



Republic of South Africa  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case Number 6744/2011**

In the matter of:

**DELTA FINANCE, a division of WESBANK,**  
**A division of FIRSTRAND BANK LTD**

**Applicant/Plaintiff**

versus

**MARIUS OPPERMAN**

**Respondent/Defendant**

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**Judgment: 9 DECEMBER 2011**

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**MOSES, AJ:**

**Introduction.**

[1] This is an opposed application for summary judgment pursuant to a summons having been issued in terms whereof the plaintiff claims, *inter alia*, for the delivery of a motor vehicle that was sold to the defendant in terms of a written instalment sale agreement.

[2] The essential averments as reflected in the plaintiff's particulars of claim, and on which it relies for its claim for summary judgment, appear to be the following:

- “5. That on 26<sup>th</sup> August 2005 and at Bellville, Unitrans Motors t/a Williams Hunt Cape Town (hereinafter referred to as the “Seller”) entered into a written Rental Agreement (**a copy whereof is annexed hereto marked “C”**) with the Defendant who leased one 2005 Isuzu KB bearing engine no: 4JH1267805 (**a copy of the Registration Certificate is annexed hereto marked “D”**) for a total rental of R412 936, 90 which included finance charges of R107 005, 59 and documentation charges of R3 448, 31. That on the 26<sup>th</sup> August 2005, the Seller duly gave cession of its right, title, interest and ownership in the Agreement to the Plaintiff being Delta Finance, a Division of Wesbank, a Division of Firststrand Bank Limited, who accepted the cession of same.
6. It was an express term and condition of the Agreement that the Defendant would pay to Plaintiff on the 1<sup>st</sup> day of each month an instalment of R5 354, 10 commencing on the 1<sup>st</sup> October 2005 with a final instalment of R97 045, 00 on the 25<sup>th</sup> August 2010.
7. That ownership in the said vehicle would remain vested in Plaintiff.
10. That the Defendant has breached the terms of the Agreement in that he has failed to maintain regular instalments on account, the arrears being the sum of R105 578, 37 and the balance the sum of R105 578, 37. As a result of the Defendant’s breach, the Plaintiff has elected to cancel the Agreement, alternatively, Plaintiff’s election to cancel the agreement is herewith

conveyed to the Defendant”.

[3] In addition. Plaintiff also seeks rectification of the written agreement referred to above on the following basis:

“4.1 The written agreement does not correctly record the agreement between the parties in that it records the engine number as **“4JHR67805”** and the chassis number as **“271433”**.”

4.2 The incorrect recordal of the engine and chassis numbers was occasioned by a common error of the parties and the parties entered into the agreement in the **bona fide** but mistaken belief that it recorded the true agreement between the parties.

4.3 The engine number should have been recorded as **“4JH1267805”** and the chassis number as **“ADM TFR77D5C271433”**.”

[4] The plaintiff therefore prays for judgment against the defendant for:

- “(a) An Order rectifying the written contract, **Annexure “C”** by the substitution of engine number **“4JHR67805”** and chassis number as **“271433”** for engine number **“4JH1267805”** and chassis number **“ADM TFR77D5C271433”**;
- (b) Confirmation of cancellation of the agreement;
- (c) Delivery of the goods to the Plaintiff;
- (d) Damages being the difference between the value of the goods upon repossession and the balance outstanding on all amounts due to the Plaintiff by the Defendant;
- (e) Interest calculated on prayer C at the rate of prime plus 0,16% per annum as from date of Summons to date of payment,

calculated on the outstanding balance from time to time;

- (f) Costs of suit;
- (g) Further or alternative relief.”

[5] In its application for summary judgment the plaintiff only seeks for an order in terms of prayers (a), (b), (c) and (f), prayers (d) and (e) to stand over for later determination. At the hearing of this matter Mr Wessels, who appeared on behalf of the applicant/plaintiff, advised the court, that the plaintiff is not persisting with the claim for an order confirming the cancellation of the agreement inasmuch as “... the agreement has been validly cancelled and this is the case whether the court confirms it or not”.

