**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA,**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 0932/2021**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

**02/8/2022** DATE

**.....** SIGNATURE

In the matter between:

**WESTBANK DIVISION OF FIRSTRAND BANK LIMITED** PLAINTIFF

And

**HENRY NHLANHLA DLADLA** DEFENDANT

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**JUDGMENT**

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**MAHALELO J.**

[1] The plaintiff seeks summary judgment against the defendant for confirmation of the cancellation of a written instalment sale agreement and the return of a 2008 Land Rover Range Rover sport 4.2 V8 SC motor vehicle together with costs and a postponement of its claim for damages. The defendant opposed the application and raised two defences which I deal with in this judgment.

**Background facts.**

[2] On 7 December 2015, the plaintiff and the defendant entered into an Electronic Instalment Sale agreement in terms of which the plaintiff sold to the defendant a 2008 Land Rover Range Rover sport 4.2 V8 SC in terms of which the plaintiff reserved ownership of the motor vehicle until the amounts due had been paid. The plaintiff contended that the defendant breached the agreement by falling into arrears with his monthly instalments which amounted to R 86 447-99 as at 20 January 2020. Pursuant to the defendant's failure to remedy the breach, the plaintiff served summons on the defendant wherein he amongst others prayed for the cancellation of the agreement.

[3] The defendant filed a plea wherein he admitted that he entered into an instalment sale agreement with the plaintiff and admitted the amount of arrears. The defendant however raised a defence that he had not received a section 129 notice from the plaintiff.

[4] In his affidavit resisting summary judgment the defendant repeats his plea. In addition he tenders to pay R10 000-00 per month to extinguish the arrears which tender has been rejected by the plaintiff. The defendant alleges that he has been

struggling to get finances during the Covid-19 period and he has made a plan to pay the arrears from June 2021 to date. He believes that it will be unfair, unjust and unreasonable for the plaintiff to be granted an order for the return of the motor vehicle because he has fulfilled 80% of the agreement in monetary terms.

[5] Rule 32(2)(b) of the Uniform Rules of court prescribes that the plaintiff shall in an affidavit verify the cause of action and the amount if any, claimed and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

[6] The plaintiff complied with this rule in this regard.

[7] In terms of Rule 32(3)(b) of the Uniform Rules of court, the defendant resisting Summary Judgment application must set out in his affidavit facts which if proved at trial, shall fully disclose the nature and grounds of the defence and the material facts relied upon.

[8] In Maharaj V Barclays National Bank Ltd[1] it was held that:

"*A court considering whether to grant Summary Judgement or not must consider whether, (i) the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (ii) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary Judgment either wholly or in part, as the case may be*."

[1] 1976 (1) SA 418 A at 426B-C

[9] Breitenbach V Fiat SA (Edms) Bpk[2] the court held:

[2] 1976 (2) SA 226 (T) AT 228 C and 228 E…

*"I respectfully agree ... that the word "fully" should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides."*

[10] Jili v Firstrand Bank Ltd[3] Willis JA held*:*

*"It is indeed trite that a court has a discretion as to whether to grant or refuse an application for summary judgment. …… It is a different matter where the liability of the defendant is undisputed: the discretion should not be exercised against a plaintiff so as to deprive it of the relief to which it is entitled Where it is clear from the defendant's affidavit resisting summary judgment that the defence which has been advanced carries no reasonable possibility of succeeding in the trial action, a discretion should not be exercised against granting summary judgment. The discretion should also not be exercised against a Plaintiff on the basis of mere conjecture or speculation."*

[11] There is no merit in the defendant's defence that he had not received a section 129 notice because it is evident from the papers that a written notice in terms of section 129(1)(a) was sent by registered mail to the address nominated by the defendant as his domicillium address. It is also abundantly clear that the above mentioned notice has reached the appropriate post office for delivery to the defendant. A post-despatch track and trace print indicating delivery to the relevant post office is attached to the papers as annexure "F". It

[3] (763/13) [2014] ZASCA 183 (26 November 2014)

is sufficient for the plaintiff to have shown that it had sent the notice to the defendant's address. It does not really matter if the defendant had not fetched the notice from the relevant post office.

[12] Turning to the impossibility of performance defence, the contract concluded between the plaintiff and the defendant did not contain a force majeure clause, and therefore the common law applies.

[13] In Matshazi v Mezepoli Melrose Arch (Pty) Ltd and another; Nyoni v Mezepoli Nicolway (Pty) Ltd and another[4], it was held: " *If provision is (not made contractually by way of a force majeure clause, a party will only rely on the stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement. Performance is not excused in all cases of force majeure. In M v Snow Crystal, the Supreme Court of Appeal (per Scott J A) said as follows – "As a general rule impossibility of performance brought about by vis major or casus fortuitous will excuse performance of a contract. But will not always do so. In each case it is the circumstances of the case and the nature of the impossibility involved by the defendant, to see whether the general rule ought in the particular circumstances of the case to be applied" The rule will not avail a defendant if the impossibility is self- created, nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in* circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant."

[14] The agreement between the plaintiff and the defendant does not make provision for *force majeure*. The agreement rather defines a Material

[4] (2021) 42 ILJ 600 9hc0 t 609 para 33

Adverse Effect[5]. In the agreement it is recorded that the plaintiff may at its election, if an event or series of events occurs which has a material adverse effect on the performance by the defendant of his obligations under the agreement, change the terms of the agreement. Thus under the above clause, the plaintiff still retained the discretion to consider whether the facts disclosed by the defendant were enough to allow for any variation of the agreement.

[15] The plaintiff still retained a discretion in terms of the agreement to assess the merits of such alleged changed circumstances and decide whether or not to relax and amend any part of the obligations on the defendants.

[16] It is noteworthy that the defendant has not applied for the Covid relief package from the plaintiff nor has he sufficiently pleaded any reason why he alleges he could not get finances during the Covid 19 period.

[17] In Scoin Trading (Pty) Ltd v Bernstein NO[6], Pillay JA had this to say about supervening impossibility of performance:

> "*The law does not regard mere personal incapability to perform as constituting impossibility.*"

[18] Applying the above authorities to the facts of the present matter it is clear that the defendant has not established impossibility of performance. The difficulty to raise finances on which he relies is

[5] Clause 1.12 page oo2-15 Caselines
[6] 2011(2) SA 118 (SCA) at para 22

specific to him because of the change in his financial position, and it is not absolute. The defendant's personal incapacity does not therefore render the contract void.

[19] The defendant has failed to raise any *bona fide* and triable defence in this matter. He is well aware of his rights and he is aware that his settlement proposals were rejected by the plaintiff. Under the circumstances the application for summary judgment stands to succeed

[20] In the circumstance I make the following order:

1. Cancellation of the Instalment Sale Agreement.

2. The defendant is directed to return to the plaintiff a 2008 Land Rover Range Rover Sport 4.2 V8 SC; engine number 130807B15205428PS

3. Plaintiff's claim for damages is postponed sine die.

4. The defendant is directed to pay the costs of the application.

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**M B MAHALELO**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**This judgment was delivered electronically by circulation to the parties legal representatives by e-mail and uploading on caselines. The date and time of hand down is 10h00 on 2nd August 2022.**

**Appearances:**

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| On behalf of the applicant | : | Adv Leon Peters |
| Instructed by | : | Rossouws, Lessie inc |
| | | |
| On behalf of the defendant | : | Fekemyeko Attorneys |
| Date of hearing | : | 09 MAY 2022 |