

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

FLYNOTES: IMPOSSIBILITY AND COVID LOCKDOWN

Summary judgment – Instalment sale agreement for vehicle – Arrears – Defendant pleading impossibility – Losing income due to Covid-19 pandemic and lockdown – Inability to pay appearing to be from economic downturn and not three months of hard lockdown – Cancellation of agreement confirmed and return of vehicle ordered.

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

Case Number: **28656/2021**

REPORTABLE: **NO**

OF INTEREST TO OTHER JUDGES: **NO**

REVISED: **YES**

DATE: **09 JUNE 2022**

In the matter between:

FFS FINANCE SOUTH AFRICA (RF) (PTY) LTD

Plaintiff

and

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] This is a summary judgment application for confirmation of the cancellation of an Instalment Sale Agreement between the parties and for an order directing the defendant to return a Ford Ranger motor vehicle, which vehicle forms the subject matter of the sale, to the plaintiff.

[2] The fact that the agreement was concluded and that the defendant fell in arrears with the monthly instalments, is not in dispute between the parties.

[3] The defendant admits that he is in breach of his obligations in terms of the agreement, but pleaded that performance in terms of the agreement was impossible.

[4] The relevant allegations in the defendant's plea, read as follows:

“a) The Defendant admits that there were several months during the early part of 2021 where he was unable to pay the monthly instalments of the vehicle due to the fact that he had lost his employment and only source of income as a direct result of the ongoing Covid-19 pandemic.

b) The Defendant further pleads that he subsequently during July 2021 secured alternative employment and immediately commenced payment of the instalment on the vehicle as well as a surplus amount towards the extinguishment of the arrear amount.

c) The Defendant has made the following consecutive monthly payments since July 2021:

- R 7500 – 30 July 2021;
- R 8000 – 30 August 2021;
- R 8000 – 2 October 2021;
- R 8000 – 2 November 2021;
- R 8000 – 30 November 2021;
- R 8000 – 23 December 2021;
- R 8000 – February 2022.”

d) The Defendant accordingly denies that the arrear amount as pleaded by the Plaintiff in this paragraph is correct.

[5] In terms of a Certificate of Balance attached to the particulars of claim, the defendant was in arrears in the amount of R 28 647, 66 on 21 April 2021. The Agreement commenced on 1 August 2018 and the monthly instalment was R 6 961, 49.

[6] In view of the arrears and as a result of the defendant’s breach, the plaintiff averred in its particulars of claim that it elected to cancel the agreement *alternatively* cancels it by the issuing of the summons.

[7] The plaintiff’s right to cancel is contained in clause 15 of the Agreement. The clause is titled “*Default and consequences*”, and the relevant portion thereof reads as follows:

“You will be in default under the terms of this Agreement if you:

- *do not pay an instalment in full by the instalment date (...);*

.....

you are in default, we will notify you in writing before we take enforcement action against you (a 'Default Notice') and allow you the opportunity within 10 (ten) business days, to bring your financial obligations up to date, to seek the assistance of a debt counsellor ..) and to resolve any complaints or disputes.

We may, not less than 20 (twenty) business days after the date of your default and not less than 10 (ten) business days after we delivered the Default Notice to you cancel this Agreement and issue legal proceedings against you to recover your debt (including repossessing the Asset) under this Agreement.”

[8] A Default Notice was delivered on 30 April 2021 and summons was issued on 9 June 2021.

[9] *Prima facie* the plaintiff was, in the circumstances, entitled to cancel the Agreement due to the defendant's breach.

Impossibility

[10] The question then arises whether the defendant's alleged inability to perform as a direct result of Covid excused him from performance. If performance was impossible, the question whether the plaintiff was entitled to cancel the agreement arises, which question could constitute a *bona fide* defence for purposes of the summary judgment application.

[11] In the Form 27 Notice of agreement or opposition to mediation, the contents of which the defendant incorporated into his affidavit resisting summary judgment, the defendant stated *inter alia* the following:

“1. The Defendant is self-employed as sole proprietor and acted such since February 15th 2018.

2.

3. *The Defendant's account with the Plaintiff was kept up-to-date and in good standing since February 15th 'til the promulgation of the Covid-19 Lockdown Regulations on March 26th 2020.*

4...

