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

CASE NO: 45290/21

REPORTABLE: YES / NO

OF INTEREST TO OTHER JUDGES: YES / NO

REVISED

15 August 2022

In the matter between:-

ABSA BANK LIMITED

Plaintiff

V

NGALE JOHANNES SIROVHA

Defendant

JUDGMENT

KOOVERJIE J

SUMMARY JUDGMENT

[1] The plaintiff (“ABSA Bank Limited”), seeks summary judgment against the defendant (“Mr Sirovha”) for the return of the motor vehicle (identified below). The relief sought in the summary judgment application is for:

- (i) confirmation of cancellation of the installment sale agreement;
- (ii) return of the goods namely, a 2019 Toyota Hilux 2.4 GD-6 RV SRX P/U S/C with engine nr. [...] and chassis number [...].

[2] It is common cause that the plaintiff and the defendant entered into a written instalment sale agreement. It is the applicant’s case that the defendant failed to comply with the obligations in terms of such agreement by failing to make the necessary monthly payments. Summons was instituted after serving the Section 129(1) notice. The defendant defended the action and filed his plea. The plaintiff, thereafter, applied for summary judgment proceedings. The defendant accordingly filed his resisting summary judgment. Consequently, the matter was enrolled for hearing.

[3] It is trite that a court at any stage before judgment can grant leave to a party to amend any pleading or document. The provisions of the amended Rule 32 of the Uniform Rules does not prevent the defendant from amending his/her plea. Hence any interpretation that the defendant could not do so is in conflict with the provisions of Rule 28(10).

[4] In the **Belrex** matter the court stated at paragraph 31¹:

*“The mere fact that in terms of the amended Rule the plaintiff could only succeed with summary judgment after the defendant has delivered the plea, does not preclude the defendant from amending his plea, after the plaintiff has proceeded with the application for summary judgment”*²

[5] In this instance, the defendant had in fact filed his notice of intention to amend the plea. The plaintiff objected thereto. Once an objection is filed, the defendant was required to file an application for leave to amend his plea. Since he failed to do so, this court is confined to the initial plea.

CONDONATION

[6] The defendant’s affidavit resisting summary judgment was not filed timeously. The defendant sought condonation for the late filing of such affidavit. I have noted the explanation proffered and am satisfied that a reasonable and full explanation setting out the cause for the delay was pleaded. The defendant explained that due to his employment at the mine and the long working hours, it was difficult to appoint a legal representative and consult timeously. Furthermore, the extensive distance between his work place and his attorney of record exacerbated the delay. The plaintiff’s attitude was that although an acceptable explanation may have been furnished, the defendant was still required to show that he has prospects of success in this application.

¹ Belrex 95 CC v Barday 2021 (3) SA 178 WCC

² Erasmus Superior Court Practice Second Edition Van Loggerenberg Volume 2, Page D-416B the commentary sets out the process when an amendment is filed:

There is nothing in the way of the defendant to deliver an affidavit which is in harmony with the proposed amendment of the plea and which complies with the provisions of sub-rule (3)(b). In such circumstances, it was held that an application for summary judgment should be postponed *sine die* in order for the defendant to bring an application to amend its plea and that such application should be dealt with first.² If such application is refused then the application for summary judgment could be re-enrolled and be dealt with in the light of the defendant’s original (unamended) plea. If the application to amend is granted and the defendant effects the amendment in terms of Rule 28(7) and plea in the amended form raises a triable issue, the plaintiff should consent to leave to defend the action and the costs of the application for summary judgment should stand over in order to be dealt with by the trial court.

[7] Rule 32(3)(b) makes provision for the defendant to file his opposing affidavit five days before the day on which the application was to be heard. It was pointed out that his affidavit should have been filed on 14 January 2022. However, it was only filed on 10 February 2022.

[8] In weighing the relevant jurisdictional factors, and having considered the application, I am satisfied that sufficient cause has been shown and I thereby condone the non-timeous filing of the defendant's affidavit.

THE DEFENCE

[9] It is not in dispute that the parties entered into a written instalment sale agreement on 21 June 2019. By 30 September 2019, the defendant failed to honour his monthly payments.

[10] The nub of the defendant's defence is that the motor vehicle that was delivered to him by Solly's Car Sales in Nigel (the seller) was not the motor vehicle placed in his possession. It was pointed out that Sollys delivered a motor vehicle to him which he did not order. Hence ABSA financed a vehicle which he did not have in his possession.

