

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 4643/2021

DATE: 2022-11-10

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

REVISED

DATE:14/06/2023

In the matter between

MERCEDEZ-BENZ FINANCE & INSURANCE

Applicant

and

MATHARA INVESTMENTS CC & MARY-JANE

THABO RAMUSI

Respondents

JUDGMENT

PILLAY (AJ): The Court proceeds with an application for summary judgment that is being brought by the applicant, Mercedes-Benz Finance and Insurance, a Division of Mercedes-Benz Financial Services, South Africa being the plaintiff and Mathara Investments CC being the first defendant and Mary-Jane Thabo Ramusi being the second defendant.

The application has been sought in terms of the summary judgment. It is briefly the following. that the summary judgment against the defendants, jointly and

severally for the one paying the other to be absorbed for cancellation of the agreement entered into between the plaintiff and defence.

An order, authorizing the sheriff of the High Court to attach, seize and hand over the vehicle to the plaintiff being a 2018 Mercedes-Benz B-250 BlueTEC Avantgarde 80 Automatic Transmission Engine number 651[...], chassis number WDF 447[...].

And then the further prayers would be flowing from that application sought. In support of the application they have an affidavit from Feroza Ghani, who informs the court that she is a legal and collection specialist for the plaintiff and that she has access to books, accounts and recording alleging to the defendant's facility.

They are stored all electronically and she has access to them via her computer and the result of the foregoing the facts contained are with in her personal knowledge and believed true and correct. She is duly authorized to dispose of, to dispose this affidavit. She humbly swears positively to the facts and verifies the cause of action that the defendant is indebted to the plaintiff in the amount claimed in the summons and on the ground set out therein.

She furthermore humbly verifies that the defendant is indebted to the plaintiff in the sum of R1,115,838.42, together with the interest at 12 percent from 7 March 2022 to date. She also submitted a certificate of balance to confirm said. She is of the opinion that the defendant does not have a *bona fide* defence to the claim, and the defendant's special plea and plea has to be, has not raised

any issue for a trial by virtue of the following, and this is what she is alleging in her affidavit.

The defendant admits that the plaintiff is a registered credit provider. That the defendant admits that *domicile* address. The defendant admits that the first defendant entered into an agreement with the plaintiff. The defendant admits the terms of the agreement. The defendant admits that the vehicle was delivered to the first defendant and the first defendant is in possession of the vehicle.

And the defence: The defendant denies breach and the arrears amount claimed by the plaintiff. The defendant denies that the plaintiff complied with its obligations and that the defendant could not and has not received the breach notice in the 129 notice which was delivered to 8[...] C[...] H[...] Drive, Seshego. Did not specify the unit or zone number of Seshego being zone 1.

The defendant alleges that the deed of security ship is not a valid as the second defendant was married in community of property and property and loss at the time of signing the suretyship and as such the consent of a spouse was required. The defendant admits that the plaintiff remains the lawful owner for the vehicle.

She has identified the following points in law, which she relies on in her pursuit for summary judgment. The vehicle is still in the defendant's possession and as such, the defendant remains liable and is indebted to the plaintiff in the amount as per the certificate of balance. Further that the credit agreement has the certificate signed by the manager or the plaintiff shall be *prima facie* proof of the

borrowers indebtedness at the time.

It shall not be necessary to proof the identity and or appointment of the person signing any such certificate and then the 129 in breach notice has been addressed, however it was a point *in limine* which was not taken to fruition and abandoned. And then the striking absent from the founding affidavit is any indication as to what effect the defendant could have used their statutory right had they received the notice prior to the summons, or how the defendant could use those rights now that is still in respect of the Section 129 and they, it has been held and this is what she says at 7.7, and it will be argued that a dilatory defence cannot be a *bona fide* defence.

Now a suretyship signed on behalf of a company, usually as a director in favour of a creditor, the second defendant is a member of the company and as per the resolution attached here to and signed the suretyship agreement in the ordinary course of business and that the Matrimonial Property Act 88 of 1984 sets up the provisos consent of spouse to sign as a surety is not required when a party signs an agreements such as a suretyship agreement in their ordinary course of business.

Such suretyship is deemed valid and enforceable. She prays for summary judgment. The defendant opposes the application and raises the following in the arguments. This is the second defendant that is opposing, but as a person that has the capacity to speak for herself and the first dependent. The facts in the affidavit are correct to the best of her ability and I am dealing with point 2, she says she deposed this affidavit in order to oppose or resist the granting of summary judgment, which plaintiff, applicant is

sought, the grounds for opposing the application are set out here below.

The *point in limine* which was abandoned will not be canvassed by the Court in respect of her response. We are doing point 2 at '*Bona fide* defence'. I am cited in the main action premised on the purported deed of suretyship. It is my contention and submission that the purported deed of suretyship is valid on the basis that at the time of signing the same I was already married in community of property, community of property and of property and loss. The purported surety does not comply with the provisions of Section 15(1) of the Matrimonial Property Act and as my husband did not give the written consent to bind myself as the surety.

