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

Case no: 12908/2020

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: No
DATE: 8 September 2021

In the matter between:

FIRSTRAND AUTO RECEIVABLES (RF) LTD Plaintiff

and

MISS EAULENDA MOKGADI MAKGOBATLOU Defendant

JUDGEMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The time and date for hand-down is deemed to be 13h00 on 8 September 2021.

PRETORIUS AJ:

[1] In this application for summary judgment the plaintiff seeks cancellation of an instalment sale agreement and delivery of a motor vehicle, a 2017 BMW 320i T/A (F30) with chassis number WBA8A16020NU73914 and engine number [....] ("*the vehicle*"). In support of its claim, the plaintiff relies on an instalment sale agreement concluded between Wesbank, a division of FirstRand Bank Ltd, and the defendant

on 25 August 2017 and executed by means of an electronic signature in terms of section 13 read with section 1 of the Electronic Communications and Transactions Act 25 of 2002 ("*the ECTA*"). In terms of the agreement, a true copy of which the plaintiff claims is annexure "B" to the particulars of claim, the defendant purchased from Wesbank the vehicle for a purchase price of R675 300 together with accessories, fees, finance charges and VAT. The plaintiff contends that on 20 February 2019 Wesbank ceded all its rights, title and interest in and to the agreement to the plaintiff.

[2] The plaintiff claims that the defendant breached the agreement in that she failed to make payment of the instalments as and when they became due and payable. After the defendant referred the agreement to a debt councillor in terms of section 129(1) of the National Credit Act 34 of 2005 ("*the NCA*"), the plaintiff accepted an offer for a reduced monthly instalment. The defendant eventually also failed to make payment of the reduced monthly instalments. As a result, the plaintiff claims cancellation of the agreement and delivery of the vehicle.

[3] The defendant has raised a number of defences in her plea and her inordinately prolix affidavit resisting summary judgment ("*the opposing affidavit*"). Part A of the opposing affidavit consists of so-called pertinent background information which stretches over 39 pages and in which reference is made to 19 annexures consisting of 56 pages. Apart from the absence of the defendant's personal knowledge of the allegations (conceded by her), she has not demonstrated the relevance of the allegations. The plaintiff's counsel argued that part A of the opposing affidavit is inadmissible and irrelevant. I agree.

[4] The opposing affidavit contains a number of inconsistencies. One example is the defendant's initial denial that she concluded the agreement whilst she later conceded that she did. There are also discrepancies between the defendant's plea and her opposing affidavit. In her plea the defendant admits that she received a copy of the agreement (albeit after a period) whilst in the opposing affidavit this is denied.

[5] The majority of the defences raised by the defendant pertain to relief which is not sought by the plaintiff at this stage, in particular the payment of damages suffered by the plaintiff as a result of the defendant's alleged breach.

The agreement

[6] The main defence pursued during the argument was whether or not the agreement attached to the particulars of claim is the agreement concluded between the parties. In the opposing affidavit the defendant alleges that she "*did not enter into any agreement with the applicant [the plaintiff]*"[1] whilst later, in the same affidavit, she contended that she "*did enter into a contract with the applicant*".[2]

[7] The defendant does not deny having purchased the vehicle and does not contend she is not in possession of the vehicle. I am however persuaded that an agreement was concluded in respect of the vehicle. The remaining issues for determination are whether the agreement was ceded by Wesbank to the plaintiff and whether the terms of the agreement are those contained in annexure "B".

[8] Turning to the contractual defences raised, the defendant, firstly, contends that the agreement was not validly concluded in accordance with the provisions of the ECTA.[3] In this regard the defendant contends that the agreement was not signed despite the NCA requiring signature.[4] I do not agree. In terms of section 13(1):

> "Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used." [emphasis added]

[9] The defendant did not refer me to any law which requires the signature of the agreement. Accordingly there is no merit in the defendant's contention.[5]

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[1] Par 5 of the opposing affidavit (005-47/5)
[2] Par 43 of the opposing affidavit (005-88/430. See also paras 52 and 54 of the opposing affidavit (005-92/52 and 54)
[3] Paras 3.2 and 4.2 of the plea (003-5/3.2, 4.2)
[4] Par 50 of the opposing affidavit (005-91/50)
[5] See Spring *Forest Trading CC v Willberry (Pty) Ltd t/a Ecowash and Another* 2015 (2) SA 118 (SCA) for related principles on this issue.

