, any person who has a lawful claim to the vehicle had to apply for its release to him or her.

[3] The applicant launched the application, in the court *a quo*, duly supported by documentary evidence, claiming the vehicle as its owner. That matter served before the learned Chief Magistrate North, and judgment was delivered on the 22nd day of October 2019, in terms of which the respondent was ordered to release the vehicle to the applicant and was also ordered to

pay the costs of application. It is against that order that the respondent launched this appeal. His grounds of appeal are that:

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The learned Magistrate erred in law in dealing with a clear case of dispute of fact in application proceeding yet it is quite apposite that where there is such, a trial has to be held and oral evidence led.

-3-

The learned Magistrate erred in law in dealing with expert evidence on documentary basis production without it being properly attested to in person by the expert on trial. Thus, resulting into inadmissible hearsay evidence more especially when dealing with release application of a motor vehicle where ownership is highly contested.

-4-

The learned Magistrate erred in law in dealing and considering annexures that were not even certified for purposes of confirming their authenticity.

[4] The respondent, has further filed an additional grounds in terms of which he lamented that the learned magistrate based her judgment on the 'order not issued', and further that she was biased against him for adjudicating the application for release of the motor vehicle because, as he puts it:

This is absolutely amounts to bias because it would be far-fetched for her worship Mokhoro to go against her order which she gave in CRI/T/179/15. Therefore, when CIV/APN/LRB/23/19 was filed, the court a quo had already made its conclusion and judgment. That is why it would be realised that at page 53 of the record of appeal which is the judgment of the court a quo, in trying to avoid ruling that there was a dispute of fact, the court says it ordered Appellant to file

supplementary affidavit mero motu though Rule 52 (6) of the Subordinate Court Rules 1996 denies it. But looking at the Court a quo record of proceedings, pages 42, 43 of the record of appeal there is no such order made by the court. This shows that the court a quo knew it had to allow oral evidence to be lead to choose to be biased against Appellant. (sic)

[5] When this appeal was filed, it was allocated to my colleague Peete J who has since gone on retirement in July 2020. It was only re-allocated to me on the 21st November 2020 hence why it is serving before me. I turn to deal with the grounds of appeal raised by the respondent:

[6] (1) **Dispute of fact**

In terms of the Subordinate Court Rules 1996, Rule 52 (8) thereof:

(8) In the event of any dispute arising as to the facts, the Court may –

(a) Receive evidence either viva voce or by affidavit and try the issues in dispute in a summary manner; or

(b) Order that the issues shall be tried by way of action, that the applicant shall be plaintiff and the respondent be defendant and the notice of application shall stand as summons or that the applicant shall deliver such particulars of his claims as are prescribed in the rule 6, within seven days or such shorter time as the court may determine.

[7] In terms of this sub-rule the court is given a discretion whether to order referral to *viva voce* evidence or an order that evidence be contained in affidavits, in order to resolve disputes of facts arising from the papers. The

respondent argues that the court *a quo* misdirected itself by not ordering referral to *viva voce* evidence the question of ownership of the vehicle in issue. In the instant case, it should be determined whether a dispute of fact actually arose and whether the approach to its determination should be made by reference to the principles applicable to the choice between motion proceedings and trial action, which choice should be permitted according to whether there is or not the absence of foreseeable genuine or real dispute of fact on any material issue between the parties. This critical consideration is what should inform the understanding of the procedure which was adopted in the court *a quo*.

[8] The starting point is the Act. The proceedings in the court *a quo* was governed by the provisions of s. 14(3) of the Act, which provide that:

> *Where a motor vehicle seized under this section is taken before a court for the purpose of a prosecution in respect thereof, the court shall not release such vehicle until the conclusion of any such prosecution, and unless, within six months of the date of seizure of the vehicle, whichever is the later, application is made for such release supported by satisfactory documentary proof of lawful ownership or lawful possession thereof, and if, at the conclusion of such period of 6 months the vehicle remains unclaimed it shall be handed back to the police to be handed back to the police to be dealt with as an unclaimed vehicle in accordance with the provisions of section 19.*