It is denied that the application, applicant has terminated the credit agreement *in casu* as the first respondent has been and is still paying the monthly instalments due to the applicant as per the agreement, despite the alleged termination. The first respondent is not indebted to the applicant. The first respondent has been and still is paying the instalments of the applicant.

Lastly, the first respondent is not in arrears as far as the contractual instalments due to the applicant are concerned. She respectfully submits this application, be dismissed with cost and the first respondent be granted leave to defend the main action until the first and second (I take it) respondents be granted leave to defend the main action until finality.

Now I have heard arguments from both the applicant, plaintiff, and the respondents/defendants in this

particular matter and I have had to consider all the provisions insofar as summary judgment is concerned. Now, the most important aspect to attend to would be the fact that there would be need for compliance to the new rules, insofar as a summary judgment application is concerned.

Clearly this was not a point in issue, so I can accept nobody raised it as it is a problem insofar as the application itself is not complying to the Rule 32. I can accept that the respondent in as much as from the Bar, raised it as a argument. It is not an argument that was an argument sought by the defendants/respondents when they responded on oath to the affidavit.

So as far as Rule 32 is concerned, I accept that the affidavit that was compiled by the applicant for the summary judgment was done in terms of the provisions of the new Rule 32. Now in terms of Rule 32 a Court might grant summary judgment in respect of claims based on a liquid document for a liquidated amount for delivery of a specific, a specified movable. movable property and for ejectment together with interest and costs.

Now, when opposing an application for summary judgment the respondent would be required to satisfy the Court that he or she has a *bona fide* defence to the action. In the respondent's papers it must disclose fully the nature and grounds for its defence and the material facts that it relies upon, as raised by the counsel for the respondent, *Mirage versus Barclays Bank, National Bank Limited*, 1976 (1) South Africa 418 (A) 426.

"In essence, the sets of facts set out or the set of facts that

are set out by the respondent must be able to be proven at the trial stage. And this would constitute a valid defence to the claim raised by the plaintiff."

Now if the defendant fails to set out a *bona fide* defence or to raise triable and arguable issues, and the plaintiff can establish that its case clearly on the papers then summary judgment should be granted. On the other hand if the plaintiff has an unanswerable case and it is reasonably possible that the defendant has a good defence, then the defendant should be given an opportunity to ventilate this defence.

Now, in this particular case, there is an agreement. It is an instalment sale agreement for the purposes of the purchase of this Mercedes-Benz vehicle, the details of those, that vehicle has been amplified by the Court when it started its introduction concerning the, the movable property that is being sought to be attached and removed outside of confirming the cancellation of this contract.

Now it is alleged by the plaintiff in this particular matter that the defendant first and second, the surety for the first defendant, but it is also a member of the first defendant has failed to satisfy the obligations in terms of the agreement and as such the plaintiff seeks for the cancellation and the return of the asset and then obviously the following steps that may occur thereafter.

And for all intents and purposes, the provisions of the National Credit Act, which was initially raised as a *point in limine*, will not be adjudicated on by this Court, insofar as this matter is concerned because everybody kept their attention to the defence raised, the points that were argued

and the issue of the provisions of the National Credit Act not featuring at this stage in this application for the vehicle to be returned.

The court took cognizance of what the defendant in their affidavit indicated. The arguments that were raised firstly is that;

1. As far as the first defendant is concerned. The respondent in this, first respondent in this matter says, as far as they are concerned, they do not believe this contract has been cancelled. They have been consistently complying to the contract's terms and conditions. And that, for all intents and purposes, they have paid and they are up to date as far as the instalments are concerned. They are not indebted to the applicant and they have been paying their instalments to the applicant as per the agreement. And they are not in arrears as per contractual instalments as at, or as alleged by the plaintiff/applicant.

Now when one has to listen or read or take cognizance of that defence one, and correctly quote as the applicant argued, one would expect for one when one raises a *bona fide* defence that there would be some form of motivation to supplement that *bona fides*. You do not have to proof the case, but you can say that I strictly adhere to the contract's terms in that every month on the 30th of the month I have paid my instalment. I have proof that would be able to substantiate this allegation.

Something more than a bold averment a bold allegation, something more than just what is in the air for

this Court to be able to say that if the Court refuses the application for summary judgment, the Court sees that the defendant/respondent of this application has a triable issue that clearly the applicant/plaintiff has abused its authority, misconnected the account of the defendant/respondent, number one , and has not credited this account with the amount of money that supposedly has been paid by the respondent number 1, debtor, defendant number 1.

However it is just stated. There is no mention of dates or times, and when one comes to the court wanting to show *bona fides*, the whole essence of the word *bona fides* means clean hands. You tell the Court what exactly is your defence. The new Rule 32 provides that only after the plea, when the defendant has put down on paper what they rely on to rebut the claim of the plaintiff can the plaintiff approach the Court for summary judgment.

More importantly then everyone is aware what the defendant is claiming. Now from the plea, there was a lot of reliance on the provisions of the National Credit Act as far as what could possibly be a defence raised. And for all intents and purposes, the Court cannot but help note that in respect to this amount that is provided on the certificate of balance be it the certificate of balance on the summons. Which I need to just bring to everyone's attention so that everyone knows, just bear with me a second so that the record can read exactly to what the Court is taking cognizance of.

