

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

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

Signature:  Date: 11/10/2022

CASE NO: 91617/2019

In the matter between:

BMW FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD

Plaintiff / Applicant

And

DIMAKATSO MPANE

Defendant / Respondent

Coram: Nichols AJ

Heard: 3 October 2022.

Delivered: 11 October 2022 – This judgment was handed down electronically by circulation to the plaintiff and defendant's representatives *via* email and to the third party's representative in court; by being uploaded to *Caselines* and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 11 October 2022.

JUDGMENT

NICHOLS AJ

Introduction

[1] This matter was set down on the unopposed roll for 3 October 2022. The plaintiff, BMW Financial Services South Africa (Pty) Ltd, sought summary judgment against the defendant, Ms Dimakatso Mpane.

[2] Due to the arguments advanced by the parties' representatives, I considered it necessary to provide a short judgment setting out my reasons for the ruling.

[3] The defendant and the third party who is her ex-husband, seek an order striking the application from the roll on the basis that it has been incorrectly enrolled and notification of the date of the hearing was not provided to the third party.

[4] The plaintiff instituted action against the defendant in January 2020 pursuant to a credit agreement pertaining to a MERCEDES BENZ GLE 63S AMG motor vehicle (the vehicle). The relief sought in that action is for an order confirming the cancellation of the credit agreement; an order directing the defendant, or anybody else in whose possession it may be, to forthwith deliver the vehicle to the plaintiff and; an order authorizing the plaintiff to apply to court on the same papers, duly supplemented, for judgment in respect of any damages and further expenses incurred by the plaintiff to be determined once the vehicle has been repossessed and sold.

[5] The issues for determination are whether the plaintiff is entitled to an order granting it summary judgment confirming the cancellation of the credit agreement with the ancillary relief entitling it to the return of the vehicle. Alternatively, whether the application should be struck from the roll due to the plaintiff's incorrect enrollment of the application for summary judgment and its failure to deliver the notice of set down to the third party.

[6] It is common cause that the summons was served on the defendant on 14 January 2020. As at 1 November 2019, the plaintiff averred that the arrears outstanding was R100 606.48, with the total outstanding amount being R1 674 342.20.

[7] It is further common cause that the defendant delivered a special plea, plea and an affidavit opposing the summary judgment. The defendant pleaded an indemnity and misjoinder in her special plea, plea and opposing affidavit. She alleged that the third party, her ex-husband, should be a party to these proceeding as they were married in community of property and he indemnified her for any outstanding debts, claims or fines in respect of the vehicle, in terms of their divorce settlement agreement. Notably, their divorce was

concluded after the summons was served on her in which she alone is cited as the defendant.

[8] It is also common cause that the defendant's third party notice in terms of rule 13 was served upon the third party on 14 June 2021. Rule 13 makes provision for instances where a party alleges that another person, not a party to the action (the third party), should contribute or indemnify the first mentioned person from the relief claimed by a plaintiff in the action. Rule 13(5) provides that a party shall be deemed to be a party to the action when service of a notice in terms of rule 13(1) has been effected. In this case 14 June 2021.

[9] The notice setting the matter down on the unopposed roll for 3 October 2022 reads: '*that the abovementioned matter is set down for hearing for the Default Judgment Application on 3 OCTOBER 2022 at 10H00 or as soon thereafter as the parties may be heard.*' This notice was delivered to the defendant's attorneys on 9 September 2022. A follow up email to the defendant's attorney on 16 September 2022, simply records that '*the notice of set down is attached*'.

[10] Mr Bester, who appeared on behalf of the plaintiff, submitted that the plaintiff is entitled to an order for summary judgment since the defendant's plea discloses no *bona fide* defence. Her averments regarding her ex-husband do not establish a *lis* between the plaintiff and the third party, who he contended was not a party to these proceedings.

[11] Mr Mawela who appeared on behalf of both the third party and the defendant argued that the matter was not properly before the court and on this basis alone, should be struck from the roll. Further, that the notice of set down specifies that judgment will be sought by *default* and not that the plaintiff would be seeking summary judgment. He contended that the two proceedings are different.

[12] In addition, had the defendant been correctly informed that the matter was set down for summary judgment then she could have availed herself of the opportunity to amend her special plea, plea and affidavit opposing summary judgment to place additional new facts before the court that are pertinent to her defence.

[13] The new facts allied to Mr Mawela's second submission relate to the third party's conclusion of an agreement with the plaintiff to settle the total amount outstanding claimed in the action. He contended that the third party has complied faithfully with the terms of

that agreement. In this regard, he contended that when the third party was informed about the claim and action, the total amount due was approximately R1.7 million and at present the total outstanding amount is approximately R150 000.00.

