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

Case No: 11947/2020

In the matter between:

ALPHERA FINANCIAL SERVICES Applicant
(Plaintiff)
(A division of BMW Financial Services (SA) (Pty) Ltd)

and

SIBONGISENI KOLANISI Respondent (Defendant)

Coram: Justice J Cloete

Heard: 28 April 2021

Delivered electronically: 29 April 2021

JUDGMENT

CLOETE J:

[1] The narrow issue for determination in this opposed application for summary judgment is whether the defendant has set out facts which, if proved at trial, will constitute an answer to the plaintiff's only substantive claim at this stage, which is for the return or delivery of a certain Volkswagen Golf motor vehicle pursuant to

termination of an instalment sale agreement ("the agreement") concluded between the parties at Cape Town on 28 September 2019.

[2] It is common cause, or not disputed, that: (a) clause 2.1 of the agreement records that the defendant had selected the goods (i.e. the vehicle) *'from the supplier* (i.e. the dealer) *and the Seller* (i.e. the plaintiff) *had no knowledge of the purpose for which the goods are required by you'*; (b) in terms of clause 3.1 the seller remains the owner of the vehicle until the full amount owing to it has been paid; (c) in terms of clause 11 thereof the failure to make punctual payment of any amount due shall constitute a material breach entitling the plaintiff at its election to cancel and obtain possession of the vehicle; and (d) the defendant has failed or refused to make punctual payment of the instalments due since 27 February 2020.

[3] The defendant disputes the plaintiff's entitlement to cancel the agreement. However what is also not in dispute is that the agreement has been cancelled, given the defendant's allegations at paragraphs 7.6 and 7.8 of his plea as well as paragraph 4.1(ii) of his opposing affidavit that it was he who cancelled it. Put differently, although each party disputes the other's entitlement to cancel, and each claims that the other has breached the agreement, it has, on both parties' versions, come to an end in circumstances where the plaintiff remains the owner of the vehicle. To this it must be added that in his later opposing affidavit the defendant also alleged in paragraph 4.1(ii) that *'I have cancelled the agreement on the basis it is void anyway'.*

[4] The plaintiff's particulars of claim, and application for summary judgment, make clear that all that is sought at this stage are confirmation of termination of the agreement, return of the vehicle and costs pertaining to this portion of the claim, with *'damages to be postponed sine die'* as set out in prayer (c).

[5] Given the defences raised and the dispute about how the agreement came to be terminated, the prayer for confirmation of termination is unnecessary since judicial cancellation is not an issue. In any event such a prayer amounts to seeking a declaratory order which is not permissible in terms of uniform rule 32.

[6] The defences raised in the plea and opposing affidavit are as follows:

6.1 The defendant seeks a stay of the action pending the outcome of a complaint he allegedly referred to the National Consumer Commission ("NCC") in terms of s 71 of the Consumer Protection Act ("CPA")[1];

6.2 Since he alleges that he cancelled the agreement as a result of the plaintiff's breach, he seeks restitution (including repayment of the amounts he has already paid to the plaintiff), alternatively for the agreement *'to be set aside'* on the ground of an alleged fraudulent omission (although his pleadings are not a model of clarity, counsel were ad idem that the defendant contends that this allegedly occurred on the part of the dealer); and

[1] 68 of 2008.

6.3 Although not raised in his plea but only in his later opposing affidavit, he denies having received the statutory notice in terms of s 129 of the National Credit Act ("NCA").[2]

[7] In *Tumileng Trading CC v National Security & Fire (Pty) Ltd*[3] it was held that the trite legal principles as to the test in summary judgment proceedings remain, notwithstanding the amendments to uniform rule 32 with effect from 1 July 2019. Accordingly, in essence, the defences must be bona fide in the sense that they are valid in law and raised in a manner not inherently and seriously unconvincing. However if they do not meet this standard, the Court nonetheless retains a discretion to refuse summary judgment, provided that such discretion is exercised judiciously and on the material before it.

[8] The defendant referred to various annexures in his opposing affidavit. These were not in fact attached to the original nor to the copy served on the plaintiff's attorney. However he referred in the affidavit to those portions of the missing annexures which he regarded as pertinent. The first defence raised reveals that the subject matter of the complaint to the NCC is for the setting aside of both the sale and the agreement and for the *'seller to repay the full purchase price'.* The NCC's decision cannot, in law, have a bearing on the plaintiff's current claim for delivery of the vehicle, since on both parties' versions the agreement has terminated and the vehicle must therefore be returned to the plaintiff.

---

2 34 of 2005.
3 2020 (6) SA 624 (WCC) at paras [24] to [27].