[10] A second attack on the validity of the agreement pertains to the allegation that the plaintiff acted *mala fide* and with fraudulent intent when concluding the agreement.[6] This contention was not seriously pursued during argument. I cannot find any persuasive support for the defendant's contentions on the papers.

[11] The defendant further contends, as a third attack, that she was forced to sign an agreement without having the opportunity to read the agreement.[7] The defendant's allegation that she signed the agreement under duress is inconsistent with her allegation that the agreement was not signed at all. Nevertheless, I cannot find any support for the alleged duress on the papers. To the contrary it appears from the defendant's version that the conclusion of the agreement was preceded by a negotiation process which included the trade-in of a vehicle.

[12] I am not persuaded that any of the defendant's attacks on the validity of the agreement has merit. These defences were evidently not raised by the defendant until the commencement of the action. The improbabilities of the defendant not raising the defence earlier, considering the defendant's admission that she received a copy of the agreement[8] and the implementation of a debt counselling process, are overwhelming. I am satisfied for purposes of summary judgment that a valid agreement was concluded.

Terms of the agreement

[13] The defendant disputes the terms of the agreement and alleges that the plaintiff has "*unilaterally and without consent amended the agreement between the parties.*"[9] In support of her defence, the defendant places certain specific terms as set out in the written agreement relied upon the plaintiff[10] in dispute. In this regard the defendant contends:

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[6] Paras 10.3 and 10.4 of the plea (003-12/10.3-10.4)
[7] Par 6.3.3 of the plea (003-6/6.3.3)
[8] Paras 6.3.4 and 10.5 of the plea (003-7/6.3.4 and 003-9/10.5)
[9] Par 6.3.6 of the plea (003-7/6.3.6)
[10] "B" to the particulars of claim (001-13)

(13.1) firstly, that the accessories (extras) amounting to R110 500 charged by the plaintiff in addition to the purchase price were either included in the purchase price or were not ordered or received by the defendant;[11]

(13.2) secondly, that she traded in a Kia vehicle to the value of R240 000 which should have served as a deposit;[12] and

(13.3) thirdly, that the balloon payment provided for in the agreement in the amount of R162 578.55 was not agreed upon by the defendant.[13]

[14] The defendant made payments of the monthly instalments[14] as reflected in the agreement. It is to be expected that the defendant would not have done so if there was any merit in her disputing the mentioned terms. Although there are inconsistencies in the defendant's papers regarding her having received the agreement,[15] it is unlikely that she was not aware of the terms as contained in the agreement – whether from the statements received from Wesbank (or the plaintiff) or from a copy of the agreement.

[15] Nonetheless, the terms of the agreement disputed by the defendant do not affect the relief sought by the plaintiff at this stage. Those defences may have an impact on the quantum of damages, which will be determined only after delivery of the vehicle to the plaintiff to assess its value. Those defences can be raised by the defendant at that stage of the action.

[16] The defendant however argues that it may be, should the defendant be correct in respect of the disputed terms, that the defendant is not indebted to the plaintiff with the result that the plaintiff is not entitled to cancellation or delivery of the

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[11] Par 6.2 of the plea (003-6/6.2). See also par 7.2.2 of the plea (003-7/7.2.2) and par 56 of the opposing affidavit (005-93/56)
[12] Paras 6.3.1-6.3.2 of the plea (003-6/6.3.1-6.3.2). See also par 7.2.1 (003-7/7.2.1) and 12.2 (003-10/12.2) of the plea and par 55.3 of the opposing affidavit (005-93/55.3)
[13] Par 6.3.5 of the plea (003-7/6.3.5. See also par 7.2.3 (003-7/7.2.3) of the plea and par 60 of the opposing affidavit (005-95/60)
[14] "S2" to the founding affidavit (005-16)
[15] In her plea (par 6.3.4) the defendant pleads that the plaintiff provided her with a copy of the agreement "*after a period of 12 months*" after she requested a copy. See also par 10.5 of the plea (003-9/10.5). In par 44 of the opposing affidavit (005-88/44) the defendant alleges that she requested a copy on 5 September 2019. See further par 55 of the opposing affidavit (005-92/55)

vehicle. Accepting that the defendant is correct, that the accessories should be deducted and that the deposit should be increased, this may have an effect on the monthly instalment, i.e. the principal debt would be substantially less with the result that the monthly instalments would be less. However, accepting the defendant's version that she did not agree on a balloon payment, the absence thereof would have substantially increased the monthly instalment with the result that she would still have been in arrears and consequently in breach of the agreement.

