

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 31239/2020

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

9 November 2021

.....
DATE

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SIGNATURE

In the matter between:

VELOCITY FINANCE (RF) LIMITED

Plaintiff

and

SIVUYILE ABEDNINGO MANINJWA

Defendant

JUDGMENT

JOUBERT AJ

- [1] It is not in dispute that, around March 2017, the defendant (Mr Maninjwa) bought a Polo Vivo vehicle and entered into an instalment sale agreement

(*“the credit agreement”*) with Volkswagen Financial Services SA (Pty) Ltd (*“VWFS”*) to this end.

- [2] It is further not in dispute that VWFS and the plaintiff, Velocity Finance (RF) Limited, a registered credit provider (*“Velocity”*), entered into a written cession and sale agreement on 18 July 2017 (*“the cession agreement”*). In terms of the cession agreement, Velocity purchased from VWFS, VWFS’s right, title and interest in various instalment sale agreements.
- [3] On 19 July 2019, VWFS and Velocity entered into a written *“sale supplement agreement”* in terms of which the credit agreement and motor vehicle of the defendant was identified, sold, ceded and assigned to Velocity as being one of the instalment sale agreements referred to in the cession agreement.
- [4] Velocity claims that the defendant failed to make full and punctual payments of the monthly instalments in terms of the credit agreement and that he is in arrears with such payments.
- [5] Velocity therefore instituted action against the defendant initially for the following relief:

- “1. Cancellation of the credit agreement;*
- 2. The defendant to return to the plaintiff the vehicle, being a 2017 VOLKSWAGEN POLO VIVO GP 1.4 TRENDLINE 5D with engine number CLP 262751 and chassis number AAVZZZ6SZHU013353;*
- 3. Leave to return to Court on the same papers, duly supplemented, to obtain judgment for the damages claimed once the vehicle has been sold;*

4. *Costs of suit in the sum of R200 plus Sheriff's fees;*
5. *Further and/or alternative relief."*

[6] Following an exception filed in respect of its particulars of claim, Velocity amended its particulars of claim and sought only the following relief:

- "1. Cancellation of the credit agreement;*
- 2. The defendant to return to the plaintiff the vehicle, being a 2017 VOLKSWAGEN POLO VIVO GP 1.4 TRENDLINE 5D with engine number CLP262751 and chassis number AAVZZZ6SZHU013353;*
- 3. Costs of suit;*
- 4. Further and/or alternative relief."*

[7] The plaintiff's amended particulars of claim rely on the credit agreement entered into by the defendant and VWFS on 30 March 2017. In his plea, the defendant admits the conclusion of the credit agreement.

[8] The relevant terms of the credit agreement, as pleaded by the plaintiff and admitted by the defendant, are as follows:

- "5.1 The amount advanced on behalf of the defendant was R315 554.40;*
- 5.2 The defendant would repay the loan in terms of the credit agreement in monthly instalments, whereof the monthly instalment would be R4 622.86;*
- 5.3 The first instalment would be payable on 26 May 2017;*
- 5.4 The finance charges would be calculated from the date of signature of the credit agreement and would be calculated daily on the amount outstanding at the end of each day and would be compounded and debited monthly;*

- 5.5 *The nature and amount of the defendant's indebtedness to VW may at any time be determined and proved by a written certificate purporting to have been signed on behalf of VW and which certificate would be prima facie proof of the contents of such certificate and of the fact that such amount is due and payable. The certificate of balance is attached hereto as annexure 'B';*
- 5.6 *The defendant shall be liable to VW for all legal costs, as permissible, incurred by VW to enforce its rights arising from the credit agreement in the event of any default by the defendant;*
- 5.7 *Ownership of the vehicle would remain vested in VW until all amounts due to VW by the defendant in terms of the credit agreement had been paid in full;*
- 5.8 *The defendant chose as his domicilium citandi et executandi as indicated in paragraph 2 above;*
- 5.9 *The defendant acknowledged that the Cedent could cede all its right, title and interest in and to the credit agreement to a third party;*
- 5.10 *Should the defendant commit any breach of the credit agreement, then VW would be entitled, without prejudice to any other rights it may have against the defendant, to:*
- 5.10.1 *enforce the credit agreement, or*
- 5.10.2 *take repossession of the motor vehicle in terms of an attachment order, retain all payments made in terms of the credit agreement by the defendant and to claim as liquidated damages, payment of the difference of the motor vehicle determined in accordance with clause 11.5.2.3, which amount shall be immediately due and payable."*

