IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 20932/10

In the matter between:

CLIVE FRANCIS FORD Applicant (Defendant)

and

ALPHERA FINANCIAL SERVICES (A DIVISION OF BMW FINANCIAL SERVICES (SOUTH AFRICA) (PTY) LTD Respondent (Plaintiff)

Court: GRIESEL J
Heard: 15 November 2012
Delivered: 20 November 2012

JUDGMENT

GRIESEL J:

[1] This is an application in terms of Uniform rule 31(2)(b)[1] for rescission of a default judgment granted by the registrar of this court on 20 April 2011 in favour of the respondent (plaintiff in the main action)

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[1] Rule 31(2)(b) provides:
'A defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.'

against the applicant (as defendant). (For convenience, I refer to the parties by their respective designations in the main action.)

Factual background

[2] The claim arises from a written 'instalment sale agreement' concluded on or about 24 May 2007 ('the agreement') in respect of a certain 2005 Volkswagen Touareg 4.2 V8 TIP motor vehicle. In the agreement, attached to the particulars of plaintiff's claim, the defendant is described as the purchaser, whereas the seller is described as 'Alphera Financial Services (A Division of BMW Financial Services (South Africa) (Pty) Ltd)'. The document also bears the company registration number '1990/004670/07' which, according to the undisputed CIPC company report on record, is the number allocated to BMW Financial Services (South Africa) (Pty) Ltd.

[3] The principal debt amounted to R407 675 plus interest, payable in monthly instalments of R8 782,14 commencing on 1 July 2007. The agreement also contains the usual reservation of ownership clause until the full purchase price has been paid.

[4] Subsequent to the conclusion of the agreement and the delivery of the vehicle the defendant fell into arrears with the monthly instalments and on 10 June 2009 the arrears amounted to R15 2002,72. In the result, on 11 June 2009, the plaintiff sent a notice in terms of s 129(1) of the National Credit Act, 34 of 2005, to the defendant. However, the defendant failed to respond to the notice with the result that the plaintiff elected to cancel the agreement, which election was communicated by way of a letter sent by pre-paid registered post. This was followed by

summons issued in the Cape Town magistrate's court, seeking *inter alia* the return of the vehicle.

[5] In the summons, the plaintiff was cited as 'Alphera Financial Services (A Division of BMW Financial Services), a company having a share capital duly formed and incorporated as such . . . (etc)'. The defendant noted an exception to the particulars of claim, *inter alia* on the basis that they do not disclose a cause of action, the argument being that the plaintiff as cited 'is not a person legal or juristic capable either of contracting or of suing or being sued' and that, 'accordingly the action was void *ab initio* and a nullity'. When the exception came to be argued before the magistrate, on 8 March 2010, there was no appearance on behalf of the plaintiff, with the result that the exception was upheld and the action was dismissed with costs awarded against the plaintiff's attorneys *de bonis propriis*, this on the basis that costs could not be awarded against or recovered from a non-existent plaintiff. In the event, the plaintiff's attorneys duly paid the costs.

[6] Subsequently, on 14 July 2010, a second notice in terms of s 129(1)(a) of the Act was sent to the defendant, the arrears having escalated to R134 276,91 in the meantime. In the absence of a response from the defendant, summons was issued in this court in the present matter, the plaintiff now being cited as 'Alphera Financial Services (A Division of BMW Financial Services (South Africa) (Pty) Ltd)'.

[7] The summons was served on 28 September 2010 at the same address where the magistrate's court action's summons was originally served (being the chosen *domicilium citandi et executandi* in terms of the

agreement), which address had not been changed by the defendant at any stage. The defendant did not enter appearance to defend the matter, with the result that default judgment was granted by the registrar on 20 April 2011, as mentioned earlier, confirming the plaintiff's cancellation of the agreement and directing the defendant forthwith to return the vehicle to the plaintiff. A warrant for the delivery of the goods was issued simultaneously.