[17] But there are further factors that I should take into account. Those include the fact that the defendant, even on her version, authorised her bank to make payment of the instalments in accordance with the instalment amount as reflected in the agreement. The debit orders were paid for a period of 19 months before the defendant fell into arrears. In April 2019 the debt was restructured pursuant to a debt review process and a monthly instalment of R10 783.90 was offered to and accepted by the plaintiff. Only four of these instalments were paid by the defendant before she again fell into arrears.

[18] For these reasons, I am satisfied that, notwithstanding the disputed terms, the defendant breached the agreement and that the plaintiff is entitled to the relief sought at this stage.

Cession

[19] The defendant denies that Wesbank ceded all its rights, title and interest in and to the agreement to the plaintiff. In support of the denial, the defendant contends that the plaintiff has a residual obligation towards the defendant and that the cession could not have been executed without her permission or input.[16]

[20] In terms of clause 16.2 of the agreement:

> "We [Wesbank] may without notice to you [the defendant], transfer any of our rights and/or obligations and you agree that you will recognise the transferee's [the plaintiff] rights."

[16] Par 11 of the plea (003-9/11)

[21] The defendant did not challenge clause 16.2 in her plea or opposing affidavit. When confronted with clause 16.2, the defendant's counsel submitted during argument that the terms is *contra bonos mores*. This was not raised by the defendant in either her plea or opposing affidavit but I will briefly deal with the submission.

[22] In *Barkhuizen*[17] it was held:

> "[30] In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."

[23] In *Bredenkamp*[18] it was held:

> "[38] This court in *Sasfin* consequently restated the obvious, namely that our common law does not recognise agreements that are contrary to public policy. Our courts have always been fully prepared to reassess public policy and declare contracts invalid on that ground. Determining whether or not an agreement was contrary to public policy requires a balancing of competing values. That contractual promises should be kept is but one of the values. Reasonable people, irrespective of any philosophical or political bent, might disagree whether any particular value judgment was 'correct', ie more acceptable. Didcott J, for one, believed, in relation to restraint of trade cases, that the sanctity of contract trumped freedom of trade, whereas AS Botha J (a former member of this court who also died recently), together with Spoelstra AJ, thought otherwise, while Vermooten J agreed with Didcott J.

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[17] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [30]
[18] *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) [38]

> The view of Didcott J was eventually adopted by this court in *Magna Alloys*. The disagreement in *Sasfin* between the majority and the minority did not affect the principle, but its application to particular clauses and severability. Public policy considerations are also not static and their weight may change as circumstances change."

[24] As mentioned, the defendant did not raise in her papers that clause 16.2 of the agreement is *contra bonos mores*. Accordingly, no specific public policy considerations which the court is required to take into account have been raised. For these reasons I am not persuaded that there is merit in the defendant's contentions.

[25] The defendant further alleges in her opposing affidavit that the cession affected her in that Wesbank had a residual obligation to transfer ownership to her. The defendant contends that "*it is trite*" that residual obligations cannot be ceded.[19] When asked for authority in support of this contention, the defendant's counsel could not provide any. Nevertheless, I am not persuaded that Wesbank had any residual obligation towards the defendant. Ownership of the vehicle would have passed to the defendant upon payment (by the defendant) of the last instalment. The defendant was already in possession of the vehicle.

Novation

[26] In par 13.2 of her plea, the defendant contends that the plaintiff's acceptance of the debt review restructuring constitutes a novation of the original agreement and that the plaintiff should have claimed on the novated cause of action. The defendant abandoned this defence during argument.

