IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 55323/20

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

In the matter between:

MERCEDES-BENZ FINANCIAL SERVICES **APPLICANT/PLAINTIFF**

and

M MAGOME INCORPORATED **RESPONDENT/DEFENDANT**

CONCISE REASONS FOR ORDER

AC BASSON, J

The parties

[1] The applicant is Mercedes-Benz Financial Services and the respondent is M Magome Incorporated.

Nature of the application

[2] This is an opposed Summary Judgment application based on a written instalment sale agreement ("*the agreement"*) for the return of a motor vehicle and postponing the quantum portion thereof *sine die*.

[3] In terms of the agreement the applicant sold a motor vehicle to the respondent (duly represented by Mr M Magome). Despite delivery of the vehicle to the respondent, ownership remains vested with the applicant.

[4] In terms of the agreement, the respondent shall pay to the applicant the monthly installments as specified in the agreement by way of debit order without withholding or deferring payment for any reason whatsoever.

[5] The agreement further states that should the respondent fail to pay the monthly instalments on the due date, the applicant shall be entitled to cancel the agreement and claim return and possession of the vehicle, which the applicant duly did by the issuing of the summons on 28 October 2020.

[6] When summons was issued and the application for summary judgment was issued, it was common cause that the respondent was in arrears. The applicant submitted that the cancellation is therefore lawful.

The respondent's plea

[7] Apart from the fact that the plea of the respondent was filed late (and only after a notice of bar had been served), the defendant raises no triable issue. The agreement is admitted and the terms thereof. The balance of the plea is simply a bare denial and does not satisfy the requirements of Rule 32.

[8] The only defence raised by the respondent in the plea is that it is simply boldly denied that the respondent had breached the contract. This purported defence has no merit for the following reasons: Firstly, this is a bare denial that the contract was not breached without setting out "*the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence"*.[1] Secondly, if regard is had to the belated opposing affidavit, there is now an allegation that the arrears have been paid which in itself belies the purported defence that the respondent did not breach the contract. Moreover, the respondent specifically refers to the *"financial woes"* which the respondent experienced as a result of COVID 19.

[9] There is therefore not triable defence raised on the papers and the application should therefore succeed.

Disclosure of a bona fide defence

[10] The principles applicable to summary judgment proceedings have been succinctly summarized by the Supreme Court of Appeal in *South African Land Arrangements CC v Nedbank Limited*:[2]

> *"[13] The legal principles governing summary judgment proceedings are well-established. In Maharaj v Barclays National Bank Ltd, Corbett JA outlined the principles and what is required from a defendant in order to successfully oppose a claim for summary judgment as follows:*
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> > *'…[One] of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a)*

[1] See the case law quoted in paragraph [10] *infra.*
[2] 2015 JDR 2364 (SCA).

whether the defendant had "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence.'

[14] Regarding the remedy provided by summary judgment proceedings, Navsa JA said in Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture[3]:

'[31]…The summary judgment procedure was not intended to "shut a defendant out from defending", unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. [32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful applications in our courts, summary judgment proceedings can hardly continue to be described as extraordinary.'"

[11] The Full Court in *Raumix Aggregates (Pty) Ltd v Richter Sand CC*[4] explains what is required of a respondent in summary judgment*:*

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[3] *Joob Joob Investments (Pty) Ltd* v *Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA).
[4] *Raumix Aggregates (Pty) Ltd v Richter Sand CC* 2020 (1) SA 532 (GJ).

> *"[15] Under the amended rule the applicant is required, 15 days after the date of delivery of a plea or an exception, to deliver a notice of application for summary judgment, together with an affidavit identifying any point of law relied upon and the facts underpinning the claim, briefly explaining why the defence as pleaded does not raise any triable issue. Under the old rule the plaintiff was required to file a brief affidavit 'verifying a cause of action' and opining that the defendant has no bona fide defence. These requirements are no longer applicable under the new procedure. The question is whether this change in procedure would, if applied retrospectively, adversely affect substantive rights.*
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> *[16] The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under s 34 of the Constitution."*

See also Nedbank v Maredi[5] where the Supreme Court of Appeal confirmed the importance of disclosing a *bona fide* defence failing which the application would be dismissed:

> *"[3] Before I consider the contentions on behalf of the parties, I deem it pertinent to set out the jurisprudential framework within which an application for summary judgment should be considered, which is trite and established. In order to stave off summary judgment, the defendant has to disclose a bona fide defence, which means a defence set up bona fide or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim (Bentley Maudesley & Co. Ltd v "Carburol"(Pty) Ltd and Another 1949 (4) SA 873 (C); Lombard v Van der Westhuizen 1953 (4) SA 84 (C) at 88). The defendant must satisfy the*

[5] *Nedbank v Maredi* SCA Case no 25205/2013 28 February 2014 ad paragraph.

court that he has a bona fide defence to the plaintiff's claim and the full nature and grounds thereof.