[9] The plaintiff claims that:

- 9.1 at the time of the institution of the action, the defendant had been in default of his obligations in terms of the credit agreement for at least 20 (twenty) business days;
- 9.2 on or about 20 March 2020, the plaintiff had delivered a notice to the defendant in terms of section 129(1)(a) of the National Credit Act (“NCA”);
- 9.3 the defendant has not responded to the above notice;
- 9.4 at least 10 (ten) business days had elapsed since the plaintiff delivered the notice, and
- 9.5 the plaintiff has elected to enforce the credit agreement in terms of section 130 of the NCA.

[10] The defendant raised several special pleas, a summary of which is set out below:

- 10.1 the remedies sought by the plaintiff are not provided for in the credit agreement;
- 10.2 by giving notice in terms of section 129(1)(a) of the NCA, the plaintiff elected to enforce the credit agreement and yet now seek to cancel the agreement. The defendant pleads that the plaintiff’s election to enforce the credit agreement means that the plaintiff has abandoned any right in respect of the present proceedings, to terminate the credit agreement;

10.3 the plaintiff's claim for the return of the motor vehicle has no contractual basis, and

10.4 the plaintiff has failed to comply with clause 13.5 of the credit agreement, which provides as follows:

"13.5 Should we elect to terminate this Agreement in terms of Section 123 of the Act, the same procedure set out in 13.3 above, will be followed prior thereto."

10.5 the defendant alleges that the notice sent to him, which was sent in terms of section 129(1)(a) of the NCA and clause 13.3 of the credit agreement, was not sent in terms of section 123 and clause 13.3 of the credit agreement and did not inform the defendant of the plaintiff's election to terminate the credit agreement, as required by clause 13.5;

10.6 the defendant claims that the compliance with the requirements of clause 13.5 is a conditioned precedent to the institution of the claim for termination of the agreement;

10.7 the plaintiff has failed to comply with clause 13.6 of the credit agreement in that it failed to give the defendant an opportunity to reinstate the credit agreement by paying all overdue amounts;

10.8 the plaintiff failed to comply with clause 22.6 of the credit agreement, which states:

"22.6 This is the whole Agreement and no changes or cancellation will be valid unless it is in writing and signed by both parties or is voice logged by us and subsequently reduced to writing."

10.9 the defendant pleads that the failure to comply with clauses 13.2, 13.3, 13.5 and 13.6 of the credit agreement, amounts to a unilateral variation of the credit agreement. However, these have not been committed to writing, as required by clause 22.6.

[11] Following the filing of the defendant's plea, Velocity applied for summary judgment, seeking:

- "1. Cancellation of the credit agreement entered into between the Plaintiff and the Defendant;*
- 2. The Defendant to return to the Plaintiff the vehicle being a 2017 VOLKSWAGEN POLO VIVO GP 1.4 TRENDLINE 5D with engine number CLP262751 and chassis number AAVZZZ6SZHU013353;*
- 3. Leave to return to Court on the same papers, duly supplemented, to obtain judgment for the damages claimed once the vehicle has been sold.*
- 4. Costs of suit."*

[12] Ms Sunette Stewart ("*Ms Stewart*"), described as a legal manager employed by WesBank, a division of FirstRand Bank Limited ("*WesBank*"), deposed to the affidavit in support of summary judgment. Ms Stewart states that WesBank administers "*collections*" for and behalf of both Velocity and VWFS. She further states that she has access and control over all the "*accounts and other documents relating to this application*".

[13] The certificate of balance, annexed to the particulars of claim (as amended) as annexure "B", is signed by Ms Stewart, designating her as a "*Legal Manager*" on the letterhead of VWFS. It is the same certificate of balance

annexed to the affidavit in support of the application for summary judgment as annexure “SJ1”.