[9] The defendant's contention that the vehicle cannot be returned to the plaintiff, but only to the dealer from which he bought it, is legally flawed. As was held in *Slip Knot Investments 777 v Du Toit*[4] a party who is induced to conclude an agreement by the fraud or misrepresentation of a third party will nevertheless be bound if the other party to the agreement is innocent of such fraud or misrepresentation. This does not of course prevent the defendant from pursuing a claim against the dealer on the basis of an alleged fraudulent omission.

[10] The defendant complains that the plaintiff ought to have joined the dealer as a party to this action. This too misconstrues the legal position. Uniform rule 10(3) provides that joinder is only appropriate where the determination of substantially the same question of fact or law is in issue in relation to <u>both</u> defendants.

[11] The plaintiff's only *lis* at this stage is between itself and the defendant for the return of the vehicle. It is open to either party, after the vehicle is returned and damages are the issue, to invoke uniform rule 13 if so advised, i.e. the third party procedure. This would enable the defendant to fully pursue his defence of fraudulent omission against the dealer if he elects not to institute a separate action against it. This disposes of the second defence.

[12] The third defence is that the defendant did not receive the s 129 notice and that given the Covid-19 lockdown he could not have *'legally'* collected same from the postal authority.

---

[4] 2011 (4) SA 72 (SCA) at paras [9] and [12].

[13] The s 129 notice is dated 23 June 2020, but was posted on 20 July 2020. In the notice the defendant was called upon to remedy the default within 10 business days of delivery of the notice. The track and trace report reflects that it was received at the local post office in the area in which the defendant resides on 4 August 2020 and, on the same date, the first notification was despatched by the postal authority to the defendant.

[14] The fact that the defendant did not collect the s 129 notice from the postal authority does not mean that the plaintiff did not comply with that section of the NCA. In *Kubyana v Standard Bank of South Africa Ltd*[5] it was reiterated that there is no general requirement that the notice be brought to the consumer's subjective attention by the credit provider, or that personal service on the consumer is necessary for valid delivery under the NCA. While the s 129 obligation on the credit provider is to "draw the default to the notice of the consumer in writing", this obligation is discharged by making the document available to the consumer.

[15] Where a consumer has chosen to receive notice by way of post the credit provider's obligation to deliver ordinarily consists of sending such notice by way of registered mail and ensuring that it is sent to the correct branch of the post office for the consumer's collection. The Court in *Kubyana* applied the test of a "reasonable consumer" which means that the consumer would be expected to take reasonable steps to receive the notice. There is no indication in the present matter that the defendant took any such steps. He merely makes the bald

---

[5] 2014 (3) SA 56 (CC) at paras [31] to [35].

allegation, without adducing any evidence to support it, that the lockdown level at the time did not permit the plaintiff's attorney to *'issue'* the s 129 notice and that he could not *'have legally gone to collect it from the Post Office'*.

[16] In any event, pursuant to *Kubyana*, amendments were effected to s 129 of the NCA. For present purposes, s 129(5) and (7) which came into effect from 13 March 2015 provide as follows:

> *' (5) The notice contemplated in subsection (1)(a) must be delivered to the consumer---*
>
> *(a) by registered mail; or …*
>
> *(7) Proof of delivery contemplated in subsection (5) is satisfied by---*
>
> *(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or …'*

[17] There is thus also no merit in the third defence raised. I have further come to the conclusion that, given all of the above, there would be no rational basis to nonetheless exercise my residual direction to refuse summary judgment. However I make clear that the granting of summary judgment is in no way intended to be a pronouncement or finding on the issue of lawful cancellation of the agreement, which will be a matter for the court to determine when the question of damages is considered.

[18] As far as costs are concerned, the plaintiff has been substantially successful and they should therefore follow the result. However both the cause of action and the quantum of the plaintiff's claim fall within the jurisdiction of the magistrates' court.

The plaintiff seeks costs on the attorney and client scale but it was accepted during argument that the agreement upon which the plaintiff relies makes no provision for costs on this scale.

[19] **The following order is made:**

1. **Without this Court making any finding as to which of the parties were lawfully entitled to terminate the instalment sale agreement concluded between them at Cape Town on 28 September 2019, summary judgment is granted against the defendant as follows:**
   - **1.1 An attachment order is issued authorising the Sheriff of this Court to take possession of and deliver to the applicant the asset, namely a 2016 Volkswagen Golf VII GTi 2.0 TSi DSG with engine number CHH131639 and chassis number WVWZZZAUZGW164937, wherever it may be found; and**
   - **1.2 Costs of suit to date on the scale as between party and party in accordance with the applicable magistrates' court tariff.**
2. **The remaining relief sought by the plaintiff is postponed sine die.**

_____

J I CLOETE