IN THE HIGH COURT OF SOUTH AFRICA

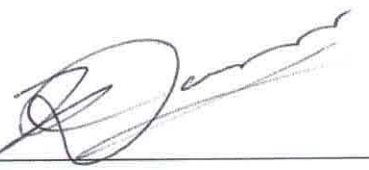
GAUTENG DIVISION, PRETORIA

CASE NO: 24694/2021

DATE: 2022-11-03

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

SIGNATURE



In the matter between

BB LEASING (PTY) LTD t/a BB USED HATFIELD Plaintiff

and

CUDOPATH (PTY) LTD t/a MARCOL MOTORS First Defendant

MARTIN GERALD COLEMAN Second Defendant

J U D G M E N T

DAVIS J:

This is the ex tempore judgment in the matter of BB Leasing (Pty) Ltd trading as BB Used Hatfield and Cudopath (Pty) Ltd trading as Marcol Motors as first defendant and a Mr Coleman as the second defendant which appears as matter 36 on the opposed motion court roll. The pleadings indicate

that the first defendant had entered into an agreement in terms of which it would become a trader with the plaintiff's BB Motor Group. During the course of events which took place in terms of that agreement three motor vehicles were delivered to the plaintiff, being a Hyundai i30, a Ford Ranger 3.2 and a Polo Vivo 1.4 as indicated in the particulars of claim.

All these vehicles did not comply, so the plaintiff pleaded, with the requirements that they would be in good working condition and fit to be resold. The various defects ranged in extent from minor defects to completely written off and reregistered vehicles. As a result of those defects the plaintiff incurred expenses in having paid the first defendant for the vehicles and having initially attempted to effect repairs of the vehicles. All three vehicles, including the vehicle registered as a salvaged vehicle, had however subsequently been tendered back to the first defendant. The pleadings read that the first defendant had accepted the cancellation of each of the sales of these vehicles and had undertaken to refund the plaintiff. Upon a failure to refund, the plaintiff instituted the present action, which action had been instituted as long ago as May of last year.

The second defendant is a surety of the first defendant and both these defendants delivered an intention

to defend the action, but have only done so in March of this year. Thereafter, despite being properly represented by BPG Attorneys Inc, who had in the notice of intention to defend indicated their email address as hekkie@BPGlaw.co.za, the defendants have failed to deliver a plea. Such failure attracted a notice of bar which was delivered on 25 April of this year. That is now 8 months ago. Pursuant to the failure to comply with the notice of bar and the defendants thereby being *ipso facto* barred from further pleading, the plaintiff applied for default judgment against both defendants.

Despite there being no need for further notice, the plaintiff still delivered a notice of set down by electronic mail to the defendant's attorney. The Court was favoured with an email confirming such delivery of notice of set down with the address hekkie@BPGlaw.co.za. On today's unopposed motion court roll, that is 3 November 2022, counsel appeared for the defendants with very scant instructions. Her instructions were simply to request a postponement and to tender wasted costs. After a debate whether the costs should not at least be tendered on an attorney and client scale, the matter stood down. Counsel, upon obtaining further instructions, was favoured with the briefest of indications of what the defendants would plead, were they given such an opportunity.

The plea now proposed would be to the effect that the vehicles, despite the particulars mentioned in the plaintiff's particulars of claim, had been in proper working condition and were delivered in terms of the agreement between the parties. Nothing was said about the particularity pleaded in particulars of claim regarding the defects to the vehicles, nothing was said about the allegations of cancellation of the agreements in respect of each vehicle and nothing was conveyed to counsel to convey to the Court regarding the previously made undertakings to pay or to refund the plaintiff. In effect a bare denial of breach was tendered without addressing even the remainder of the particulars of claim. No evidence supporting an application for the upliftment of the bar was put forward.

Even if those allegations or denials mentioned from the bar had been included in an affidavit in support of a formal application for postponement, so as to appraise the court of the merits of a defence, they would not have carried the day. Presently they carry even less weight, being simply contained in a request from the bar. Insofar as the bare denials were tendered as an indication of a real triable issue, they simply do not justify a postponement or an upliftment of bar. The defendants are the makers of their

own misfortune. They were dilatory in the extreme. The procedure provided for by delivery of a notice of bar is to give a defendant a final opportunity to remedy the default which he had already created. That opportunity was not seized by the defendants and I find no evidence on which to exercise a discretion on why I should otherwise come to the defendants' assistance. Accordingly the plaintiff is entitled to the order as claimed for which I have been favoured with a draft and the consequence is that default judgment is granted in favour of the plaintiff in terms of the draft which I have marked X.

ON BEHALF OF THE RESPONDENTS: As it pleases the Court, M'Lord.

ON BEHALF OF THE PLAINTIFF: As the Court pleases, M'Lord.

COURT ADJOURNED

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DAVIS J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
DATE OF HANDING DOWN OF JUDGMENT: 3 NOVEMBER 2022.