



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

CASE NO: 5141/2021

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

[Signature]
14/04/22

In the matter between:

IKE THAMISANQA KHUMALO

APPLICANT

AND

ABSA BANK LIMITED

RESPONDENT

JUDGMENT FOR LEAVE TO APPEAL

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on April 2022.

BAQWA J:

A. INTRODUCTION

- [1] This application for leave to appeal concerns the decision of this court in which an order was granted that the vehicle described in the notice of motion be returned to the applicant ("Absa"), alternatively that any other person holding the vehicle through the respondent be ordered to deliver the vehicle to the applicant alternatively, the Sheriff of the court.
- [2] Even though the respondent filed a notice of intention to oppose, he filed no answering affidavit. Resultantly the testimony on which the applicant based its case was uncontested.
- [3] The respondent now makes an attempt to bring forth issues which ought to have been brought by way of an answering affidavit before the court by using the grounds on which it bases the application for the leave to appeal. This, in my view is irregular. Such matters were not before the unopposed motion court and can therefore not be used to ground an application for leave. The prospects of success ought to arise from the time when the matter was considered by the court, not *ex post facto*.
- [4] The order granted by this court is of an interlocutory nature and thus has no final effect in that the main action is currently pending and it is in that action that the court will make a final determination as to whether or not the instalment sale agreement may be cancelled and whether the motor vehicle described as a 2015 BMW ("the vehicle") should be returned to Absa indefinitely. There can therefore be no appeal against an order which has no final effect.

- [5] In any event, the applicant submits and I accept that the grounds on which the application for leave is based are not sustainable being the following:
- 5.1 That only the copies of the instalment sale agreement and proof of postage was attached to the application by Absa and that no origin were provided.
- 5.2 That there was no evidence led demonstrating alleged compliance with the Electronic Communication Act 25 of 2002.
- [6] The fact of the matter is that as stated in the applicant's founding affidavit, the agreement in question was concluded through an online application. There is therefore no original document in the convention sense referred to *Standard Merchant Bank vs. Rowe*¹ and others on which the applicant seek to rely.
- [7] The contestation of the agreement is of no moment as the applicant admits the instalment sale agreement and its terms and conditions in paragraph 3 of his plea.
- [8] The result of such admission is that the instalment sale agreement is common cause and the applicant does not have to tender any further evidence in that regard.
- [9] The *Rowe* decision is distinguishable from the present case. That case relates to matters where a written document was relied upon by the parties and the court found that the best proof in respect of such written document was the document without producing it.

¹ 1982 (4) SA 671 W.

[10] Contrary to the *Rowe* decision Absa has produced a copy of the document in term of section 15 (1) of the Electronic Communication and Transaction Act 25 of 2002 ("The ECT Act"). In term of section 15 (b) it is the best evidence that the person adducing it, (Absa) can reasonably be expected to obtain. In any event in light of the admission by the respondent any reference to the ECT Act is nonsensical in the circumstances.

[11] The suggestion by the applicant that an affidavit had to be filed in that regard is not to be found in the ECT and no proper basis has been set for the submission.

[12] Further, Absa only had to establish a *prima facie* right and ownership of the motor vehicle was not in question as the agreement states that ownership remains with it until payments have been made in full.


[13] Section 17 of the Superior Courts Act 10 of 2013 provides:

"(1) Leave to appeal may only be given when the judge or judges concerned are of the opinion that:

I. The appeal would have reasonable prospects of success."

[14] In light of the above, I am not persuaded that such prospects exist in the present application.

[15] In result the application for leave to appeal is dismissed with costs on an attorney and client scale.



SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 28 March 2022

Date of judgment: April 2022

Appearance

On behalf of the Applicants

Adv M Snyman

Instructed by

Mashao Attorneys

Tel: 082 571 2797

Email: msnyman@snymanfamilie.co.za

On behalf of the Respondents

Adv N Alli

Instructed by

Jay Mothobi Incorporated

Tel: 073 084 9593

Email: nadeem@law.co.za