[14] Accordingly, there is simply no basis for the plaintiff to be seeking judgment against the defendant when the third party has complied with his agreement with the plaintiff to settle directly to it not only the arrears but also the full outstanding amount due. This application is patently *in terrorem*.

[15] Mr Mawela also contended that since the third party was a party to these proceedings, he should also have been informed, by notice, of the plaintiff's intention to seek judgment against the defendant so that he could have delivered the necessary pleadings. He further contended that the third party does not have all the necessary information and documentation that he requires to properly defend the action although he has been making payment pursuant to the agreement concluded with the plaintiff.

[16] Mr Bester did not concede that there was an agreement between the third party and the plaintiff, or that the third party had paid over R1 million pursuant to this agreement. However, since there was a concession that approximately R150 000.00 was still outstanding, he contended that such evinced an acknowledgement of arrears due entitling the plaintiff to an order for summary judgment.

[17] He further contended that Mr Mawela was not entitled to make representations on behalf of the third party since the third party was not a party to these proceedings and had no *locus standi* to make representations on the matter.

[18] Finally, he contended that it mattered not that the notice of set down referred to an application for default judgment because the practice note filed in respect of the court appearance for 3 October 2022, specified that the plaintiff would be proceeding with the application for summary judgment.

[19] It is trite that the purpose of a notice of set down is for the party receiving the notice to be informed of the date for the hearing of the matter and the nature of the relief that will be sought on the date of set down.

[20] Different considerations apply when a court considers an application for summary judgment versus an application for default judgment. At its most simplistic, an application for default judgment requires a court to consider only the version of the plaintiff, whereas

during an application for summary judgment the court is enjoined to consider whether the defendant has disclosed a *bona fide* defence to the plaintiff's claim. The defendant is not precluded from amending her plea and affidavit opposing summary judgment at any time before the application is heard.

[21] A court is not entitled to ignore a defendant's affidavit resisting summary judgment, despite there being no appearance for the defendant at the hearing of the application for summary judgment.¹ Following on from the court's obligation in this regard, a defendant cannot be said to be in default once she has delivered her plea and affidavit opposing summary judgment.²

[22] Although Mr Bester was prepared to accept for the purpose of his argument, that an amount of R150 000 remains outstanding, thereby justifying the relief sought by the plaintiff, he would not confirm that an agreement was concluded with the third party or that he had complied with his obligations in this regard. Similarly, he was unable to dispute these contentions, which are further borne out by the correspondence submitted by both the defendant and the plaintiff pursuant to a previous postponement of this matter.

[23] A third party joined to proceedings in terms of rule 13 is not entitled to receive further documents or notices as a party to the proceedings if he fails to deliver a notice of intention to defend. It is common cause that the third party did not deliver a notice of intention to defend in these proceedings.

[24] In the circumstances, I am satisfied that both the defendant and the third party have been prejudiced by the plaintiff's failure to properly notify the defendant that it intended to seek summary judgment against her on the unopposed roll of 3 October 2022. Further, that the defendant and/or the third party should be allowed to place additional pertinent facts before the court to allow for a proper adjudication of the matter should the plaintiff wish to persist with an application for summary judgment.

[25] In the circumstances, the following order is made:

(a) The application for summary judgment is postponed sine die.

¹ *Morris v Autoquip (Pty) Ltd* 1985 (4) SA 398 [WLD] at 400E- F.

² *Morris v Autoquip (Pty) Ltd* 1985 (4) SA 398 [WLD] at 400F- H; *Labstix Diagnostics (Pty) Ltd and Another v SDV South Africa (Pty) Ltd* (91624/2016) [2018] ZAGPPHC 380 (17 May 2018) para 27.

- (b) The third party is directed to deliver his notice of intention to defend the main action within 10 days of the delivery of this order and to thereafter deliver the requisite pleadings.
- (c) Costs shall be costs in the cause.



T NICHOLS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, PRETORIA

HEARD ON:	3 October 2022
JUDGEMENT DATE:	11 October 2022
FOR THE PLAINTIFF:	Adv Bester
INSTRUCTED BY:	Strauss Daly Attorneys Pretoria Ref: BMW10/1786 wayne@roblaw.co.za
FOR THE DEFENDANT:	Mr Mawela
INSTRUCTED BY:	Jarvis Jacobs Raubenheimer Inc Ref: JJacobs/NK/MAT22490 zinta@jjrinc.co.za
FOR THIRD PARTY:	Mr Mawela
INSTRUCTED BY;	A Mawela Inc