[9] Thus, s.14(3) mandates that the procedure for claiming the release of a motor vehicle seized in the circumstances of this case is motion proceedings. It is trite that motion proceedings are meant for resolution of legal issues based on common cause facts, and cannot be deployed to determine probabilities **(National Director of Public Prosecutions v**

Zuma 2009 (2) SA 277 (SCA): [2009] 2 ALL SA 243 (SCA) at para. 26**).** Where motion proceedings are statutorily authorised, the application should not be approached, in the case of disputes of fact, on the basis of the permissibility at the choice of procedure between motion proceedings and action trials. A court faced with a genuine and material dispute of fact on affidavits should resort to Rule 52(8) and call for *viva voce* evidence in order to resolve the genuinely disputed facts, instead of dismissing the application on the basis that those material disputes of fact were foreseeable as it would normally be the case. This owes itself to the nature of the proceedings in question in terms of which motion proceedings have been statutorily mandated. The nature of the proceedings in question and the approach to resolution of disputed fact when they arise, was articulated in **Room Hire Co. (Pty), Ltd v Jeppe Street Mansions (Pty); Ltd 1949 (3) SA 1155 (T.P.D)** at 1161 where Murray, A.J.P. said:

> *I propose to set out, first, as I understand it, the general position in regard the permissibility of motion proceedings as opposed to trial actions. Two types of proceedings may be mentioned, as falling outside the scope of this enquiry. (1) There are certain types of proceedings (e.g., in connection with insolvency) in which by statute motion proceedings are specially authorised or directed: in these the matter must be decided upon affidavit and Rule 9 may be invoked, as shown in Mohamed v Malk (1930 T.P.D. 615), to permit viva voce evidence to be led in order to counteract any balance of probability appearing form affidavits ….*

[10] Where dispute of facts arise in proceedings now under scrutiny, the following principles as stated in **Mahomed v Malk 1930 T.P.D 615 at 619 Tindall J.,** should serve as a guide on how the court should exercise its

discretion whether or not to refer a genuine and material dispute of fact to *viva voce* evidence :

> *The court must be satisfied that a viva voce examination and cross-examination will not disturb this balance of probabilities, before making an order for sequestration on the affidavits. For example, if the debtor's version is on the face of it so inherently improbable that it cannot reasonably be accepted, or if the admitted facts show that the attack on the validity of the claim or on the grounds of insolvency alleged is not honestly made (citation omitted), or, if for other sufficient reasons the court is satisfied that viva voce evidence will not disturb the balance of probabilities, the court may grant the sequestration on the affidavits….*

[11] Although these principles were expressed within the context of sequestration proceedings, they are equally applicable in the instant matter. When the respondent raised the so-called point *in limine* that there was a dispute of fact, learned magistrate says she adopted the following approach (at para 25 of the judgment):

> *[25] Rule 52(6) of the Subordinate Court Rules 1996 provides that no further affidavit may be filed by any party after the filling of a replying affidavit unless the court in its discretion permits further affidavits to be filed. In realising that the respondents opposing affidavit had not adequately addressed the alleged dispute of fact and that a Ruling on whether there existed any dispute of fact in principle amount to a final judgment the court mero motu gave the respondent an opportunity to file a further affidavit but this the respondent did not do but instead filed detailed heads of arguments which are not supported in anyway by the opposing affidavit.*

[12] Although the court *a quo* did not necessarily order the respondent to file supplementary affidavits as it says, that would still not alter the result of the case as will be shown in due course. The applicant's case was contained in the affidavit of Mr Mashudu Marobe. His founding affidavit is supported by the affidavits of warrant officer 'Mammorobela Matome Peter who conducted investigations on the vehicle in issue, and the verifying affidavit of Petrus Cornelius Wepener who is employed by the Department of Transport. Mr Wepener did the verification and authentication of the vehicle's particulars which appear on the certificate of registration which was found in possession of the respondent. And further, the affidavit of Mr. Mosoeu Donald Mosolotsane was also filed in support of the application.

