REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 38511/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED NO

In the matter between:

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED Plaintiff

and

PSG HAULERS CC Defendant

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14h00 on the 25th of August 2022.

DIPPENAAR J

[1] The plaintiff seeks summary judgment against the defendant for the return of a FAW vehicle, together with costs. The defendant delivered a plea containing bald denials. It further delivered an affidavit resisting summary judgment.

[2] In terms of that affidavit, the conclusion of the instalment sale agreement in its terms, delivery of the truck to the defendant and the defendant's breach of the said agreement by its failure to make regular monthly payments are not disputed. It was further not disputed that the plaintiff reserved ownership of the truck until the defendant discharged its indebtedness to the plaintiff. In terms of its particulars of claim, the plaintiff elected to cancel the instalment sale agreement.

[3] The first defence raised is that the application for summary judgment does not meet the requirements of r 32 as the plaintiff did not set out the factors which validates its claim and why the defence raised is not sustainable. It was argued that the plaintiff should have attached a record of all payments made by the defendant and its failure to do so rendered the application for summary judgment defective.

[4] In its heads of argument, reliance was further placed on a challenge to the amounts claimed and the contents of the certificate of balance relied on by the plaintiff. It was argued that this challenge to the certificate of balance constituted a triable issue, justifying the refusal of summary judgment.

[5] The r 32 challenge can be disposed of succinctly. R 32(2)(b) provides:

> "*The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.*"

[6] In its affidavit, the defendant failed to identify the specific manner in which the application for summary judgment fails to comply with the relevant rule. In my view, the affidavit in support of the summary judgment application complies with r 32(2)(b) as it

verifies the plaintiff's cause of action and amount and provides an explanation why the plea does not raise a valid defence[1]. The defendant's challenge thus lacks merit.

[7] Turning to the defendant's challenge to the certificate of balance, it did not in my view, either in its plea or its affidavit, put up any evidence supporting a *bona fide* valid challenge to the contents of the certificate of balance. Attached to the answering affidavit were various proof of payment documents, pertaining to payments to various account numbers under different reference numbers, constituting defendant's "attempts to pay the arrears" during 2020. At the hearing the defendant sought an indulgence to clarify the payments and the parties were afforded the opportunity to deliver supplementary heads of argument on the issue. Supplementary heads of argument were received from both parties.

[8] In its supplementary heads of argument, the defendant contended that the aggregate amount of the payments made by the defendant would substantially reduce the amount owing to the plaintiff if such payments were allocated to the present instalment sale account, which the plaintiff should have done. It was submitted that the payments were for the present account but that the plaintiff had not allocated them. It was argued that this constituted a triable issue.

[9] I am not persuaded that these contentions have merit. The defendant held seven different accounts with the plaintiff pertaining to similar matters, all of which reflected arrears as at November 2020. The same proofs of payment were used by the defendant in opposition to the seven actions instituted against it by the plaintiff. The aggregate of the arrears on each of the accounts exceed the aggregate of the proofs of payment relied on by the defendant. It can thus not be concluded that the payments extinguished the arrears on the accounts.

[10] In any event, the plaintiff elected to cancel the agreement as it was entitled to do, which cancellation was communicated to the defendant when the summons was served

[1] Tumileng trading CC v National Security and Fire (Pty) Ltd; E&D Security Systems CC v National Security and Fire (Pty) Ltd (3670/2019; 3671/2019) [2020] ZAWCHC 52 (15 June 2020)

on it on 8 December 2020. The Defendant did not dispute that it was in arrears at the time nor did it contend that the plaintiff was not entitled to cancel the agreement in its affidavit. Once the defendant was in material breach of the instalment sale agreement by failing to make regular monthly payments, the plaintiff was entitled to make an election in terms of the said agreement to cancel it. The plaintiff was entitled to communicated its election in the summons and the particulars of claim[2].

[11] I am not persuaded that the defendant has illustrated a *bona fide* defence in relation to this issue. The applicable threshold for illustrating a *bona fide* defence was enunciated thus by the Appellate Division in *Maharaj v Barclays National Bank*[3]:

> *"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 the part of the claim, a defence which is both bona fide and good in law."*

[12] I conclude that the defendant has not met the necessary threshold or that such defence is *bona fide* or good in law.

