

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1325/2013

In the matter between:-

FIRSTRAND BANK LIMITED t/a WESBANK

Applicant

and

CHRISTIAAN SMITH HATTINGH

Respondent

HEARD ON: 13 JUNE 2013

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 4 JULY 2013

[1] This is an application for summary judgment. The plaintiff sued the defendant in terms of an instalment agreement entered into by the parties on 7 February 2012. The said agreement had been signed online by the defendant, using his nominated username and pin code, to access his online account.

[2] In terms of the said agreement, the plaintiff sold to the defendant a 2007 Mercedes Benz SL 65 AMG, with engine number 27598160004073 and chassis number WDB2304792F130207.

- [3] The plaintiff avers in its particulars of claim that the defendant has breached the agreement in that he has failed to pay the instalments in terms of the agreement and that he has been in default for at least 20 business days. On 14 March 2013, the defendant was in arrears in the amount of R52 386,49. A notice in terms of section 129 of Act 34 of 2005 was sent to the defendant, but he (defendant) has failed and/or refused to make the required payment.
- [4] As a result of defendant's breach, the plaintiff cancelled the agreement, as it is entitled to do in terms of the agreement and claimed, among others, return of the vehicle. I do not mention the other prayers, because Mr Roux, on behalf of the plaintiff, said that is the only order that he moves for.
- [5] In his affidavit resisting summary judgment, the defendant states that the aforesaid vehicle had latent defects, which existed at the time of the sale, which latent defects substantially impaired its utility or effectiveness for the purpose for which it had been sold or for which it was commonly used. He further tenders return of the vehicle concerned, against repayment of the amount he had already paid to the plaintiff in respect of the said vehicle. That the plaintiff and/or its duly appointed agent made false representations to him in respect of the vehicle, which misrepresentation induced him to purchase the vehicle at the agreed price and if he had known the true facts, he would not have purchased the vehicle at all. He accepted the

plaintiff's repudiation of the said agreement and cancels same.

- [6] During the hearing of the matter, counsel for the plaintiff conceded that the defendant has raised a triable issue in respect of whether it is the plaintiff or defendant who has committed the breach of the contract and repayment of the amount already paid by the defendant to the plaintiff for the vehicle. He, however, contended that since the defendant does not dispute that the plaintiff remains the owner of the vehicle and that all that the plaintiff requires at this stage is return of the vehicle, the court should grant summary judgment only on the basis of return of the vehicle to the plaintiff and the other issues to be determined during the trial.
- [7] The plaintiff's right to claim return of the vehicle is based on the fact that the defendant has breached the contract. Defendant denies that he has breached the contract and the plaintiff concedes that this issue can only be resolved at the trial. I therefore find it difficult to comprehend how the court can order return of the vehicle to the plaintiff before deciding whether the defendant has breached the contract, as there would be no basis on which such an order is made. The plaintiff is not entitled to use a non-performance for which it is responsible as a foundation for a claim of cancellation and damages. I have also not been referred to any authority that the court can order restitution in piecemeal fashion in that

part of restitution is ordered at summary judgment stage and the other part after the trial.

[8] On the basis of the above, I find that summary judgment cannot be granted and therefore the application for summary judgment is dismissed.

[9] The next question to consider is the one of costs. Counsel for the defendant argued that pursuant to the filing of the opposing papers, the plaintiff became aware of the defendant's defence and should not have proceeded with its application after becoming aware of same. The defendant therefore argues and prays that the plaintiff should pay his costs occasioned by the hearing of this matter on an opposed basis. I, however, find that it was not unreasonable for the plaintiff to proceed with this matter to hearing on an opposed basis and that the defendant can still argue the costs of this application at the end of the trial.

[10] I therefore make the following orders:

1. The plaintiff's application is dismissed.
2. The defendant is granted leave to defend.
3. The costs of application to be costs in the cause.

N.W. PHALATSI, AJ

On behalf of applicant: Adv L.A. Roux
Instructed by:
Strauss Daly Inc
BLOEMFONTEIN

On behalf of respondent: Adv C.A. Human
Instructed by:
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