

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2388/2013

In the matter between:-

FIRSTRAND BANK LIMITED t/a WESBANK Applicant/Plaintiff

and

THOMAS ROBERT DOBIE Respondent/Defendant

HEARD ON: 5 SEPTEMBER 2013

JUDGMENT BY: THAMAGE, AJ

DELIVERED ON: 19 SEPTEMBER 2013

- [1] This is an application for summary judgment. Plaintiff is Firststrand Bank Limited t/a Wesbank and defendant is Thomas Robert Dobie an adult male residing at Bethlehem.
- [2] Plaintiff instituted an action against the defendant for the following:-
- “1. Confirmation of termination of the agreement;
 2. Return of the vehicle as referred to herein;
 3. An order authorising the Plaintiff to apply to the Court on the same papers, supplemented insofar as it may be necessary, for judgment in respect of any damages and

further expenses incurred by the Plaintiff in the repossession of the said vehicle, which amount can only be determined once the vehicle has been repossessed by the Plaintiff and has been sold;

4. Interest at 11% *a temporae morae* to date of final payment;
5. Party and party costs to be taxed;
6. Further and/or alternative relief.”

[3] The prayers in respect of summary judgment are the same as prayers in the summons. Plaintiff in his heads of argument stated that he is only pursuing prayer 2, i.e.

“That the Defendant is directed to forthwith return to the Plaintiff the following goods: 2006 Isuzu KB 300 TDI LX P/U D/C, with engine number 4JH1303140 and chassis number ADMTR77D5C294551 failing which the sheriff is authorised to attach the aforementioned goods, whenever same is found, and to hand the goods to the plaintiff.”

[4] Plaintiff is thus stating that he is proceeding in terms of *rei vindicatio* on the basis that he is the owner of the said vehicle and that the defendant is in possession of the vehicle. Counsel for the plaintiff submitted that plaintiff will not pursue other relief sought except for an order of costs. Counsel for the defendant submitted that due to the fact that defendant's wife did not consent to the purchasing of the vehicle by the defendant, the agreement between plaintiff and defendant is void, reference is made to the Matrimonial Property Act 1984, Act 88 of 1984 and specifically section 15(2)(f).

[5] Both plaintiff and defendant entered into a written instalment sale agreement on 9 March 2012. In terms of the agreement, the plaintiff sold a 2006 Isuzu motor vehicle to defendant. The defendant breached the terms of the agreement in that he failed to pay the instalments due. As a result of the breach, plaintiff claims that it is entitled to the return of the vehicle.

[6] Rule 32(2) of the Uniform Rules states as follows:

“The Plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purposes of delay”.

Rule 32(3)(b) requires the defendant to satisfy the court by affidavit that he has a *bona fide* defence and shall disclose fully the nature and the grounds of the defence and the material facts relied upon.

[7] Plaintiff submitted that he is proceeding by way of *rei vindicatio* and that all the elements of *rei vindicatio* have been proven. Defendant argued that the instalment sale agreement is void for reasons that the defendant's wife did not consent to the instalment sale agreement, hence the validity of the said agreement can only be properly

adjudicated at the trial. Further argued that the granting of summary judgment would prevent the defendant from pleading that the agreement is invalid and counter claiming on restitution.

- [8] It is not in dispute that the plaintiff is the owner of the vehicle neither is it disputed that the defendant is in possession of the vehicle Isuzu. For a plaintiff to succeed on the claim of *rei vindicatio* he has to allege and prove that he is the owner of the property claimed and secondly that the defendant was in possession of the said property at the time the action was instituted.

See: **Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd** 1993 (1) SA 77 (AD).

As mentioned earlier, there has been no dispute on these two requirements and consequently I am of the view that plaintiff succeeded in verifying the cause of action as it appeared on the particulars of claim.

- [9] The next question to be decided is whether the defendant has set out a *bona fide* defence, i.e. whether the defendant has disclosed the nature and grounds of his defence and secondly, whether on the facts so disclosed the defendant appears to have a defence which is *bona fide* and good in law.

See: **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) at 426.

- [10] The purported defence raised by the defendant is not good in law. The fact that the defendant's wife did not consent to the agreement, is *per se* not a defence for a claim of *rei vindictio*. It is common cause that the plaintiff is the owner of the vehicle in question and that the defendant is in possession of the vehicle.
- [11] The *bona fides* of the defendant is also questionable. The defendant's wife had disposed of an affidavit stating that she did not consent to the sale and state that she has no knowledge of the vehicle in question. This averment is also stated by the defendant that his wife has no knowledge. If indeed, his wife does not have any knowledge of the vehicle and her being an interested party, why was she not joined in the proceedings as a second defendant.
- [12] From the defendant's own averment, even if I had to consider his version that the contract is invalid, then it calls for the defendant to return the vehicle because he is holding the vehicle based on an invalid contract.
- [13] Defendant argued that the granting of summary judgment will preclude the defendant from pleading that the contract is invalid, as well as instituting restitution counter claim. I am of the view that defendant can still institute his action of

restitution, while the vehicle is returned to the plaintiff if he feels that there are substantial merits in his case.

[14] In the circumstances I come to the conclusion that the defendant had not raised any *bona fide* defence to the plaintiff's claim. The application for summary judgment thus succeeds.

[15] Plaintiff also made an application for condonation for late filing of the application for summary judgment. He did that under mistaken believe that his application was out of time, whilst not. Defendant did not oppose as the application was within the time period. Defendant thus requested court to order costs against plaintiff for that application. I am of the view that the plaintiff is to pay costs for the unnecessary application he brought to court.

[16] The following order is made:

1. Summary judgment is granted.
2. Defendant is directed to return the 2006 Isuzu KB 300 TDI LXP/4D/C with engine number 4JH1303140 and chassis number ADMTR77D5C294551 to the plaintiff, failing which the sheriff is authorised to attach the aforesaid vehicle, wherever same is found, and to hand it to the plaintiff.
3. Defendant to pay costs.
4. Plaintiff to pay costs for the unnecessary application for condonation of late filing of summary judgment.

S.J. THAMAGE, AJ

On behalf of plaintiff/applicant:

Adv L.A. Roux
Instructed by:
Strauss Daly Inc
BLOEMFONTEIN

On behalf of defendant/respondent:

Adv J. Els
Instructed by:
Wessel & Smith
BLOEMFONTEIN

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