[13] It is common cause that the vehicle in issue currently bear the following particulars:

Model	-	Toyota Hilux
Reg. No.	-	DHD 407 FS
VIN NO.	-	AHTCX39G365669768
Engine No.	-	2TR8156934

[14] The material averment in the applicant's founding affidavit is that the vehicle's particulars mentioned above were tampered with, and that in their original form they are as follows:

Model	-	Toyota Hilux
Reg. No.	-	CBJ 019 FS
VIN NO.	-	AHTCX39G605009768
Engine No.	-	2TR7167559

[15] Mr. Mashudu Morobe who deposed to an affidavit as Head of Fleet Management of the applicant averred that a vehicle bearing identity features mentioned in para.14, above, was stolen while in the possession of one of its employees Mr. Pholo Benjamin Moshe at Botshabelo in the Republic of South Africa on the 26th November 2014. There is no confirmatory affidavit from the said Moshe, so the issue that the vehicle was stolen from Moshe at Botshabelo is hearsay:

> *"Where the applicant refers in the supporting affidavit to communications or actions by other persons, such reference must be affirmed by obtaining, affirming or confirmatory affidavits, from the said persons and attaching it to the supporting affidavit. The attachment of confirmatory affidavits is necessary in order to comply with the evidentiary rule against hearsay evidence. Only admissible evidence should be in the affidavit."* **(Theophipoulos, Van Heerden and Boraine Fundamental Principles of Civil Procedure 3 ed. (2015) at p. 144).**

[16] However, be this as it may, I am convinced that the absence of the confirmatory affidavit is not fatal to this case because there is evidence of that the vehicle was reported stolen as confirmed by Mr 'Mammorobela Peter in his affidavit – case number Botshabelo CAS327/11/2014. The vehicle was later was found in possession of the respondent here in Lesotho, at Hlotse. The respondent's arraignment in relation to the theft of the vehicle was articulated in the background facts above and need not be repeated here. The vehicle was found in possession of the respondent bearing the identity features suspected of being falsified. The Lesotho police advised their South Africa counterparts of the discovery of the vehicle, and Warrant Officer Mammorabela Matome Peter was dispatched

to the Kingdom to conduct investigations. The procedure and details of his investigations are contained in his affidavit filed in support of the application: He states that he has nine (9) years' experience as a vehicle crime investigator; that he investigates more than 20 vehicles per week on average; that he uses electro acid process (etching) and microdot in respect of which he received training to conduct investigations; that he has access to the South African Police Service Computer systems and the Electronic National Information System (ENATIS) which houses details about registration, ownership of all registered vehicles, vehicle clearances, import and export of vehicle in South Africa.

[17] Warrant Officer Matome Peter's investigations uncovered the following:

(a) The VIN. NO. AHTCX39G 605009768 on the "rear wheel chassis frame was not in its standard." He does not say what he means by that it was not in its standard. He further observed grinding marks which shows that there had been tampering

(b) The engine number 2TR8156934 was on its the original place.

(c) VIN data which is normally engraved on the left door pillar had been removed.

(d) Upon entering the vehicle's engine and VIN letters and numbers in the ENatis system nothing appeared. This raised a further suspicion because all Toyota vehicles with VIN which starts with "AHT" must appear on the system as they are manufactured in South Africa.

(e) Registration number DHD407FS being displayed on the vehicle appeared against the vehicle: White Opel Astra which belong to one

Donald Mosolotsane of Kroonstaad. The confirmatory affidavit of Mr Mosolotsane had been filed of record, and pictures depicting the Registration numbers on this Astra have been attached to the pleadings.

(f) He conducted the electro chemical process (etching) on the VIN on the rear wheel chassis frame to reveal the ground numbers. This process revealed, on re-construction, VIN NO. "AHTCX39G605009768". Upon this VIN being entered into the South African Police System it revealed that the vehicle was reported stolen on the 26 November 2014, and that its full particulars were:

Engine No: 2TR7167559
Registration number: GBJ019 FS

[18] In support of the application, Mr. Petrus Cornelius Wepener's affidavit was filed. The said Wepener is an Assistant Director in the National Department of Transport, and a member of the Inspectorate for Driving Licence Testing Centres and Vehicle & Drivers Licence Compliance in the branch of Road Transport. Mr Wepener avers that he was requested by Warrant Officer 'Mammorobela Matome Peters to authenticate the certificate of registration which was found in possession of the respondent, and he found the following:

(a) Vehicle register number BLG973L and Registration certificate serial number BD8436198 appearing on the Registration certificate was issued to J. L. Lesabane from Bela Bela office and not to Phuthadijaba as indicated on the certificate of registration.

