

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED

8 March 2021
DATE

SIGNATURE

CASE NUMBER: 6380/2020

In the matter between

**ALPHERA FINANCIAL SERVICES,
a division of
BMW FINANCIAL SERVICES
(SOUTH AFRICA) (PTY) LTD**

APPLICANT

and

EDWARD RICCARDO LEMMETJIES

RESPONDENT

JUDGMENT

DOSIO AJ:

INTRODUCTION

- [1] This is an application in terms whereof the plaintiff ("the applicant") seeks summary judgement against the defendant ("the respondent"), based on the breach of a written instalment sale agreement ("the agreement") entered into between the parties.
- [2] The application is opposed.
- [3] Two special pleas have been raised by the respondent in the affidavit resisting summary judgment, namely:
1. That the monetary amount claimed (namely, the value of the motor vehicle R390 494-89 and the arrear amount R79 508-89) falls within the monetary jurisdiction of the Magistrates' Court 32 of 1944 ("the Magistrates' Court Act"). As a result, the applicant has failed to provide any motivation for the need to institute the action in the High Court as opposed to the Magistrate Court, and has failed to obtain the High Court's consent to institute the action in the High Court.
 2. Alternatively, if the Court finds that the applicant could institute the action in a High Court, the applicant should have instituted the action in the respondent's closest division of the High Court, being the Gauteng Local Division, Johannesburg.

BACKGROUND

- [4] The applicant instituted action against the respondent by way of summons for the following relief:
- "a) Confirmation of termination of the agreement;
 - b) Return of a 2012 AUDI A4 1.8T SE MULTITRONIC ("the vehicle") with engine number: [...] and chassis number: WAUZZZ8K1DA111581 to the Plaintiff forthwith;
 - c) An order authorizing the Plaintiff to apply to the Court on the same papers, supplemented insofar as may be necessary, for judgment in respect of any damages and further expenses incurred by the Plaintiff in the repossession of the said vehicle, which amount can only be determined once the vehicle has been repossessed by the Plaintiff and has been sold;
 - d) Costs on an attorney and client scale, to be taxed or agreed."
- [5] It is common cause that on or about 11 July 2014, the respondent and the applicant, concluded a sale agreement wherein the applicant sold the vehicle to the respondent for an amount of R390 494-89. In terms of the agreement the respondent would pay

the purchase price together with interest, fees and costs by way of 58 consecutive instalments of R5 249-79 each, commencing on 16 August 2014, with a final instalment of R80 757-28 payable on 16 July 2019. It is further common cause that this matter falls within the ambit of the National Credit Act 34 of 2005 ("the National Credit Act") and that the respondent resides at 19 Hoy Street, Discovery, Roodepoort.

- [6] On the 14th of November 2019 the respondent had breached the agreement and at the date of the issue of the summons the arrear instalments owed to the applicant amounted to R79 508-02.
- [7] In due compliance with the National Credit Act, on 21 October 2019, the applicant addressed a notice in terms of Section 86(10) of the National Credit Act to the respondent *via* registered post, notifying the respondent of his default under the re-arrangement proposal. Despite the aforementioned notice, the respondent remained in arrears. Consequently, the applicant cancelled the section 86(10) procedure and instituted legal action against the respondent, wherein it claimed the relief as more fully set out in paragraph [4] *supra*.
- [8] The summons in the main action was properly served upon the respondent on 31 January 2020, by affixing at the respondent's main outer door of the chosen *domicilium citandi et executandi*. The respondent entered an appearance to defend on 26 February 2020, and subsequently filed his plea on 10 December 2020 after having been served with a notice of bar on 3 December 2020. The applicant filed the application for summary judgment on 5 January 2021.

SUBMISSIONS BY THE RESPONDENT IN RESPECT TO THE SPECIAL PLEAS RAISED

First special plea - Monetary jurisdiction of the Magistrate's court

- [9] It was contended on behalf of the respondent that in terms of s29 of the Magistrates' Courts Act, the relevant Magistrate's Court will have jurisdiction in all actions arising out of any credit agreement as defined in section 1 of the National Credit Act. Reference was made to the majority judgment in the matter of *Nedbank Ltd v Gqirana NO and Another and Similar Matters* 2019 (6) SA 139 ECG. In addition, it was contended that the amounts pertaining to the vehicle and the amounts referred to in the applicant's particulars of claim, fall within the jurisdiction of the Magistrate's Court and that in line with the decision of *Nedbank Ltd v Thobejane and Similar Matters* 2019 (1) SA 594 (GP), the action ought to have been instituted in the relevant Magistrates' Court

having jurisdiction and not in the High Court. It was further contended that the applicant should have sought leave from the High Court before instituting the action in the High and that such failure constituted an abuse of the Court process.

