

REPUBLIC OF SOUTH AFRICA



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

Case Number: 7434/20

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

DATE 04 DECEMBER 2023 SIGNATURE

In the matter between:

VELOCITY FINANCE (RF) LIMITED

Applicant

and

PRATIBHA NAIDOO

Respondent

In re:

VELOCITY FINANCE (RF) LIMITED

Plaintiff

and

PRATIBHA NAIDOO

Defendant

JUDGMENT

KORF, AJ

Introduction

- [1] This is an application for summary judgment by the plaintiff/applicant against the defendant/respondent, who was the purchaser of a 2019 Volkswagen Tiguan motor vehicle from Volkswagen Financial Services South Africa (Pty) Ltd (“Volkswagen”) as envisaged by an Instalment Sale Agreement concluded on 30 November 2018 (“Agreement”).
- [2] The plaintiff pleads that Volkswagen ceded to it all rights, title and interest in and to the Agreement to the plaintiff.¹
- [3] I shall refer to the parties described in the main action, i.e., to the applicant and respondent (in the summary judgment application) as the plaintiff and defendant, respectively.
- [4] In essence, the plaintiff seeks judgment for the cancellation of the Agreement, confirming that the plaintiff is entitled to retain possession of the vehicle, authorisation to sell the vehicle, and that the damages component of its claim be postponed *sine die*.

¹ According to the plaintiff's chronology under paragraph 7 of its practice note (commencing at Caselines 029-4), the cession allegedly took place on 24 January 2020. This date does not accord with the particulars of claim since paragraph 10 (Caselines 004-5) specifically refers to "24 January 2019" as the date of the alleged cession. As the plaintiff did not attach a copy of the written deed of cession, it is assumed for present purposes that the alleged cession agreement was concluded in 2019, as pleaded.

The plaintiff's claim

- [5] In the action instituted early in 2020, the plaintiff, as cessionary, claims that Volkswagen sold and delivered the vehicle to the defendant in terms of the Agreement, which constituted an agreement as contemplated by section 8(1) of the National Credit Act (the "Act"). The purchase consideration, together with other amounts, totalled the financed amount of R665,180.79, which was repayable with finance charges over 71 months. Ownership of the vehicle remained vested in Volkswagen until all outstanding payments under the Agreement were paid.
- [6] As already stated, the plaintiff further claims that, on or about 24 January 2019, Volkswagen ceded all rights, title, interest in and ownership of the vehicle to it.
- [7] As of 27 February 2020, the defendant has allegedly fallen in arrears of R127,466.44², and the outstanding balance due under the Agreement totalled R938,402.48. The plaintiff contends that a written notice was dispatched to the defendant in accordance with the provisions of section 129(1)(a) of the NCA and that the plaintiff was consequently entitled to the relief summarised above.

The defendant's plea

- [8] In the defendant's plea dated 25 March 2020, the defendant pleads, *firstly*, that the Agreement was concluded under duress; *secondly*, that it was invalid for lack of spousal consent; and *thirdly*, that the vehicle was defective and, consequently, that it has been returned to the dealership and later to Volkswagen and that the Agreement has been cancelled.

² This date and amount correspond to the amount reflected as in arrears on the last page (Caselines 053-26) of the "DETAILED STATEMENT" issued by "Volkswagen Financial Services" (starting at Caselines 053-23).

- [9] Save for stating that the Agreement was concluded under duress, no further circumstances or facts have been pleaded to support the first defence.
- [10] The defendant pleads in amplification of the second defence, that the Agreement was concluded without the written consent of her spouse to whom she was married in community of property, rendering the Agreement invalid under the provisions of section 15(2)(f) of the Matrimonial Property Act, 88 of 1984.
- [11] Concerning the third defence, the defendant pleads that she took delivery of the vehicle on 4 January 2019, that the vehicle was defective and consequently, that she returned to the dealer on 10 January 2019 and on 15 January 2019 for repairs, and again on 12 February 2019.
- [12] The defendant further avers, *inter alia*, informed Volkswagen in writing on 26 February 2019 and 13 May 2019, and on numerous occasions telephonically, that she wished to “*unbundle and cancel*” one the contract because of the “*faulty*” state of the vehicle, which the dealership’s mechanic had allegedly confirmed. She filed a complaint with the Motor Industry Ombudsman of South Africa on 5 March 2019, which documents were copied to Volkswagen.
- [13] Apart from the foregoing, the defendant denies the plaintiff’s citation, the cession referred to above and compliance with the provisions of section 129 of the NCA.