[11] His defence was *bona fide*. In this regard, he relied on two points, namely that he ordered a 2019 Toyota Hilux 2.4 GD-6 RV SRX P/U S/C but received a 2019 Toyota Hilux GD P/U S/C A/C with registration [...].³ Secondly, it was pointed out that the vehicle in his possession holds a lesser value than the financed amount. This, he argued, brings into dispute the validity of the underlying credit agreement entered into with him. The discrepancy remains, namely that, ABSA financed a motor vehicle which he was not in possession of.

[12] As a result of these circumstances, it was argued that there is a reasonable possibility that his defence may succeed at trial. At this stage in the proceedings, the

³ 016-11 par 15 of the record

court is not required to determine the likelihood of the defendant's allegations as being true or false.

PLAINTIFF'S CASE

[13] The plaintiff argued that the plea fails to disclose the nature and the grounds of the defendant's defence and the material facts relied upon. On the papers, therefore, the defence lacks merit.

[14] In considering the averments made by the defendant in his plea, in paragraph 3 he pleaded that he was not in possession of the motor vehicle the plaintiff claimed. It reads:

"3. Paragraph 5 thereof

The contents therein are denied and the defendant pleads that the car the plaintiff delivered to him was not a 2019 Hilux 2.4 GD-6 RB SRX P/U S/C motor vehicle and the defendant is not in possession of the abovementioned motor vehicle ...";

[15] At paragraph 4 he pleaded that the matter is currently before the Motor Industry Ombudsman of South Africa:

"4. Paragraph 6 thereof

The contents of this paragraph is denied. The defendant pleads that this matter is currently with the Motor Industry Ombudsman of South Africa (MIOSA). The said Ombudsman mandated the plaintiff to amend the instalment sale agreement in question. The defendant is still waiting to sign the amended instalment sale agreement. The defendant denies liability."

[16] The defendant, in his opposing affidavit, alleged the following:

- (i) the vehicle he was quoted on was a 2019 Hilux 2.4 GD-6 RB SRX PU/SC with registration [...];
- (ii) he communicated with the seller prior to the finalisation of the sale that he was unable to collect the vehicle;
- (iii) the credit agreement provided for by the plaintiff was granted on the strength of the seller's documentation that made reference to the description of the motor vehicle and price of R415,899.99;
- (iv) the defendant explains the misrepresentation regarding the delivery of the vehicle.

[17] For the purposes of this judgment I find it necessary to reiterate the averments, namely:

"11 Upon delivery of the vehicle, unbeknownst to me, the seller delivered the incorrect vehicle that was valued at a lower amount than the initial one described and quoted on.

12 My discovery of the misrepresentation occurred six months after delivery, whereafter I confronted the seller's salesperson requesting an explanation and delivery of the correct vehicle.

13 The seller argued that the correct vehicle had been delivered despite clear evidence that this was not so.

14 My suspicion was confirmed when I had the vehicle inspected at Toyota Louis Trichardt, Makhado.

14.1 The dealership confirmed that I received an ordinary Toyota Hilux and not the spec I had intended on purchasing by inspecting the engine and its identifying markers against the VIN number.

15 The vehicle that was delivered was a 2019 Toyota Hilux GD P/U S/C A/C instead of a 2019 Toyota Hilux 2.4 GD-6 RB SRX P/U S/C.

16 I thereafter contacted the plaintiff and explained the situation. I was informed that the plaintiff would refer the matter to its fraud department.

17 On or about 11 September 2020 the plaintiff informed me that they would be unable to assist internally and referred to the Motor Industry Ombudsman of South Africa (MIOSA), for further assistance.”⁴

[18] The defendant further in his affidavit set out the seller’s attitude after the matter was referred to MIOSA. He also alleged that the seller made the following claims, namely that:

- (i) the discrepancy in the description was due to a technical error; and
- (ii) the error was communicated to the plaintiff and an addendum was to be prepared by the plaintiff for the defendant’s attention;

[19] He also went on to state in paragraph [21]⁵ of the affidavit that he was not satisfied with the addendum, particularly, that the addendum made no mention of the correct vehicle being delivered. It was at that stage that the defendant opted to have the agreement cancelled.

