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: 289/2017

In the matter between:

BMW FINANCIAL SERVICES (SOUTH AFRICA) (PTY) LIMITED — Applicant

and

DANIEL DE WET DU PLESSIS N.O — First Respondent

DIANA VAN DER BIJL DU PLESSIS N.O — Second Respondent

JAN FREDERIK TAUTE DU PLESSIS N.O — Third Respondent

DANIEL DE WET DU PLESSIS N.O — Fourth Respondent

CORAM: **MHLAMBI J**

HEARD ON: 8 June 2017

DELIVERED ON: 18 August 2017

MHLAMBI, J

[1] This is an application for summary judgment against the respondents for:

1.1 Rectification in respect of the Agreement in respect of the Chassis Number from **00C94735** to **WBAZW420900C94735;**

1.2 Confirmation of the Cancellation of the agreement;

1.3 Against the 1st, 2nd and 3rd Respondents/Defendants for:
An order authorising the Sheriff of the Court to take possession of and to deliver to the Applicant/Plaintiff, the goods being:
VEHICLE DESCRIPTION: 2014 BMW X5 xDrive 30d M-Sport A/T
ENGINE NUMBER: 31708501
CHASSIS NUMBER: WBAZW420900C94735

2. Against the 4th Respondent/Defendant, together with the 1st, 2nd and 3rd Respondent/Defendant, jointly and severally the one paying the other to be absolved for:

2.1 That judgment for the amount of damages that Applicant/Plaintiff may have suffered, together with interest thereon, be postponed *sine die,* pending the return of the vehicle to the Applicant/plaintiff, the subsequent valuation and sale thereof and the calculation of the amount to which the Applicant/Plaintiff is entitled.

2.2 Interest on the amount referred to in prayer 2.1 above at a Variable rate of Prime plus **0.00%** per annum as from **27 September 2016** to date of final payment, such interest to be capitalised monthly.

3. Costs of suit on Attorney and client scale;

4. Further and/or alternative relief.

[2] The applicant (plaintiff in the main action) sued the first three respondents (first, second and third defendants in the main action) in their representative and official capacity as trustees of the Baruk Property Trust and the 4th respondent as the surety and co-principal debtor of all debts and obligations by the Baruk Property Trust.

[3] The respondents opposed the application and applied for the condonation of the late filing of the opposing affidavits and the

dismissal with costs of the application for summary judgment as they contended that the applicant's papers were not in order. The main issues raised by the respondents are briefly set out in the opposing affidavit as follows:

"6. The plaintiff did not comply with the peremptory requirements of National credit Act (Act 34 of 2005) ("the Act").

7. Its failure to follow the prescripts of the Act was already evident when it failed to conduct a proper credit assessment regarding the affordability of the transaction to the Trust and myself as surety and co-principle(sic) debtor. As such, no proper credit assessment was done on either the Trust or myself.

8. I have been advised that this would constitute reckless credit and that there are certain statutory remedies available to a debtor in these circumstances. I need the opportunity to defend the matter to enable me to obtain sufficient information and in this regard to be able to exercise my rights.

9. I furthermore confirm that neither any of the trustees nor myself did receive a Section 129 notice prescribed by the Act. I am residing at ***[...] P. R., D. P., Bloemfontein.*** *I am the person responsible for taking out the mail and I can confirm that such a registered slip was not delivered to the post box. This even more prejudicial to myself since I am cited as surety and co-principal debtor.*

10. I have been advised that if we had obtained knowledge of the Section 129 notice certain options would have been available to us. I wish to have the opportunity to consider such options. We do intent to plead in the main action *that the hearing thereof be stayed pending the Plaintiff's compliance with the Act.*

11. I was shocked to learn that the vehicle that was delivered to the Trust was not the vehicle that the Trust agreed to purchase. I have been advised that the Plaintiff now wants to rectify the agreement to change the agreement. I need to investigate this before I can decide whether I am to oppose the claim for rectification or agree to same.

18. The Plaintiff is relying on a written agreement entered into between the parties. The written agreement attached to the particulars of claim is not signed by all of the parties. It would follow that the Plaintiff's attached agreement is not the one as referred to in the particulars of claim. It would render the pleadings excipiable and furthermore constitutes an irregular step".

[4] **Ad the condonation**

The deponent to the founding affidavit to the condonation application, Mr Daniel de Wet du Plessis, admitted therein that, having received the summons, their attorneys were instructed to defend the matter and the summary judgment application was enrolled for 30 March 2017. The attorneys had instructions to settle the matter[1].

[1] Paragraph 9: Founding affidavit: Condonation

[5] The settlement offer was not accepted and the court made the following order on 30 March 2017:

"1. The application for summary judgment is postponed to ***8 June 2017;***

2. The defendants to file their opposing affidavits together with their application for condonation on or before 20 April 2017;

3. The plaintiff to file their opposing affidavit to the application for condonation, if any, on or before 11 May 2017;

4. The defendants to file their replying affidavit to the condonation application, if any, on or before 25 May 2017;

5. Heads of arguments to be filed by the plaintiff on or before 31 May 2017 and by the defendants on or before 2 June 2017;

6. Costs to stand over."

[6] The respondents failed to file their opposing affidavit and the condonation application on or before 20 April 2017, but only on 25 April 2017. The orders contained in paragraphs 3, 4 and 5 of the said order were not given effect to by the parties.