Application for rescission

[8] In his founding affidavit in the present application, the defendant explained that he was not in wilful default as he had not received the summons that gave rise to the default judgment herein. This was due to the fact that he had several months earlier vacated the premises chosen as his *domicilium citandi et executandi* and that he believed that the plaintiff had full knowledge of that fact. He only became aware of the judgment when a debt collector authorised by the plaintiff's attorneys arrived to recover the vehicle. The present application was launched, on 8 September 2011, within 20 days after he became aware of the judgment, as required by rule 31(2)(b).

[9] As far as the requirement of a *bona fide* defence is concerned, the defendant states that '. . . my intention in this matter is to prove to this Honourable Court at a trial that I am not indebted to the "Plaintiff" in the amount alleged or at all since the "Plaintiff" does not exist at law nor is the "Plaintiff" so called entitled to "take" the vehicle from me.'

[10] This was in essence the same defence that was upheld on exception by the magistrate. This led the defendant to add a second

string to his bow by claiming that the present matter is *res judicata*, having already been 'finally adjudicated upon by the magistrate's court . . . and was dismissed substantially and on its merits'.

Discussion

[11] There is a burden of proof on the defendant of actually proving 'good cause' (Afrikaans: '*gegronde redes*') for rescission. This includes 'the existence of a substantial defence'.[2] While it is neither possible nor desirable to attempt a definition of this ubiquitous term in our law, certain requirements have crystallised from the decisions of our courts over the years:

(a) The applicant must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.

(b) His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.

(c) He must show that he has a *bona fide* defence to the plaintiff's claim.[3]

[12] The first requirement, although not conceded on behalf of the plaintiff, was not seriously challenged on its behalf in these proceedings and I shall accept in favour of the defendant, without so finding, that he

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[2] *Silber v Ozen Wholesalers* 1954 (2) SA 345 (A) at 352G-H.
[3] See eg Erasmus *Superior Court Practice* (Service 38, 2012) B1 p 201 and following, especially the authorities cited in footnote 72.

has furnished a reasonable explanation for his default. The focus therefore shifts to the second and third requirements.

[13] Although a host of 'defences' were raised on behalf of the defendant in the magistrate's court proceedings (mostly of a hyper-technical nature), the defences raised on the merits in the present proceedings were succinctly summarised in the defendant's heads of argument as follows:

(a) The matter is *res judicata*; and

(b) The plaintiff lacked *locus standi* to institute the present proceedings, as it has failed to join a legal *persona* with a direct and substantial interest in these proceedings.

(I will deal with these defences in inverse order.)

Locus standi

[14] The defendant's complaint about lack of *locus standi* is based on the form of citation of the plaintiff, namely as 'Alphera Financial Services (A Division of BMW Financial Services (South Africa) (Pty) Ltd)', the argument being that a 'Division' is not a legal *persona* and accordingly lacks capacity to contract or to sue.

[15] This argument has its genesis in an *obiter* remark by Conradie J (as he then was) in *Volkskas Bank ('n Divisie van Absa Bank Beperk) v Pietersen*,[4] where the learned judge pointed out that in our law there was

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[4] 1993 (1) SA 312 (C) at 314A.

no legal *persona* such as a division. A similar approach was followed by Roux J in *Spoornet v Watson*,[5] where the plaintiff was cited as 'Spoornet, a division of Transnet Ltd, a public company with limited liability . . . ' (etc).

[16] Mr *Ford*, who appeared on behalf of the defendant, strongly relied on both these decisions in support of his complaint about lack of *locus standi* on the part of the plaintiff. He failed to refer, however, to a series of cases, cited by Mr *Groenewald* on behalf of the plaintiff, where this line of reasoning has not been followed or expressly disapproved.[6]

[17] Thus, in *Two Sixty Four Investments*,[7] the plaintiff was cited as 'Trust Bank, 'n divisie van Bankorp Bpk, 'n maatskappy met beperkte aanspreeklikheid . . . (etc)'. The defendant's argument was summarised as follows:

'The argument was advanced that the use of the word "division" postulated a portion of a whole. It was then said that there could be no portion of a juristic person, that such portion did not enjoy separate personality and therefore that the respondent, in instituting action in the manner cited, did not have *locus standi* to institute the current proceedings.' [8]

