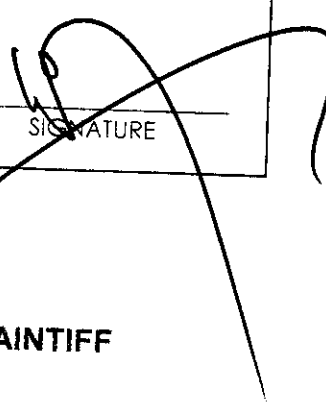




IN THE GAUTENG DIVISION, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

12/12/2014

CASE NO: 8914/14

| | |
|---|--|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED: <input checked="" type="checkbox"/> |
| 12.12.2014 DATE | |
|  SIGNATURE | |

In the matter between:

MERCEDES-BENZ FINANCIAL SERVICES

PLAINTIFF

And

MUKHTAR AHMED FAKIR MAHOMED

DEFENDANT

JUDGMENT

MSIMEKI J:

INTRODUCTION

- [1] I shall refer to the parties as plaintiff and defendant. This is an application for summary judgment. On 21 February 2011 the plaintiff and the defendant concluded an instalment sale agreement (agreement). A copy of the agreement in annexure "A" to the particulars of claim. The plaintiff alleges that the defendant has breached the material terms and the conditions of the agreement and has sued for payment of the full outstanding balance said to amount to R520 044.08. The defendant opposes the application.

BRIEF FACTS

- [2] In terms of the agreement the plaintiff sold a Jeppe Grand Cherokee 3.6L V6 Limited (New) with engine number BC 583635 and chassis number 1J4R25GGOBC583635 (the "vehicle") to the defendant. The defendant took delivery of the vehicle. On 17 March 2011 the defendant had to pay R9 102.14 which would be followed by 51 payments of R9 102.14 on each corresponding day of each consecutive month commencing on 17 April 2011 with the final payment of R135 108.00 payable on 17 February 2016.
- [3] The plaintiff, in the particulars of claim, alleges that the agreement provides that should the defendant fail to pay any amount on due date or fail to satisfy any of its other obligations in terms of the agreement the plaintiff shall, without prejudicing any of its other rights in law, be justified in cancelling the agreement, and in the event of such cancellation:
- 3.1. claim return and possession of the vehicle;
 - 3.2. be entitled to retain all payments already made by the defendant; to claim payment of the difference between the amount outstanding at date of cancellation of the agreement less a rebate on finance charges calculated from date of termination of the agreement, and the amount at which the vehicle has been sold for;
 - 3.3. claim interest on the amount referred to in the agreement calculated at 9.00% per year, alternatively at the current interest rate linked to the fluctuation of the interest rate calculated from date of termination of the agreement to the date of payment; and
 - 3.4. costs on the attorney/client scale.

- [4] The agreement further provides that a certificate signed by any manager of the plaintiff shall be prima facie evidence of the matters stated therein.
- [5] The plaintiff alleged that it could not obtain possession of the vehicle from the defendant and could, as a result, not have it valued and sold.
- [6] The plaintiff alleged that it had complied with the provisions of the National Credit Act 34 of 2005. (the "NCA")
- [7] The summons was served on the defendant on 27 February 2014. The defendant entered an appearance to defend the action on 4 April 2014. The plaintiff then applied for summary judgment which is opposed by the defendant.
- [8] The defendant raised the following defences in his affidavit resisting the application for summary judgment:

1. **CHOSEN DOMICILIUM CITANDI ET EXECUTANDI**

The defendant contends that he changed his chosen *domicilium citandi et executandi* address for service of pleadings in terms of the agreement and that the summons and the notice in terms of section 129 (i) (a) of the NCA, prior to the commencement of the proceedings, were served on the incorrect address. The applicant, however, holds the view that the summons and the notice which was annexed to the summons were duly received by the defendant. Indeed, this is correct and the defendant had enough time after his receipt of the summons and the notice to take the necessary steps and react properly. The summons was served on the defendant on 27 February 2014. Notice of intention to defend was only entered on 4 April 2014. The

notice of application for summary judgment is dated 23 April 2014 while the filing sheet accompanying the respondent's affidavit resisting the application for summary judgment is dated 19 June 2014. See in this regard the judgment of Van Eeden AJ in the South Gauteng High Court in the matter of **SA Taxi Development Finance (Pty) Limited v Phalafala Mahlodi Rulph** case No. 1512/2013 at [9].

2. **MITIGATION OF LOSSES**

The vehicle was damaged when it was involved in an accident. The defendant contends that a meeting was held where it was communicated to the plaintiff that the defendant had lost his meaningful employment and that the plaintiff had to retrieve the motor vehicle which, at the time, had become subject of a lien by a towing company which had towed and looked after the vehicle. The defendant appears to have expected the plaintiff to negotiate with the towing company. Ms Butow-Du Toit, for the defendant, however, conceded that the plaintiff was not obliged to negotiate. This in my view, does not constitute a defence to the plaintiff's claim. The plaintiff could not legally be forced to pay the towing company. That was the responsibility of the defendant.

3. **THE CALCULATION OF INTEREST**

The plaintiff, in the particulars of claim claimed interest payable at the rate of 9% per annum. It, however, in its prayers, in the particulars of claim and the notice of application for summary judgment, claims interest at the rate of 9.50% per annum in terms of the agreement. The current total amount outstanding seems to have been calculated on the basis of 9.50% per annum. Counsel for the defendant dealt with this problem in her argument and submissions. Mr Ellis, for the applicant, realising the applicant's problem

submitted that interest could be based on 9% per annum. This however, does not assist the applicant whose problem needs proper attention. Granting the plaintiff summary judgment against the defendant, in the circumstances of the plaintiff's case, would not be prudent and proper. It is, in my view, unnecessary to deal with the rest of the defendant's contentions. The current total amount of R520 044.08 said to be outstanding is vigorously disputed by the defendant who, in my view, deserves to be given leave to defend the plaintiff's action.

[9] The following order is made:

1. The defendant is granted leave to defend the action
2. The costs of the application will be costs in the action.


M.W. MSIMEKI
JUDGE OF THE GAUTENG DIVISION
PRETORIA

COUNSEL FOR THE PLAINTIFF:
INSTRUCTED BY:

ADV ELLIS
STRAUSS DALY INCORPORATED

COUNSEL FOR THE DEFENDANT:
INSTRUCTED BY:

ADV BUTOW-DU TOIT
DU TOIT-MOODLEY INC C/O VAN STADEN VAN DER ENDE INC

DATE OF HEARING:
DATE OF JUDGMENT:

13 OCTOBER 2014