IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case no: 52455/2012

17/10/2013

In the matter between:

COMMCARCO INVESTMENTS (PTY) LTD	**APPLICANT**
AND	
MERCEDES-BENZ FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD	**RESPONDENT**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

17/10/2013

IN RE:

MERCEDES-BENZ FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD	**APPLICANT**
AND	
COMMCARCO INVESTMENTS (PTY) LTD	**RESPONDENT**

JUDGMENT

BAQWA J

[1] This is a judgment in case number 52455/12 in which the parties and issues are similar to those involved in case number 52454/12 which also serves before me today. The main difference between the two is the *merx* or the item regarding which an instalment sale was entered into, being a Mercedes Benz Ml 270 CDI in case number 52455/2012 and a Mercedes Benz SL 500 in case number 52354/2012.

[2] It has been agreed between the parties that whilst the cases are different in the manner explained above, argument by counsel will be presented at the same time with regard to both cases, *mutatis mutandis*.

[3] On that basis therefore even though written judgment is handed down in case number 52455/2012 I will merely give an order in case number 52454/2012 for completeness sake and for the record.

[4] This is an application for rescission of an order granted by this court on 16 October 2012 for the return of a Mercedes Benz ML 270 CDI motor vehicle.

[5] The order granted to respondent is in the form of an interlocutory order pending finalisation of a claim respondent is pursuing for cancellation of the agreement between respondent and the applicant.

[6] This application has been brought in terms of Rule 42 (1) (a) of the Uniform Rules of Court and not in terms of Rule 31 (2) (b) as is usually the case in applications of this nature. The basis of the application is that it was erroneously sought and erroneously granted.

[7] It is common cause that an instalment sale agreement was entered into between applicant and the respondent in terms of which the vehicle mentioned above was sold to the applicant subject to certain terms and conditions.

[8] One of those conditions was that applicant would pay respondent the instalments specified in the Schedule forming part of the agreement and at the times stipulated therein.

[9] It was also part of the agreement that ownership of the vehicle would vest in the respondent and would only pass to the applicant once all the amounts due or arising from the agreement had been paid in full.

[10] A further term of the agreement was that should applicant default in the amounts payable under the agreement, respondent would be entitled to cancel the agreement and obtain return of the vehicle.

[11] Respondent alleges that applicant has breached the agreement in that it defaulted in payment of the instalment envisaged in the agreement and that as at 15 February 2009 applicant was in arrears in the amount of R31,156.51.

[12] According to a certificate of balance produced by the respondent, as at 26 March 2012 applicant was indebted to respondent in the sum of R393.699.80.

[13] Respondent instituted action against applicant for vindicatory relief for the return of the vehicle and termination of the agreement. Applicant is defending the action by filing a plea on 8 April 2010.

[14] On 5 September 2012 respondent brought an application for interim relief by way of immediate delivery of the vehicle to respondent for safe keeping pending the finalisation of the action referred to above.

[15] The repossession application was served on applicant's chosen *domicilium* on 17 September 2012 and set down for hearing in this court on 16 October 2012 where the relief sought was granted. This is the order that applicant seeks to rescind in terms of Rule 42 (1) (a).

[16] In *limine*, respondent challenged applicant's *locus standi* by alleging that the founding affidavit is deposed to by one Glen David Criek who is not duly authorised to depose to the founding affidavit. There is no resolution attached by applicant authorising him to bring the rescission application or to depose to the founding affidavit on its behalf.

[17] The point raised in *limine* has however not been pursued by the respondent and the application has been argued on the merits.

[18] From the outset counsel for the applicant conceded that he could not pursue the application in terms of rule 42 (1) (a) of The Uniform Rules of Court and as

encapsulated in his Notice of Motion. He has argued for alternative relief in terms of the Common Law.

[19] Mr Van der Merwe, for the applicant submits that applicant's reason for not opposing the interlocutory application for the return of the vehicle is because service of the relevant documents was effected on the *domicilium* address from which the applicant had moved some five years earlier. Applicant therefore had no knowledge of the application and was accordingly not in wilful default. Whilst he concedes the failure of applicant and its attorneys to notify the respondent of the changed address he submits that in the context of this application that omission ought to be viewed in conjunction with applicant's *bona fide* defence to the interlocutory application.

[20] He submits that having regard to the requirements for an interim interdict, respondent did not make out a case regarding "irreparable harm" and in any event not to the extent required in the case **of BMW Financial Services SA (Pty) Ltd v Rathebe 2002 (2) SA 368 (W).**

[21] Applicant does not deny that he entered into an instalment sale agreement with the respondent. That being the case applicant is bound by the terms and conditions of the agreement. As already stated one of the terms is that responded retains ownership of the vehicle until the instalments are paid in full.

[22] It stands without reason therefore that *ex contractu* respondent would be entitled to pursue a vindicatory claim in the event of applicant defaulting on payments. By the same token, respondent possesses *ex contractu* not only a *prima facie* right but a clear right which entitles it to the interlocutory order which applicant now seeks to rescind.

[23] It is common cause that the vehicle is presently in applicant's possession and that applicant last paid the requisite instalment 17 December 2008. Miss Maritz, for the respondent submits and I accept that the vehicle is a movable asset that depreciates on a daily basis whilst in use by the applicant. Should anything happen to the vehicle, respondent could suffer irreparable harm.

[24] It is however also correct as submitted by counsel for the respondent that whilst the respondent would ordinarily be required to prove a *prima facie* right, a well grounded apprehension of irreparable harm if the interim relief is not granted, a balance of convenience in favour of the granting of the interim relief and the absence of any other satisfactory remedy, the present case falls to be decided as one of two exceptions to the rule.

[25] These exceptions were articulated in the case of:

Fedsure Life Insurance v Worldwide African Investment Holdings (Pty) Ltd 2003 (3) SA 268 (W) at 278.

[25.1] In that case it was held that there are two exceptions to the rule that an interlocutory interdict must show the requisites outlined above. Such exceptions are interdicts pending vindicatory actions and interdicts pending possessory actions.

[25.2] The present case falls under the aforesaid exception in that the application by respondent was for interlocutory relief pending the adjudication of the vindicatory action referred to above.

[26] The Fedsure Life decision is a full bench decision of this division in which it was decided that an applicant for an interdict pending a vindicatory action to recover

what he alleges is his own property need not show that he will suffer irreparable loss if the interdict is not granted.

[27] Further, an applicant under these circumstances need not show that he has no other satisfactory remedy as a person who is entitled to vindicate property in the hands of another cannot be forced by the action of that person to accept merely the value of the property, see **Cowen and Hammand v Campbell 1906 TH 191.**

[28] In the circumstances the "absence of irreparable harm" defence of the applicant on which it bases the application for rescission cannot stand.

[29] In the result an order is granted in the following terms:

[29.1] The application for rescission is dismissed.

[29.2] Applicant is ordered to pay respondent's costs on an attorney and client scale.

S.A.M BAQWA

JUDGE OF THE HIGH COURT

FOR THE APPLICANT	ADV: H A VAN DER MERWE
INSTRUCTED BY	SENEKAL SIMMONDS
	011 450 3084
FOR THE RESPONDENT	ADV: S MARITZ
INSTRUCTED BY	STRAUSS DALY ATTORNEYS
	012 348 1683
DATE OF HEARING	16 OCTOBER 2013
DATE OF JUDGMENT	17 OCTOBER 2013