The plaintiff’s application for summary judgment

- [14] On or about 26 May 2020, the plaintiff delivered its notice of application for summary judgment for granting the relief described above. The founding affidavit was deposed to by one ALLISTAIR SAMUELS, an employee of FirstRand Bank trading as Westbank, which allegedly performed debt collections, repossessions, and related matters on behalf of Volkswagen. The

deponent allegedly gained personal knowledge “*of the Defendant’s financial standing*” and that he could swear positively to the facts alleged in the amount claimed in the plaintiff’s particulars of claim.

[15] The deponent contends that the defendant’s denial of the cession is unfounded as clause 16.2 of the Agreement provided for Volkswagen’s right to cede its rights in terms of the Agreement without notice to the defendant and that the cession did not affect the Agreement concluded between the defendant and Volkswagen. In any event, the deponent contends that the defendant does not provide the court with anything disproving the cession.

[16] The deponent furthermore states that the defendant provided no documentary proof supporting her allegation that the vehicle had been defective and that the alleged documentary proof attached to the defendant’s plea started in March 2019. The deponent contends that, despite the defendant’s version regarding the alleged defective vehicle, the defendant’s last payment to the plaintiff was made on 28 June 2019. On this basis, the deponent questions the reasons for payments made after 12 February 2019 when, according to the defendant, she was not obliged to have done so.

[17] Regarding possession of the vehicle, the plaintiff’s case on summary judgment is all but clear. The deponent avers in paragraph 6.10 of the said affidavit that the instant claim is for the “*retention of the Vehicle in the Plaintiff’s possession*” (which corresponds notionally with the contents of prayer 2 of the particulars of claim), and the deponent questions why the defendant opposes the claim given her having returned the vehicle. These allegations are premised on the basis that the Plaintiff is in possession of the vehicle. The deponent, however, states in paragraph 6.11 that “[*T*]he vehicle is high valued... and is further being used by the Defendant...”. In paragraph 7, the deponent states further that the plaintiff’s claim is for the delivery of a specified movable asset (the vehicle) as contained in the Agreement. According to these allegations, the defendant is alleged or suggested to be in possession of the vehicle.

[18] The plaintiff's version regarding possession of the vehicle postulates two opposing propositions. I shall assume in the plaintiff's favour that it intended to mount its application for summary judgment on the basis that the vehicle was at all relevant times in its (the plaintiff's) possession.

The defendant's affidavits resisting summary judgment

[19] The defendant delivered three affidavits opposing the plaintiff's application to wit: the first, dated 14 June 2020; the second, dated 21 March 2021; and the third, dated 4 March 2023. I pause to note that the plaintiff hasn't raised any objection to this multiplicity of opposing affidavits, and correctly, so because the second and third opposing affidavits do not introduce any further aspects that would have a bearing on the outcome of the instant application. In any event, had leave been sought for the delivery of the second and third opposing affidavits, a court would hardly have refused that relief, given the expiry of some three years since the institution of the action with little progress in the matter, the consequent absence of prejudice to the plaintiff and the extraordinary nature of summary judgment proceedings.

[20] *Firstly*, regarding the Section 129 notice, the defendant states that she did refer the dispute to the Motor Industry Ombudsman and that the plaintiff's action was premature. *Secondly*, the defendant says she has signed a written instalment sale agreement, which the plaintiff failed to produce. *Thirdly*, the Agreement is allegedly invalid as the defendant signed without her husband's consent, to whom she had been married in community of property. *Fourthly*, the defendant contends that the plaintiff failed to produce the alleged cession agreement. *Fifthly*, the defendant states that she was entitled under section 55(2)(b)³ of the Consumer Protection Act (the "CPA") to receive the vehicle free of any defects

³ Section 55(2) "Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that—

(a)...

(b) are of good quality, in good working order and free of any defects;..."

and further to return the vehicle in terms of section 56(2)⁴ of the same act, as she alleges did not occur. The defendant advances a detailed factual account of what she describes as the vehicle's defects and the steps she took to have the same repaired. She complains that the vehicle's acceleration was delayed to the extent that she describes the vehicle's condition as "*extremely dangerous*". She received the vehicle on 4 January 2019, reported the defect on 10 January 2019, and returned it for repairs on 12 January 2019. After receiving the vehicle on 17 January 2019, she seemingly complained again on 21 January 2019, returned it on 24 January 2019, and received it shortly thereafter. She again complained on 30 January 2019, referred the dispute in writing to Volkswagen's Head Office on 11 February 2019, and returned the vehicle on 12 February 2019. She alleges that one Leonie Bokers confirmed telephonically on 25 February 2019 that the vehicle was defective. The defendant allegedly cancelled the Agreement on 26 February 2019.

