REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NUMBER: 24520/2018

DELETE WHICHEVER IS APPLICABLE

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

28/03/2019
DATE

SIGNATURE

In the matter between:

FIRSTRAND BANK LTD T/A WESBANK Plaintiff/Applicant

and

LETSOLATHEBE RISK & INVESTMENT BROKERS CC First Defendant/Respondent

NHLAPO, SIYABONGA THEBE Second Defendant/Respondent

JUDGEMENT

NGALWANA AJ

[1] The plaintiff seeks summary judgment against the defendants in respect of a debit balance on a car instalment sale agreement and a suretyship agreement. It seeks repossession of the car together with costs of suit.

[2] The defendants resist summary judgment on the grounds that

(1) the parties concluded an agreement that was made an order of court on 21 June 2018 (*"the Settlement Agreement"*);

(2) the Settlement Agreement required the defendants to pay R17 206.55 to the plaintiff on or before close of business on Thursday 5 July 2018,[1] the R3 132.42 made by the defendants must reflect as being duly made and received by the plaintiff on or before close of business on Thursday 21 June 2018,[2] and the defendants must continue to make monthly instalments of R11 442.25 as from 20 June 2018;[3] and

(3) they complied with all these requirements.

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1 Clause 2 of the Settlement Agreement
2 Clause 3 of the Settlement Agreement
3 Clause 4 of the Agreed Order

[3] Clause 5 of the Settlement Agreement says if the defendants

(1) pay the R17 206.55 by close of business on Thursday 5 July 2018;

(2) the R3 132.42 is reflected as being duly made and received by the plaintiff by close of business on Thursday 21 June 2018; and

(3) pay the monthly instalment of R11 442.25 on 20 June 2018

then, and only in the event of the defendants complying with these requirements, the first defendant's account will be deemed not to be in arrears.

[4] Clause 7 of the Settlement Agreement says in the event of any default on any of these payments by the defendants, the plaintiff may re-enrol the summary judgment application.

[5] Clause 8 then says in the event of all these payments being made in terms of clauses 2, 3, 4 and 5, then the plaintiff will withdraw this summary judgment application with no order as to costs.

[6] A dispute then arose from the parties' conflicting interpretations of the Settlement Agreement. The plaintiff says the defendants have not complied with clause 4 of the Settlement Agreement because they have failed to make

payment of the monthly instalments of R11 442.25 *"as from 20 June 2018"*. That being so, says the plaintiff, clause 7 has been triggered to re-enrol the summary judgment application.

[7] The defendants say all the Settlement Agreement required of them in relation to the monthly instalment was to make payment of R11 442.25 *"on 20 June 2018"* in order to render the first defendant's account *"not to be in arrears"*. They say once that was done, and the other payments made in terms of clauses 2 and 3, the plaintiff should have withdrawn the summary judgment application. They say defaulting after 20 June 2018 in making payment of monthly instalments of R11 442.25 constitutes a new cause of action for which the plaintiff should have issued a new summons.

[8] Counsel for the plaintiff invoked a Constitutional Court judgment in *Eke v Parsons* 2016 (3) SA 37 (CC) for the proposition that Settlement Agreements similar to the one in question are enforceable. But that misses the point. The question in this case is not whether or not the Settlement Agreement is enforceable between these parties. The question is rather which interpretation of it should hold sway. That is not the question that *Eke* addressed.

[9] The applicable principles to interpretation, whether of statutes or contracts, were enunciated in *Endumeni*,[4] as follows:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.
> The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[5]

[10] The Settlement Agreement is in my view capable of both the interpretation given to it by the plaintiff and that preferred by the defendants. What a court is required to ascertain is not which of these two tickles its fancy, for whatever reason, but rather which of the two is sensible. That sensibility lies in the purpose of the document read in the context of the surrounding circumstances that gave birth to it.

[11] The Settlement Agreement was born out of the defendants' defaulting on an instalment sale agreement and a suretyship agreement, respectively. The

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4 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (*Endumeni*).
5 At para 18.

original dispute arising from that default was settled by the parties themselves, and therefore that case became *res judicata*. That means the matter has been determined on the merits, and the parties cannot litigate again on the same matter.[6] Thus, the present summary judgment application relates not to the original dispute but to alleged non-compliance with this Settlement Agreement.

[12] The defendants' interpretation is that the plaintiff should have withdrawn the summary judgment application when payments were made on 20 June 2018, 21 June 2018 and 5 July 2018 because any defaulting after 20 June 2018 raises a new cause of action for which the plaintiff should have issued a fresh summons, not re-enrol the same summary judgment whose cause of action lay in breach of the sale instalment agreement that has now been superseded by the Settlement Agreement.

[13] It seems to me this interpretation is rather impractical[7] as it would entail the parties incurring more costs and imposing an additional burden on courts that are already stretched to deal with a dispute, possibly on trial, in relation to which the defendants have not advanced any defence on the merits. It also misses the point that the parties have themselves agreed that the plaintiff may re-enrol the same summary judgment application in the event of the defendants defaulting on the monthly instalments *"as from 20 June 2018"*.

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6 *Eke* para [31], footnote 46; and para [36]

7 *Eke* para [26]

[14] As I understand the plain meaning of clause 5, it is upon the payment, on time, of the amounts listed there that the first defendant's account would be deemed not to be in arrears. *Non constat* that payment of the amounts listed in clause 5 entitles the defendants to withdrawal of the summary judgment application. Clause 8 is clear in this regard. It is only upon payment not only of the amounts listed in clause 5, and on the dates there mentioned, that the plaintiff agreed to withdraw the summary judgment application. It is also upon resumption of the monthly instalments *"as from 20 June 2018"* in terms of clause 4.

[15] While the Settlement Agreement is in my view inelegantly crafted (hence this dispute), it seems to me the more sensible interpretation on the facts and surrounding circumstances is that contended for by the plaintiff.

[16] In the circumstances, I am persuaded that summary judgment is warranted.

[17] As regards costs, given the challenge presented by interpretation of the Settlement Agreement, I am not persuaded that a costs order is warranted.

Order

1. Summary Judgment is granted.

2. The defendants are directed, jointly and severally, forthwith to deliver the following property to the plaintiff:

2016 MERCEDES BENZ GLC 220D
CHASSIS NUMBER: WDC2539052F021669
ENGINE NUMBER: 65192133135912

3. There is no order as to costs

V Ngalwana
Acting Judge of the High Court

Appearances

For the plaintiff:	BM Lukhele
Instructed by:	Rossouws Lesie Inc
For the defendants:	T Hadebe
Instructed by:	T Hadebe Attorneys
Date of hearing:	26 March 2019
Date of judgment:	28 March 2019