Leveson J dealt with this argument as follows:

'Under our law no juristic person is capable of being divided into a number of separate juristic personalities, all forming a division of the whole. The concept is

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[5] 1994 (1) SA 513 (W).
[6] See eg *Two Sixty Four Investments (Pty) Ltd v Trust Bank* 1993 (3) SA 384 (W); *Mega Flex ('n Divisie van Sentrachem Bpk) v White River Motor Trading (Edms) Bpk* 1996 (1) SA 616 (T); *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) at 260I.
[7] Footnote 6 above.
[8] At 385E–F.

totally alien to our jurisprudence. Thus when reference is made to a business which is conducted under a trading name and the words "Limited" or "(Proprietary) Limited" are not affixed thereto, no ground exists for drawing the inference that the business as an entity enjoys corporate personality. If in addition thereto it is said that the business is a division of a named company, registered according to the laws of the Republic, there is only one possible further inference and that is that the incorporated company trades through the medium of the business under that particular trading name.[9] Indeed, an incorporated company may trade through the medium of a number of such businesses, each with a separate trade name. I know of no rule of law which disentitles it from doing so. None of them will thereby acquire separate corporate personality.

Until the introduction of the current Uniform Rules of Court, a business in this sense, not being a juristic person, did not have *locus standi* to sue or be sued. . . . Now the position is governed by Rule 14 of the Uniform Rules of Court. Subrule (2) provides that a partnership, firm or association can sue or be sued in its own name.

According to subrule (1) "firm" means a business carried on by the sole proprietor under a name other than his own. Of these Rules Joubert (ed) *The Law of South Africa* vol 3 para 55 says that they

> "are designed to solidify and facilitate actions and applications by or against partnerships, firms and associations which at common law cannot generally sue or be sued in their own names apart from the members constituting it".

I have no doubt that the respondent falls squarely within the definition of "firm". It has a sole proprietor, the name of which is set out in the citation in the summons as "Bankorp Bpk". [. . .] In my opinion, while the word "division" may not be the most appropriate ("firm" or "business" would have been better), it is perfectly clear that the respondent is a business concern owned by the company Bankorp Bpk.

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[9] My emphasis.

To the extent that I differ from the views expressed by Roux J in *Spoornet v Watson* (not reported, WLD case No 91/18572 - 12 September 1992) and Horwitz AJ in *Absa Bank v Blignaut and Another* (not reported, OPD case No 2451/92 – 21 August 1992), I respectfully consider that the decisions in those cases are open to doubt. I derive comfort, however, from the fact that in *Nel v Trust Bank* (not reported, WLD case No 91/7567), . . . De Klerk J has taken the same view as I do in the present case. In view of the last-mentioned judgment, I do not consider myself bound to follow the two previously cited judgments.'[10]

[18] In *Trust Bank Bpk v Dittrich*,[11] this court (per Van Niekerk J, Farlam J concurring) quoted the above extract from *Two Sixty Four Investments* and, save for the reservation that Leveson J, in the under-lined passage above, may have gone too far, did not expressly disagree with the approach adopted in that case.

[19] Having regard to the principles laid down in the above cases, it would obviously have been preferable had the plaintiff been cited the other way around, namely as 'BMW Financial Services (South Africa) (Pty) Ltd), trading as Alphera Financial Services', or even as 'Alphera Financial Services, a firm owned by BMW Financial Services (South Africa) (Pty) Ltd)'. Mr *Ford* conceded during oral argument, rightly in my view, that had the plaintiff been cited in that way, the whole basis for the defendant's objection would have fallen away. This concession amply demonstrates that the defendant's objection is based on nothing but pure semantics, which runs counter to the more pragmatic and less dogmatic approach followed by our courts in matters of this kind.

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[10] At 385F–386F.
[11] 1997 (3) SA 740 (C) at 748A–749A.

[20] I hold, therefore, that the defendant's complaint about lack of *locus standi* does not constitute a valid and *bona fide* defence to the plaintiff's action.