Applicable legal principles

[21] Summary judgment is granted on the supposition that the plaintiff's claim is unimpeachable because the defendant has no proper defence.⁵ It is an exceptional remedy that should only be granted when it is clear that the claim is good and the defendant has no defence.⁶ On the other hand, if the defendant satisfies the court that he/she/it has a *bona fide* defence, the court must give leave to defend, and the action proceeds as if no application for summary

⁴ Section 56(2): "*Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, either—*

(a) repair or replace the failed, unsafe or defective goods; or

(b) refund to the consumer the price paid by the consumer, for the goods."

⁵ Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A); Gruhn v M Pupkewitz & Sons Pty Ltd 1973 (3) SA 49 (A); Mosehla v Sancor BK [2001] 3 All SA 83 (A), 2001 (3) SA 1207 (SCA); Majola v Nitro Securisation 1 (Pty) Ltd [2012] 1 All SA 628 (SCA); 2012 (1) SA 226 (SCA) at [25]; Standard Bank of South Africa v Norris [2012] JOL 29206 (WCC) at [17].

⁶ Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another [2011] 1 All SA 427 (KZP); see also FirstRand Bank Ltd t/a FNB Home Loans v Ziphozonke [2012] JOL 28662 (GNP) at [11]–[14].

judgment was made.⁷ “Satisfy” does not mean “prove”. What is required is that the defendant set out in his/her/its affidavit facts that, if proven, will constitute an answer to the plaintiff's claim.⁸ The court does not attempt to decide the matter on probabilities.⁹

[22] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* the Supreme Court of Appeal commented as follows:¹⁰

“...the summary judgment procedure was not intended to ‘shut (a defendant) out from defending’, unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case (supra) at 425G–426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are ‘drastic’ for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper

⁷ *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C); *Standard Bank National Industrial Credit Corp Ltd v Postmasburg Metal and Mining Supplies (Pty) Ltd* 1978 (3) SA 812 (NC).

⁸ *Breytenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *IPH Finance Proprietary Limited v Agrizest Proprietary Limited* (unreported, WCC case number 21771/2023 dated 28 February 2023 at paragraph 11).

⁹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426.

¹⁰ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at [31]–[33].

application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case (supra) at 425G–426E.”

Analysis

[23] I shall first deal with the alleged defective vehicle.

[24] The defendant placed a detailed version of the alleged defects before this court, supported by various correspondences.

[25] In response, the plaintiff contended, *firstly*, that the defendant's alleged correspondence postdated her alleged return of the vehicle on 12 February 2019 and the alleged cancellation of 26 February 2019, and *secondly*, that the defendant made a payment to in respect of the vehicle as late as the end of June 2019. These allegations, so the plaintiff contends, militate against the defendant's opposition to summary judgment.

[26] At the summary judgment stage, the plaintiff's first contention does not carry any weight, even if found to be correct. The chronological order of correspondences is a matter of probabilities that ought to be dealt with at the hearing of the case.

[27] The payment mentioned above (after the alleged cancellation of the Agreement) cannot be said to be destructive of the defendant's version concerning the alleged defective vehicle. It will be for the defendant, at the trial, to explain any payments after the defendant's alleged cancellation. It will be for the court to consider the evidence before it and take any such payments and the explanation(s) tendered into account when determining the probabilities of the versions in question.

[28] In any event, the plaintiff's deponent made no allegations that could have equipped him with the requisite personal knowledge to make any statements regarding the vehicle's condition.

[29] Therefore, regarding the vehicle's condition, I cannot find that the defendant is defenceless to the plaintiff's claim.

[30] Regarding the cession, I agree with the defendant that the plaintiff was obliged to have attached a copy of the written cession agreement, or at least the relevant part of the said agreement, to its particulars of claim. It is not even debatable that Rule 18(6) of the Uniform Rules of Court applies to the alleged written cession agreement between Volkswagen and the plaintiff.

[31] Some anomalies appear in the plaintiff's papers that render credence to the defendant's denial of the cession.

