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**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 number: 3795/2022

In the matter between:

FIRST RAND LIMITED

t/a WESTBANK

Plaintiff

and

MADELEINE JANSE VAN RENSBURG N.O.

Defendant

HEARD ON: 23 FEBRUARY 2023

CORAM: JONASE AJ

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 22 MAY 2023. The date and time for hand-down is deemed to be 22 May 2023 at 15h00.

Introduction

[1] This is an application for summary judgment following a summons issued by the plaintiff against the defendant. The defendant has also brought an application for condonation for the late filing of the opposing affidavit and the plaintiff did not take much issue and did not oppose it. As such, this Court granted the application for condonation.

[2] The plaintiff seeks the following order:

- a) delivery by the defendant to the plaintiff, of the 2011 Mercedes Benz AXOR 3340S/33 T/T C/C with engine number: 457[...] and chassis number WDB[...], alternatively the Sheriff should take into possession the said vehicle from whosoever's possession it may be found, and place the plaintiff in possession thereof.
- b) alternatively to the above, the defendant be ordered to effect payment in full the outstanding balance due in the amount of R 182 574-71 together with interest on the abovementioned amount at the rate of prime plus 0,75 % per month from 04 November 2022.
- c) Costs of the action.

Facts

- [3] The defendant is sued herein by virtue of her capacity as an Executrix in the deceased estate of one, J Naude Janse Van Rensburg ("the deceased"), with Identity document number 681[...].
- [4] The plaintiff alleges that it is the owner of the vehicle described in its prayers in this court. In support of the said claim, it annexed a copy of the certificate of registration which is marked as ANNEXURE "C" in these proceedings.
- [5] The plaintiff further alleges that the deceased was in possession of the vehicle in terms of the instalment sale agreement, ("the agreement") entered into between the deceased and the plaintiff. The said agreement was allocated under account number: 852[...].
- [6] A copy of the said agreement is attached as ANNEXURES "D1" and "D2" to the particulars of the claim.

- [7] The said agreement provides, *inter alia*, that upon the consumer's death, the plaintiff will be entitled, at its election, to claim immediate payment of the outstanding balance together with the interest and all amounts owing or take repossession of the goods in terms of an attachment order.
- [8] The deceased passed away on 01 March 2021 and the defendant was appointed as the Executrix and is duly authorised to liquidate and distribute the deceased's estate.
- [9] As a result of the deceased's death, the full balance owing in terms of the agreement became due and payable.
- [10] By virtue of the defendant's capacity as the Executrix of the deceased estate, the Executrix was obliged to effect the balance payment to the plaintiff of the sum owing by the deceased estate in accordance with the provisions of the Administration of Estates Act¹.
- [11] On 14 April 2021, the plaintiff dispatched written correspondence to the defendant wherein the defendant was notified of the outstanding balance and options available to finalise the matter in terms of the agreement. A copy of the notice is marked ANNEXURE "E".
- [12] The last payment received in the account was made on 24 February 2021 and the defendant was, after the deceased's death, to take possession of the said vehicle and to maintain payment on the account or return the vehicle should there be insufficient funds to sustain the agreement.
- [13] The plaintiff elected to cancel the agreement and take repossession of the said vehicle. A copy of the cancellation letter addressed to the defendant is marked ANNEXURE "F1". The defendant responded through the letters marked "F2-F4", respectively.

¹ ACT 66 OF 1965

[14] In essence, the response was to inform the plaintiff about the change of the defendant's attorneys of record and the subsequent attorneys of record taking over to represent the defendant.

[15] On 18 October 2022 the defendant filed a plea.

Defendant's plea

[16] the defendant pleaded as follows, that;

- a) the estate is no longer in possession of the said vehicle by virtue of a written sale agreement concluded with a third party. A copy of the said sale agreement is marked ANNEXURE "MJV1".
- b) the third party claimed to be the owner of the said vehicle and undertook to settle any outstanding amounts with the plaintiff after receiving payment from the fourth party, A copy of the email to that effect is marked ANNEXURE "MVJ2".
- c) Consequently, the third and fourth parties have a direct and substantial interest in this matter and are necessary parties to these proceedings. As such, the defendant prays for the dismissal of the plaintiff's claim with costs.

[17] On 8 November 2022, the plaintiff filed a summary judgment.

An application for a summary judgment

[18] The plaintiff summed up its grounds for a summary judgment as follows;

- a) The agreement was concluded between the plaintiff and the deceased in terms whereof the plaintiff financed the deceased for the said vehicle.