Second special plea – Geographical jurisdiction of the Gauteng Local Division, Johannesburg

- [10] It was contended that because both the respondent's address and the fact that the contract was concluded in Oakdene, the applicant ought to have instituted its process in the nearest division of the High Court to the debtor, which would be the Gauteng Local Division, Johannesburg. By instituting its action in the Gauteng Division, Pretoria, the applicant deliberately chose a division of the High Court that is inconvenient to the respondent which amounts to an abuse of the Court process. As a result, it was contended that the respondent has a *bona fide* defense against the action and that the summary judgment application must fail.

SUBMISSIONS BY THE APPLICANT IN RESPECT TO THE SPECIAL PLEAS RAISED

First special plea - Monetary jurisdiction of the Magistrate's court

- [11] The applicant's counsel contended that irrespective of the fact that the applicant's monetary claim falls within the jurisdiction of the Magistrate's Court, the applicant *in casu* seeks an order for specific performance without an alternative payment of damages, which the Magistrates' Court is incompetent to make in terms of section 46(2)(c) of the Magistrate's Court Act. Counsel argued that the applicant cannot, at this stage, and prior to receiving such performance, quantify its damages. Furthermore, it was contended that notwithstanding that Magistrates' Courts enjoy jurisdiction over matters arising out of credit agreements, the relief sought in the matter *in casu* cannot be adjudicated by the Magistrate's Court by virtue of its jurisdictional limitations under section 46(2)(c).
- [12] Counsel argued that the High Court was correctly approached to adjudicate this matter by virtue of its jurisdiction to do so, and leave of this Court, was not required due to the nature of the relief sought.
- [13] In addition, Counsel argued that the respondent was aware that the applicant was entitled to institute proceedings in any High Court, as this had been contractually agreed upon between the parties in the instalment sale agreement at paragraph [14.1].

Second special plea – Geographical jurisdiction of the Gauteng Local Division, Johannesburg

- [14] Counsel contended that where more than one High Court has the necessary jurisdiction to adjudicate on a matter, the applicant who is *dominus litis* will have the right to choose the court in which it wants to institute action. In this instance, an election was made by the applicant by virtue of the concurrent jurisdiction enjoyed by the Gauteng Local Division, Johannesburg and the Gauteng Division, Pretoria, to institute the action in the latter Court..

EVALUATION

- [15] In the matter of *Nedbank Ltd v Thobejane supra*, the learned Tolmay J, writing on behalf of the full bench, ordered that in order to promote justice, as from 2 February 2019 all civil actions or applications, where the monetary value claimed is within the jurisdiction of the Magistrates' Court, should be instituted in the Magistrates' court having jurisdiction unless the High Court has granted leave to hear the matter in the High Court.
- [16] There is a myriad of cases prior to the decision of *Nedbank Ltd v Thobejane supra* which dealt with similar issues. In the matter of *Koch v Realty Corporation of South Africa* 1918 TPD 356 a full court of the Transvaal Provincial Division, (as it then was), recognised that the High Court and Magistrate Court had concurrent jurisdiction over matters that fell within the territorial jurisdiction of both courts. In *Goldberg v Goldberg* 1938 WLD 83 the court held that as a matter of principle a court is bound to entertain proceedings that fall within its jurisdiction and could decline to do so only where a statute provided otherwise or in the exercise of the court's inherent jurisdiction to refuse to entertain proceedings which amount to an abuse of its process. In the matter of *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) at 820 paragraph [I] ("*Bester*"), the full court held that "courts should be extremely wary of closing their doors to any litigant entitled to approach a particular court. The doors of courts should at all times be open to litigants falling within their jurisdiction. If congested rolls tend to hamper the proper functioning of the courts then the solution should be found elsewhere, but not by refusing to hear a litigant or to entertain proceedings in a matter within the court's jurisdiction and properly before the court".
- [17] In the matter of *Sealand Shipping and Forwarding v Slash Clothing Co (Ltd)* 1987 (W), the learned Coetzee DJP stated that a court should only refuse to entertain a plaintiff's claim if its action amounted to an abuse of the process of the Court. In the case of *Bester supra*, the learned judge formulated the meaning of an 'abuse of

process' by stating that "an abuse of the process of court can be said to take place when its procedure is used by a litigant for a purpose for which it was not intended or designed, to the prejudicial or potential prejudice of the other party to the proceedings."¹