(b) The register number, VIN number and engine number do not exist on the Enatis. All this information led him to conclude that the registration certificate was a false document.

[19] As said already, the respondent in his answering affidavit raised the so-called point in *limine* that there is a dispute of fact regarding the ownership of the vehicle and that the matter ought to be dismissed on that score. This approach is misguided and does not seem to be abating despite the apex court's admonitions to counsel in **Makoala v Makoala LAC (2009 – 2010) 40.** In that matter, it was made plain that foreseeability of material dispute of fact should not be raised as a point in *limine* nor a court should entertain it when raised as such. The raising of points in *limine* in this jurisdiction was described as being akin to a pavlovian response, and the instant matter is no exception (see: **Makoala (**ibid) at paras, 4 and 10 (1)).

[20] In his answering affidavit the respondent annexed the same registration certificate which was demonstrated by Mr. Petrus Wepener to have been falsified. The respondent annexed it to show that he bought the vehicle from one David Masenya whose names appear thereon. He did not attach confirmatory affidavit of the said Masenya nor proof of the alleged sale.

[21] To the allegations about the removed VIN tag, grinding marks on the right near wheel chassis frame, vehicle's engine and chassis numbers were tampered, and that registration certificate is fraudulent, the respondent averred that:

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AD PARA 5

I aver that contents therein are denied more especially when the said certificate that Applicant has attached still stands to be verified whether it is authentic itself."

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AD PARA 7(a), 7(b), 7(c), 7(d), 7(e), 7(f) and 7(g)

I aver that contents herein are denied, I am advised by my counsel of record all that was done as per applicant's averments in para 7 in total was done without being tested at all, therefore such evidence is simply formal hence cannot alone be considered in reaching a conclusion in this matter."

[22] Despite being enjoined by s.14(3) of the Act to produce satisfactory documentary proof of lawful ownership or lawful possession, the respondent has dismally failed to do so. In my judgment the averments that the registration certificate is fraudulent; that the registration No. DND 407 FS was not issued to the said Masenya but to Mr Mosolotsane in respect of an Opel Astra vehicle; and Warrant Officer Matome Peter's evidence that the chassis numbers of the vehicle were tampered with; that the vehicle's VIN data tag had been removed from the left door pillar where it was stuck by the manufacturer, remain unchallenged by any documentary evidence at all.

[23] As I see it, the manner in which the respondent pleaded his case shows without doubt that he was clueless about the purpose of affidavits in motion proceedings. That purpose is worth re-stating:

"[9] It is trite that an application encompasses pleadings and evidence, all rolled into one. The affidavits take the place of the pleadings and

the evidence and formulate the issues of fact between the parties and contain evidence upon which each wishes to rely. The applicant must set out in the founding affidavit the facts necessary to establish a prima facie case in as complete a way as the circumstances demand. The respondent is required in the answering affidavit to set out which of the applicant's allegations he admits and which he denies and to set out his version of the relevant facts. In dealing with the applicant allegations of fact, the respondent should bear in mind that the affidavit is not solely a pleading and a statement of lack of knowledge coupled with a challenge to the applicant to prove part of his case does not amount to a denial of the averment of the applicant likewise, failure to deal with an allegation by the applicant amounts to an admission. It is normally not sufficient to rely on a bare or unsubstantiated denial…."
(South African Football Association v Mangope (JA 13/11) [2012] ZA LAC 27: (2013) 34 ILJ – 311 (LAC) (7.0.2012).