Authority and personal knowledge of the deponent

[27] The defendant contends that the deponent to the affidavit in support of summary judgment is not authorised to act on behalf of the plaintiff.[20] If I follow the argument correctly, the defendant relies on the fact that the deponent states that he

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[19] Par 5.3 of the opposing affidavit (005-48/5.3)
[20] Paras 72-74 of the opposing affidavit (005-102/72-74)

is employed by the plaintiff, not Wesbank, and that he is authorised to depose to the affidavit on behalf of the plaintiff. However, so the defendant contends, the resolution upon which is relied by the deponent is issued by Wesbank's CFO on 20 July 2020 whereas the cession was effected on 20 February 2019. As a result, so the defendant contends, the deponent is employed by Wesbank and not the plaintiff and therefore not authorised.

[28] *Ex facie* the resolution signed by Wesbank's CFO, Wesbank is a division of FirstRand Bank Limited ("*FirstRand*"). The CFO of Wesbank was authorised to sign the resolution by a resolution passed by the board of directors of FirstRand on 31 August 2016 and the Delegation Authority Policy of the Wesbank Group in terms of which the mentioned "*officers*" of Wesbank were authorised to act on behalf of the plaintiff.

[29] In *Unlawful Occupiers*[21]the Supreme Court of Appeal, held that the remedy of a respondent who wished to challenge the authority of a person allegedly acting on behalf of a purported applicant, is provided for in rule 7(1). In this regard Brand J held:

"However, as Flemming DJP has said, now that the new Rule 7(1) remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, i e by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That question can, in my view, be answered only in the negative."

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[21] *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) [16]

[30] The defendant did not employ the process provided for in rule 7(1). As a result, I am not persuaded that there is any merit in the defendant's contentions.

[31] The defendant further denies that the deponent can swear positively to the facts and the amounts claimed.[22]

[32] A deponent to an affidavit in support of summary judgment, other than the plaintiff himself, is required to state that the facts are within his personal knowledge, unless such knowledge appears from other facts stated. The deponent should also state the grounds for his knowledge but even if he does not, the court will not hold the affidavit to be defective for that reason, as long as the deponent is someone who would ordinarily be presumed to have personal knowledge of the matter.

[33] In *Absa Bank Ltd v Le Roux*[23] when referring to *Maharaj*[24] it was held:

> "It is not the allegations which the defendant puts in issue that determine the extent of the knowledge that the deponent to the supporting affidavit must have. The deponent must have direct knowledge of most, if not all, of the facts that the plaintiff will have to prove to establish its claim in the action."

[34] I am satisfied that the deponent has sufficiently stated the grounds for his knowledge of the facts that the plaintiff is required to prove for its claim.

Commissioning of affidavit

[35] The defendant contends that the application should be dismissed because the commissioner of the affidavit in support of the application for summary judgment was uncertain about the gender of the deponent.[25] This, the defendant contends, is evident from the deponent describing himself as a "*Legal Manageress*" and the use of the word "*she*" in the commissioner's certificate.

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[22] Par 75 of the opposing affidavit (0005-103/75)
[23] 2014 (1) SA 475 (WCC) [13]
[24] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)
[25] Par 80 of the opposing affidavit (005-105/80)

[36] The defendant relies on *ABSA Bank v Botha*[26] where Kathree-Setiloane J upheld an objection in terms of rule 30 to an affidavit in support of summary judgment and found that the affidavit was irregular.

[37] *Botha* is distinguishable from the present matter as it was decided pursuant to a rule 30 application in which the defendant in that matter raised the issue and argued that the application for summary judgment constitutes an irregular proceeding. In the present matter the defendant did not employ the rule 30 remedy available to her. Instead, the defendant filed an opposing affidavit, thereby condoning any irregular step.