[6] The plaintiff relies on two affidavits in support of its claim for summary judgment; one of Zaibunissa Munshi (“Munshi”) and one of Erica Korb (“Korb”). In her affidavit Munshi states the following:

- “1. I am a Team Manager, duly employed as such by the Plaintiff at Wesbank House, Riebeeck Street, Cape Town. I am duly authorized to depose to this Affidavit on behalf of the Plaintiff. I have all the Plaintiff’s files and documents pertaining to this matter under my control and have furthermore perused all such documents and files and acquainted myself with the contents thereof.
2. Due to a lack of storage space, the Plaintiff has embarked upon a process of storing its documents on a computer as scanned images. In each case, once the original document has been scanned and stored upon the Plaintiff’s computer, the original is destroyed.

3. A copy of the agreement relating to the above matter has been retrieved from the Plaintiff's computer system and is annexed to the Plaintiff's Particulars of Claim marked Annexure "C".
4. I respectfully submit that the annexure is the best evidence of the agreement in view of the fact that the original has been destroyed. On this basis I would ask the above Honourable Court to accept the copy into evidence in accordance with the principles established in *Barclays Western Bank Limited v Creser*, 1982 (2) SA 104 (T) at 106G."

She concludes with a prayer that summary judgment be granted in the plaintiff's favour, against the defendant/respondent.

[7] Korb in her affidavit states *inter alia* that she is employed by the plaintiff as a Team Manager, who, in her said capacity, have all the plaintiff's files and documents pertaining to this matter under her control and that she has perused these and acquainted herself with the contents thereof. She states that as a result of a lack of storage space, the plaintiff has embarked upon a process of storing its documents on a computer as scanned images; and that, in each case, once the original document has been scanned and stored as such, the original is destroyed. Thus, in this case the document annexed to the plaintiff's particulars of claim on which it relies for its relief, is such a scanned copy of the original but, so she submits, should be accepted and admitted by this court as the best evidence of the agreement that exists between the plaintiff and the defendant. In addition, so she submits, this document, which she certifies as being a true copy of the original agreement, qualifies as a data message as defined in the Electronic

Communications and Transactions Act, No. 25 of 2002, since it is data stored by electronic means. She therefore submits, “that, notwithstanding that the annexed document is a copy, it may, by its mere production in these proceedings and by virtue of the provision contained in Section 15 (4) of the Act (referring to the above-named Act 25 of 2002) be admitted as evidence as rebuttable proof of its content” (my emphasis).

[8] In the opposing affidavit filed on behalf of the defendant various points are taken to found a defence. These include the following:

1. That the defendant disputes certain sections of the alleged agreement;
2. That the particulars of claim do not comply with rule 18;
3. That rectification is sought and that this aspect cannot be decided without evidence;
4. That the plaintiff lacks *locus standi* as a cession agreement has allegedly not been fully pleaded;
5. That the defendant has denied that the amount alleged to have been overdue as alleged in the summons;
6. That the court should exercise its discretion not to grant summary judgment in favour of the defendant.

[9] Mr Wessels, on behalf of the plaintiff, submitted that these defences raised by and on behalf of the defendant are spurious, and in the context of this case constitute, “... a textbook example of a *mala fide* defence that seems to have been compiled with the sole purpose of frustrating and delaying the plaintiff’s claim”. The gist of Mr Wessels’ arguments is that the defendant did not, in its opposing affidavit, disclose a *bona fide* defence to

the plaintiff's claim. With regards to the claim for rectification, he submitted, with reference to *PCL Consulting (Pty) Ltd v Tresso Trading 116 (Pty) Ltd* 2009 (4) SA 68 SCA at paragraph 4, that since the defendant in *casu* did not properly dispute the *facta probanda* that are necessary in order to entitle the plaintiff to the relief it seeks, the mere fact that the plaintiff claims rectification is no bar to the granting of summary judgment. In other words, and as I understood Mr Wessels' argument, since the defendant did not dispute the merits of the rectification of the contract, the claim for rectification is competent, and hence it is no bar to a summary judgment application. I return to this aspect hereunder.

