

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

CASE NO: 23019/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

15 AUGUST 2022

In the matter between:

KOFIFI INVESTMENTS (PTY) LIMITED

Applicant/Defendant

and

MERCEDES BENZ FINANCIAL SERVICES

Respondent/Plaintiff

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

AJ, J G RAUTENBACH

1 Having read the papers filed of record and having heard Counsel in this

matter, I have made an order granting summary judgment in favour of the Plaintiff, Mercedes Benz Financial Services (Pty) Limited on the 25th June 2018 ordering the return of a Mercedes Benz C250 Blue Tech AMG Line A/T W205 motor vehicle with engine number [...] and chassis number [...] . It is against this Order that the Applicant, Kofifi Investments (Pty) Limited seeks leave to appeal.

- 2 It is unfortunate to say the least that this matter was heard on the 25th June 2018 and now, nearly four years later, I am faced with an application for leave to appeal. It appears that the Notice of Application for Leave to Appeal was filed on the 4th July 2018. For some or other reason which is not known to me, this matter was never brought to my attention and in fact was only brought to my attention during 2022. It puts me at a disadvantage because I have no independent recollection of the matter or of the argument or the events that happened when the matter was heard by me.
- 3 The case came before me as an application for summary judgment and although it appears that there was an Affidavit filed opposing the summary judgment, it does not appear as if there was any appearance on the day on behalf the new Applicant to resist the summary judgment.
- 4 To complicate things more, when I heard the Application for leave to appeal, the Attorneys on behalf of the Applicant withdrew shortly before the application was heard by me. The Affidavit Resisting Summary Judgment that appeared on CaseLines was Incomplete and although I inquired from the Respondents in the application whether a completed Affidavit was before me when I originally heard the application, the representative for the Respondent could not assist me in giving clarity on this aspect.
- 5 After hearing the Respondent, I requested the Respondent to make sure as to whether there was a complete Affidavit before me when I originally heard the matter and if it was, that such Affidavit would be made available to me before I give judgment herein.

- 6 Shortly after I heard the application, I was informed by the representatives of the Respondent that they could not trace any such Affidavit. However, two weeks ago and out of the blue, I was supplied by the Respondent of a complete Affidavit. This left me with the issue that I am still not sure whether a complete Affidavit was before me when I heard the application.
- 7 It seems not, as o gave an order without a written Judgment from which I infer that the matter was treated as an unopposed summary judgment application
- 8 For purposes of this application, I will take into account the contents of the Affidavit that filed originally opposing the application for summary judgment. The Applicant took issue with the fact that there was no resolution attached to the Affidavit in support of this summary judgment. The answer to this is that there is no requirement in Rule 32 that a resolution must be attached to the Affidavit.
- 9 In the motion proceedings and In summary judgment proceedings, the Deponent to an Affidavit need not be authorized to depose to the Affidavit, it is the institution and prosecution of the proceedings which need to be authorized. The Applicant also raised the point that the Deponent did not have the necessary personal knowledge to depose to the Affidavit.
- 10 From the Affidavit by Kaylaser it is stated that she is the Legal Team Manager which was employed by the Plaintiff. In my view there is no merit in arguing that she does not have personal knowledge of the matter and I am of the view that she made out a proper case of personal knowledge in her Affidavit.
- 11 The Applicant has further averred that the Deponent above did not state that she swears positively to the facts verifying the cause of action. It was pointed out by the Respondent that this is however incorrect. She verified the cause of action and claim amount in Summons as being true and correct. She also swore positively that the Respondent is liable for the relief

claimed in the Particulars of Claim.

- 12 The relief claimed was relief as envisaged in Rule 32(1) (c) for delivery of a specified movable property, being the motor vehicle in question. I am satisfied that the Deponent verified the cause of action and of the Respondent's entitlement to the return of the vehicle.
- 13 The Applicant then proceeds to deny that it was in arrears. The Applicant however failed to give any facts to back up this statement with reference to payments that have been made but was not taken into account. In these circumstances, this defence of the Applicant does not amount to *bona fide* defence.
- 14 As the Respondent has pointed out, the relief sought is based on the cancellation of the Agreement by the Plaintiff. As the Agreement was cancelled, the Applicant was not entitled to keep possession of the vehicle.
- 15 As far as an application for leave to appeal is concerned, the Applicant had to show that the appeal would have reasonable prospects of success or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. In my view there are no other compelling reasons that such appeal should be heard and furthermore I am of the view that the Applicant does not have any reasonable prospects of success.
- 16 In the circumstances, the application for leave to appeal is dismissed with costs on the scale as between Attorney and client.

J G RAUTENBACH
Acting Judge of the High Court
15 August 2022