[24] The commutative effect of the evidence of Warrant Officer 'Mammorobela Matome Peter and Mr. Petrus Wepener, and Mr. Mosolotsane proves beyond a reasonable doubt that the vehicle belongs to the applicant and not the respondent. I find no fault in the learned magistrate's finding that the respondent's averments did not raise any dispute of fact about the ownership of the vehicle. In my judgment, even if it could be said that the issue of registration certificate raises a dispute of fact, *viva voce* examination and cross-examination could not disturb the balance of probabilities which are heavily stacked in favour of the applicant. The respondent's version of the vehicle being the subject of a sale agreement, in the absence of a confirmatory affidavit or a Deed of sale or affidavits in support, contradicting what Matome and Wepener aver in respect of the vehicle, renders the applicant's version inherently improbable. Confirmation of the sale agreement would not , it must be stated, have taken the respondent's case anywhere without evidence contradicting the

damning evidence already alluded to. The conspectus of all the evidence for the applicant points in one direction that referral to *viva voce* evidence would not have disturbed the balance of probabilities that the vehicle belongs to the applicant. It follows therefore, that the court a *quo* was correct in determining the matter solely on affidavits, and its conclusion on the issue is unassailable.

[25] **Inadmissibility of Affidavits sworn and attested outside the Kingdom**

It is the respondent's contention that the learned magistrate erred in relying on expert evidence. He argues that the said expert evidence was "on documentary basis production without it being properly attested to in person by the expert on trial. Thus, resulting into admissible hearsay with release application of a motor vehicle where ownership is highly consisted."

[26] The expert documentary evidence to which the respondent is referring to is evidence contained in affidavits by the said experts were sworn and attested in the Republic of South Africa. The way I understood the respondent's argument before court, it vacillated between disregarding the affidavits for being inadmissible hearsay and unauthenticated. I deal with these issues in due course. The argument seems to be confusing admissibility of affidavits with authentication of same. As I understood him, the respondent has a problem with the fact that the court *a quo* based its judgment on affidavits sworn and attested in South Africa. It is common cause that the applicant's evidence is contained in affidavits which have been sworn and attested in South Africa. The question to be answered, is whether those affidavits are admissible in this jurisdiction without needing any authentication. The answer to this question is found in **Authentication**

of Documents Proclamation No. 73 of 1957 s. 13 thereof, which provides that:

> *"13. Notwithstanding anything in this part contained –*
>
> *(a) An affidavit sworn before and attested by a Commissioner of Oaths of the Territory outside the Territory, or by a Commissioner of Oaths of the Bechuanaland Protectorate, Swaziland, the Union or the Federation within those respective Territories, shall require no further authentication if filed in any court in the Territory for use in any cause pending therein; and*
>
> *(b) no power of attorney executed in the Bechuanaland Protectorate, Swaziland, the Union or the Federation and intended as an authority to any person to take, defend or intervene in any legal proceedings in any court in the Territory shall require authentication provided such power of attorney appears to have been attested by two competent witnesses." (emphasis added)*

In S. 1, "the Union" is defined as "the Union of South Africa [currently the Republic of South Africa], and shall include South West Africa [currently Namibia]."

[27] The rules relating to authentication of documents executed in foreign countries are meant to ensure that such documents are genuine (see: **Dique v Viljoen (14218 2007) [2007] ZAGPHC 2006 (14.09. 2007)** and the authorities cited therein**).** Those affidavits needed no authentication as the respondent would seem to think. Whether some of those affidavits should be disregarded for containing inadmissible hearsay, is the discussion to which I turn.

[28] **Hearsay evidence and computer-generated evidence of Mr Wepener and Matome Peter**

I have already said that the applicant's case was not clearly articulated., and so, I am going to assume that by attacking the court a quo's reliance on hearsay evidence he was referring to the affidavit of Messrs Wepener and Matome Peter which is based on information sourced from the computer. The nature of the civil proceedings in our jurisdiction is adversarial, and it is by virtue of this characteristic that a litigant is placed at the centre of the litigation in terms of orally presenting his or her case before court and consequently being subjected to cross-examination. So logically, when statements made by persons who are not parties before court as witnesses are sought to be tendered to prove the truth of what they contain they are regarded as inadmissible hearsay(**S v Holshausen 1984 (4) SA (A))**. The dangers of admitting these statements have been documented (L H Hoffmann and D T Zeffertt **The South African Law of Evidence 4 ed.** At p.125).

