

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

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

2012-11-02

02/11/2012

Case No: 40305 / 2012

In the matter between:

MIDFIX CC

Applicant

And

SUZETTE SWARTS

Respondent

JUDGMENT

MAVUNDLA, J.

[1] This is an opposed application for summary judgment against the defendant, for an Order as follows:

1.1 Delivery of the 2008 Nissan Hardbody 300TD Bakkie, with chassis number: ADNJ470000E1211;

1.2 Payment of the amount of R16, 000. 00:

1.3 Interest on the aforesaid amount calculated at the rate of 15. % per annum a *temporae* until date of payment.

1.4 Cost of suit.

[2] It is common cause that the defendant was in the employ of the plaintiff between June 2010 and June 2012. It is also common cause that plaintiff entered into an installment *Sale Agreement* with *ABSA Bank Ltd* in terms of which it purchased the motor vehicle referred to herein above which is forming the subject matter *in casu*.

[3] It is common cause that the motor vehicle is registered in the name of the plaintiff. In terms of the installment Sale agreement, the monthly installment was R3 865. 96. The plaintiff and the defendant agreed orally that plaintiff would obtain the required finance for the said motor vehicle and the defendant would be responsible for the payment of the monthly installments to the finance house. The parties further agreed that the deductions were to be made by the plaintiff from the defendant's monthly salary, in consideration for the latter's use and possession of the motor vehicle. The plaintiff was to

deduct an amount from the defendant's salary which is equal to the monthly installment payable to the finance house in terms of the installment sale agreement, less R1000. 00.

[4] The plaintiff provided the defendant with the said motor vehicle and commenced deducting from her salary an amount of R2 865. 96 from March 2011 to June 2012. During the aforesaid period, the plaintiff, over and above the monthly amount of R2 865. 96, also paid an amount of R1000. 00 per month to the financing house towards the monthly installment in the amount of R3 865. 96.

[5] The plaintiff's attorney has conceded, in his heads of argument that prayers 2 and 3 cannot be obtained through summary judgment and has not pressed for these to be made an order of Court, wisely so in my view. Because there was no formal withdrawal of these two relief, the application in that regard stands to be dismissed with costs.

- [6] *In casu*, the particulars of the relevant vehicle are clearly stated so as to make it readily identifiable. In respect of the return of the claim for delivery of the vehicle is concerned, such claim does indeed fall within the purview of s32.
- [7] It was submitted on behalf of the plaintiff that the defendant was entitled to the use of the motor vehicle so long as he was in the employ of the plaintiff. However, because the defendant is no longer in the employ of the plaintiff, she no longer has any right to refuse to return the vehicle and consequently has no *bona fide* defence to the plaintiff's claim.
- [8] It was further submitted that the defendant's defence premised on an alleged oral agreement, in terms of which she could retain possession of the vehicle, pending payment of a sum of R48 721. 32 should be dismissed. There are no facts set out as to how the amount of R48 721. 32 were computed. It was further submitted that a counterclaim such as the one defendant alleged, is no defence to a summary judgment application. Reliance for this submission was made on the matter of *Spilhause & Co v Coreejees* 1966 (1) SA 525 (C).

[9] It was further submitted that although the vehicle belonged to ABSA, it is however, registered in the name of the plaintiff. The risk falls upon the plaintiff. The plaintiff is therefore entitled to claim the return of the vehicle without joining ABSA.

[10] On the other hand, the defendant in opposing the summary judgment application, contended that, the Court in exercising its discretion, should have regard to the factors mentioned in the matter of *Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton and Another*¹ namely (a) the right which, though prima facie established, is open to some doubt"; (b) a well grounded apprehension of irreparable injury; (c) the absence of ordinary remedy. It is contended that the applicant is not entitled to the relief sought for want of meeting the factors mentioned herein above.

[11] The respondent further contended that the applicant is not entitled to the relief sought because it is not the owner of the relevant vehicle. The vehicle belonged to ABSA, which has not claimed the return of the vehicle. It further contended that the applicant has not alleged facts which would entitle him to the relief sought. It is further contended by the respondent that it has a right to possess the motor

¹ 1973 (3) SA 685 (A).

Vehicle, which right has not lapsed. It was further submitted that the applicant's reliance in *Spilhouse & Co v Coreejees* case (supra) is misplaced, because ownership of the vehicle did not vest with him but with ABSA

[12] It is trite that for the defendant to resist summary judgment application, she must disclose a *bona fide* defence, which in law is arguable. I take note of the fact the defendant has tendered delivery of motor vehicle upon payment of an amount of R48 721. 32, which amount she alleged was agreed upon subject to delivery of the motor vehicle. The very fact that, the respondent made a tender of the return of the vehicle is, in my view, a clear indication that she has no right to retain it.

[13] The respondent has not set out facts upon which the amount of R48 721. 32 were arrived at. In my view, the said amount is an unliquidated claim, and cannot be raised as defence against summary judgment. Besides, in *Spilhouse & Co v Coreejees* case (supra) it was held that the very fact that a defendant has a

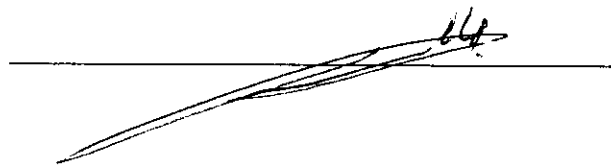
counterclaim for damages against the plaintiff is no defence to a summary judgment application.

[14] It further needs to be borne in mind that, the plaintiff's rights over the relevant motor vehicle are derived from the Installment Agreement it concluded with ABSA, which was attached to the summons. The relevant contract reserves ownership of the vehicle to ABSA and grants to the plaintiff possessory rights as *possessor*. The defendant could hardly claim to be a *possessor* of the vehicle, at best for him he was a *dententor*. He cannot resist the *possessor*'s claim for the return of the vehicle, *vide* *Barlow Motors Investments Ltd v Swart* 1993 (1) SA 347 (WPD) at 351B-H. In my view, the plaintiff was within his rights to claim delivery of the vehicle to him.

[15] In the circumstances, I conclude that the defendant does not have a *bona fide* defence to the summary judgment application and therefore the application must succeed.

[16] Consequently  make the following order:

1. That summary judgment against the defendant is granted for:
 - 1.1 Delivery of the 2008 Nissan Hardbody 300TD Bakkie, with chassis number: ADN470000E1211;
 - 1.2 Cost of suit.



N.M. MAVUNDLA J.

DATE OF HEARING : 10 / 10/ 2012

DATE OF JUDGMENT : 02 / 11 / 2012

APPLICANT'S ATT. : SENEKAL SIMMONS INC

APPLICANT'S ADV. : ADV. C. VAN DER MERWE

RESPONDENT'S ATT.: JACO DUPLESSIS ATTORNEY

RESPONDENT'S ADV: ADV. J.H. MOLLENTZE