- [18] In the matter of *Mofokeng v General Accident Versekering Bpk* 1990 (2) SA 712 (W) the court stated that the 'abuse of process' is not a discretionary matter, but rather a factual issue which must be considered in the light of all relevant facts and circumstances.
- [19] The Supreme court of Appeal in the matter of *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* 2013 (5) SA 484 (SCA) ("*Agri Wire*"), confirmed the principle in the case of *Bester supra*, stating that "save in admiralty matters, our law does not recognise the doctrine of forum *non conveniens*, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction".²

First special plea

- [20] It is clear that Magistrates' Courts are more geographically accessible to persons living in a specific magisterial district. Section 29(1)(e) of the Magistrates' Court Act grants a Magistrate Court jurisdiction in respect to actions arising out of any credit agreement. Section 46(2)(c) of the Magistrates' Court Act however limits a Magistrate Court's jurisdiction in certain respects.
- [21] Section 46(2)(c) states:
- “(2) A court shall have no jurisdiction in matters-
- (c) in which is sought specific performance without an alternative of payment of damages, except in –
- (ii) the delivery or transfer of property, moveable or immovable, not exceeding in value the amount³ determined by the Minister from time to time by notice in the *gazette*; and
- (iii) the delivery or transfer of property, moveable or immovable, exceeding in value the amount⁴ determined by the Minister from time to time by notice in the *Gazette*, where the consent of the parties has been obtained in terms of section 45;” [my emphasis]

¹ *Standard Credit Corporation Ltd v bester and Others* 1987 (1) SA 812 (W) page 820

² *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* 2013 (5) SA 484 (SCA) paragraph 19

³ The amount is currently R200 000 with effect from 1 June 2014 – GN 217 of 27 March 2014 (GG 37477 of 27 March 2014)

⁴ The amount is currently R200 000 with effect from 1 June 2014 – GN 217 of 27 March 2014 (GG 37477 of 27 March 2014)

- [22] In *Carpet Contracts (Pty) Ltd v Grobler* 1975 (2) SA 436 (T) at 422 C-D, the learned Viljoen J held that the Magistrate's Court has no jurisdiction to entertain a claim for specific performance in the absence of an alternative claim for specific damages. This decision was followed in the cases of *Weepner v Kriel* [1977] 4 All A 589 (C), 1977 SA 212 (C), *Ierse Trog CC v Sulra Trading CC* 1997 (4) SA 131 (C) and *Morettino v Italian Design Experience CC* [2000] 4 All SA 158 (W).
- [23] The learned authors Jones & Buckle in *The Civil Practice of the Magistrate's Courts in South Africa*⁵, state:
 "Magistrates' courts have the ordinary common-law jurisdiction to grant orders for specific performance, but this jurisdiction is fettered to the extent laid down in the Act, in that certain cases the court cannot grant an order without an alternative order for damages."⁶
- [24] It is clear that a Magistrates' Courts have no jurisdiction in any matter in which specific performance is sought without an alternative claim for the payment of damages and that the two exceptions referred to in s46(2)(c)(ii) and (iii) are not applicable in the matter *in casu*. Firstly, the value of the vehicle is R390 494-89 and therefore s46(2)(c)(ii) does not apply. Secondly, in respect to the exception contained in s46(c)(iii), although the value of the vehicle exceeds R200 000-00, (as determined by the Government notice 217 of 27 March 2014), there is no consent between the parties and accordingly s46(c)(iii) does not apply.
- [25] Where there is an alternative remedy available to the applicant, it would not be in the interests of justice for the High Court to exercise its inherent jurisdiction. In the matter *in casu*, in the absence of claiming in the alternative for damages, the applicant had no choice but to bring this application in the High Court. Accordingly, the High Court was correctly approached to adjudicate on this matter by virtue of the lack of jurisdiction of the Magistrates' Court to grant specific performance in the absence of a claim for damages. Accordingly, leave from this Court was not required.
- [26] It is important to note that paragraph 14.1 of the instalment sale agreement states:
 "You consent to the jurisdiction of the Magistrate's Court having jurisdiction over any

⁵ Jones & Buckle in *The Civil Practice of the Magistrate's Courts in South Africa*, Volume I, tenth edition, (service 13,2017 at page 305)

⁶ Jones & Buckle in *The Civil Practice of the Magistrate's Courts in South Africa*, Volume I, tenth edition, (service 13,2017 at page 306)

proceedings that may arise from this Agreement, irrespective of the amount in dispute. The seller may choose to institute action in the High Court.”