5. *The impact of these measures had an immediate and devastating effect on the total South African economy including the business of the Defendant, whom from the immediate instance stopped receiving payments from clients he had provided goods and services to, prior and subsequent to the lockdown.*

6. *In spite of the Defendant's best efforts & not being able to afford legal assistance, he was unable to retrieve funds owing to him or to generate sufficient new business to meet the payments due to the Plaintiff and fell further behind.*

7. *The Defendant has now secured full time employment with Spres (Centurion) High Pressure Equipment as Sales Manager which will commence during July 2021 placing him in a position to re-commence monthly instalment repayments to the Plaintiff with effect from end of July 2021."*

[12] In view of the aforesaid facts, it is apposite to have regard to the doctrine of supervening impossibility of performance.

[13] In *Freestone Property Investments (Pty) Ltd v Remake Consultants and Another* 2021 (6) SA 470 (GJ) "FPI", the doctrine was discussed in detail by Gilbert AJ.

[14] The facts in the *FPI* matter also concern the effect of the lockdown regulations on a contractual relationship between the parties. *FPI* is a lessor of commercial

premises in a shopping centre and *Remake* the lessee of two stores in the shopping centre.

[15] *Remake* fell behind with its monthly rental payments which resulted in *FPI* terminating the agreement. *FPI* issued summons and brought a summary judgment application for *Remake*'s ejectment and payment of arrear rental.

[16] *Remake* alleged that for the period March to June 2020 and during "hard" lockdown, the parties could not comply with their respective obligations in terms of the lease agreement. Due to the supervening impossibility, *FPI* was excused from tendering occupation and *Remake* from paying rent. The court agreed with *Remake*'s submissions and granted leave to defend the action insofar as rent for the period March to June 2020 was concerned.

[17] It is noteworthy that both parties to the lease agreement was unable to perform due to the "hard" lockdown and that the court found that the parties were only excused from performance for the period March to June 2020.

[18] The facts in *casu* differ substantially from the facts in the *FPI* matter. The plaintiff fulfilled its obligations in terms of the provisions of the Instalment Sale Agreement, by placing the defendant in possession of the vehicle. Although the defendant did not comply with his obligations by paying the monthly instalment, he retained possession of the vehicle.

[19] The facts are, in my view, more in line with the following finding in *Johannesburg Consolidated Investment Co v Mendelsohn & Bruce Ltd* 1903 TH 286 at 295, 296:

"The consequence of holding that the defendants in this case are entitled to a remission in rent appears to me to be far-reaching. It would involve this, that on the happening of any event amounting to vis major, which caused a temporary diminution of the population of a town, every tradesman who could show he had sustained temporary loss or a considerable diminution of profit might be entitled to a remission of rent. Suppose, for instance, that in consequence of the outbreak of an epidemic disease a large proportion of

the inhabitants fled, with the result that owing to the absence of their usual customers the tradesman temporarily were carrying on business at a loss, and closed their shops, it would be an unpleasant surprise to the lessors to find that the whole of the loss is to fall upon them, and that they occupy in effect the position of insurers of their lessees' custom."

[20] The defendant's inability to pay the monthly instalments appears to me to be due to a downturn in the economy and not due to the three months of hard lockdown. It seems unlikely that customers will summarily cease paying for goods and services rendered prior to the hard lockdown, simply because their movement is limited for a period of three months.

[21] In the result, I find that the defendant was not excused from paying the monthly instalments and that the plaintiff was entitled to cancel the agreement.

ORDER

The following order is issued:

1. The cancellation of the Instalment Sale Agreement ("the Agreement") between the parties is confirmed.
2. The Agreement is rectified by the substitution of chassis number [...] with chassis number [...].
3. The defendant is ordered to return the 2018 Ford Ranger 2.2TDCi XL P/U D/C
Engine number: [...]
Chassis number: [...]
to the plaintiff.
4. The enforcement of the defendant's remaining obligations in terms of the agreement is postponed *sine die*.
5. Cost of suit.

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

03 May 2022

DATE JUDGMENT DELIVERED PER COVID19 DIRECTIVES:

09 June 2022

APPEARANCES

Counsel for the Plaintiff: Advocate J Eastes
Instructed by: Delberg Attorneys

Counsel for the Defendant: Advocate N Terblanche
Instructed by: Lily Rautenbach Attorneys