



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 17574/2022P

In the matter between:

NEDBANK LIMITED

PLAINTIFF

and

THANDI MARGARET DLAMINI

DEFENDANT

Coram: Davis AJ

Heard: 17 October 2023

Date of Judgment: 20 October 2023

ORDER

The following order is granted:

1. Summary judgment against the defendant is refused;
 2. The defendant is given leave to defend the action;
 3. The costs occasioned by the application for summary judgment are reserved for decision by the trial court.
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JUDGMENT

Davis AJ:

Introduction

[1] Plaintiff seeks summary judgment against the defendant directing the defendant to forthwith deliver to the plaintiff the vehicle described as a Hyundai H-1 2.5 CRDI Wagon, with chassis number KMHWH81KMGU788934, and with engine number D4CBF880489. Plaintiff also seeks, upon return of this vehicle, to be granted leave to apply for judgment for any outstanding damages in which action the plaintiff shall aver and prove that it complied with the requirements in paragraph 20.3 of the order in *First National Bank Limited t/a Wesbank v Davel*.¹ The plaintiff seeks cost of the suit.

[2] The plaintiff is a registered credit provider as contemplated in section 40(1) of the National Credit Act 34 of 2005. The plaintiff entered into an instalment sale agreement with Mr. Siyabonga Dlamini whereby it sold to him the vehicle described above. The principal debt amounted to R 1 432 049.76 and Mr. Dlamini took delivery of the vehicle on or about 1 May 2016.

[3] Mr. Dlamini passed away on 6 November 2021, and since then there has been no payments made in accordance with the instalment sale agreement. A certificate of balance, dated 16 September 2022, reveals that Mr. Dlamini or his estate is indebted to the plaintiff in the amount of R209 152.02. At the time of this application for summary judgment no executor has been appointed to wind up the estate of Mr. Dlamini.

[4] In terms of the agreement between Mr. Dlamini and the plaintiff if the Mr. Dlamini dies, this constitutes a breach of the contract and justifies inter alia the plaintiff cancelling the agreement, claiming the return and possession of the vehicle and related relief in respect of any damages that the plaintiff may have sustained.

¹ *FirstRand Bank Limited t/a Wesbank v Davel (University of the Free State Law Clinic as amicus curiae)* [2019] ZASCA 168; [2020] 1 All SA 303 (SCA).

[5] The defendant is Ms Thandi Margaret Dlamini, she is the sister of the late Mr. Dlamini, she resided at the same address as him during his lifetime and at the time he entered into the contract. They lived in Avoca Hills, Durban North.

Condonation

[6] The defendant applied for condonation for the late filing the heads of argument and practice note. The condonation application was not opposed by the plaintiff. Having regard to the explanation for the late filing of the defendant's papers, the extent thereof, the absence of opposition, coupled with the need to have this matter dealt with as expeditiously as possible, I was of the view that the administration of justice would best be served by condoning the late filing of the defendant's heads of argument.

Pleadings

[7] The plaintiff pleads that the defendant obtained possession of the motor vehicle when the debtor died and remains in unlawful possession of the vehicle. The defendant, despite demand, failed and/or refused to return the vehicle to the plaintiff, or, and in the alternative, the plaintiff pleads that if it is found that the defendant is no longer in possession of the vehicle and/or disposed of the vehicle, the plaintiff alleges that the defendant parted possession with the vehicle with knowledge of the plaintiff's ownership.

[8] The defendant filed a notice of an intention to defend and thereafter her plea, this included a special plea submitting that the citing of the defendant is in fact a misjoinder. This contention was correctly abandoned by the defendant's counsel at the hearing of the application. In terms of the vindicatory relief sought the defendant is correctly cited.

[9] In respect of the averment by the plaintiff that the defendant is in possession or parted with possession of the vehicle when the defendant was aware of the plaintiff's ownership of the vehicle, which averment is essential to the relief sought by way of *rei vindicatio*, the following plea somewhat incongruously appears, 'defendant cannot admit or deny same the plaintiff is put to the proof thereof (sic) the averments contained herein.'

