IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 2847/2020P

In the matter between:

TRANSSEC (4) RF Ltd APPLICANT

and

SIVANANTHA KISTEN PILLAY RESPONDENT

JUDGMENT

Delivered on 2 February 2021

Mossop AJ:

[1] This is an opposed application in which the plaintiff seeks summary judgement against the defendant. In doing so, the plaintiff seeks an order for confirmation of the termination of an agreement in terms of which a motor vehicle was sold to the defendant (henceforth '*the agreement*'), the return of that motor vehicle, being a 2019 Toyota Quantum 2.5 D-4D Sesfikile 16S motor-vehicle

with engine number […] and chassis number […] (henceforth '*the motor vehicle*') and attorney and client costs to be taxed.

[2] This morning I had the pleasure of hearing argument from Ms. Franke, who appears for the plaintiff, and Mr. Pitman, who appears for the defendant.

[3] The plaintiff's cause of action in its particulars of claim, briefly put, is the following:

(a) an entity known as Potpale Investments (RF) (Pty) Ltd (henceforth '*Potpale*') concluded the agreement with the defendant in terms of which Potpale sold to the defendant the motor-vehicle;

(b) the defendant was required to pay an initial deposit of R50,000.00 and the first instalment of R13,589.04 on 1 October 2019 and thereafter 71 equal instalments of R13,589.04 each;

(c) failure to pay any one instalment would grant Potpale the right to terminate the agreement and repossess the motor vehicle;

(d) on 8 March 2019, Potpale, the plaintiff, SA Taxi Development Finance Pty Ltd and Transsec Security SPV (RF) Pty Ltd concluded a written agreement in terms of which it was agreed that Potpale could, from time to time,

offer to sell and/or cede to the plaintiff the right title and interest that Potpale held to credit agreements that it had concluded with its customers;

(e) on 29 October 2019, Potpale sold and/or ceded to the plaintiff all of the former's right, title and interest in and to the agreement with the defendant;

(f) subsequent thereto, the defendant breached the agreement by failing to pay instalments due in terms thereof and by 17 January 2020 he was in arrears with his installments in the total sum of R41,496.34;

(g) the plaintiff has cancelled the agreement by virtue of the issuing of the summons and the total indebtedness of the defendant to it as at the date of termination is R504,371.40; and

(h) the defendant is liable to pay its costs on the scale as between attorney and client.

[4] The defendant entered an appearance to defend and on 7 September 2020 delivered his plea. In that plea, the defendant pleaded, *inter alia*, that he had entered into an oral agreement with the plaintiff (represented by a Ms. Matlego) in terms of which the plaintiff agreed to provide him with a revised agreement specifying that the defendant was to obtain his own short-term vehicle insurance and credit life insurance from Outsurance. The defendant never received the

revised agreement. To the plaintiff's allegation that he had failed to pay instalments and was in arrears, the defendant's response was a '*vehement*' denial and he pleaded that he had in '*good faith*' made an advance payment of R50,000.00 to the plaintiff.

[5] Within the period prescribed by the Uniform Rules of Court, the plaintiff brought its application for summary judgement. The defendant delivered an opposing affidavit. In that affidavit, the defendant raised the following defences:

(a) *in limine*, he denied the *locus standi* of the plaintiff, pleading that he had no knowledge of the cession relied upon by the plaintiff. He stated that the cession was dated 8 March 2019 and he offered up certain criticisms of the document bearing that date;

(b) he again pleaded the point about the insurance of the motor-vehicle already referred to earlier in this judgement and he indicated that he intended to bring a '*counteraction*' for the rectification of the sale agreement to exclude the portion thereof relating to insurance;

(c) he denied that as of 17 January 2020 he was in arrears, again asserting that he had made a payment of R50,000.00 and had been told by one '*Precious*', who is apparently employed by the plaintiff, that he should sign the agreement and take delivery of the motor vehicle and start paying the necessary

installments once the amended agreement reflecting that he did not require insurance was presented to him. He claimed to have recorded telephone conversations with Precious in this regard; and

(d) he pleaded an inability to pay thereafter arising out of *force majeure* in respect of the period from January 2019 to May 2020. I think that this is an error on his part: the date ought to have been from January 2020 as in January 2019 the agreement had not yet been concluded. He alleged that the occurrence of the *force majeure* resulted in a suspension of his obligation to pay his installments.

