



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: **2655/2022**

In the matter between:

SA TAXI DEVELOPMENT FINANCE (PTY) LTD

Plaintiff / Applicant

and

LEHLOHONOLO JACOB MOLEKO

Defendant / Respondent

CORAM: TSANGARAKIS, AJ

HEARD ON: 26 JANUARY 2023

DELIVERED ON: 16 FEBRUARY 2023

INTRODUCTION

[1] This is an opposed application for summary judgment in terms of which the applicant seeks an order in the following terms:

- “1. *Return to the plaintiff of a **2017 TOYOTA 2.7 SESFIKILE 16S** with engine number [....] and chassis number [....];*
2. *In the event of the Defendant failing to comply with paragraph 1 above within five days of service of this order on the Defendant, the Sheriff is authorised and directed to take the aforesaid vehicle into his possession from wherever he may find it and return the vehicle to the Plaintiff;*
3. *Costs of suit; and*
4. *Further and/or alternative relief.”*

[2] Pursuant to the applicant having delivered its application for summary judgment, the respondent filed an amended plea in terms of which he introduced two new defences in respect of the applicants claim(s) against him.

[3] Thereafter the applicant caused to be filed a supplementary affidavit. By way of that affidavit the applicant sought to deal with the two newly raised defences of the respondent as aforesaid.

[4] In my view the litigious methodology adopted by the parties, in their respective prosecution and defence of the application, was correct.

[5] In ***Belrex 95 CC v Barday*** 2021 (3) SA 178 (WCC)^[1] the court found that the defendant was not precluded from amending his plea after the delivery of an application for summary judgment.

[6] In ***City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorney (Pty) Ltd & Another*** 2022 (3) SA 458 (GJ) Fisher J held that the plaintiff was entitled to make a consequential adjustment to the “*documents filed by him*”. Fisher J explained the position thus:

“[19] As long as the adjustment is strictly consequential on the amendment, there is, to my mind, no reason why the affidavit, although supplemented, should not be read to conform to the description of the subrule (2)(a) affidavit the purpose of which is to provide information as to the plaintiff’s case in a way that ‘explain[s] briefly why the defence pleaded does not raise any issue for trial.

[20] To my mind, it stands to reason that if the pleaded defence changes, the affidavit filed may need to be adjusted to deal with the new defence. The fact that a further affidavit is necessary for the purpose of this adjustment does not change the nature and characterisation of the founding application. Indeed, the adjustment may not be evidence dependent at all and may require only the setting out of a legal point. Such an adjustment would not, on any interpretation, be hit by the prohibition in subrule (4) which applies only to ‘evidence’.”

¹

Paragraphs 30 to 39

- [7] I accordingly find that the applicant's supplementary affidavit and the respondent's amended plea are both properly before me and that their content falls to be considered in the adjudication of this application for summary judgment.

THE PLEADINGS

- [8] On 9 June 2022 the applicant issued summons against the respondent.
- [9] The more pertinent allegations, evident from the applicant's particulars of claim for purposes of this judgment, are these:
- 9.1 On or about 30 October 2017, and at Midrand, a company referred to as Potpale Investments (RF) (Pty) Limited ("Potpale") concluded a written credit agreement with Mofokeng Joshua Moleko ("Mr Moleko") in terms of which Potpale, as seller, sold a **2017 TOYOTA 2.7 SESFIKILE 16S** with engine number [...] and chassis number [...] ("the vehicle") to Mr Moleko, as purchaser ("the agreement");
- 9.2 Pursuant to the conclusion of the agreement, and on 4 January 2020, Mr Moleko passed away. No letters of executorship or letters of authority have to date been issued relevant to Mr Moleko's deceased estate;
- 9.3 Potpale, after the conclusion of the agreement but before the passing of Mr Moleko, and on 21 February 2018, sold and/or ceded to the applicant all of its rights, title and interest in and to the agreement;