[10] On the back of this plea the plaintiff applied for summary judgment. In its founding affidavit the plaintiff states that the defendant's plea does not disclose any triable defence in law but is a bare denial,² and therefore the plaintiff is entitled to summary judgment. The plea to the averment in the founding affidavit of the plaintiff stating that the defendant cannot admit or deny that the defendant was in possession of the vehicle, as this information would clearly be within the personal knowledge of the defendant.

[11] The law is clear, the contents of the plea are material when determining whether the defendant has a *bona fide* defence or not. Moreover,³ 'a plea constitutes a bare denial when the defendant does not clearly and concisely state the material facts upon which he relies for his defence, alternatively does not state his defence with sufficient particularity to enable the plaintiff to reply thereto.'

[12] Since the amendments to Uniform rule 32, a plaintiff is constrained to apply for summary judgment only after the delivery of the plea. Previously,⁴ 'summary judgment proceedings could be instituted upon the notice of intention to defend being filed. The rationale behind the amendments was so that summary judgment proceedings could be adjudicated on the basis of the defendant's pleaded defence.'

[13] *Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd*⁵ explains the rationale of the amended rule 32 process:

'It sets out the intention of the legislature to address the shortcomings of the position under the old rule bearing in mind that the plaintiff is required to bring a summary judgment application at the time when a possible defence to the claim has not yet been disclosed in the plea. The amended rule now requires an affidavit in support of summary judgment to be filed only once the defendant's defence to the action is apparent, by virtue of having been set out in a plea.'

² *Nedbank Ltd v Magadla* [2023] ZAKZPHC 54 paras 13-14.

³ *South African Securitisation Programme (RF) Ltd and others v Cellsecure Monitoring and Response (Pty) Ltd and others* [2022] ZAGPPHC 925 para 10, see also *Wesbank, a division of Firstrand Bank v Silver Solutions 3138 CC* [2023] ZAKZPHC 26, and *Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd and another* [2020] ZAGPP 387.

⁴ *South African Securitisation Programme (RF) Ltd and others v Cellsecure Monitoring and Response (Pty) Ltd and others* [2022] ZAGPPHC 925 para 22.

⁵ *Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd and another* [2020] ZAGPP 387 para 14, referencing *FirstRand Bank Ltd v Shabangu and others* 2020 (1) SA 155 (GJ) paras 16-19.

[14] The role of pleadings in litigation is well-known, the⁶ 'object of pleadings is to define the issues upon which a court will be called upon to adjudicate and to enable the parties to prepare for trial on the issues as defined. A plea is the answer by a defendant to the claims made against it by the plaintiff and in which his defence is set out.'

[15] Uniform rule 22(2) stipulates:

'The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.'

[16] In a matter where the primary issue is whether or not the defendant is in possession of the vehicle, to plead in the manner described above appears to me to be the result of slovenly draughtsmanship which is unacceptable. This is especially so when the defence to the claim is peculiarly within the knowledge of the defendant.

Opposing affidavit and *bona fide* defence

[17] The defendant then filed a replying affidavit, the germane averments are, 'I deny to be in possession of the vehicle or parted possession with the vehicle'⁷ and 'furthermore the defendant is not in possession of any plaintiff's vehicle.'⁸ In *Bragan Chemicals (Pty) Ltd*⁹ Basson J said,

'I accept that there may be circumstances in which a defendant in summary judgment may well be able to raise a defence in the affidavit resisting summary judgment but which was not raised in the plea.'

[18] The plaintiff's relief is founded in the *rei vindicatio*. The requirements in order to obtain relief under the *rei vindicatio* is:¹⁰

⁶ *Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd and another* [2020] ZAGPP 387 para 15.

⁷ Court bundle, at 52, para 5.3.1.

⁸ Court bundle, at 53, para 6.1.

⁹ *Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd and another* [2020] ZAGPP 387 para 16.

¹⁰ G Muller, R Brits, JM Pienaar & ZZ Boggenpoel *Silberberg and Schoeman's: The Law of Property* 6ed (2019) at 270, which reference to *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-E per Jansen JA.

'An owner who institutes the *rei vindicatio* to recover his or her property is required to allege and prove that

(a) he or she is the owner of the thing;

(b) the thing was in the possession of the defendant at the commencement of the action; and

(c) the thing which is vindicated is still in existence and clearly identifiable.' (footnotes omitted)

[19] In the defendants replying affidavit for the first time, in perfunctory terms, the defendant avers that she denies being in possession or parted possession with the vehicle.¹¹ The defendant supplies no further amplification with regard to the factual basis of her denial at all. It is another example of inadequate drafting of the defence to the claim.

