IN REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 09045/18

In the matter between:

WHIRLAWAY TRADING 234 CC	Applicant
and	
MERCEDES-BENZ FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD.	First Respondent
THE SHERIFF OF THE HIGH COURT, PRETORIA	Second Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 17 November 2022.

JUDGMENT

COLLIS J

INTRODUCTION

[1] In the present application the applicant seeks the return of a certain Mercedes Benz E 250 CGI Cabriolet, engine number [....] and chassis number [....], ("the vehicle") of which the applicant at all material times hereto was the lawful possessor. The present application is opposed by the first respondent.

[2] During November 2018, the latter obtained an order in its favour whereby the instalment sale agreement was cancelled and at the same time the court ordered that the vehicle be delivered to the first respondent.[1]

[3] Pursuant to this order being granted the parties entered a settlement agreement, avoiding the return of the vehicle for as long as the applicant made due payment of certain amounts.

[4] The applicant failed to comply with the agreement and on the 3 March 2020 a warrant of execution was executed whereby the second respondent on instruction of the first respondent repossessed the vehicle. It is this step taken by the first respondent that resulted in the applicant launching the present application. As for the present application the first respondent filed its Answering Affidavit late and sought condonation from this court. The late filing of this affidavit is condoned by this court. No Replying Affidavit had been filed by the Applicant.

ISSUES IN DISPUTE

[5] As per the joint practice note, this court was called upon to determine whether the applicant has shown that it complied with the written agreement to avoid the execution of the order obtained in favour of the first respondent.

COMMON CAUSE FACTS

[1] See Court Order at CaseLines 003-3.

[6] Between the parties, the following are the common cause facts:

6.1 The applicant and the first respondent concluded an instalment sale agreement;
6.2 The first respondent obtained default judgment confirming the cancellation of the agreement and an order the return of the motor vehicle;
6.3 Post judgment a further agreement was reached between the parties whereby the first respondent would hold over execution steps pending compliance with certain repayment terms.
6.4 It is further common cause between them that to date the judgment has not been set aside or rescinded.

BACKGROUND

[7] During 2017 the parties concluded an instalment sale agreement. As a result of the applicant's failure to maintain the instalments in respect of the vehicle, the first respondent on 31 October 2018 obtained a default judgment against the aapplicant. On 13 November 2018, it thereafter obtained a writ of execution against the applicant for the delivery of the vehicle. The parties subsequently concluded an agreement in terms of which the Applicant was to settle the arrears payment.

[8] Over the period 6 March 2019 to 11 June 2019, the applicant subsequently repaid the arrears due to the first respondent by making payment of R 25 688.87 on 6 March 2019, 9 April 2019, 10 May 2019 and 11 June 2019.[2]

[9] On 28 June 2019 and based on the repayment of the arrears, the parties entered into a second agreement on 28 June 2019 ("the agreement").[3]

[10] In terms of this further agreement, the parties agreed that the applicant would repay the full outstanding amount in respect of the vehicle by making three (3)

[2] Founding Affidavit para 3.1 Annexure "VN4".
[3] CaseLines page 003 – 5 Annexure "VN4".

monthly payments of R 25841.37 commencing on 7 July 2019, then again on 7 August 2019 and thereafter on the 7th September 2019.

[11] It was then also agreed that the applicant would thereafter resume payment of the normal monthly instalment with effect from 7 October 2019 until payment of the last instalment on 5 November 2023.[4]

[12] The agreement so concluded was with the proviso that, as long as all payments are timeously met by the applicant, that the first respondent will stay taking execution steps.[5]

APPLICANT'S CASE

[13] It is the applicant's contention that after making payment of the amount of R 25841.37 on 4 July 2019, that it was in advance with all its payments due as at this date. It was on this basis that it requested and in fact was given permission to thereafter repay as per the normal monthly instalments.[6]

[14] The applicant further contends that to its complete surprise it was then again contacted by a representative of the first respondent and informed that the account was in arrears with the payments in the amount of R 66 230.41. Around January 2020 it was then furnished with proof of how the arrears was computed.[7]

[15] From the breakdown that has been furnished to it, as per annexure "VN5", it reflects the monthly instalment in respect of the vehicle to be R 13 076.04. From this breakdown the applicant alleges that it is clear that it was not alleged that the applicant was in arrears by his failure to have paid the amount of R 25841.37 on 7 August 2019 and on 7 September 2019.