[38] Not only has a court a discretion to refuse an affidavit which does not comply with the Regulations,[27] a court also has a discretion to condone non-compliance with the Regulations. In *Lohrman*[28] Nestadt J held that:

> "... it seems to me that where an attorney (who is an officer of this Court) describes the statement as being a "beëdigde verklaring", it can and must be accepted that it was sworn to on oath. To require that, in addition to these words, there should again in conjunction with "geteken" be added the word "beëdig" would be to insist on an unnecessary duplication of allegations.
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> Even, however, if this approach be insufficiently formalistic, it nevertheless seems to me that the document in question is an affidavit. It is now settled (at least in the Transvaal) that the requirements as contained in regs 1, 2, 3 and 4 are not peremptory but merely directory; the Court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with them has been proved or not (*S v Msibi* 1974 (4) SA 821 (T)). In *Ladybrand Hotels v Stellenbosch Farmers'* supra a similar conclusion was arrived at. In that case the admissibility of an affidavit was attacked on the basis that the certification did not state that the deponents' had signed it in the presence of the

[26] *ABSA Bank Ltd v Botha N.O. and Others* 2013 (5) SA 563 (GNP)
[27] The Regulations Governing the Administering of an Oath or Affirmation, GNR.1258 of 21 July 1972 ("*the Regulations*")
[28] *Lohrman v Vaal Ontwikkeling* 1979 (3) SA 391 (T) 398E-399A

commissioner of oaths. It was held that the maxim *omnia praesumuntur rite essa acta* applied, that there was an onus on the person who disputes the validity of the affidavit to prove by evidence the failure to comply with the prescribed formalities and that in the absence of such evidence the objection taken failed. In any event, it was held that if the affidavit was defective it should be condoned.

It is of course a question of fact in each case whether there has been substantial compliance or not."

[39] In *Capriati*[29] Peterson AJ dealt with a similar issue raised as a point in limine. Petersen AJ dismissed the point in limine, in my view correctly so. Although the issue was raised by the defendant in the present matter in her opposing affidavit (unlike *Capriati*), the defendant has similarly not advance any evidence that the founding affidavit was not sworn to properly or evidence why the said affidavit, commissioned by an attorney, does not comply substantially with the Regulations. Similar to *Capriati*, the defendant in the present matter did not employ rule 30 but instead filed an opposing affidavit, thereby condoning any irregular step.

[40] In my view the following factors should be considered:

(40.1) The requirements as contained in regulations 1, 2, 3 and 4 of the Regulations are not peremptory but directory;[30]

(40.2) When disputing the validity of an affidavit, the defendant has an onus to advance evidence of the failure to comply with the prescribed formalities;

(40.3) The court should accept that where an attorney of the court attested the affidavit, there is substantial compliance with the Regulations, unless there is evidence to the contrary;

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[29] *Capriati v Bonnox (Pty) Ltd and Another* (101816/2016) [2018] ZAGPPHC 345 (10 May 2018)
[30] *S v Msibi* 1974 (4) SA 821 (T) 825A; *S v Munn* 1973 4 All SA 96 (NC)

(40.4) The defendant objects to the regularity of the affidavit and therefore the objection should be raised in terms of rule 30. The filing of the opposing affidavit instead constitutes condoning the alleged irregular step; and

(40.5) The court is vested with a discretion to condone non-compliance with the Regulations and to admit an affidavit.

[41] Considering the aforesaid factors in the context of this matter, I find that there is no merit in the defendant's objection in her opposing affidavit and that it must accordingly fail.

Certificate of balance

[42] The defendant takes issue with clause 22.5 of the agreement which pertains to a certificate of balance and which reads as follows:

> "We may provide a certificate from any of our managers, whose position it will not be necessary to prove, showing the amount that you owe to us. You agree that we may take any judgment or order that we are entitled to in law based on the amount contained in the certificate, unless you disagree with such amount and are able to satisfy the court that the amount in the certificate is incorrect."

[43] The relevance of the defendant's challenge is not clear. The plaintiff does not rely upon or attach to its papers a certificate of balance in terms of clause 22.5.

The affidavit resisting summary judgment

[44] Before concluding it is appropriate to make a few remarks regarding the opposing affidavit in general. As mentioned before, the opposing affidavit is inordinately prolix and consists of a portion (39 pages in the affidavit and 19 annexures attached thereto consisting of 56 pages) of allegations which are irrelevant, inadmissible and which do not fall within the defendant's personal

knowledge. In addition, the opposing affidavit contains a number of inconsistencies, both inherent and with the defendant's plea.