[13] The last defence raised by the defendant was that as a result of the national lockdown in terms of the Disaster Management Act, the defendant was unable to trade and there was *vis major* or a supervening impossibility of performance and as such, performance under the contract was excused.

[14] As held in *Glencore Grain Africa (Pty) Ltd v Du Plessis NO and Others*[4], if provision is not made contractually by way of a *force majeure* clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of

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[2] WinTwice Properties (Pty) Ltd v Binos and Another 2004 (4) SA 436 (W)
[3] 1976 (1) SA 418(A)
[4] [2007] JOL 21043 (O); (4621/99) [2002] ZAFSHC 2 (28 March 2002) at 10

supervening impossibility of performance, for which objective impossibility is a requirement. Performance is not excused in all cases of *force majeure*.

[15] The instalment sale agreement does not make provision for *force majeure*. The agreement however specifically defines a Material Adverse Effect.[5] In clause 10.3 of the instalment sale agreement it is recorded that the plaintiff may at its election, if an event or series of events occurs which has a material adverse effect on the performance by the defendant of its obligations under the agreement, the plaintiff may at its election change the terms of the agreement.

[16] There is no evidence that the plaintiff was informed by the defendant of any change in its financial position at any time prior to the launching of the present proceedings. The letter relied upon by the defendant is dated 20 May 2021, well after the institution of the action by the plaintiff. In terms of the instalment sale agreement, the plaintiff retained a discretion to assess the merits of such alleged changed circumstances and decide whether or not to relax and / or amend any part of the obligations on the respondent. No evidence was presented by the defendant that the plaintiff elected to do so.

[17] The defendant is thus constrained to illustrate compliance with the common law doctrine of supervening impossibility of performance.

[18] It is apposite to refer to *Scoin Trading (Pty) Ltd v Bernstein NO*[6], wherein Pillay JA held:

> *'The law does not regard mere personal incapability to perform as consulting impossibility.'*

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[5] Defined as: a substantial change in your shareholding and/or interest and/or in your circumstances, which, in our reasonable opinion has or will have a material adverse effect on financial condition, business or operations and your ability and/or the ability of your surety to perform the financial or other material obligations under the agreement.

[6] 2011 (2) SA 118 (SCA) at paragraph 22

[19] In LAWSA[7] it is explained as follows:

> *"The contract is void on the ground of impossibility of performance only in the impossibility is absolute (objective). This means, in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a peculiar contracting party because of his personal situation, that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract.*

[20] In *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd*[8], it was held by Flemming DJP:

> *'Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.'*

[21] Applying these principles to the facts, it cannot be concluded that the defendant has established impossibility of performance as a legally cognisable defence. First, the defendant put up no cogent documentary evidence in support of its contentions. Second and more importantly, the impossibility on which the defendant relies is subjective and specific to itself. The change in the defendant's financial position is not, as required by law, absolute. The obligation to render performance even during lockdown can, in general, be performed by parties in the position of the defendant. The defendant's personal incapability does not render the instalment sale agreement void.

[22] In the circumstances, it cannot be concluded that the defendant has illustrated a *bona fide* defence or that it has raised a triable issue.

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[7] LAWSA Vol 5(1) First Reissue para 160, See also Frye's (Pty) Ltd v Ries 1957 3 SA 575 (A)
[8] 2000(4) SA 191 (W) at 198 D – E

[23] It follow that the plaintiff is entitled to summary judgment as sought. There is no reason to deviate from the normal principle that costs follow the result.

[24] I grant the following order:

[1] Summary judgment is granted in favour of the plaintiff for the delivery of a vehicle being a 2018 FAW 16.240 FL F/C C/C, chassis number: [....] and engine number: [....];

[2] The defendant is directed to pay the costs of suit.

EF DIPPENAAR

JUDGE OF THE HIGH COURT JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 26 July 2022
DATE OF JUDGMENT	: 25 August 2022
PLAINTIFF'S COUNSEL	: Adv L. Peter
PLAINTIFF'S ATTORNEYS	: Rossouws Leslie Inc.
DEFENDANT'S COUNSEL	: Mr G.M. Yeko
DEFENDANT'S ATTORNEYS	: Mabuza Attorneys