[6] Each of these defences needs to be carefully considered. I intend to deal firstly with the point in limine and thereafter with the other defences.

[7] As regards the question of *locus standi*, it is not clear what the relevance of the document concluded on 8 March 2019 is. Mr. Pitman's submissions in this regards seem to be valid and well taken. It may be, as Ms. Franke, argued that it is missing something that would establish its relevance to the matter at hand. At the moment, it is not possible to determine its relevance. However, it was clearly pleaded that the actual cession relied upon by the plaintiff was concluded on 29 October 2019.

[8] Cession has been defined as a bilateral juristic act in terms of which a right is transferred by agreement between the transferor (cedent) and transferee

(cessionary).[1] Generally, no formalities are required for the antecedent obligatory agreement or the act of cession although the parties may agree on the formalities with which the cession is to comply.[2] A cession may thus be written or oral, may be either express or tacit, or may be inferred from the conduct of the parties.[3]

[9] The plaintiff has not pleaded that there were any formalities that needed to be complied with regarding the cession and, on his own version, the defendant plainly has no knowledge thereof. Accordingly, the plaintiff is within its rights to simply plead that cession occurred.

[10] The defendant has alleged in his plea and in his affidavit resisting summary judgment that he has no knowledge of the cession and therefore he denies that it had occurred. That may well be so. The reality is that cession, in order to be effective, does not require the prior knowledge, consent, concurrence or cooperation of the debtor. The debtor has no right of veto. The cession is complete when the cedent and the cessionary reach finality on the act of cession. It follows that the debtor is not actively engaged in the process of cession. The reason for this is that it should not in principle matter to the debtor whether he renders his performance to the cedent or to the cessionary.

[11] The defendant's denial of the *locus standi* of the plaintiff is accordingly, in my view, not a meritorious denial. In my view, the plaintiff has established its *locus standi* and the point *in limine* must fail.

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[1] LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd 1974 (1) SA 747 (A) at 762A.
[2] National Sorghum Breweries Ltd v Corpcapital Bank Ltd 2006 (6) SA 208 (SCA) at para 1.
[3] Botha v Fick 1995 (2) SA 750 (A) at 762B-H and 778F-G.

[12] Considering the remaining defences raised by the defendant, the most significant is that he alleges that he was not in arrears with his installments as of 17 January 2020. The basis of this submission appears to be his contention in his plea that he made a payment in '*good faith*' of R50,000.00 and his further assertion in his affidavit opposing summary judgment that such payment '*more than covered any amount allegedly due at that stage*'. The plaintiff has pleaded that the defendant paid the R50,000.00 deposit but does not suggest that any other payments in that amount were made. The defendant admits payment of that amount but has not pleaded that he made another payment in that amount. It is safe to concluded therefore that only one payment in that amount was made.

[13] In my view, there is also no merit in this defence. Firstly, the payment was not a payment in '*good faith*' as claimed by the defendant. It was a requirement of the agreement. A consideration of the agreement reveals that the credit advanced or the value of goods provided to the defendant was the amount of R468,035.93. To that amount had to be added the charges in respect of an initiation fee in the amount of R2,990.00 and further charges in the amount of R2,555.33. The total of those amounts is R473,581.26. The agreement, however, records that the total of the amount advanced was R423,581.26. The reason for the difference in the two amounts is because the agreement records that from the total of the all the charges it was necessary to '*Deduct deposit required*' in the amount of R50,000.00. That deduction accounts precisely for the difference between the two figures.

[14] The deposit having been applied to reduce the value of the loan to himself, the defendant is not in a position to apply it again to unpaid installments.

[15] The suggestion that he was advised by Precious that he only had to start paying installments when he received the amended agreement can safely be rejected on at least two grounds. Firstly, any such agreement would constitute a variation of the agreement. The agreement, however, contains a clause that the agreement is the entire agreement, that no variation would be effective unless reduced to writing and that by signature of the agreement any prior agreements between the parties would be cancelled. The sequence pleaded by the defendant is that the alleged agreement with Precious was struck and he then signed the agreement In so doing, he negated the alleged prior agreement. Secondly, if the defendant did have telephone recordings of his discussions with Precious as he alleges, the very least that could be expected of him would be to put it up. He did not do so.