- a. As stated above, the founding affidavit in support of the application for summary judgment was deposed to by one ALLISTAIR SAMUELS, who describes himself as "1.... *an adult male manager employed by FirstRand Bank Limited t/a Wesbank..., in its collections department. Audi Financial Services a division of Volkswagen Financial Services South Africa (Pty) Ltd (herein after referred to as VWFS) engages the services of Wesbank to, inter alia, manage and administer its debt collection, repossessions, and related matters....* 2. *By virtue of the aforementioned, I am duly authorised on behalf of both Wesbank and VWFS... VWFS ceded its right, title, interest in and to the account to Velocity Finance (RF) (Pty) Ltd, the Plaintiff herein, who retained the services of Westbank...*" The deponent then incorporates an attached resolution as "AS1", from which it appears that he was mandated by "VOLKSWAGEN FINANCIAL SERVICES (SOUTH AFRICA) PTY LTD", whose Directors were, *ex facie* the document, authorised to approve the mandate on 14 November 2019. If Volkswagen were indeed divested of all rights, title and interest in and to the Agreement, then one would have expected the plaintiff (and not

Volkswagen) to have appointed Wesbank as the collecting agent and for the plaintiff (or Wesbank) to have mandated Mr SAMUELS. One would not have expected the plaintiff to rely in its summary judgment application on a written mandate (dated 14 November 2019 and thus after the alleged cession) given by Volkswagen.

- b. In paragraph 6.7 of the founding affidavit, Mr SAMUELS contends that the defendant made a last payment to Plaintiff on 28 June 2019. The deponent relies on annexure “AS2” for this statement. Annexure “AS2” is a “DETAILED STATEMENT”, not issued by the plaintiff, but by “VOLKSWAGEN FINANCIAL SERVICES”. This statement does not even refer to the plaintiff.

[32] Given that the plaintiff has not acquitted itself of this duty to produce the cession agreement (or the relevant part thereof), there is, in my view, no duty on the defendant to “disprove” the alleged cession agreement. Further, given the above anomalies that appear from the plaintiff’s papers, I believe that the defendant’s denial of the cession is sufficient to avoid summary judgment.

[33] Given the foregoing, it is unnecessary to consider any other issues in this application.

Plaintiff’s proposed relief

[34] Mr Peter urged me to make an order to permit the plaintiff to dispose of the vehicle and for the parties to resolve the damages part of the claim on trial. He contended that the *status quo* is highly prejudicial to the plaintiff (if not both parties) as the plaintiff cannot sell the vehicle per public auction. If granted, an order permitting the sale of the vehicle will offer a practical solution to the highly unfavourable *de facto* situation.

[35] While the plaintiff's proposal may be an attractive, convenient and practical solution, the question is what the cause of action or legal basis would be for granting the proposed order. I believe that the plaintiff's proposed relief, if granted, would be legally flawed. For purposes of this discussion below, I assume that a valid Agreement was concluded between the parties.

[36] The plaintiff claims, in essence, that the defendant failed to perform her obligations in terms of the Agreement by making the agreed payments. Due to this default, the plaintiff was or is entitled to cancel the Agreement (including to seek such relief as proposed in terms of prayer 1 of the particulars of claim) and to seek orders against the defendant as provided for in the NCA, including for it to retain the vehicle and for the damages portion of its claim to be postponed.

[37] On the other hand, the defendant contends that the *res vendita* was defective, which entitled her to resile from the Agreement. This alleged right was allegedly executed on 26 February 2019.

[38] Therefore, the vexed question is which of the plaintiff or the defendant first acquired the right to cancel the Agreement and which party exercised that right.

[39] The granting of prayers 1, 2 and 3 of the particulars of claim turns firstly on a finding of whether the defendant had resiled lawfully from the Agreement on 26 February 2019. If the defendant fails to demonstrate that she has lawfully resiled from the agreement, it will be for the plaintiff to prove its entitlement to the relief it claims.

Conclusion

[40] For the reasons stated above, the application for summary judgment ought to be refused, and leave should be granted to the defendant to defend the matter.

Costs

[41] I believe that the costs of this application should be reserved for determination by the trial court.

Order

Accordingly, the following order is made:

- [1] The application for summary judgment is dismissed, and leave is granted to the defendant to defend the matter.
- [2] The costs of this application shall be reserved.

**C.A.C. KORF
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Applicant: **ADV L PETER, instructed by
ROSSOUWS, LESIE INC.**

For the First and Second Respondent: **In Person.**

Date of hearing: 11 April 2023

Date of judgment: 4 December 2023