[29] It is trite that information which is punched by humans into the computer, is not generated by humans but the computer itself(**Nurlis v South African Bank of Athens 1976 (2) SA 573 (A)** at 577H), therefore, computer-generated evidence therefore falls into the mould of hearsay evidence. The evidence to which the applicant has an issue with relate to Mr Wepener's affidavit in terms of which he verifies that the certificate of registration for the vehicle in issue has been falsified; that the VIN , register and engine numbers do not exist on the ENATIS

system and the conclusion that the certificate of registration was not issued by the ENATIS; that serial number which appears on the certificate of registration- which the applicant claims to be authentic- was issued to JL Lesabane from Bela Bela office and not Phuthaditjaba. Mr Matome Peter's evidence about which the applicant would also seem to have an issue with, is to the effect that the engine, VIN numbers and letters appearing on the vehicle were found that not to exist on the Enatis system.

[30] As a general rule evidence which tends to prove or disprove a fact in issue is admissible unless it can be excluded on the basis that it is hearsay evidence (**Rex v Trupedo 1920 AD** 58 at 62). The definition of the rule against hearsay is applicable to documents as well (**S v Ndiki 2007 (2) ALL SA 185 (Ck)** at para. 31). The statement of this general position pertaining to inadmissibility of hearsay may be an over-simplification of the rule against hearsay because "[t]he 'rule against hearsay' is a matter of common sense, not some arcane ritual**"(Tseliso Lempe v Rex (1997-1998) LLR-LB 195 at p.198).** In this case it was made plain that the purpose for which evidence is tendered must be ascertained to determine if it is an inadmissible hearsay. Hearsay evidence may be tendered for purposes of explaining why what happened, happened. In that case it is not tendered to prove the truth of what it says.

[31] Evidence of Mr Wepener is contained in what is essentially a verifying affidavit based entirely on the computerised records and it was tendered for the purpose of proving the truth of what it contains. The question to be answered, therefore, is whether

this evidence is admissible, and what its probative value is? It is apposite to state that when information is fed into the computer by humans, that presents reliability problems, and when the same information which is stored in the computer, it presents issues of reliability and hearsay, especially when such evidence is tendered for purposes of proving the truth of what it contains. In order to deal with issues of reliability associated with human input of information into the computer and generation of such information by the computers when it is tendered as evidence tendered in court, the presumption of regularity is applied **(Trustees for the time Being of the Delsheray Trust and Others v ABSA Bank Limited [2014] 4 ALL SA 748 (WCC)** (9 October 2014)(hereinafter '**Delsheray Trust'**). I can do no better than quote extensively from the **Delsheray Trust** case - which I am persuaded correctly states the law- wherein the court dealt with the relationship between the principle of reliability which is applied in other jurisdictions and the presumption of regularity, when it comes to the methods of proof in cases where computer-generated information is relied upon in court. At para.43, as regards the presumption of reliability, the court referred with approval to the Australian case wherein it was said:

> [39] In explaining the nature of this presumption Stephen Mason op cit quotes, in para [5.01], the following passage from an Australian case, **Barker v Fauser (1962) SASR** 176 at 178:
>
> *'It is rather a matter of the application of the ordinary principles of circumstantial evidence. In my opinion such*

instruments can merely provide prima-facie evidence in the sense indicated by May v O'Sullivan [(1955) 92 CL 654]. They do not transfer any onus of proof to one who disputes them, though they may, and often do, create a case to answer. Circumstantial evidence is something which is largely based upon our ordinary experience of life. … It is merely an application of this principle to our ordinary experience in life which tells us of the general probability of the substantial correctness of watches, weigh bridges and other such instruments. If they are instruments or machines of a type which we know to be in common use our experience tells us that this is suggestive of their substantial correctness. Experience also tells us that they are rarely completely accurate, but usually so substantially accurate that people to on using them, and that subject to a certain amount of allowance for some measure of incorrectness, they act upon them. In fact, this means that for a small overweight one would necessarily …'

[32] When dealing with evidence generated by scientific machinery such as computers, the standard of proving the reliability of computer-generated evidence may not be strictly adhered to or relaxed, based on the following considerations:

[43] In the final paragraph of the passages from the Mthimkulu judgment quoted in para [41] above, Corbett JA listed the factors which may influence a court to relax the strict standards of proof. Having regard to these factors we are of the view that there are four main considerations which support the application of the presumption of reliability to the evidential problems arising during the second stage of the process, ie the generation of respondent's computer records.