Actually for record purposes the summons did not have the, it had the 129 notice on it, but the certificate of balance that I am looking for I cannot seem to find right now. But the affidavit in support and the current certificate of balance

speaks to the same amount. I am not going to allow myself now to get distracted by numbers except to say that there is an arrear amount that arrear amount is identifiable.

As highlighted by the applicant when the application was placed before the Court and in argument the applicant at this stage is only seeking two issues, to have the contract declared confirmed to be cancelled and then for the return of this motor vehicle and then after that whatever the steps may proceed will have to be proceeded upon. In the response to this application we have the first defendant say, the first defendant is according to them and according to the affidavit not in debt it has paid its debt and it is not in arrears. It has not motivated why, how and on what basis this particular aspect is attending to and is in existence from.

More importantly the Court must take cognizance of the fact that summons was already issued as far as the particulars of claim is concerned. It was issued, served on the defendant already, three to seven sorry.

ADV FOR APPLICANT: Page 3 M'Lady.

COURT: Sorry?

ADV FOR APPLICANT: Page 3.

COURT: Thank you. I am looking on page 7. It was already served on the first and second on 11 January 2022. So from 11 January 2022 when summons was issued right up and until today we had not had any where an indication to the effect that there is proof to this amount that I have paid, I can defend this case

because you have got a wrong claim against me. And normal course, one would expect that if one is opposing the summary judgment that that *bona fides*, that genuine intent from the first respondent would have come to the fore.

In so far as the second respondent is concerned she has raised the issue of suretyship that she could not have signed because she was not in the right capacity to be able to sign it as the person applying to purchase this vehicle on behalf of the first respondent in her capacity as a member of the first responder.

So at the time when she was negotiating the contract and signing the contract and seeking the finance towards the contract, etcetera she did not have that right to capacity and because of that, when she signed as the surety for the business she did not have the necessary authority.

Now the agreement is *ex facie* on the documents and one would expect that if this capacity was in any way questioned that would have been the part when the vehicle would not have been given to the applicant or to the respondent/first, second defendant on the basis that you are not in a position to contract because of the following reasons, you do not qualify to contract because of the following reasons. You have disclosed all these aspects to us before we could go further with this agreement.

Clearly, at the time when she was signing this a surety she was signing on behalf of this business that was going to pay. The business that was going to be able to meet the requirement of this contract to be able to take this

vehicle off the lot from Mercedes-Benz. The Court is satisfied that that defence that she has raised insofar as her statutory capacity in terms of the Matrimonial Property Act is concerned.

It has no merit. It could not have made it if she was prepared to commit herself at the time she contracted for this entity in respect of the purchase of this vehicle. The Court is satisfied that the defences raised were firstly bold, they did not have any supporting foundation on which to rely and technical which does not show *bona fides* on the parts of the first and second respondent to play open cards with the Court. And as such the prayers sought in the application for summary judgment has to be granted.

Therefor the Court orders as prayed that the summary judgment against the defendants for both jointly and severally, the one paying the other to be resolved, cancellation of the agreement entered into between the plaintiff and the defendants, and the further order authorizing the sheriff of the High Court to attached, seize and hand over the vehicle to the plaintiff, being this 2018 Mercedes-Benz V-250 BlueTEC Avantgarde Automatic Transmission Engine number 651[...], chassis number WDF 447[...].

And that there would be costs in the suit. The plaintiff is given leave to approach the above Honourable Court on the same papers duly supplemented for the payment of the difference between the balance outstanding and the market value of the vehicle in the event that they, being a shortfall after the vehicle has been repossessed and sold or released, and there being a balance outstanding by the defendants to the plaintiff.

ADV FOR APPLICANT: As the Court pleases M'Lady.

MR PHASHA: As the Court pleases M'Lady.

COURT: The draft order is then signed, X. Made an order of the Court. Thank you.

ADV FOR APPLICANT: M'Lady if the Court will permit, I just realised I handed all the copies of the concept orders up to Court, may I just uplift one to give it to Mr Phasha? There is three. So then there will be two on the Court file.

COURT: I have to sign them.

ADV FOR APPLICANT: Yes I am ...[intervenes]

COURT: And I am giving ...[intervenes]

ADV FOR APPLICANT: I only need one extra because I know it is customary to at least hand it to your opponent as well. Thank you M'Lady.

COURT: Thank you then the Court will adjourn for the day.

COURT ADJOURNS

[15:05]

Date: 2023-06-08

The Clerk of the Court: Registrar of the High Court;
Polokwane

PROBLEMS WITH THE TRANSCRIPTION: 2022-11-10

With reference to the record of proceedings, the following problems were experienced on the audio on .

1. Incorrect grammar typed verbatim.
2. Unknown names typed phonetically.
3. No annotations for names of Judge nor defence advocate.

Rina Pistorius

Transcriber

NOTE: Transcriber can only transcribe what is recorded and what is clearly audible.

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