

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

CASE NO: 33589/19

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
04/06/2021

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

**LUSOLINK INTERNATIONAL EXPORT (PTY) LTD
GABRIEL GARY MOONSAMY**

First Respondent

Second Respondent

JUDGMENT

YACOOB J:

1. The applicant seeks an order confirming the cancellation of three instalment sale agreements, and ordering the return of three motor vehicles to it.
2. The first respondent concluded the instalment sale agreements with the applicant, for the purchase of the three vehicles. The second respondent represented the first respondent in the conclusion of these agreements and also is the first respondent's guarantor. The National Credit Act does not apply to the agreements as the purchaser was a juristic person.

3. The first respondent has breached the agreements by defaulting on its payments, prompting the applicant to approach the court for the relief set out above.

4. The respondents' affidavit was filed late and, although an affidavit was filed purporting to support an application for condonation, there was no formal application. The applicant submitted that neither affidavit should be admitted.

5. I consider that it is in the interests of justice to have the respondents' version before the court and allow the affidavits.

6. The respondents contend that a judgment has already been granted in this matter and an application for leave to appeal is pending.

7. The matter was set down on the unopposed roll because the answering affidavit was filed late. The court then granted an interim order that the vehicles be returned to the applicant for safekeeping pending the determination of this matter. No decision was made on the merits. In those circumstances I may hear the matter.

8. The first respondent's defence set out in the answering affidavit (which is deposed to by the second respondent) is that it did not receive the default notices which the applicant sent to both the nominated *domicilia* and by email, and that the price it was charged for one of the vehicles ("the coupe") was R300 000 more than market price, when it was represented to be market price. Finally, the first respondent contends that the applicant ought not to have instituted motion proceedings but action proceedings since an expert would have to testify about the value of the vehicles.

9. The first respondent does not deny that it received the cancellation letters which were sent to the same addresses as the default notices. It must be noted that each agreement has a different *domicilium* address. The contract requires only that the applicant send the default notices to the first respondent. Letters for all three agreements were sent to each of the different address provided by the first

respondent. In addition, all were sent by email. There is no contention by the respondents that the email address was incorrect.

10. It is by now well established that all a creditor has to do is establish that it has dispatched the necessary notices, as a recalcitrant debtor cannot be forced to collect notices from the post office, or even to acknowledge an email. Even where the National Credit Act applies, and the requirements of notice are much stricter, all that has to be done by the creditor is prove that the notices were received by the relevant post office.

11. The first respondent also does not set out any evidence of what the market price of the coupe may have been, nor any other evidence that may support its case. It also sets out no defence for the default on the other two agreements. In any event, the value or market price is not relevant at this stage of proceedings. All that the respondents are required to do is return the vehicles. The value or market price is relevant only if damages are claimed after the vehicles have been sold.

12. In any event, the first respondent entered the contract for the purchase of the coupe on the basis of the price that is contained in the contract. No steps were taken to correct any purported error or misrepresentation.

13. There is clearly also no merit in the contention that damages may not be claimed in motion proceedings. In this case, in any event, the contracts provide for a claim to be made on the basis of a certificate of balance, which is a liquid document.

14. In any event, the issue is whether the applicant who has chosen to initiate motion proceedings rather than action proceedings is able to prove its case. In this case, the applicant clearly has proved its case.

15. For these reasons I make the following order:

1. The First Respondent is ordered to immediately return to the Applicant the:

1.1.1. 2018 Ford Ranger 3.2 TDCI Wildtrak AT with engine number [...] and chassis number [...].

1.1.2. 2016 Mercedes Benz GLE Coupe 450/43 with engine number [...] and chassis number [...].

1.1.3. 2013 Mercedes Benz S500 BE with engine number [...] and chassis number [...].

2. The sheriff of the court is authorised to attach and remove the aforesaid vehicles from the possession of the First Respondent or wherever else and in whose possession, it may be found and to hand it to the Applicant or its representatives.

3. The Applicant is granted leave to apply to this court on the same papers duly supplemented for an order that the first and second Respondents jointly and severally the one paying the other being absolved make payment to the applicant of any amount due to the Applicant after the inspection valuation and sale of the vehicles.

4. First and second Respondents jointly and severally the one paying the other being absolved are to pay the costs of this application.

S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for Applicant: AJ Venter

Instructing Attorneys: Martins Weir-Smith Inc

Respondent's Legal Representative: Mervyn Fehler (Attorney)

Date of hearing: 22 June 2020

Date of judgment: 04 June 2021