⁴ 010-4 to 010-5 of the record

⁵ 010-6 of the record

[20] He argued that since the matter remains unresolved between himself, the seller and the plaintiff, the summary judgment proceedings are inappropriate.⁶

[21] The defendant also argued that the agreement between the plaintiff and the defendant was void from the outset and that the matter before court is premature. It remains impossible in law to return a vehicle which the defendant is not in possession of.⁷

[22] I am not in agreement with the plaintiff's contention that the defence has no merit. All that the defendant is required to do, at this stage of the pleadings, is to sufficiently plead. At the heart of the defendant's case is that he is in possession of a vehicle he did not agree to purchase. He pleads this fact in his plea and explains same in his affidavit.

[23] A defence has been pleaded and, in my view, it impacts on the instalment sale agreement. The subject matter of the agreement, that is the vehicle that ABSA seeks return of, seems not to be in the defendant's possession. Ultimately, the defendant, relying on his defence, would have to prove at the trial that the motor vehicle in his possession is not the motor vehicle that ABSA financed.

[24] On the plaintiff's understanding, and in terms of the agreement ABSA financed a motor vehicle 2019 Hilux 2.4 GD-6 RB SRX P/U S/C with engine number [...] and chassis number [...] for the amount of R653,407.35 with the principal debt amount of R415,899.99.

[25] There is a *bona fide* defence in that the defendant did not receive the motor vehicle 2019 Hilux 2.4 GD-6 RB SRX P/U S/C but a 2019 Hilux GD P/U S/C A/C. Simply put, then ABSA is claiming for a motor vehicle that is not in the defendant's possession.

⁶ Paragraphs 25-27 of the opposing affidavit p 010-7

⁷ Par 32 of the opposing affidavit p 010-8

[26] While the defendant need not deal exhaustively with the facts and the evidence relied upon, he is required to disclose his defence with sufficient particularity.⁸ As alluded to above, he has done so in this matter.

[27] The plaintiff argued that the defendant's claim is against the seller. ABSA should not be dragged into a matter where the cause of the misrepresentation was the seller.

[28] The plaintiff, on the other hand, further relied on clause 4 of the terms and conditions of the instalment sale agreement. It constituted an indemnification whereby the defendant assumes full responsibility to ensure that he took delivery of the motor vehicle, that was agreed upon. Such indemnification clause protects the plaintiff from any dispute which arises as a result of the transaction between the seller, Solly's Car Sales, Nigel, and the defendant himself.⁹

[29] I am of the view that the said indemnification clause does not do away with the conundrum the parties are facing. The plaintiff's claim in this instance is only for the return of the motor vehicle. The defendant cannot return a motor vehicle which is not in his possession. I must reiterate that the claim in this application is only based on the return of a specific identified vehicle. The indemnification clause may have its place on the damages claim arising from the agreement. However, such claim is not before me.

[30] The defendant alleged that he took the vehicle for inspection where it was confirmed that he was not furnished with the vehicle he ordered. It is rather concerning that there was no verification of this fact by the plaintiff, upon receipt of the plea. In my

⁸ Maharaj v Barclays National Bank 1976 (1) SA 418A at 425G

⁹ "Before you accept delivery of the asset from the supplier you will check that it is:

(1) what you want or ordered ...

... we will pay for the asset when you have accepted it and ownership will pass to us.

Any claims or potential claims that you may have in reaction to the asset including but not limited to claims to:

- defects;
- incompleteness;
- fitness for purpose or
- late delivery or non-delivery

are for you to pursue against the supplier and we shall have no liability whatsoever."

view, the defence raised remains a triable issue at trial. I am therefore inclined to grant the defendant leave to defend.

[31] It is trite that summary judgment procedure was intended to shut out a defendant who can show that there is a triable issue.¹⁰ If the defendant can show a defence on the alleged facts which assuming are true, then he should be afforded an opportunity to state his case at trial. Consequently, the relief sought by the plaintiff in this matter cannot be granted. In short, it is impossible to return a vehicle the defendant does not have in his possession.

[32] In the premises I make the following order:

1. Condonation for the late filing of the respondent's affidavit is granted.
2. The summary judgment is refused.
3. The defendant is granted leave to defend.
4. The costs of the application for summary judgment are to be costs in the action.

H KOOVERJIE
JUDGE OF THE HIGH COURT

Appearances:

¹⁰ Majola v Nitro Securitisation 1 (Pty) Ltd 2012 (1) SA 226 SCA at 232 F-G

Counsel for the plaintiff:

Instructed by:

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Counsel for the defendant:

Instructed by:

Adv XP Mthombeni

Kern & Dekker Incorporated

Date heard: 25 July 2022

Date of Judgment: 15 August 2022