[7] The main thrust of the respondents' argument for condonation is the late communication of the rejection of their offer by the applicant on 30 March 2017 and the latter's refusal to agree to a postponement or the condonation for the late filing of the opposing

affidavit. No reasons were advanced for the non-compliance of the court order and the subsequent late filling of the opposing affidavit and condonation application. It was contended on their behalf in oral argument that the applicant had granted condonation as per applicant's letter dated 31 May 2017 (which was admitted in court during the hearing by the applicant's representative); but no proper grounds were advanced why the affidavit in support of the condonation application was filed outside the time stipulated in the court order and why the court's indulgence was not sought or set out in the papers.

[8] The first two grounds relied on in the opposing affidavit were not persisted with in oral argument. It was contended on behalf of the respondents that the two aspects which were in issue were the rectification of the contract and the contract itself. It was contended that for the court to grant the rectification of the contract, a common error between the parties must be shown to exist. Furthermore, Moleboheng Molefe, the applicant's collections supervisor, was not a party to the agreement between the parties and as the section 129 notice was defective, an affidavit by a secretary or saleslady

who sold the vehicle should have been attached for the rectification of the contract to be granted.

[9] Respondents referred me to the PCL Consulting[2] decision in support of their argument and in particular paragraph 4. For the sake of completeness I quote both paragraphs 4 and 5:

"4. I therefore with respect agree with the judgment of Coetzee J in Malcomess Scania (Pty) Ltd v Vermaak and Another to the extent that it holds that a plaintiff who alleges that a written contract should be rectified is confined to what the plaintiff alleges is the true agreement between the parties, and cannot (in the absence of an express indication to the contrary) rely in the alternative upon the terms of the written agreement as they stand; but I am constrained to disagree with that judgment to the extent that it suggests that summary judgment is incompetent, even where both parties are ad idem as to the respects in which their written contract does not correctly reflect the agreement between them.

5. In summary judgment proceedings a plaintiff is required, in terms of rule 32(2), to 'verify the cause of action' - not to verify that it will be able to prove the cause of action. The cause of action in the present matter is that the defendant hired the 4th floor office in Fedsure Towers from the plaintiff, in consequence of which it became obliged to pay amounts totalling R396 188, 35 to the plaintiff, which it has failed to do. There was no dispute as to the terms of the agreement and, in particular, the identity of the premises let. The plaintiff was therefore not obliged to cross the evidential hurdle of proving that, despite the provisions of the written lease which referred to the 6th floor office, it was the 4th floor office which was in truth let to the defendant. <u>Had the</u>

[2] PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009 (4) SA 68 (SCA)

defendant placed in issue what the terms of the agreement were, the plaintiff would have been obliged to prove its version of the agreement at a trial, and summary judgment would have had to have been refused. But the defendant did not do this. The question then becomes: Should the court of first instance have been satisfied that the defendant had a bona fide defence to the claim for the arrears pursuant to the agreement alleged by the plaintiff (the terms of which are not disputed)? I turn to consider this question. (My emphasis)

[10] It was contended on behalf of the applicant that the respondents did not provide a defence to the claim, but merely suggested that they might have a claim. The rectification of the agreement is in respect of the chassis number from 00C94735 to WBAZW20900C94735 as provided for and reflected in the registration document attached to the particulars of claim as the correct description of the goods. The description of the chassis number as 00C94 735 reflected the correct last digits of the chassis number and clearly showed that it was a typographical error and the respondent did not deny that it was indeed so. The section 129(1) notice, despite the respondent's protestations, was correct as it referred to the correct engine number, account number, vehicle description, the instalment amount and the amount in arrears. For the respondent to raise the incorrect chassis number as a point of dispute is unjustifiable. The respondent was clearly engaging in delaying tactics in the circumstances.

[11] The signed written agreement between the parties, annexed to the particulars of claim referred to what the applicant alleged were the wrong chassis number. The plaintiff is therefore obliged to seek

rectification of the written agreement in order to enable it to lead evidence that what it alleged were the correct goods were sold to the respondents.[3]

[12] In the light of the above, I am not persuaded that there are prospects of success for the respondent in the main action and that sufficient grounds have been provided for and/ or good cause shown for the court to grant condonation in this matter. Consequently the application for condonation must fail and the applicant should succeed in its application for summary judgement.

[13] I therefore make the following order

ORDER

Prayers 1, 2 & 3 of the Notice of Motion are granted.

JJ MHLAMBI, J

Counsel for Applicant:	Adv. A. P Berry
Instructed by:	Hugo & Bruwer Attorney 129 Zastron Street BLOEMFONTEIN
Counsel for Respondents:	Adv. LA Roux
Instructed by:	Van Der Berg Van Vuuren Attorneys

[3] See PCL Consulting, supra, paragraph 3

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