[45] Affidavits must contain admissible evidence. In motion proceedings, affidavits serve a dual function of both pleadings and evidence.[31]

[46] In *Venmop*[32] Peter AJ held:

> "The role of legal representatives has two key aspects. First is the supervision, organisation and presentation of evidence of the witnesses and, secondly, the formulation and presentation of argument in support of a litigant's case. The diligent observation of those roles facilitates the role of the judicial officer, which is to arrive at a reasoned determination of the issues in dispute, in favour of one or other of the parties. Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner, the introduction of inadmissible evidence and the confusion of fact and argument, with the attendant increase in costs and delay in its finalisation, inimical to both expedition and economy."[33]

> "Save in urgent applications for interim relief to restrain irremediable injury and to keep matters in status quo, where otherwise inadmissible hearsay might be permitted (*Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T) at 157E–G), there is no authority that the admissibility of the evidence of a witness in motion proceedings is somehow different from that in a trial action."[34]
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> "Disputes of fact ought not to be disguised in a mass of indignant argument, expostulation and other useless verbiage."[35]

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[31] *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd* 2001 (3) SA 1350 (W) [34]
[32] *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) [7]-[16]. See also *Knoop NO v Gupta* 2021 (3) SA 88 (SCA) [145]
[33] *Venmop* [7]
[34] *Venmop* [9]
[35] *Venmop* [12]. See also *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) 323D; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) [17]

[47] The defendant's opposing affidavit is replete of protracted quotations of legislation, irrelevant matter and inadmissible hearsay allegations. Even the part of the opposing affidavit dealing with the actual facts of this matter are mostly irrelevant to the relief sought by the plaintiff at this stage of the proceedings. Litigants and their legal representatives employing this practice of abuse should be penalised with an appropriate order as to costs.

In conclusion

[48] In conclusion I am persuaded that there was an agreement in terms of which the defendant purchased and came into possession of the vehicle. The inconsistencies in the opposing affidavit aside, the defendant cannot dispute concluding an agreement nor does she dispute being in possession of the vehicle.

[49] The defendant's challenges of the terms of the agreement relate to the defendant's indebtedness and not the relief sought at this stage. Even if they constitute triable issues, they can be raised by the defendant at the next stage of the action. This was conceded by the plaintiff during the hearing of the application.

[50] The defendant conceded in the opposing affidavit that she cannot afford the instalments of the vehicle. The plaintiff's statement,[36] which is not disputed, demonstrates that the defendant fell in arrears with the instalments before and after the restructuring of the indebtedness pursuant to debt review proceedings. The defendant does not sincerely dispute that she is indebted to the plaintiff – she merely disputes the quantum of such indebtedness.

[51] The plaintiff seeks cancellation and delivery of the vehicle at this stage. On any version of the agreement, the defendant has breached the agreement which entitles the plaintiff to cancellation. Should the defendant continue not paying instalments and retain possession the vehicle, it would lead to the untenable situation where the defendant will continue to use the vehicle, of which the plaintiff is the owner, at least until such time as the action is finalized. This will prejudice not only the plaintiff but also the defendant in whose interest it is that the value of the

[36] "S2" to the founding affidavit (005-16)

vehicle be assessed as soon as possible in order to mitigate any indebtedness the defendant may have.
In the circumstances I make the following order:

1. The cancellation of the instalment sale agreement concluded by the defendant for the sale of a 2017 BMW 320i T/A (F30) with chassis number WBA8A16020NU73914 and engine number [....] ("*the vehicle*") is confirmed;

2. The Defendant is ordered to deliver the vehicle to the plaintiff within five days of date of this order;

3. The relief sought in paragraphs 4 to 7 of the plaintiff's particulars of claim is postponed *sine die*;

4. The defendant will be entitled to raise as defences to the postponed relief all the contractual defences raised by her during the summary judgment application pertaining to her indebtedness to the plaintiff.

JF PRETORIUS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING:	10 August 2021
DATE OF JUDGMENT:	8 September 2021
COUNSEL FOR THE APPLICANT:	L Peter
INSTRUCTED BY:	Rossouws Leslie Inc
COUNSEL FOR THE RESPONDENT:	D Keet
INSTRUCTED BY:	C Bester Inc