IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL LOCAL DIVISION, DURBAN

Case No: 4032/2017

In the matter between:

FirstRand Bank Limited, t/a Volkswagen Financial Services & Wesbank — Applicant

and

Achievers Security Training Centre CC — Respondent

Judgment

Lopes J:

[1] The applicant seeks summary judgment against the respondent, directing the respondent forthwith to deliver to the applicant a 2011 Audi Q5 motor vehicle ('the Audi'). The respondent was the first defendant in an action instituted by the applicant against both the first defendant and Kitesh Singh ('Singh') as surety for, and co-principal debtor with the respondent, for the debts which it owed to the applicant.

[2] The applicant's cause of action against the respondent may be summarised as follows:

(a) On the 4th of April 2011, CGK Motors CC t/a Alpine Motors concluded an agreement with the respondent in terms of which Alpine Motors sold the Audi to the respondent. On the same day Alpine Motors ceded its right, title and interest in and to the sale agreement and suretyship, and transferred its ownership in the Audi to the applicant.

(b) As at the 8th of April 2017, the respondent had defaulted in the repayment of instalments to the applicant, in a total amount exceeding R87 000.

(c) The applicant seeks summary judgment for the return of the motor vehicle, having alleged that by the issue of summons it cancelled the agreement between the parties.

(d) The respondent's defences to the summary judgment application are as follows:

(i) A first point *in limine* that the terms of the sale agreement make no reference to the applicant, FirstRand Bank Limited, and accordingly the applicant has failed to establish a legal connection to justify instituting these proceedings.

(ii) A second point *in limine* that, in failing to join Singh as a second respondent in the summary judgment proceedings, Singh's right to be heard on the basis of the principle of *audi alteram partem* has been denied to him.

(iii) Within six months of purchasing the Audi, the respondent experienced mechanical problems with it. It took the Audi back to Alpine Motors many times, and was advised that those problems were teething problems, which would settle once the vehicle had had time to 'run in'. Eventually the vehicle broke down completely and for the last year has been with Audi Centre, Pinetown for repairs. The respondent took up the matter initially with Alpine Motors, and thereafter with Volkswagen Financial Services / Wesbank as the trading arms of FirstRand Bank Limited. The respondent was allegedly given assurances by Volkswagen Financial Services / Wesbank that they would take the matter up with Alpine Motors, but nothing materialised. The respondent has been advised by Audi Centre Pinetown that the cost of repairs exceeds R100 000. Any claim that the respondent would have had against Alpine Motors, has now become prescribed. Accordingly, the respondent ceased making instalment payments to Volkswagen Financial Services / Wesbank because it no longer derives any financial benefit from the use of the Audi. In the premises, the respondent submits that:

(aa) The sale agreement was premised on the fact that the vehicle would be in perfect working condition, free of all defects, latent or otherwise. The agreement was concluded on a common, material, *bona fide* mistake on the part of the seller and the respondent concerning the state of the vehicle, and that this renders the sale agreement void, alternatively voidable at the instance of the respondent.

(bb) The applicant has stepped into the shoes of Alpine Motors by virtue of the cession. The respondent's right of recourse against the original seller having prescribed, it is prejudiced by that prescription and its right of recovery lies against the applicant.

(cc) The respondent relies on the principle of estoppel, in view of the empty promises made to it by the applicant, which distracted it from pursuing its rights against the initial seller.

(dd) The Audi is currently with Audi Centre Pinetown which has a lien over the vehicle for repairs and the respondent accordingly cannot comply with any order for the delivery of it.

The first point in *limine*

[3] In both the heading to the summons and paragraph 1 of the particulars of claim, the plaintiff is described as 'FirstRand Bank Limited trading as Volkswagen Financial Services and Wesbank'. The sale agreement concluded between the applicant and the respondent is headed 'Volkswagen Financial Services a Division of Wesbank a Division of FirstRand Bank Limited,…'. A similar heading is contained on the pre-agreement statement for the instalment sale agreement, which sets out the terms and conditions of the sale agreement as well as the suretyship and other documents. The applicant alleges at paragraph 9 of its particulars of claim that the original seller ceded its right, title and interest in and to the agreement, and transferred its ownership, to the applicant. It is clear from the respondent's answering affidavit in the summary judgment application, that it does not dispute the cession.

[4] In my view, there is no objection in law to a corporate entity using different trading names. [See: *Two Sixty Four Investments (Pty) Ltd v Trust Bank* 1993 (3) SA 384 (W)]. Those trading names are fully set out in the documentation and the particulars of claim and clearly establishes the title of the applicant to sue the respondent and Singh. In my view, the first point in *limine* has no merit.

[5] The second point in *limine:*

The complaint that the failure to join Singh as a second respondent in the summary judgment proceedings has no merit. I say this because the summary judgment application seeks delivery of the Audi which was not alleged to be in the possession of Singh, but in the possession of the respondent. I cannot conceive of any prejudice to Singh as a result of not having been joined in the summary judgment application. Indeed, had he been joined, he may well have legitimately complained that the joinder was incorrect and that he had to incur unnecessary costs in defending himself. Any defence which Singh may have had arising out of the sale agreement is fully explored by the respondent in its opposing affidavit. In those circumstances, there is no breach of the a*udi alteram partem* principle. Accordingly, the second point in *limine* must fail.

The main defence:

[6] The complaints of the respondent regarding the condition of the Audi do not, in my view, provide a defence to the summary judgment application. I say this because the agreement of sale was concluded in 2011 and some seven years later the respondent has taken no steps to institute legal proceedings against the applicant or the original seller. The fact that the respondent's right of recourse against the original seller may have become prescribed does not operate to the prejudice of the respondent. It has had every opportunity to institute action over the last seven years', and has failed to do so. [See: *Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (c) at 529,A-H].

[7] The respondent also raises an estoppel based on allegedly empty promises made to it by the applicant which prevented it from pursuing its rights against the initial seller. The requirements of estoppel are not set out in the opposing affidavit and, in my view, would in any event not provide a defence for the respondent.

[8] Finally, the respondent complains that it is no longer in possession of the Audi which is at Audi Centre Pinetown for repairs and that company has a lien over the vehicle for the cost of the repairs. That is no defence to the summary judgment application because the prayers sought provide in the alternative for the Sheriff to take possession of, and deliver the goods, to the applicant. In the event that the possessor of the vehicle claims a lien, the applicant will have to satisfy that lien if it

wishes to obtain possession of the Audi or bring some other legal proceedings to demonstrate its entitlement to delivery of it, as against the lien holder.

[9] In all the circumstances I grant summary judgment in the following terms:

(a) The respondent is directed forthwith to deliver to the applicant a 2011 Audi Q5 3.0 TDI Quattro S Tronic motor vehicle bearing chassis number WAUZZZ8RXBA079627 with engine number CCW116003 ('the vehicle'). In the event of the respondent failing to do so, the Sheriff of this court is authorised and directed to take possession thereof and deliver it to the applicant.

(b) The respondent is to pay the applicant's costs of the summary judgment application, calculated on the scale

(c) as between attorney and client.

Lopes J

Dates of hearing:	24th April 2018.
Date of Judgment:	4th May 2018.
Counsel for the Applicant:	Mr K Gounden (instructed by Legator, McKenna Incorporated).
Counsel for the Respondent:	Attorney Ms R Nathanael (instructed by Ronell Nathanael & Company).