(a) The first is that respondent is a large commercial bank with branches all over the country. It can safely be assumed that its computer system is as sophisticated, efficient and reliable as those of financial institutions competing with it.

(b) It can also be assumed that respondent would employ the personnel (or outside contractors) with the experience, expertise and responsibility which the proper operation of such a computer system would require.

(c) A third factor is the relatively minor effect of a verifying affidavit in contested legal proceedings. It does not create any onus or evidential burden and it plays virtually no role in the enquiry as to whether a defendant raises a valid defence in its answering affidavit.

(d) A fourth factor is that respondent's computer records with respect to any account are accessible to the client. Statements are sent to the client and information may, for example, be accessed by telephone, through ATMs (automated teller machines) or via internet banking. This aspect would tend to minimise the effect of possible mistakes.(**Delsheray Trust** case (ibid) at para 43).

[33] Regarding the solution to evidential problems associated with human input of information into the computer, the court in **Delsheray Trust** case, at para.49, said:

[49] An alternative solution to the problem regarding the admissibility of evidence arising from the human input is the application of a presumption of regularity. This presumption has been described as follows

in Zeffert v Paizes second edition The South African Law of Evidence at 212.

'The scope of the presumption of regularity, usually expressed in the maxim omnia praesumuntur rite esse acta, is very ill-defined…… In some cases it appears to be no more than an ordinary inference, based upon the assumption that what regularly happens is likely to have happened again. In other cases it is treated as a presumption of law, sometimes placing an onus upon the opposing party and sometimes creating only a duty to adduce contrary evidence. It has been applied in a wide variety of cases which are impossible to catalogue exhaustively.'

[50] The presumption of regularity was applied by Steyn J in the context of the operation of computers in R v Minors; R v Harper supra at 213:

'Moreover, in a great many cases the necessary evidence could be supplied by circumstantial evidence of the usual habit or routine regarding the use of the computer. Sometimes this is referred to as the presumption of regularity. We prefer to describe it as a commonsense inference, which may be drawn where appropriate.'

[51] There is clearly a significant degree of overlap between this presumption and the presumption of reliability discussed above. This is understandable as the reliable operation of a computer also depends upon the quality of the human input. It seems to us therefore that the arguments in favour of the application of the presumption of reliability in this case, mentioned in para [32] above, applies mutatis mutandis to the application of the presumption of regularity.

[34] Although these principles were articulated within the context of summary judgment, my considered view is that they are applicable with equal force in the instant case where motion

proceedings are statutorily mandated. Applying these principles to the circumstances of this case, it will be observed that Mr Wepener works in the Department of Transport as Assistant Director, and a member of Vehicle and Drivers Licence Compliance of the same department. He has access to the Enatis system -Mr Matome Peter has access to this system as well- whose functions have already been mentioned. The Enatis system is a national system which registers all transactions and records pertaining to vehicles for the whole of South Africa, and one would safely assume that it is a reliable and sophisticated system; I also assume that the Enatis system is operated by individuals skilled in its usage. It can, further, be reasonably inferred that the computers which were stored the information were reliable.

[35] As regards the human aspect of feeding in formation into the computer, the issue of the standard of proof resolves itself into the determination of what regularly happens when computers are used. This is the manifestation of the principles of regularity, as already seen above. It can safely be assumed that the individuals employed in the department to punch information into the computers did what they are meant to do and what they usually do, that is to enter correct information into the machines. On the basis of the presumption of regularity, I therefore, find that computer-generated evidence upon which Mr Wepener entirely relied upon in his verifying affidavit is admissible. The same considerations apply as regards evidence of Mr Matome Peter in so far as it relies upon computer-generated evidence.

