

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



Case number: 17104/2019

Heard on: 25 January 2021

Date of judgment: 28 January 2021

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

.....
DATE

.....
SIGNATURE

In the matter between:

CELEMPILO MONICA MGAGA

Applicant

and

WESSEL GIETZMANN STADLANDER N.O.

First Respondent

BRENDAN HARMSE N.O

Second Respondent

**AUDI FINANCIAL SERVICES a division of
VOKSWAGEN FINANCIAL SERVICES
SOUTH AFRICA (PTY) LTD**

Third Respondent

JUDGMENT

SWANEPOEL AJ:

[1] This is an application for the rescission of a judgment granted in first and second respondents' favour by this court on 13 June 2019, with the following material terms:

[1.1] The credit agreement between the parties was cancelled;

[1.2] Applicant was ordered to return a 2016 Audi Q 5 2.0 TDI S Quattro S Tronic ("the vehicle") to respondents.

[2] Only the first and second respondents have opposed the application. I shall refer to them collectively as "the respondents".

[3] The facts alleged by respondents are briefly as follows:

[3.1] Respondents allege that they are joint trustees of the Velocity Finance Issuer Trust.

[3.2] On 11 May 2016 applicant purchased the vehicle from third respondent ("Volkswagen") in terms of an instalment sale agreement.

[3.3] On 24 August 2016 Volkswagen ceded its right title and interest in and to the agreement and the vehicle to applicants.

[3.4] Applicant fell into arrears and ultimately went under debt review. Due to the fact that 60 days expired after the applicant went under debt review. and no application for debt review had been filed, respondents terminated the debt review process.

[3.5] Notices of termination of the debt review process were sent by registered mail to the domicile address on the credit agreement, being 27 Selina Road, Cresta.

[4] Subsequently respondents issued summons, which was served by affixing to the front door at 27 Cecilia Road, Cresta. Evidently there is no Selina Road in Cresta. Applicant says that she never received the summons, and there is no suggestion that applicant was in willful default of entering an appearance to defend. She only became aware of the fact that judgment had been granted against her on 1 August 2019. This application was launched within the 20 days' period provided for in rule 31 (2) (b).

[5] Applicant has raised two defences in support of her application:

[5.1] Applicant denies that there had been a cession of Volkswagen's rights to applicants. Consequently, she says, respondents do not have *locus standi* to bring the action against her;

[5.2] Applicant says that she has never lived at 27 Selina Road, that there is no such address in Cresta, and that she has no idea where the address which was inserted on the instalment sale agreement came from. Consequently, applicant says, notice of termination of the debt review process in terms of section 86 (10) of the National Credit Act, 2005 was improper, and respondents were not entitled to enforce the agreement.

CESSION OF RIGHTS

[6] In the particulars of claim respondents made the bald allegation that:

“On or about 24 August 2016 Volkswagen Financial Services (SA) Proprietary Limited ceded all its rights tile and interest in and to the instalment sale agreement, concluded with the defendant on or about 11 May 2016 (“credit agreement”) to the plaintiffs.”

[7] There was no indication whether the cession was oral or in writing, and no written cession was attached.

[8] In the application for rescission, the applicant says that she did not purchase the vehicle from applicants. She does not know who they are, and she denies that they have *locus standi*. She denies the existence of a cession agreement.

[9] In respondents' answering affidavit respondents say again that on 24 August 2016 Volkswagen ceded its right title and interest in and to the vehicle to respondents. They then say:

“Attached hereto marked as annexure “AA3” a copy of the relevant pages has been attached. However, and if the court required the whole cession agreement which is in excess of 200 pages to be made available the first and second respondents will make same available to the above Honourable Court.”

[10] I am then given four pages of what appears to be a 16 page agreement. The agreement is dated 17 December 2014, some 17 months before the vehicle was sold to the applicant, and nearly 20 months before the cession was supposed to have occurred.

[11] In these circumstances one would expect the respondents to say that the agreement envisaged the cession of rights after the agreement was signed, and that such cessions would occur on the same terms and conditions as are contained in the December 2014 agreement. It does not say that.

[12] In the recital clause the agreement reads:

“A. The seller has entered into various agreements for the provision of credit in relation to the purchase, by way of a credit agreement, of motor vehicles by its customers in the ordinary course of its business pursuant to which such customers are

obliged to make periodic payments in respect of instalment sale agreements.

B. The seller has agreed to sell and the issuer has agreed to purchase the seller's right, title and interest in and to the participating assets in relation to each series which includes certain instalment sale agreements together with the related security in respect of such instalment sale agreements, in accordance with the terms of this agreement."

[13] The rest of the document is not of any value in determining which rights arising from which agreements were ceded, and when. I therefore have a cession document which was signed long before the alleged cession took place. I am not told that there was a further oral (or written) agreement that applicant's credit agreement would be the subject of a cession. In fact, the cession document (which is titled a "sale agreement") seems to refer to historical credit agreements that had already been entered into at the date of signing of the document.

[14] I trust that respondents have an explanation for these concerns, and they can address them at the trial. However, on the papers as they stand, respondents have not provided a defence to applicant's claim that they do not have *locus standi*.

[15] As far as the question raised in par. 5.2 above is concerned, I do not have to make a determination on this issue, given my views on the first question.

[16] Consequently I make the following order:

[16.1] The default order granted against applicant on 13 June 2019 is rescinded;

[16.2] The warrant of delivery dated 25 June 2019 is set aside;

[16.3] The vehicle, a 2016 Audi Q 5 2.0 TDI S Quattro S Tronic with engine number CMG 030740 and chassis number WAUZZZ8R4GA051572 shall be returned to the applicant within 5 days of this order being served on respondent's attorney by email.

[16.3] Respondents shall pay the costs of the application.

JJC Swanepoel

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 January 2021.