[14] In his affidavit opposing the summary judgment, the defendant raised, in short, the following defenses:

- 14.1 the deponent to the affidavit in support of summary judgment is not a person who can swear positively to the facts. Ms Stewart states that WesBank, her employer, “*administers the collections for and on behalf of Velocity...*” and that she has “*access to and control over all accounts and other documents relating to this application*”;
- 14.2 the plaintiff’s claim and summary judgment application do not relate to “*collections*” on an account, but rather the cancellation of a contract, return of the motor vehicle to the plaintiff and leave to return to the court to claim damages;
- 14.3 the relief sought does not fall within the scope of that provided for in Rule 32(1);
- 14.4 there has not been compliance with Rule 32(2)(c) which requires that, where a claim is founded on a liquid document, a copy of the document shall be annexed to the affidavit;
- 14.5 the certificate of balance attached to Ms Stewart’s affidavit “*has nothing to do with the relief sought in the summary judgment application*”, as there is no claim for arrears in the summary judgment application;

- 14.6 the plaintiff does not have *locus standi in iudicio*, as the certificate of balance was issued by VWFS;
- 14.7 the plaintiff is prevented from bringing an application for summary judgment on the basis that it had taken a further step by effecting a comprehensive amendment to its particulars of claim;
- 14.8 the taking of such a further procedural step “*means that [the plaintiff] waived its right to apply for summary judgment*”;
- 14.9 the plaintiff’s affidavit in support of summary judgment does not verify all the material facts required to be proven in order for the plaintiff to obtain judgment and therefore, has not verified the cause of action, and
- 14.10 finally, the special pleas raised by the defendant in his plea constitute a bar to an application for summary judgment.

[15] Rule 32 requires a plaintiff seeking summary judgment, *inter alia*, to verify its cause of action. Mr Mbana, for the defendant, referred to it as a “*jurisdictional requirement*”.

[16] The plaintiff’s claim is expressly stated to be contractual in nature. Ms Stewart states:

“12. The plaintiff contends that the defendant breached the terms of the contract by failing to maintain the payments agreed to in terms thereof, and is currently in arrears with his payment obligations towards the plaintiff.”

- [17] In terms of clause 13.1 of the credit agreement, in the event of the defendant failing to pay any amounts due under the credit agreement, the plaintiff may, at its election, proceed with the enforcement or termination of the agreement.
- [18] The fact of the defendant's indebtedness to it is therefore central to the plaintiff's cause of action. For this reason, the certificate of balance is relied on by the plaintiff.
- [19] The certificate of balance is dated 19 March 2020, that is well subsequent to the conclusion of the cession agreement. Despite this, the certificate of balance is printed on the letterhead of VWFS and (formatting aside), reads as follows:

*"I, Sunette Stewart in my capacity as Legal Manager of the Specialized Collections Department – Volkswagen Financial Services a division of FirstRand Bank Ltd; 1 Enterprise Road, Fairland do hereby certify that on ... 19/03/2020 MR SIVUJILE A MANINJWA is **indebted to Volkswagen Financial Services** in the amount of R149 304.20 (One hundred and Forty Nine thousand Three hundred and Four rand, and Twenty cents) being the balance outstanding. Current arrears outstanding R16,289.10 (Sixteen thousand Two hundred and Eighty Nine rand, and Ten cents) in respect of the ... INSTALMENT SALE." (sic)*

- [20] On its clear terms, the certificate does not establish or verify any amount owed in terms of the credit agreement sale to the current plaintiff, Velocity, but to VWFS. Given that the certificate was signed subsequent to the cession agreement, there is no immediately obvious reason why the certificate could be relied on by the plaintiff to establish an indebtedness to it.

[21] Considering the above, I am of the view that the plaintiff has failed to verify its cause of action and has therefore not shown its entitlement to summary judgment. It is not necessary for me to consider the remaining issues raised by the defendant.

[22] I make the following order:

The application for summary judgment is dismissed, costs to be cost in the cause.



I JOUBERT

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: *B. van der Merwe*

Instructed by: *Glover Kannieappan Incorporated*

Counsel for the Respondent: *Pumzo Mbana*

Instructed by: *SA Maninjwa Attorneys*

Date heard: *26 July 2021*

Date of judgment: *9 November 2021*