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[4] Annexure "VN4" at paragraph 3.3
[5] Annexure "VN4" at paragraph 3.6
[6] Founding Affidavit CaseLines page 002 – 7 at paragraph 5.5.
[7] Founding affidavit CaseLines page 002 – 8 at paragraph 5.8; Annexure "VN5" at CaseLines 003 – 12.

[16] On behalf of the applicant, counsel had argued that this provides unequivocal proof that the first respondent agreed that the increased amounts did not have to be paid by the applicant for the months of August and September 2019.

[17] In respect of the breakdown so provided the applicant further contends that the first respondent claimed that the applicant failed to pay the amount of R 13 076.04 for five (5) consecutive months from September 2019 to January 2020. In the statement of account, dated 31 January 2020, it was averred that the last payment received from the applicant was on the 5th August 2019 for an amount of R 12 514.09. In view of the non-payments as well as the short payment in August 2019, the arrear amount was calculated at R 66 230.41.[8]

[18] This exposition so provided by the first respondent, the applicant alleges, is incorrect as can be seen from annexure "VN6" the beneficiary payment history in respect of payments made by the applicant to the first respondent.[9]

[19] Upon a perusal of annexure "VN6" the applicant alleges, it can be seen that it paid an amount of R 13 436.70 on the following dates to wit 12 August 2019; 11 September 2019; 7 October 2019; 5 November 2019; 10 December 2019; 15 January 2020 and 11 February 2020.

[20] The payments so reflected in annexure "VN6" was R 13 347.00 whereas the monthly instalments due in terms of the agreement was R 13 076.04. It is on this basis that it asserts that in fact an excess payment of R 270.96 was made on a monthly basis. In view of these payments the Applicant was substantially in advance with the amounts due to the first respondent.

[21] It is for this reason further that the applicant alleges, with specific reference to annexure "VN5", that there was no arrears on the account as contended for by the the first respondent, albeit that no payment in the amount of R 25841,37 was made by it for the months of August 2019 and September 2019.[10]

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[8] Annexure "VN5" at CaseLines 003 – 13.
[9] Annexure "VN6" at CaseLines 003 – 15 to 003 – 16.
[10] First Respondent's Answering affidavit at CaseLines 005 – 4 at paragraph

[22] It is for this reason that counsel had argued that the first respondent is incorrect when it asserts that the applicant admits that it failed to comply with the agreement, in that he did not pay the first respondent R 25841.37 on 7 August 2019 and R 25841.37 on 7 September 2019.

[23] In regards to the failure to make the payments of R 25 841.37 during August and September 2019, it is significant that the applicant is silent as to whom on behalf of the first respondent gave him permission to proceed with his normal repayments after his payment made on 4 July 2019. The applicant is also silent as to how this permission was in fact given to him, i.e. either oral or in writing. What is clear is that this agreement was contrary to the provisions set out in paragraph 3.3 and paragraph 5 of the Memorandum of Agreement concluded between the parties.

[24] A considerable amount of time was also spent on the argument that annexure "VN5" incorrectly reflect arrears on the account when in fact the applicant's account was up to date. Furthermore, that if the account indeed was in arrears, annexure " VN5" would have reflected the instalment amount for the months of July, August and September 2019 as R 25 841.37 instead of R 13 076.04.

[25] To my mind, nothing turns on this point as by the applicant's own admission, an agreement was reached post judgment between the parties, that for these months in question, the instalment amount would be R 25 841.37 instead of R 13 076.04. It therefore matters not, that annexure "VN5" reflects the instalment amount as R 13 076.04 instead of R 25 841.37.

[26] The admission of payment of an increased instalment amount not only is proof of the applicant's account having been in arrears, but it is also indicative of steps taken by the applicant to remedy the arrears on his account thereby potentially preventing the consequences of execution. This gesture granted to it by the First Respondent was rather generous to conclude a further agreement with the it, when it already had a judgment in its favour upon which it could execute.