[36] **<u>Magistrate based her judgment on an order she did issue:</u>**

The respondent's contention in this regard is that *"The learned magistrate erred and misdirected by basing herself judgment (sic) in the court a quo on an order she did not grant. At page 53 of the record of appeal, which is the judgment of the court a quo. The court says it made an order that Appellant should file a supplementary affidavit mero motu though rule 52 (6) subordinate (sic) Court Rules 1996 denies it, so as to allow Appellant to canvass further the dispute of fact so raised."*

[37] The context in which this argument is raised is that at para. 25 of the judgment, the court a *quo* record that:

"[25] Rule 52(6) of the Subordinate Court Rules 1996 provides that no further affidavit maybe filed by any party after the filing of a replying affidavit unless the court in its discretion permits further affidavits to be filed. In realising that the respondents opposing affidavit had not adequately addressed the alleged dispute of fact and that a Ruling on whether there existed any dispute of fact would in principle amount to a final judgment the court mero motu gave the respondent an opportunity to file a further affidavit by this the respondent did not do but instead filed detailed heads of arguments which are not supported in anyway by the opposing affidavit."

[38] Both Advs. Ratau and Sengoai were in agreement that what Magistrate recorded here is not what happened, that is, she did not order the respondents to file supplementary affidavits as she says. This was clearly a misdirection, on the part of the court, *albeit* a non-material one, because as I said, there is an

unrebutted and overwhelming evidence that the respondent is not the owner or a lawful possessor of the vehicle in issue.

[39] I however, wish to make the last comment on the excerpt in question. Even if it was accurate that the learned magistrate had ordered the respondent to file supplementary affidavit without his instigation, that would not have been the correct procedure to adopt. It is the litigant who should know whether she/he wants to file supplementary affidavit and I must state, that is a course which is not easy to traverse as it is fraught with difficulties. As a general rule only two sets of affidavits are permitted, and so, for that reason, a party who seek to file further affidavit has a duty to explain to the court that his is not *mala fide* or that he was not culpable nor remiss in not filing that affidavit earlier. This trite approach negates the approach the court a *quo* would have taken.

[40] Explaining the roles of the court and litigants in the scenario where a litigant wants to file supplementary affidavit, the court (correctly) in the case of **Standard Bank of S.A. Ltd v Sewpersadh and Another 2005 (4) SA 148 (C. P. D)** at para. 10 said:

[10] The court is vested with the discretion. There is thus no official who can decide on this [application to file further affidavits], not even the Registrar of this court. (see Transvaal Government v The Standerton Farmers' Association 1906 T. S. 21). A fortiori no litigant may take it upon himself to simply file further affidavits without first having obtained the leave of the Court to do so. The court will exercise its discretion to admit further affidavits only if there are special circumstances which

warrant it or if the court considers such a course advisable (See Rieseberg v Rieseberg 1926 WLD 59; Joseph & Jeans v Spiz and Others 1931 W.L.D 48.) In Bangtoo Bros and Others v National Transport Commission and Others 1973 (4) SA 667 (N) it was held among other things that a litigant who seeks to serve an additional affidavit is under a duty provide an explanation that negatives mala fides or culpable remissness as the cause of the facts and/or information not being put before the court at an earlier stage. There must furthermore be a proper and satisfactory explanation as to why the information contained in the affidavit was not put up earlier, and what is more important, the court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs. (see Transvaal Racing Club v Jockey Club of South Africa 1958 (3) SA 599 (W); Cohen NO v Nel and Another 1975 (3) SA 936 (W)).

[41] The last ground of appeal relating biasness on the part of the learned magistrate is dismissed as baseless without the need to specifically deal with.

[41] In the result, the following order is made:

(a) The appeal is dismissed with costs.

MOKHESI J

For the Appellant:	**ADV. T. SENGOAI** **Instructed by K. D. Mabulu & Co. Attorneys**
For the Respondent:	**ADV. S. RATAU** **Instructed by Tshangana Attorneys, Westdene, Bloemfontein C/O T. Matooane & Co. Attorneys**