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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: **8400/2022P**

In the matter between:

WESBANK, A DIVISION OF FIRSTRAND BANK

PLAINTIFF

and

SILVER SOLUTIONS 3138 CC

DEFENDANT

Coram: Mossop J

Heard: 7 March 2023

Delivered: 7 March 2023

ORDER

Summary judgment is granted against the defendant for:

1. Confirmation of the termination of agreement concluded between the parties on 29 March 2018;
2. An order for the return of a 2018 Volkswagen Polo 1.0 Tsi Comfortline DSG motor vehicle bearing engine number [...] and chassis number [...] (the motor vehicle);

3. Costs of suit on the scale as between attorney and client, such to be on the regional magistrate's court scale and are to include such costs as the plaintiff may incur in locating, storing and disposing of the motor vehicle and are also to include the costs of counsel's reasonable fee on brief; and
4. An order authorising the applicant to apply to this court on the same papers, supplemented insofar as may be necessary, for an order for any damages to which it is entitled in which such proceedings the plaintiff shall allege and prove that it has complied with the requirements set out in para 20.3 of the substituted order granted in *FirstRand Bank Limited t/a Wesbank v Davel* [2020] 1 All SA 303 (SCA).

JUDGMENT

MOSSOP J:

[1] This is an opposed summary judgment application. The plaintiff's cause of action is contractual in nature, it claiming to have entered into a written instalment sale agreement (the agreement) with the defendant on 29 March 2018 in terms of which the defendant purchased from the plaintiff a 2018 Volkswagen Polo 1.0 Tsi Comfortline DSG motor vehicle bearing engine number [...] and chassis number [...] (the motor vehicle). It alleges that the defendant breached its repayment obligations and accordingly summons was issued against the defendant in which, inter alia, the cancellation of the agreement is claimed. The defendant has pleaded to the plaintiff's summons and the plaintiff has timeously delivered its application for summary judgment. The defendant has delivered an affidavit opposing the granting of summary judgment.

[2] The plaintiff delivered its short heads of argument and its practice note and was represented this morning when the matter was called by Mr Anderton. The defendant has filed no heads of argument, whether long or short, and has also not delivered a practice note. There was no representation for the defendant this morning when the matter was called.

[3] The plaintiff has pleaded its case in both the summons and the application for summary judgment with a degree of thoroughness that has not really been matched by the defendant's plea or by its affidavit resisting summary judgment. To state that both the plea and the defendant's affidavit resisting summary judgment are tersely worded is to understate the position.

[4] While the defendant admits in its plea having received the motor vehicle from the plaintiff it, firstly, denies having concluded the agreement relied upon by the plaintiff and it consequently denies the terms of the agreement that have been extensively pleaded by the plaintiff and secondly, it also denies that it is in arrears with its obligations. These are the principle issues that require consideration arising out of the plea. Obviously the second issue will only arise if it is found that the agreement was concluded, as alleged by the plaintiff.

[5] The defendant presumably denies the existence of a written agreement because there is no document before this court that bears its representative's manuscript signature. I am obliged to make this assumption because the basis for the denial by the defendant is never explained in any of the documents that it has delivered. The plaintiff does not, however, rely on a document that bears a manuscript signature: it relies on a document concluded electronically. The method of concluding such an agreement is stated by Ms Sonja Viljoen in her affidavit prepared in support of the application for summary judgment. In summary, it involves:

- (a) A credit application being submitted electronically by the defendant to the plaintiff;
- (b) On approval of the credit application by the plaintiff, an email link to the plaintiff's website is sent by SMS to the defendant. Included in the SMS is a one-time pin number;
- (c) By following the email link to the plaintiff's website, the defendant is able to access the draft agreement that specifically relates to it. Relevant details, including the one-time pin, must be inserted by the defendant;

(d) The defendant is required to view a number of pages and is required to confirm that each page is correct by clicking on blocks confirming the correctness of what is stated on each page. This also applies to the last page, which traditionally would be the signature page;

(e) The final agreement is then generated and will bear a watermark on each page recording the identity of the person acting for the defendant, and the date and time on which the agreement was concluded. In this instance, the watermark records that the person representing the defendant is one Ranesh Kawlasir, who concluded the agreement on 29 March 2018 at 09:57:31. The person who deposed to the affidavit resisting summary judgment on behalf of the defendant is the same Ranesh Kawlasir;

(f) Once the agreement is concluded, the documentation may be taken to the relevant dealership to collect the motor vehicle purchased.