From the above, the respondent must have foreseen that the applicant could resort to litigation in the High Court.

- [27] I do not find that the institution of this action in the High Court amounted to an abuse of the Court process. Taking into consideration the facts placed before me, the correct procedure was followed by the applicant which is not prejudicial to the respondent and accordingly the first special plea must fail.

Second special plea

- [28] The creation of the Constitution was aimed at bringing justice to the people. In the event that a High Court has the necessary jurisdiction to adjudicate upon a matter, it must do so, unless to do so, would amount to an abuse of the Court's process or where it is statutorily prohibited to do so. (see *Goldberg v Goldberg supra* and *Nedbank Limited Ltd v Thobejane supra*).
- [29] In this instance, the respondent resides within this Court's jurisdiction and there is no statutory provision precluding this Court from pronouncing upon this matter. In addition, no basis exists, either factually or legally, why it would amount to an abuse of Court process should this division of the High Court hear this application.
- [30] In so far as the issue of convenience is relevant, it is widely accepted by our Courts, that the doctrine of forum *non conveniens* is not recognised, and on this basis a Court is not entitled to decline to adjudicate upon a matter which falls within its jurisdiction and in the exercise of its jurisdiction. (see *Nedbank Ltd v Thobejane supra* and *Agri Wire supra*.)
- [31] Even if I am wrong in this regard, to transfer this matter to the Gauteng Local Division, Johannesburg would duplicate matters and would increase the final costs.
- [32] For these reasons, the respondent's challenge to this Court's jurisdiction must fail.

Bona fide defence

- [33] Notwithstanding the two special pleas raised by the respondent, I will proceed to evaluate whether the application for summary judgment complies with Uniform Rule 32

and whether the respondent has raised a *bona fide* defence. In considering this aspect, the test is whether the applicant's case is unanswerable or whether the respondent has a triable defence. (see *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11G -12G). A defendant who opposes an application for summary judgment must disclose the nature and grounds of the defence and the material facts relied thereupon. (see *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G-426E). It is settled law that whilst the defendant is not required to prove his defence, he or she must at least provide sufficient detail to enable the Court to ascertain that the opposing affidavit discloses a *bona fide* defence. It is further required of the defendant to go beyond the mere formulation of disputes, and must take the Court into his or her confidence. (see *Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoors (Edms) Bpk* 1997 (1) SA 244 (T) at 249F-G.)

[34] In the matter of *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 JDR 0747 (WCC) the learned Binn-Ward J set out the legal position when dealing with the amended summary judgment court rules and their impact on applications for summary judgment. At paragraph [12] the court held:

“the test for determining whether summary judgment should be given remains unaffected by the amendments;...A defendant is able to defeat an application for summary judgment by showing that it has a *bona fide* defence. It does that by doing what the subrule enjoins: disclosing ‘fully the nature and grounds of the defence and the material facts relied upon therefor’.”

[35] The respondent has not provided sufficient details to enable me to determine whether he has a *bona fide* defence. In fact, the respondent has failed to deal with the merits of this application and has not disputed his indebtedness or the amount claimed by the applicant. As a result, the applicant has a valid claim for which summary judgment should be granted.

COSTS

[36] The applicant has brought these proceedings in accordance with Uniform Rule 32 (1) and I can see no reason why costs should not be awarded against the respondent on the attorney and client scale. Such costs are also provided for in the agreement between the parties at paragraph 14.2.

ORDER

[37] In the premises the following order is made:

1. Summary judgment is hereby granted against the respondent for:

- a) Confirmation of termination of the agreement;
- b) Return of a 2012 AUDI A4 1.8T SE MULTITRONIC with engine number: CJE028186 and chassis number: WAUZZZ8K1DA111581 to the applicant forthwith;
- c) An order authorizing the applicant to apply to the Court on the same papers, supplemented insofar as may be necessary, for judgment in respect of any damages and further expenses incurred by the applicant in the repossession of the said vehicle, which amount can only be determined once the vehicle has been repossessed by the applicant and has been sold;
- d) Costs on an attorney and client scale, to be taxed or agreed.

D DOSIO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 8 March 2021.

Matter heard on: 26 February 2021
 Judgment granted on: 8 March 2021

Appearances:

On behalf of the Applicant
 Instructed by:
 On behalf of the Respondent

Adv. A.C.C Barreiro
 STRAUSS DALY INC
 Ms T. Rossouw
 Instructed by:
 GERRIE EBERSOHN ATTORNEYS
 INC