[4] In Oos-Raandse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk 1978 (1) SA 164 (W) at 171 it was stated that not a great deal is required of a defendant but that he or she must lay enough before the court to persuade it that he or she has a genuine desire and intention of adducing at the trial, evidence of facts which, if true, would constitute a valid defence. All that the court enquires into is whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded and whether, on the facts disclosed so disclosed the defendant appears to have a defence which is bona fide and good in law. See also, Maharaj v Barclays National Bank 1976 (1) 418 (A) at 426."

New defence raised during argument

[12] The respondent only filed its opposing affidavit after 17H00 on the eve of the hearing. This is unacceptable. The applicant had served the application for summary judgment on 22 November 2021. The respondent was also advised that the matter was set down for 25 January 2022. The respondent therefore had ample time to file an opposing affidavit yet elected to wait until the last minute.

[13] During argument, the respondent suddenly raised a new defence that is nowhere to be found on the papers and that is that the agreement had not been cancelled. There is no merit in this submission. It is clear from the summons that the applicant (plaintiff) exercised its election to cancel the agreement by stating;

"11. Due to the Defendant's breach of the agreement the Plaintiff terminated the agreement; alternatively, the agreement is terminated herewith."

[14] The applicant therefore cancelled the agreement *before* the payment of any arrears when the summons was served. The contract cannot thereafter be revived and/or be reinstated by the Court. The respondent's submission that, because he paid the arrears, the applicant is not entitled to the relief sought, is misplaced. The legal

nexus of the lawful possession of the respondent had been terminated and the vehicle must consequently be returned to the applicant.

[15] Section 129(3) of the National Credit Act[6] (*"the NCA"*) finds no application in this matter as the agreement is exempted from this Act. In any event, section 129(4)[7] of the NCA also precludes reinstatement *after* cancellation and is of no assistance to the respondent.

[16] The fact of the matter is that the agreement was cancelled upon the service of the summons. Once an agreement is cancelled it cannot be revived.[8] There is simply no substantive law or case law for authority that an agreement can simply revive after it came to an end through breach or otherwise. The act of cancellation may be performed by the innocent party without the assistance of the Court, in which case, technically, a subsequent court order would simply confirm the cancellation that he already had carried out. A case in point is *ABSA Bank Ltd v Cooper NO and others*[9] where the court held as follows:

> *"On the papers it is clear that the applicant did cancel the agreements. It was entitled to do so. It had only to give notice of cancellation. That it did by serving the summonses in the magistrate's court cases. The subsequent withdrawal of the action could not undo the contents and effect of the notices of cancellation contained in the summonses. In any event the process of notification was repeated when the High Court action was served.*
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> *It is important to bear in mind that whereas the cancellation of a contract is a unilateral act, of which notice has admittedly to be given, the withdrawal of a cancellation and the concomitant revival of a contract is not. It has to be consensual. See Van Schalkwyk v Griesel 1948 (1) SA 460 (A) at*

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[6] Act 34 of 2005. The respondent is a juristic person with an annual turnover of asset value exceeding R 1 000 000.00. This was not disputed by the respondent.

[7] "Section 129 Required procedures before debt enforcement

(4) A credit provider may not reinstate or revive a credit agreement after-

(c) the termination thereof in accordance with section 123."

[8] See: *Edwards v Firstrand Bank Ltd t/a Wesbank* 2017 (1) SA 316 (SCA)

[9] 2001 (4) SA 876 (T).

473, Neethling v Klopper en Andere 1967 (4) SA 459 (A) at 466C - 467C and T G Bradfield Coastal Properties (Pty) Ltd and Another v Toogood 1977 (2) SA 724 (E) at 730D - H."

Order

[17] Summary judgment is granted as follows:

1. An order confirming the termination of the agreement;

2. An order directing the Respondent, or anybody else who's in possession it may be, to forthwith deliver to the Applicant a **MERCEDES BENZ ML 500 BE,** with engine number **27892830222616** and chassis number **WDC1660732A496192** to the Applicant forthwith**;**

3. 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.

4. Costs of suit on a scale as between attorney and client.

A.C. BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment 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 2022.

Appearances

For the plaintiff / respondent:	Adv CJ Welgemoed
Instructed by:	Strauss Daly Inc
For the defendant / applicant:	Mr M Magome
Instructed by:	Magome Inc