- 9.4 The agreement provides that notwithstanding delivery of the vehicle to Mr Moleko, ownership of the vehicle would remain vested in Potpale (and by operation of law the applicant) up and until all amounts outstanding in terms of the agreement had been paid to the applicant by Mr Moleko;
- 9.5 The respondent is in unlawful possession of the vehicle and as at 6 June 2022 the capital, arrears and interest in terms of the agreement amounted to R100 516.33;
- 9.6 The applicant seeks an order against the respondent in terms of the relief reproduced in paragraph 1 above; and
- 9.7 The applicant pleads that the terms and conditions of the agreement should be read as if specifically incorporated in its particulars of claim.
- [10] The respondent initially joined issue with the *locus standi* of the applicant to prosecute both the main action proceedings and the present application. This defence was abandoned during argument by counsel for the respondent and need, under the circumstances, not be considered further.
- [11] The remaining two defences raised by the respondent are evident from paragraph 7 of his amended plea the content of which is reproduced verbatim:
- “7.1 The Defendant denies the content and pleads as follow:
- 7.2 After the deceased passed away, the Defendant and the Plaintiff entered into a verbal agreement (‘the Agreement’) on or about

February 2020 and at Midrand, the Defendant in his personal capacity and the Plaintiff duly represented by an authorized representative.

7.3 The express, alternatively tacit, to the further alternative implied terms of the aforesaid were that the Defendant would forthwith accept liability for all of the deceased remaining obligations in terms of the original finance agreement, and the Plaintiff would perform towards Defendant reciprocally on such terms.

7.4 The Defendant duly performed in that payment was made to the Plaintiff in terms of the aforesaid agreement.

7.5 The Plaintiff accepted the payments and allowed the Defendant to be in possession of the vehicle.

7.6 The Plaintiff has not cancelled the Agreement and therefore cannot claim return of the vehicle.”

[12] It is convenient to deal with the raised defence of the applicants failure to cancel the agreement first.

THE FIRST DEFENCE: THE APPLICANT’S FAILURE TO CANCEL THE AGREEMENT

[13] In offence of the provisions of *inter alia* Rule 18(4) the applicant pleads that the terms and conditions of the agreement should be read as if specifically incorporated in its particulars of claim.

[14] Notwithstanding the lack of a concise statement of material facts, in respect of the terms and conditions of the agreement, it being the fundamental basis relied upon by the applicant in support of its claim against the respondent, it is evident from the pleadings of record that the applicant has failed to plead any event of breach of the agreement. So too has it failed to plead a cancellation thereof.

[15] Fourie J, in the matter of **ABSA Bank v De Villiers and Another 2009 (5) SA 40 (C)**, explained the position relevant to cancellation as follows:

*“[18] According to our law of contract, **restitution is the normal result following from the cancellation of a contract. By cancelling the instalment sale agreement, applicant, as the innocent party, would seek to set aside the agreement and return to the status quo ante, by claiming repossession of the vehicle, and to claim damages for breach of contract.***

*[19] It follows from the aforesaid that, in terms of the general principles of our law of contract, **an order authorising the attachment of a vehicle which is the subject of an instalment agreement, would be granted by the court as a claim ancillary to the cancellation of the instalment agreement.***”

(Bold font my emphasis)

[16] The fact that the death of Mr Moleko constitutes an event of breach of the terms and conditions of the agreement (paragraph 25.1.8) is of no moment,

within the context of this application, as paragraph 26.1 of the agreement provides:

*“If you are in default under this Agreement, the credit provider **may terminate** this Agreement before the time, provided it does so in compliance with the provisions of the NCA relating to enforcement and termination.”*

(Bold font my emphasis)

[17] Clearly therefore the death of Mr Moleko does not in and of itself automatically terminate/cancel the agreement. On an objective and proper interpretation of the agreement the death of Mr Moleko merely clothes the applicant with the entitlement to exercise its right of termination/cancellation should it so choose.

[18] Although it is so that the applicant reserves ownership of the motor vehicle in terms of the agreement, possession of the motor vehicle contractually vested in Mr Moleko. The agreement provides on this score as follows:

“6.3 You undertake at all times to:

6.3.1 keep the Vehicle in your possession and control;”

[19] Mr Moleko’s right to possession of the motor vehicle was upon his death transferred, by operation of law, to his estate.

