IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: **72392/11**

8/8/2012

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
7/8/2012 DATE
SIGNATURE

STANDARD BANK OF SOUTH AFRICA LTD Applicant

and

PROSPECT 1037 (PROPRIETARY) LIMITED Respondent

JUDGMENT

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[1] The applicant in this matter moves for an order for the delivery and restored possession to the applicant of a certain motor vehicle ("the truck"), the particulars of which appear in prayer 1 of applicant's notice of motion. It should be noted that the application initially pertained to a second truck also but that the applicant is not persisting in claiming delivery and possession of the second-mentioned truck. The applicant furthermore moves for a costs order in its favour (on a scale as between attorney and client).

[2] The applicant alleges that on or about 10 April 2007 a written instalment agreement (attached to the papers as annexure "A") was entered into between the parties, and in terms of which the said truck was sold by applicant to respondent. The further particulars pertaining to the sale are not relevant to the current application. According to the applicant the parties had entered into 14 separate written instalment sale agreements of which the one currently under consideration, is one. Applicant furthermore alleges that respondent fell in arrears and that despite demand, respondent failed to remedy the breach of the agreement. On 22 September 2011 and subsequent to demand to which it did not react, applicant alleges that the agreement was cancelled by way of a letter from its attorneys. The letter of demand dated 6 September 2011 *inter alia* alleges that *"you have failed to effect payments in terms of the agreement"* (par3) and *"...on your default we may do any of the following without prejudicing any of our rights: ...cancel this agreement, take possession of the goods and claim from you damages as well as the outstanding balance less the market value of the goods as at the date of cancellation. If the goods are not recovered, their value will be deemed to be nil."*

[3] Respondent raised a number of defences against the applicant's claims. Before dealing with those, it is firstly necessary to point out that there seems to be uncertainty regarding whether the particular

truck still exists. In this regard respondent alleges the following in its answering affidavit: the particular vehicle experienced serious engine trouble during 2011 and had to be taken apart: the engine was stripped and parts were used for other vehicles: the applicant was duly advised of this state of affairs: during January 2012 the applicant appointed an appraiser to evaluate the extent of the damage and the appraiser did inspect the truck during 19 January 2012 at the premises of the respondent; the respondent still awaits the outcome of such valuation: consequently it is a matter of impossibility to deliver and restore possession of the truck to the applicant as the vehicle *"is at present in bits and pieces with full knowledge of the applicant"*. (Answering affidavit, par. 32.5 to 32.11).

[4] In its replying affidavit the applicant denies having been informed by applicant of *"these developments"*, but admits that the vehicle had been appraised by an appraiser sent by it to respondent's premises with that purpose in mind. Paragraph 24 of applicant's replying affidavit reads as follows: " *Ad paragraph 32.8: This is correct. It is interesting to note that there was indeed a truck to inspect and that the applicant is entitled to recover possession of same. The appraiser was approached to value the truck. No one at applicant was made aware of the extent of the damage."* The applicant's remark that it was "interesting" to note that there was a truck to

inspect seems to be no more than an inference drawn by the applicant: nowhere does it attempt to substantiate this inference. From the contents of the next paragraph it is evident that a copy of the valuation does exist. However, no such document has been attached to the papers and the respondent is informed that it may be provided with a copy of the valuation at its request.

[5] Although the respondent initially averred (in par32.6) that *"the aforesaid engine was stripped and parts were used for other vehicles"*, it was also stated that *"...such vehicle is at present in bits and pieces with full knowledge of the applicant"* (par32.11). I regard it as reasonable and probable that, due to the appraisal made by its appraiser, applicant must be aware of the state of the vehicle and with reference to respondent's allegation regarding *"bits and pieces"*, must know whether the vehicle still exists. However, applicant preferred not to attach the appraiser's certificate which, on the probabilities, should contain these details. Indeed, applicant's remark in its replying affidavit *"that there was indeed a truck to inspect"* clearly amounts to speculation on its part. If this was indeed the position, why was the appraiser's certificate and/or report and/or supporting affidavit not attached to show that, on the probabilities, the truck indeed still existed. However, the way in which the applicant chose to deal with this issue raises, on the probabilities, doubt whether the vehicle still exists. By exercising

due care and diligence this aspect could have been clarified by the applicant but it failed to do so. It is trite law that the court will not make an order which cannot be given effect to. The fact of the matter is that applicant has not succeeded in convincing me of the very elementary requisite, that is, that there indeed exists such a vehicle as the one that applicant claims delivery of.

[5] In addition to the afore going, and should I be wrong in the conclusions to which I have come, the following applies. I accept (as alleged by respondent) that the agreement pertaining to the vehicle was concluded on 5 December 2006. The first payment was due on 19 January 2007 with 24 instalments to be paid. Consequently, respondent's obligation to make monthly instalments expired on 19 December 2008. At the latter date the applicant was consequently entitled to enforce its remedy to obtain the return of the relevant vehicle. Applicant's denial by way of a general denial in paragraph 20 of its replying affidavit, is clearly incorrect.

[6] The application was issued on 21 December 2011 which is more than 3 years from the due date i.e. when applicant's remedy to claim return of the vehicle, became enforceable. Apart from a mere denial in the replying affidavit (par21 thereof) that its claim has become prescribed, applicant did not deal with these allegations. It was, however, contended on behalf of applicant that the parties

agreed in February 2009 that respondent will make payment on all the relevant instalment sale agreements in an amount of R500 000.00 per month. One such payment was made on 19 February 2009. With reference to section 14 of the Prescription Act, Act 68 of 1969, applicant argued that prescription had been interrupted due to respondent's acknowledgment of liability.

[7] It is indeed correct that a payment in an amount of R500 000,00 was made by respondent on 19 February 2009. The question, however, is whether such payment also pertained to the particular agreement and the debt pursuant thereto. It should be noted that applicant, in its replying affidavit, *"vigorously denied"* the allegations made by respondent in its answering affidavit that its payment of R500 000.00 per month would be allocated to all the relevant instalment sale agreements. Although the respondent in paragraph 23 refers to 12 such agreements that were entered into between applicant and respondent, Mr van Ryneveld for the respondent during argument pointed out that there were in fact 14 such agreements. This is evident from the amendment-documents attached to respondent's answering papers and marked "PP-6(a)" to "PP-6(h)", which show that there were indeed 14 such agreements and not only 12. Accordingly (so the argument goes) applicant's e-mail dated 5 March 2009 and appearing as annexure "PP-5" to the answering papers, does not reflect the true position to the extent

that it refers to the R500 000.00 payment *"which should be split equally between all 12 deals"*. The upshot simply is that applicant has not shown that the said payment was also meant to apply, or indeed applied, to the agreement currently under consideration. Consequently, applicant cannot rely on the provisions of section 14 of the Prescription Act.

[8] I agree with this argument raised by respondent. Consequently, it follows that applicant's right to claim recovery of the vehicle has become prescribed.

[9] Regarding costs it was argued on behalf of the applicant that it would be entitled to its costs regarding its claim for the recovery of the second vehicle, which claim was not persisted with due to the fact that the outstanding balance has meanwhile been paid by respondent. I do not agree. The fact of the matter simply is that that part of the costs pertaining to the relief applicable to the second vehicle is negligible in the broader context of the matter. In any event, and as applicant pursued its case against respondent regarding the first vehicle, such payment by respondent would have made no or very little difference to the broader costs picture.

In the result I make the following order

The application is dismissed with costs.