[16] Other than the payment of R50,000.00, the only other payment made by the defendant was one of R13,600.00 made on 4 October 2019. That payment appears to have been made late as it was due by 1 October 2019. Why he made that payment in the light of his alleged agreement with Precious is not clear. He has not suggested that he made installment payments in November or December 2019 or in January 2020. He was clearly thus in arrears. He has not offered any explanation for that failure.

[17] If the defendant believed that he was not required to pay for the insurance then the agreement is quite clear what the installments are without that charge being included. That amount should have been paid by him as a gesture of '*good faith*', a concept with which he appears to be familiar.

[18] It follows that this defence must likewise fail.

[19] A further defence raised by the defendant is that of *force majeure*. I have carefully read the agreement. There is no such clause in the agreement. If such a clause is not included in an agreement, the position then is regulated by the common-law.

[20] In terms of the common law doctrine of '*supervening impossibility*', each party's obligation to perform in terms of an agreement, and their respective rights to receive performance under that agreement, will be extinguished in the event that the performance by a party of its obligation becomes objectively impossible as a result of unforeseeable and unavoidable events, which are not the fault of any party to that agreement.

[21] As a general rule, impossibility of performance brought about by *force majeur* will excuse performance of a contract. But this is not invariably so. In each case it is necessary to consider the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the one party, to see whether the general rule ought, in the particular circumstances of the case, to be applied.[4]

[22] The rule will not avail a party if the impossibility is self-created, nor if the impossibility is due to that party's fault.[5] Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the party raising it.

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[4] MV Snow Crystal, Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal 2008 (4) SA 111 (SCA) at para [28].
[5] MV Snow Crystal, Transnet Ltd t/a National Ports Authority, supra.

[23] The event must render performance absolutely or objectively impossible. The fact that *force majeure* has made it uneconomical for a party to carry out its obligations does not mean that performance has become impossible.[6]

[24] There was no national lockdown in January and February 2020 or in March until 27 March 2020. It is a matter of general knowledge that on Monday, 23 March 2020, the President of the Republic announced that South Africa would enter a nationwide lockdown for a period of twenty-one days commencing at midnight on Thursday, 26 March 2020.

[25] There is no explanation forthcoming from the defendant why he made no payments preceding the declaration of the nationwide lockdown. If his explanation is that his payment of R50,000.00 placed him in credit for that period, he is mistaken, as previously explained. However, assuming for the purposes of argument that there is merit in that proposition, if the installment was simply the amount in respect of the motor vehicle component of the agreement then his credit was depleted at the end of February 2020 and he would have had to make a payment at the beginning of March 2020. If the installment was the motor vehicle component and the insurance component then his credit would have been depleted by the end of January 2020. No matter how one looks at the facts, the defendant was in arrears by the end of February 2020 at the latest on his version. Mr. Pitman accepted that he was in arrears. The failure to pay the installment due at the beginning of March 2020 remains unexplained.

[26] While there may be some merit in the fact that the defendant could not

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[6] Yodaiken v Angehrn and Piel 1914 TPD 254 at 260.

generate income after March 2020, this in my view does not avail him. Accepting as I do that the payment of the sum of R50,000.00 was not a payment in '*good faith'*, he was in arrears in respect of the months of November and December 2019 and January, February and March 2020. In such circumstances, the plaintiff was entitled to cancel the agreement, as it has done.

[27] That brings me to the final defence raised, that of rectification of the agreement. The essential contention of the defendant is that the agreement ought not to have included an amount in respect of insurance, which he would arrange independently. He asserts in this regard that he already had insurance in place that would, and did, cover the motor vehicle.

[28] It is evident from this defence that it is not a complete defence to the plaintiff's claim. It covers only the insurance component of the claim.

