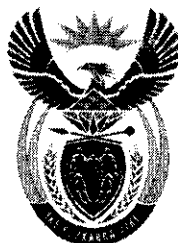


REPUBLIC OF SOUTH AFRICA



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	<div style="display: flex; justify-content: space-between;"> <div> 2014.06.23 DATE </div> <div> SIGNATURE </div> </div>

CASE NO: 75945/2013

23/6/2014

In the matter between:

BMW FINANCIAL SERVICES (SA) (PTY)

Plaintiff

and

ZM SIBANDA

Defendant

J U D G M E N T

MAKGOKA, J

[1] This is an opposed summary judgment application. The plaintiff instituted action against the defendant for delivery of a motor vehicle which was subject of an agreement entered into between the parties on 20 February 2013. It is common cause that the defendant has defaulted in terms of the agreement, as a result of which the plaintiff has cancelled the agreement.

[2] In her affidavit opposing summary judgment, the defendant explains that the reasons for her default were as a result of the financial difficulties, which she timeously communicated to the plaintiff. She has now overcome those difficulties. She has found a new employment with a better salary. She has made proposals for the settlement of the arrears, which have been rejected by the plaintiff. The defendant contends that the stance taken by the plaintiff is 'inappropriate and iniquitous' and an abuse of the process of the court.

[3] In order to stave off summary judgment, the defendant has to disclose a *bona fide* defence. This means a defence set up *bona fide* or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim (*Bentley Maudesley & Co. Ltd v "Carburol" (Pty) Ltd and Another* 1949 (4) SA 873 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 88).

[4] In the present case, the defendant has not placed in dispute her indebtedness to the plaintiff or that she was in default of its obligations in terms of the agreement when the cause of action accrued. She has raised what is, essentially, an equity argument. That argument finds no application in cases such as the present, where the subject of a credit agreement is a luxury motor vehicle. There is therefore no defence at law, let alone a *bona fide* one, to the plaintiff's claim. There is simply nothing worthy of referral to trial.

[5] In his written submissions, counsel for the defendant argued a technical point that summary judgment proceedings are incompetent since the plaintiff seeks declaratory order (for cancellation of the agreement) which, it is contended, is not authorised by rule 32. It is also contended that the plaintiff is not entitled to both the delivery of the property and payment of the delivery of the property.

[6] There is no merit in these arguments. The prayer for cancellation of the agreement is not sought as a substantive relief, but is only incidental to the

termination of the agreement by the plaintiff, which is common cause. The delivery of the property can still be granted without its presence. With regard to the contention that the plaintiff is claiming the value of the property in the alternative to the delivery, this is a misconstruction of the relief sought. The plaintiff seeks delivery of the property for preservation, pending the valuation of the property for sale. This part of the claim is to be postponed *sine die*, and The plaintiff is therefore entitled to summary judgment.

[7] I am quite aware of the drastic nature of the remedy of summary judgment. On the other hand, the court would be remiss in its duties if unmeritorious defences, clearly devoid of any *bona fides*, stand in the way of a plaintiff who is clearly entitled to relief. The ever-increasing perception that any defence, whatever its merits, is sufficient to stave off summary judgment, is misplaced and not supported by the trite general principles developed over many decades. See for example, the well-known decision of the Appellate Division in *Maharaj v Barclays National Bank Ltd* 1976 (1) 418 (A) at 426.¹

[8] Recently the Supreme Court of Appeal (the SCA) restated the purpose of summary judgment procedure in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA). At paras 31 and 33 the following is stated:

‘...[I]t was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. Having regard to its purpose and its proper application, summary judgment proceedings do not hold terrors and are ‘drastic’ for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G-426E.’

¹ See also generally, *Herb Dyers (Pty) Ltd v Mohamed and Another* 1965 (1) 31 (T) at 31H-32A-B; *Caltex Oil (SA) Ltd v Webb and Another* 1965 (2) SA 914 (N) AT 916D-H; *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA (C) at 303F-H; *Shepstone v Shepstone* 1974 (2) 462 (N) at 467A-H and *Breytenbach v Fiat SA (Edms) Bpk* 1976 (2) 226 (T).

[9] In the result I make the following order:

1. Summary judgment is granted against the defendant for the delivery of a BMW X1 motor vehicle with engine no 92598149 and chassis no 0VS97766, to the plaintiff;
2. The defendant is ordered to pay the costs of the action on the scale as between attorney and client;
3. The determination of the plaintiff's damages is postponed *sine die* pending the sale of the vehicle or the payout of any insurance policy in respect of the property.



TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 18 JUNE 2014

JUDGMENT DELIVERED : 23 JUNE 2014

FOR THE PLAINTIFF : ADV. L.W. DE BEER

INSTRUCTED BY : NEL & RICHTER INC., PRETORIA

FOR THE DEFENDANT : ADV. B. MORRIS

**INSTRUCTED BY : RAMUSHU MASHILE TWALA INC.,
PRETORIA**