[6] The plaintiff states that this procedure complies with section 13(3) of the Electronic Communications and Transactions Act No. 25 of 2002 (the Act). That particular section deals with the electronic signature of documents and states that: 'Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if-

(a) a method is used to identify the person and to indicate the person's approval of the information communicated: and

(b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.'

[7] It seems to me that the procedure adopted by the plaintiff is substantially in accordance with what is contemplated by the Act. A signature was required to prove acceptance of the agreement by the defendant but there was no agreement on the type of electronic signature that was required. The method adopted was as previously described.

[8] As was said in *Spring Forest Trading v Wilberry*,¹ prior to the concept of electronic signatures, the approach of the courts to signatures was pragmatic and not formalistic. Courts looked to whether the method of the signature used fulfilled the function of a signature, namely to authenticate the identity of the signatory, rather than to focus on the form of the signature used.

[9] At paragraph 27 of *Spring Forest Trading*, Cachalia JA stated as follows:

‘The Act describes an electronic signature – which is not to be confused with an advanced electronic signature – as ‘data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature’. Put simply, so long as the ‘data’ in an email is intended by the user to serve as a signature and is logically connected with other data in the email the requirement for an electronic signature is satisfied. This description accords with the practical and non-formalistic way the courts have treated the signature requirement at common law.’

This seems to me to accord with what was intended, and what occurred, in this matter.

[10] That an agreement was concluded seems obvious and irresistible. The admitted possession by the defendant of the motor vehicle is not explicable in any other way. The defendant has not provided any evidence of an alternative agreement that would have afforded it possession of the motor vehicle. All that it has done is to deny the existence of the agreement relied upon by the plaintiff. At the very least, the defendant would have to account for its possession of the motor vehicle by way of positive averments. None have been forthcoming. I must therefore find that the agreement that permitted the defendant to possess the motor vehicle is the agreement relied upon by the plaintiff.

[11] Clause 6.6 of the agreement reads as follows:

¹ *Spring Forest Trading v Wilberry* (725/13) [2014] ZASCA 178 para 26.

‘You agree that the Seller may provide a certificate from one of its managers, whose position it will not be necessary to prove, showing the amount due to the Seller and how it is calculated. Unless you disagree with such amount and are able to satisfy the court that the amount in the certificate is incorrect, you agree that the Seller may take any judgment or order it is entitled to in law based on the facts contained in the certificate, or such amount as the court may find to be due.’

In *Nedbank v Botha and Another*² the court remarked that:

‘Where parties agreed in a loan agreement that a certificate of balance is binding on the defendant, then such certificate constitutes prima facie proof of the amount of indebtedness.’

[12] The defendant has pleaded that it does not admit the allegations contained in the paragraph in the particulars of claim which alleges that a certificate of balance pertaining to the defendant’s account with the plaintiff is attached to those particulars of claim. Factually, there is such a certificate of balance attached to the particulars of claim. Why the defendant has chosen to dispute this is not immediately clear but it appears to me to be the result of slovenly draughtsmanship. It appears to me that it is more likely that what the defendant intended to do was to dispute the accuracy of the certificate of balance, not to dispute its existence. If this is correct, then it must immediately be stated that the basis for that dispute has not been explained. The defendant has not, for example, suggested that it made payments to the plaintiff that have not been taken into account by the plaintiff. It is simply a bald denial, devoid of any explanation or reason. In the circumstances of a summary judgment application, it is insufficient.

[13] I do not lose sight of the fact that I am not required at this stage to determine the subjective merits of the defence raised by the defendant, nor am I required to consider whether that defence, such as it is understood to be, will ultimately succeed

² *Nedbank v Botha and Another* 2016 JOL 36735 FB

at trial. All that I am required to consider is whether the pleaded defence is genuinely advanced:

‘... as opposed to a sham put up for purposes of delay’.³

[14] In *Tumileng Trading*, the court further stated that:

‘The assessment of whether a defence is bona fide is made with regard to the manner in which it has been substantiated in the opposing affidavit, viz upon a consideration of the extent to which ‘the nature and grounds of the defence and the material facts relied upon therefor’ have been canvassed by the deponent. That was the method by which the court traditionally tested, insofar as it was possible on paper, whether the defence described by the defendant was ‘contrived’, in other words, not bona fide.’⁴

[15] The defence as revealed in the plea does not pass muster and can only be described as contrived. It is simply comprised of denials and lacks positive contrary allegations or facts.

[16] In the defendant’s affidavit opposing summary judgment further defences are raised that were not mentioned at all in the plea. The defences raised are bereft of any detail. So truncated are they that they can be quoted verbatim without occupying an excess of space in this judgment:

‘5. Since the inception of the agreement I was stabbed on two different occasions which caused my business not to operate. As a result, many accounts went into arrears.