[10] Mr Rabie, who appeared on behalf of the defendant/respondent, submitted that, in order for the plaintiff to succeed in its application for summary judgment, it must overcome three formidable hurdles. Firstly the plaintiff must make out a proper case on its papers for summary judgment to be granted, failing which, the application must fail. If the application is defective, the defendant, in such circumstances need not advance a *bona fide* defence. The second hurdle to overcome by the plaintiff are the provisions of Rule 32 (3), namely if the defendant has a *bona fide* defence to the plaintiff's claim, summary judgment will be refused. Thirdly, the court has a wide discretion by virtue of the provisions of Rule 32 (5) and the plaintiff should only succeed in its application for summary judgment if it has an unanswerable case. It was Mr Rabie's contention that the application for summary judgment should fail on all three grounds as above-stated.

[11] It was submitted, and in my view forcefully demonstrated that the application for summary judgment is defective, inasmuch as:

- a) The contract – the written agreement, of which only a copy was annexed to the particulars of claim, and of which material terms are disputed by the defendant – is incomplete. Certain parts of this copy of the agreement annexed to the particulars of claim reflect the signature and/or initials of the parties, whereas other parts of the contracts do not contain such signatures and/or initials. In addition, the original agreement is, on the plaintiff's own version, destroyed.
- b) The plaintiff relied on a cession to establish its *locus standi* in the claim against the defendant, without pleading the terms of the cession agreement, nor annexing a copy of this cession agreement, if in writing, to the particulars of claim, as it should have done, but failed to do.

(See LTC Harms, Amler's Precedents of Pleadings (7<sup>th</sup> Edition, 2009) page 75 and the references cited therein under the subheading "Contract of Cession").

- c) In the circumstances there had not been compliance with the requirements of Rule 18 of the Rules of this court.

[12] It must be pointed out that the plaintiff's additional hurdle was and remains, on its own admission, that it relies on secondary evidence of this contract, which is allegedly a scanned computer generated image of the original, and which is, as admitted, rebuttable proof of its contents. (See paragraph 7 above). This contract, and the terms thereof, are disputed by the defendant. In the absence of the original contract, and given the fact that




certain material terms are disputed by the defendant, this is clearly an aspect that will have to be properly ventilated by means of admissible evidence at a trial. To grant summary judgment in such circumstances would, in my view unfairly deprive the defendant the opportunity to lead rebuttable evidence in that regard, and thus deprive it of its right to defend the matter. Moreover, where there is a claim for rectification of a contract, which is disputed, as in *casu*, such a claim fall outside the provisions of Rule 32. (See *PCL Consulting (Pty) Ltd t/a Philips Consulting SA v Tresso Trading 119 (Pty) Ltd*; *supra* paragraphs 4-5; see also Van Niekerk et al, Summary Judgment – A Practical Guide (2011) Service Issue 10 paragraph 4.6 where the authors, with reference to the abovementioned SCA judgment in *PCL Consulting (Pty) Ltd – case (supra)*, state the position as follows: “A dispute relating to the rectification of documents, whether it be the plaintiff or the defendant who seeks such rectification, cannot be resolved in a summary judgment application,” (emphasis added).

[13] As pointed out above, the contract is disputed, and to my mind, on *bona fide* grounds. It is trite that the remedy of summary judgment should be resorted to and accorded only where the plaintiff can establish his or her right clearly and the defendant fails to set up a *bona fide* defence. (See Erasmus, Superior Court Practice, Service Issue 34, 2009, B1-206 – B1-207 and the cases referred to therein). After careful consideration of all the facts and circumstances of this case, as well as the submissions advanced by both counsel on behalf of the plaintiff and defendant respectively, I am of the view that the plaintiff has failed to establish its right to summary judgment clearly. I am also of the view that the defendant has a *bona fide* defence in

law to the plaintiff's claims. Having come to this conclusion I do not consider it necessary to deal with the remaining contentions raised on behalf of the plaintiff/applicant, and on behalf of the defendant/respondent.

[14] In the result, based on the facts and circumstances of this case, and in the exercise of my discretion, the following order is made:

1. The application for summary judgment is refused;
2. The defendant/respondent is granted leave to defend the matter;
3. Costs of the summary judgment application are to stand over for later determination by the trial court.



MOSES, A J