- b) The total amount payable to the plaintiff by the deceased in terms of the agreement was R 306 377-28 including VAT and interest at a linked prime interest rate plus 0.75 % per annum.
- c) It was a material term of the agreement that the amount payable would be coverable in forty-eight monthly instalments to be paid by the deceased commencing on 28 May 2019 at an amount of R 6 382-86 until the final payment on or about 24 April 2023.
- d) The plaintiff duly complied with all its obligations in terms of the agreement and delivered the said vehicle to the deceased.
- e) The deceased passed away on 1 March 2021 and the defendant was appointed as the Executrix and was duly authorised to liquidate and distribute the estate.
- f) As a result of the death of the deceased, and in her capacity as Executrix, the defendant was obliged to take possession of the financed vehicle and to maintain the account or return the vehicle should there be insufficient funds to sustain the agreement.
- g) The defendant breached the agreement by failing to pay the monthly instalment amounts or to deliver the vehicle to the plaintiff and has failed to rectify the breach despite the demand by the plaintiff.
- h) Consequently, the plaintiff is entitled to cancel the agreement and take possession of their goods, alternatively, claim immediate payment of the full amount claimable and payable in terms of the agreement.

[19] The plaintiff contends that the defendant breached the agreement by failing to pay the monthly instalment amounts or return the vehicle to the plaintiff and has failed to remedy the breach despite the demand by the plaintiff.

[20] Consequently, the defendant's estate is indebted to the plaintiff in the amount of R 162 574-71 plus interest calculated at a rate of prime plus 0.75% per annum

from 29 July 2022.

The opposing affidavit

[21] The defendant admits the following;

- a) the plaintiff is the owner of the vehicle,
- b) the conclusion of the agreement and its terms between the plaintiff and the deceased; and
- c) following the deceased's death, the plaintiff was entitled at its election to claim immediate payment of the outstanding balance together with the interest and all monies or take repossession of the goods in terms of an attachment order.

[22] The defendant denies that the estate is in possession of the said vehicle or the estate is in breach of the agreement and that the deceased is liable towards the plaintiff.

Analysis

[23] This application is brought in terms of the Rules² of this court.

[24] Simply, the rule requires the plaintiff just to show that the defendant does not have a bona fide defence or a triable issue.

[25] On the contrary, the defendant resisting a summary judgment should establish a defence in law³. Such defence should not only be *bona fide* but it should be a good defence.

[26] Summary judgment is a drastic remedy in that it closes the door to a defendant who wishes to defend the action. It should only be granted if the plaintiff's case is unimpeachable, or the defence is bogus or bad in law or where the giving of notice to defend amounts to an abuse of the court process⁴.

² RULE 32(2)

³ PETLEN PROPERTY (PTY) LTD v BOLAND CONSTRUCTION 1973 SA (1) 434

- [27] A good defence is the one supported by the facts on the papers before the court.
- [28] The defendant admitted that the plaintiff is the owner of the said vehicle and the agreement was concluded between the plaintiff and the deceased.
- [29] It is the term of the said agreement that the plaintiff will retain ownership of the goods until the full outstanding balance has been paid in terms of the agreement.
- [30] The defendant could not indicate in this court as to on whose authority the deceased acted in selling the said vehicle to a third party.
- [31] Failure to prove such authority amounts to unlawful conduct and brings this matter to an end.
- [32] The defendant's alleged defence is not only bad in law but this is also a clear abuse of the court process.
- [33] The defendant has failed to introduce a triable issue for the hearing in due course.

Costs

- [34] The plaintiff requested this court that in granting this application, costs should include the wasted costs occasioned by the dilatory conduct of the defendant for failure to file the answering affidavit on 02 December 2022. The said answering affidavit was only filed on 19 January 2023 being the date this matter would have been heard and finalised.
- [35] This court cannot agree less and otherwise with the plaintiff. The defendant should carry those wasted costs.

⁴ MAHARAJ v BARCLAYS BANK LIMITED 1976 (1) SA 418 (A) at 423F-G

[36] In the circumstances, I make the following order;

1. Summary judgment is and hereby granted.
2. The defendant is ordered to deliver to the plaintiff a 2011 Mercedes-Benz AXOR 3340S/33 T/T C/C with ENGINE NUMBER: 457[...] and CHASSIS NUMBER: WDB[...].
3. The defendant must deliver the said vehicle, indicated in 2 above, within 10 days (TEN) from the date of this order.
4. Should the defendant fail to comply with orders 1 and 2 above, the Sheriff of this court is and hereby ordered and authorised to take into possession the said vehicle described in 2 above from whosoever possession may be found.
5. The defendant is and hereby ordered to pay to the plaintiff any amount which may be due and payable, on delivery of the said vehicle which amount flows from the agreement concluded between the plaintiff and the deceased.
6. The said amount due and payable in terms of 5 above, will be calculated with effect from the date the plaintiff receives delivery and/or repossession of the said vehicle.
7. The defendant is ordered to pay costs of action, costs of the application for the summary judgment including costs occasioned by the postponement on 19 January 2023.

S. JONASE AJ

On behalf of the Plaintiff/Applicant:

Instructed by:

Adv. GC Steenkamp

Symington De Kok Inc.
BLOEMFONTEIN

On behalf of the Defendant/Respondent:

Instructed by:

Adv A Van Jaarsveld
Gous Vertue & Ass.Inc.
BLOEMFONTEIN