6. Covid-19 also played a role which caused performance of obligations to be impossible at times.

³ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) para 23.

⁴ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* supra para 25.

7. As a result of Covid-19 and the supervening impossibility of performance, I do have a bona fide defence and defending this claim was not done solely for the purposes of delay.'

[17] The defence alluded to is thus supervening impossibility and the finer details of such a defence must be considered. In terms of our common law doctrine of supervening impossibility, each party's obligation to perform in terms of an agreement, and their respective rights to receive performance under that agreement, will be extinguished in the event that such performance becomes objectively impossible as a result of unforeseeable and unavoidable events, which are not the fault of any party to that agreement.

[18] As a general rule, impossibility of performance brought about by *vis major* or *casus fortuitus* will excuse performance of a contract. But this is not invariably so. In each case it is necessary to consider the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the one party, to see whether the general rule ought, in the particular circumstances of the case, to be applied.⁵

[19] The rule will not avail a party if the impossibility is self-created, nor if the impossibility is due to that party's fault.⁶ Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the party raising it.

[20] The event may also render performance absolutely or objectively impossible. The fact that *vis major* or *casus fortuitus* has made it uneconomical for a party to carry out its obligations, however, does not mean that performance has become impossible.⁷

[21] Impossibility of performance may also be either total or temporary. Temporary impossibility of performance does not of itself bring a contract to an immediate end.

⁵ *MV Snow Crystal, Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) para [28].

⁶ *MV Snow Crystal, Transnet Ltd t/a National Ports Authority*, supra.

⁷ *Yodaiken v Angehrn and Piel* 1914 TPD 254 at 260.

A party is entitled to treat a contract as being at an end only whilst performance is temporarily impossible where the foundation of the contract has been destroyed, or where all performance is already, or would inevitably become, impossible, or where part of the performance has become, or would inevitably become, impossible and that party is not bound to accept the remaining performance.⁸

[22] It will be discerned from the above brief discussion that the issue of supervening impossibility is complex and is largely fact driven. It cannot simply be mentioned by name and then assumed that it has been established. It must be given substance by the facts disclosed by the party raising it. After all, in terms of Uniform rule 32(3)(b) a defendant must in its affidavit resisting summary judgment disclose fully the nature and grounds of the defence and the material facts relied upon therefor. The defence must not be set out in a manner that is vague and sketchy. A defendant also cannot merely rely on conclusions in law but must set out the actual evidence that allows those conclusions to be validly drawn. A defendant must thus go beyond the mere formulation of a dispute and must disclose the grounds upon which it disputes a plaintiff's claim with reference to the material facts underlying the disputes raised.⁹

[23] In my view, the defendant has not done this. It has adopted the incorrect approach: rather than being generous with the facts that allegedly give rise to the defence of supervening impossibility, it has chosen to be frugal with its disclosures. No dates are disclosed by it when the events upon which it relies allegedly occurred. Details of the alleged stabbings are not mentioned or their seriousness. While the deponent to the defendant's affidavit resisting summary judgment states that Covid-19 'played a role' in the defendant's misfortunes, he goes no further and does not provide any information on the extent of that role. Indeed, what is stated in the affidavit resisting summary judgment are conclusions shorn of any supporting facts.

[24] In my view there simply is insufficient factual material disclosed by the defendant upon which to assess whether a bona fide defence has been raised.

⁸ *World Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W).

⁹ *Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk* 1997 (1) SA 244 (T) at 249F-G.

[25] In the result, I grant the following order:

Summary judgment is granted against the defendant for:

1. Confirmation of the termination of agreement concluded between the parties on 29 March 2018;
2. An order for the return of a 2018 Volkswagen Polo 1.0 Tsi Comfortline DSG motor vehicle bearing engine number [...] and chassis number [...] (the motor vehicle);
3. Costs of suit on the scale as between attorney and client, such to be on the regional magistrate's court scale and are to include such costs as the plaintiff may incur in locating, storing and disposing of the motor vehicle and are also to include the costs of counsel's reasonable fee on brief; and
4. An order authorising the applicant to apply to this court on the same papers, supplemented insofar as may be necessary, for an order for any damages to which it is entitled in which such proceedings the plaintiff shall allege and prove that it has complied with the requirements set out in para 20.3 of the substituted order granted in *FirstRand Bank Limited t/a Wesbank v Davel* [2020] 1 All SA 303 (SCA).

MOSSOP J

APPEARANCES

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Date of Hearing : 7 March 2023

Date of Judgment : 7 March 2023