[20] In *Tumileng Trading CC v National Security and Fire (Pty) Ltd*,¹² the court further stated that:

'The assessment of whether a defence is bona fide is made with regard to the manner in which it has been substantiated in the opposing affidavit, viz upon a consideration of the extent to which 'the nature and grounds of the defence and the material facts relied upon therefor' have been canvassed by the deponent. That was the method by which the court traditionally tested, insofar as it was possible on paper, whether the defence described by the defendant was 'contrived', in other words, not bona fide.'

[21] I am in agreement with *South African Securitisation Programme (RF) Ltd v Cellsecure Monitoring and Response (Pty) Ltd*¹³ where it stated as follows:

'[33] I am mindful that a *bona fide* defence is assessed upon a consideration of the extent to which the nature and grounds of the defence and the material facts relied upon have been canvassed. *Bona fides* does not mean that the defendant has to satisfy the court that his version is believed to be true. All the defendant is required to do is to swear to a defence valid in law, in a manner which is not seriously unconvincing. Put differently, he should show that there is a reasonable possibility that the defence he advances may succeed on trial.

¹¹ Court Bundle at 52 para 5.3.1.

¹² *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) [2020] ZAWCHC 28, 2020 (6) SA 624 (WCC) para 25.

¹³ *South African Securitisation Programme (RF) Ltd and others v Cellsecure Monitoring and Response (Pty) Ltd and others* [2022] ZAGPPHC 925, see also DE van Loggerenberg *Erasmus: Superior Court Practice* (Revision Service 21, 30 April 2023) at D1-411.

[34] I am further mindful that at this stage of the proceedings, the court is not required to decide the disputed issues or determine whether or not there is a balance of probabilities in favour of another. The court merely considers whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to be *bona fide*.¹⁴ (footnote omitted)

[22] The manner in which the defence is disclosed leaves a lot to be desired, without doubt those involved in the drafting of the defendant's papers ought to have disclosed some factual basis for their denial, the rules and precedent are sufficient pointers to that. However, it cannot be said that the denial of possession does not raise a defence or a triable issue, but the manner in which it has been ventilated is disappointing. They place their client's case in jeopardy as a result. Notwithstanding the shortcomings in the defendant's plea and opposing affidavit it does even if it is in the barest of terms disclose a valid or *bona fide* defence to the claim. Consequently, plaintiff's claim must fail and summary judgment is refused.

[23] The Supreme Court of Appeal (SCA) in *NPGS Protection and Security Services CC v FirstRand Bank Ltd*¹⁴ warned:

'The ever-increasing perception that bald averments and sketchy propositions are sufficient to stave off summary judgment is misplaced and not supported by the trite general principles developed over many decades by our courts.'

[24] The SCA reiterated that the correct approach to summary judgment is as follows:¹⁵

'Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the

¹⁴ *NPGS Protection and Security Services CC and another v FirstRand Bank Ltd* [2019] ZASCA 94; 2020 (1) SA 494 (SCA); [2019] 3 All SA 391 (SCA) para 14.

¹⁵ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-C

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.'

[25] Accordingly summary judgment must be refused.

Costs

[26] Counsel for the defendant initially sought a costs order against the plaintiff as opposed to the usual order that a court grants in summary judgment matters. That would not be appropriate in this matter. The plaintiff on the basis of the manner that the defendant pleaded to the particulars of claim were perfectly entitled to seek summary judgment.

[27] This matter unfortunately highlighted the slovenly manner in which the defendant pleaded to the claim, to mulct the plaintiff with an order of costs in such circumstances is untenable. Counsel at the conclusion of the argument withdrew his prayer for costs, wisely so in my view.

Order

[28] I accordingly make the following order:

1. Summary judgment against the defendant is refused;
2. The defendant is given leave to defend the action;
3. The costs occasioned by the application for summary judgment are reserved for decision by the trial court.

DAVIS AJ

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Date of hearing: 17 October 2023

Date of Judgment: 20 October 2023