[29] As pointed out previously, the agreement sets out fully the individual components comprising the total that the defendant was to repay. The instalment in respect of the motor vehicle was R10,646.01. Interestingly, where this total is recorded in the agreement, the following wording appears:

> *'Total Instalment Payable which relates to finance excluding Credit Insurance costs and Tracking connection fee'*

[30] This wording would tend to suggest that it was not compulsory for the defendant to avail himself of the insurance offered by Potpale.

[31] The issue of insurance was dealt with separately in the agreement and totaled R2,943.03.

[32] At the base of the agreement, the following wording appears:

> *'Any amount reflected as R nil/R0.00 indicates that this has not been selected or provided. If insurance cover has not been selected you will not be entitled to any of the cover benefits normally offered under the Policy.'*

[33] Any doubt about whether the insurance offered by Potpale was compulsory is swept aside by this wording. It was thus not required of the defendant to agree to the insurance offered by Potpale. He could quite easily have crossed the insurance clause out. It was his choice to accept it. There are no amounts reflected on the agreement as being '*R nil*' (there are such recordals, however, in respect, of an extended warranty agreement and a motor plan). This can only mean that the defendant chose to take out the insurance offered by Potpale which he now seeks to distance himself from. This is reinforced by the contents of annexure 'VV3' to the plaintiff's application for summary judgment which is an insurance proposal in respect of insurance offered by Guardrisk insurance company. The defendant signed this on 23 August 2019 and he also signed a credit life proposal on that date as well.

[34] Moreover, the defendant has provided no explanation for why he signed the short-term insurance proposal and the credit life proposal if this was contrary to what he had agreed with the representative of Potpale. These documents have simply been ignored by him and their contents not considered.

[35] The defendant asserts that he did not require the insurance offered by Potpale because he already had insurance in place through Outsurance and puts up documentation to that effect. However, that insurance is not in his name, but in the name of '*CT Tours*'. This appears to be a registered company as the registration number thereof is recorded as being '*1994/010719/06*. How the defendant is connected to that entity is never revealed. It is recorded that the company is a *'Leisure & Recreation – Tour Operator'*.

[36] I am mindful of the fact that, in general, a dispute relating to the rectification of documents, whether it be the plaintiff or the defendant that seeks such rectification, cannot be resolved in a summary judgement application.[7]

[37] Ms. Franke has argued in her heads of argument that the agreement contains a non-variation agreement which precludes rectification as a valid defence. I have considered that clause. Its wording does not appear to me to exclude an entitlement to claim rectification. The exclusion of a parties right to claim rectification must be clear and unambiguous.[8]

[38] But that is not the end of the matter. Even if the defendant were to seek rectification and succeed in that claim, his defence would be in no better position. Having found that he is in in arrears, he will still remain in default for not paying at the very least the motor vehicle component of the instalment. In any event, his conduct in signing the proposals, the fact that he paid the first instalment in the amount that included the insurance component and the fact that the insurance

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[7] Malcomess Scania (Pty) Ltd v Vermaak 1984 (1) SA 297 (W) 299E at 299F to G; Jarrosen Estates (Edms) Bpk v Oosthuizen 1985 (3) SA 550 (NC).

[8] Jarrosen Estates (Edms) Bpk v Oosthuizen 1985 (3) SA 550 (NC) at 553D; Leyland SA (Pty) Ltd v Rex Evans Motors (Pty) Ltd 1980 (4) SA271 (W) at 273.

with Outsurance is not in his name but in the name of another company, leads me inexorably to the conclusion that he has not put up a *bona fide* defence to the plaintiff's claim.

Order

[40] In the circumstances, I grant summary judgment against the defendant for:

1. Confirmation of the termination of the agreement concluded between the plaintiff and defendant on 27 August 2019;

2. Return of a 2019 Toyota Quantum 2.5 D-4D Sesfikile 16S motor-vehicle with engine number […] and chassis number […]; and

3. Costs on the scale as between attorney and client.

MOSSOP AJ

APPEARANCES

Date of Hearing	:	2 February 2021
Date of Judgment	:	2 February 2021
Counsel for Plaintiff	:	Advocate S. Franke
Instructed by	:	Mary-Lou Bester Incorporated
Counsel for Defendant	:	Advocate M. B. Pitman
Instructed by	:	Amith Luckan and Company