2.5;Answering affidavit at CaseLines 005 – 8 at paragraph 10.2; Heads of Argument at CaseLines page 000 – 6 and paragraph 12.1.

FIRST RESPONDENT'S CASE

[27] On behalf of the First Respondent the following arguments were advanced by counsel:

27.1 Firstly, that the applicant has failed to make out any case for the return of the vehicle because the very agreement which it relies on provides that the first respondent would be allowed to take possession of the vehicle in the event of a breach. On the applicant's own version, it breached those terms;

27.2 Secondly, it was argued that in any event, the relief sought by the applicant cannot be granted unless the judgment is also rescinded. It was on this basis that counsel for the first respondent had argued that the relief sought is therefore incompetent;

27.3 That in terms of the agreement subsequently concluded between the parties, it was agreed that the applicant would make certain payments to the first respondent with a view to bringing the arrears up to date and that the first respondent would hold over further execution steps subject to the applicant's compliance with the agreement[11];

27.4 In terms of the agreement the parties had expressly agreed that the first respondent would, subject to the terms and conditions of the agreement being timeously met, allow the applicant to temporarily retain possession of the vehicle against payment of certain amounts[12];

27.5 On condition that all due payments are timeously met, the first respondent will without prejudice to any of its rights already acquired in terms of the judgment obtained, stay execution steps for as long as the applicant honours the agreement[13];

27.6 Futhermore, that this indulgence so given by the first respondent would not be construed as a novation or an abandonment of the judgment that it obtained and the applicant acknowledges the right of the first respondent to immediately

[11] See CaseLines 002-5 para 5.3 and 005-3, para 2.2 – 2.3.
[12] CaseLines 003-6 para 2.4.
[13] CaseLines 003-7 para 3.6.

issue and execute a warrant of delivery in respect of the vehicle in the event of breach by the applicant.[14]

[28] The applicant having been a signatory to the memorandum of agreement; it follows, it should be held to the terms agreed upon in this memorandum. This agreement as mentioned, contained a non-variation clause as per the provisions of paragraph 5.5.

[29] The terms agreed upon also relates to the applicant acknowledging that it is indebted to the first respondent in the sum of R745,136.30, together with interest and legal fees[15] and when breached that the applicant will become liable for the full amount outstanding at that time.

[30] In the present matter as mentioned, the applicant has not filed a Replying Affidavit. The allegations set out in the Answering Affidavit therefore remain uncontested. The applicant further does not seek a rescission of the judgment granted by this court on 31 October 2018. In the absence thereof the order of the court stands until set aside by a court of competent jurisdiction.[16]

[31] It is for this reason that the relief sought for the return of the vehicle without the rescission of the judgment is incompetent and fatally defective.

[32] In addition, in circumstances where the applicant wishes to have the vehicle returned to him without a tender of payment of the full outstanding balance, it will result in the first respondent being left without protection of its rights as owner of the vehicle. This will simply not be sustainable and will leave the first respondent exposed.

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[14] CaseLines 003-7 para 3.7.
[15] CaseLines 003-7 para 3.2.
[16] *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B–C; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at 242C–244A; *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 277C; *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) at 439G–H; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* [2013] 2 All SA 251 (SCA) at paragraph [17]; *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) at 570F–H; *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at 667G–675F; *Whitehead v Trustees, Insolvent Estate Riekert* (unreported, SCA case no 567/2019 dated 7 October 2020) at paragraph [18].

[33] For the above reasons that the application simply cannot succeed and must fail.

ORDER

[34] In the result the following order is made:

34.1. The application is dismissed with costs.

C.COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

APPEARANCES

Counsel for Applicant:	**Adv. Herbst**
Instructed By:	**Galloway, van Coller & Griessel Attorneys**
Counsel for First Respondent:	**Adv. Richard**
Instructed By:	**Strauss Daly Inc. Attorneys**
Date of Hearing:	**18 July 2022**
Date of Judgment:	**17 November 2022**