Contractual capacity

[21] The defendant also relied on the same argument regarding the citation of the plaintiff to substantiate his claim that the plaintiff – allegedly being a 'non-existent entity' – lacked contractual capacity to have concluded a valid agreement with the defendant. This argument, likewise, is based on nothing but semantics. It is abundantly clear that the entity contracting with the defendant was BMW Financial Services (South Africa) (Pty) Ltd with the registration number as stated in the contract.

Res judicata

[22] Turning now to the defendant's second main defence, a plea of *res judicata* is normally raised by way of a special plea. However, in this instance, it is not necessary to wait for the formal plea before considering the merits of the defence raised by the defendant: all the facts that are relied on in support of the defence are already on record. This court is accordingly in as good a position to consider the merits of the special defence as a trial court will eventually be.

[23] To be successful with a plea of *res judicata* the defendant must prove *inter alia* that there had been a final or definitive judgment on the merits of the matter.[12] On the facts that are common cause, it appears

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[12] 9 *Lawsa (sv Estoppel)* 2ed paras 627-628 and the authorities cited therein.

that the exception was originally noted to the plaintiff's summons and particulars of claim, *inter alia*, on the grounds that they are vague and embarrassing in that it is not clear who the actual plaintiff is and whether the plaintiff (whoever that may be) is a juristic entity capable of suing or being sued. At a later stage, the defendant apparently filed a 'notice of intention to amend' its notice of exception, by adding averments that the summons and particulars of claim do not disclose a cause of action 'since no contract can exist between one party and a *non persona* at law'.

[24] It is apparent that the magistrate upheld the exception on the basis of the plaintiff's perceived lack of *locus standi* and contractual capacity. It was not necessary for the magistrate to consider the merits of the claim. It follows that in these circumstances the *exceptio rei judicatae* cannot succeed.

Bona fides

[25] As for the requirement of *bona fides*, the defendant asserted that he is not indebted to the 'plaintiff' in the amount alleged or at all since the 'plaintiff' does not exist at law. In evaluating the *bona fides* of the defendant's defences, it does not appear to be in dispute that the defendant concluded a credit sale agreement with an entity described in the contract as 'Alphera Financial Services (a Division of BMW Financial Services (South Africa) (Pty) Ltd)', the same entity that is seeking to enforce the terms of that contract in these proceedings. It, likewise, does not appear to be in dispute that the defendant has not performed his obligations in terms of the contract. Thus, the stark reality is that the defendant appears to be still driving around in the luxury vehicle bought some five years ago, of which he is not the owner,

without the owner's consent, for which he has not paid and for which he denies any liability to pay. He claims to be entitled to continue acting in this fashion until such time as the correct party eventually comes forward to institute action in the correct forum for the appropriate relief (such as a *rei vindicatio*) and, it must be added, eventually succeeds in obtaining a final judgment against the defendant.

[26] These propositions only have to be stated for them to be summarily rejected. If the defendant had been *bona fide*, he would have instituted proceedings long ago to obtain *restitutio in integrum*, or some similar form of relief to restore the *status quo ante*. He has not done so. Furthermore, notwithstanding his claims regarding a '*bona fide* defence', it was conceded on the defendant's behalf that he is presently a *'mala fide possessor'* of the vehicle in question.

[27] It is well established that the court has a wide and equitable discretion in matters of this kind, influenced by considerations of justice and fairness.[13] In my view, the court should not be astute, in the exercise of its equitable discretion, to come to the defendant's assistance in the circumstances as set out above.

[28] To sum up, I have not been persuaded that the defendant has shown good cause for rescission of the default judgment granted against him. In the exercise of my discretion I would, in any event, have refused the application due to the manifest lack of *bona fides* on the part of the defendant. It follows that the application falls to be dismissed. As for costs, the contract provides for costs to be taxed on the attorney and

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[13] *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042H.

client scale and no reasons have been advanced as to why it should not be ordered accordingly.

Order

[29] For the reasons set out above, the application is DISMISSED with costs on the attorney and client scale.

B M GRIESEL
Judge of the High Court