[20] As a general rule the rights and obligations in terms of an agreement are transferred to the estate of a party to a contract at the same time of his or her passing. The executor is entitled to sue upon a contract if the deceased could have sued, had he been alive. By the same token, the executor may be sued

by a party to a contract who was entitled to sue another party prior to the latter's death.^[2]

[21] The onus is on the applicant to plead and prove a valid termination/cancellation of the right to possession of the motor vehicle held at present by Mr Moleko's estate.

[22] Absent a pleaded termination/cancellation of the agreement, and restitution of the right of possession of the motor vehicle to the applicant, the applicant's right to demand possession of the motor vehicle from the respondent cannot lawfully arise.

[23] As such the claim of the applicant, as presently formulated, cannot pass judicial muster or scrutiny as it does not disclose a cause of action.

[24] In **Chetty v Naidoo** 1974 (3) SA 13 (A) Jansen JA explained the position on page 20 at paragraphs E - H as follows:

*"If he concedes in his particulars of claim that the defendant has an existing right to hold (e.g., **by conceding a lease or a higher-purchase agreement, without alleging that it has been terminated**: Boshoff v Union Government, 1932 T.P.D. 345 at p. 351; Henning v Petra Meubels Beperk, 1947 (2) S.A. 407 (T) at p. 412) **his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that the right to hold now would have existed but for a termination which has taken place, then ex facia the***

² **Lorentz v Melle** 1978 (3) SA 1044 (TPO) at 1057 C to F.

statement of claim he must at least prove the termination, which might, in the case of a contract, also entail proof of the terms of the contract. This is dealt with by Greenberg J., in *Boshoff v Union Government*, 1932 T.P.D. 345 at p. 351:

"I do not think that any court would be entitled to decree an order for ejectment, when a plaintiff comes to Court and says: 'I am the owner of the ground; I let that ground to the defendant on a lease which covers the present period, without some allegation that the lease is no longer in force or no longer gives the defendant the right of occupation.' It may be that the cause of action in such a case, is the ownership of the ground, but where the plaintiff's own allegations in his declaration, or what is equivalent to his declaration, show that he is not entitled to ejectment, it does not appear to me that any Court would be entitled to decree ejectment in his favour. The Court would require something to show that notwithstanding the right that he has given to the defendant, the defendant no longer has a right to remain in possession."

(Bold font my emphasis)

[25] Accordingly, the application for summary judgment unavoidably stands to fail on this point alone.

DOES THE VERBAL AGREEMENT BETWEEN THE APPLICANT AND THE RESPONDENT CONSTITUTE A *BONA FIDE* DEFENCE?

[26] In Summary Judgment, A Practical Guide, Issue 10, paragraph 11.2.3 on page 11 - 10 the learned authors hold at as follows:

*“The whole procedure of summary judgment was created to benefit plaintiffs. **At the very least, therefore, it is expected of a plaintiff, in presenting his case, to place him squarely within the four corners of the remedy. Any defects in the presentation of his case which are not merely technical and, for that reason cannot be condoned, will have as their consequence a refusal of summary judgment, even if no bona fide defence has been disclosed by the defendant. A court will not assist a plaintiff by breathing life into a poorly presented case – on the contrary, the court will consider itself bound to the terms in which the plaintiff has elected to formulate his claim.** Should it appear that the plaintiff does have a claim, but not that presented as the cause of action in the summons, the court will refuse summary judgment as it cannot be granted on a cause of action other than pleaded.”*

(Bold font and underlining my emphasis)

[27] In light of my findings in respect of the first defence, it is under the circumstances unnecessary to deal with the merits of the second defence raised by the respondent and I refrain from doing so.

COSTS

[28] As a general rule the award of the costs remains in the discretion of the Court. Counsel for the respective parties agreed that in the event that the application

for summary judgment is refused that costs of the application are to be costs in the action. I can think of no valid reason, in the judicial exercise of my judicial discretion, why this should not be so.

ACCORDINGLY, I GRANT THE FOLLOWING ORDER:

1. The application for summary judgment is refused.
2. Leave to defend the main action is granted to the respondent.
3. Costs to be costs in the main action.

S. TSANGARAKIS, AJ

On behalf of the Applicant: Adv F.F. Jacobs

Instructed by: Bokwa Attorneys
Bloemfontein

On behalf of the Respondent: Adv M.C.M. Pieterse

Instructed by: Kruger Venter Attorneys Inc.
Bloemfontein