REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO

(2) OF INTREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

DIAMOND AJ

29 October 2024

CASE №: 2359/2020

In the matter between:

ABSA BANK LIMITED	PLAINTIFF
and	
GABERTON INVESTMENT (PTY) LTD	FIRST DEFENDANT
MOKGOBA GABRIEL MESO	SECOND DEFENDANT

JUDGMENT

DIAMOND A J:

BACKGROUND

[1] The Plaintiff issued Summons against the First Defendant on 18 March 2020.

[2] The First Defendant filed a notice of appearance to defend on the 30th day of November 2020.

[3] The background to the summons is simple: on or about 15 August 2019 the Plaintiff and the First Defendant entered into a written instalment sale agreement, in respect of the purchase of a certain Caterpillar Grader. In terms of this agreement the First Defendant was obliged to pay monthly instalments to the Plaintiff and ownership of the Caterpillar Grader would be transferred to the First Defendant once the First Defendant has complied with all its financial obligations in terms of the instalment sale agreement.

[4] The instalment sale agreement contains the usual cancellation clauses in the event of breach of contract of either of the parties, and the clause that should the Plaintiff have to proceed with legal action that the First Defendant shall pay the costs of the plaintiff on a scale as between Attorney and Client.

[5] The Plaintiff alleges in paragraph 7 of its Particulars of Claim that it complied with all its obligations in terms of the instalment sale agreement. To this the First Defendant pleaded as follows "*The contents herein are denied, and the Plaintiff is put to proof thereof.*"

[6] The Plaintiff further pleaded in paragraph 8 of its Particulars of Claim that the First Defendant breached the terms of the instalment sale agreement by failing to punctually pay the instalment amounts. The First Defendant "*vehemently*" denies this allegation and pleads, in amplification, of this denial by requiring the Plaintiff to prove that the official representing the Plaintiff had the necessary authority to sign and enter into the agreement. If that is proven, the First Defendant relies on *force majeure*, because of between the period March 2020 and November 2020 its lack of income during the

lockdown period resulting from the Covid pandemic, made it objectively impossible for the First Defendant to comply with its obligations.

[7] The Plaintiff further alleged, in its Particulars of Claim, that it duly cancelled the agreement as per the cancellation clause contained in the agreement.

[8] The First Defendant recorded two special pleas, the first being that the Plaintiff failed to comply with the stipulations of Section 129 of the National Credit Act, 2005 (Act 34 of 2005) and the second that the Plaintiff did not file a notice in terms of Section 41A of the Uniform Rules of Court.

[9] This matter came before me on 22 July 2024.

[10] On the morning of 22 July 2024, at 09:24, just before the commencement of the trial, Everton Dankuru, the attorneys representing the First Defendant filed a notice of withdrawal as attorneys of record. The First Defendant appeared in person.

[11] At the outset of the proceedings, the First Defendant applied, orally, for a postponement of the trial to afford him the opportunity to employ a new firm of attorneys to represent him. I dismissed the application and indicated that the reasons will follow with the final judgment.

[12] The trial proceeded and the Plaintiff led evidence to the effect that the instalment sale agreement was concluded by a properly authorised official and furthermore and more important for purposes of this judgment, to the effect that the First Defendant failed punctual payments and that, on 5 February 2020, the First Defendant was already in arrears in the amount of R 146 057,36.

[13] Throughout the evidence, the First Defendant was given the opportunity to cross-examine the witness testifying on behalf of the Plaintiff. After the Plaintiff closed its case, the First Defendant was given the opportunity to proceed to present evidence

to the court. The First Defendant declined the opportunity to cross-examine the witness testifying on behalf of the Plaintiff and furthermore declined the opportunity to present its case to the court. His reason was that he was in no position to make a meaningful contribution to the case and that he needed a postponement in order to employ the services of an attorney.

[14] What follows is the judgment of this court and the reasons for the judgment.

APPLICATION FOR POSTPONEMENT

[15] It is trite that a postponement is not merely for the asking. The party requesting the postponement must provide a compelling justification for the postponement.[1]

[16] The court stated in *Kleynhans* in paragraph 23 that the court is generally inclined to grant the postponement if the reason for the postponement is fully explained and justified, especially if justice demands further time for the applicant to present the case adequately.

[17] Furthermore, prejudice is a vital factor in the court's consideration.[2]

[18] It is against the backdrop of the above considerations that the application for postponement was dismissed. The First Defendant could not give any reason why his attorney of record withdrew, other than to state that it could not have been for financial reasons since he had adequate access to funds to enable him to proceed with the litigation.

[19] Apart from the above, what, in my view, is important to consider is the

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[1] See *Legal Practice Council v Kleynhans (6160/24) [2024] ZAWCHC 196 (5 August 2024)*, Pars 20 – 25 ("*Kleynhans*"), and the authorities are referred to in that case.
[2] *Kleynhans*, Par. 24.

context and the nature of the case. The First Defendant offered two special pleas in its plea, none of which is even vaguely convincing.[3]

[20] As far as the merits are concerned, the plea of the First Defendant contains, for all practical purposes, an admission to the pivotal case of the Plaintiff and that is the First Defendant was in arrears by end of February 2020, entitling the Plaintiff to the relief sought. What the First Defendant did plead though, was that it was excused from performing due to supervening impossibility of performance flowing from the Covid 19 lockdown. This plea of supervening impossibility for the reasons set out in the plea is also patently untenable[4]

[21] The gist of the case of the Plaintiff was furthermore extremely simple - it turned exclusively on the question whether the First Defendant made payments in terms of the contract, or not. It should have been extremely simple to answer to this case – First Defendant simply had to present proof of payments of the instalments of the monthly instalments. In fact, to do so would be so simple that the First Defendant would have been able to do so in person in court. There are no legal complexities involved in this question. This he did not do, in fact, he stated in his plea that he was unable to pay due to the Covid 19 lockdown measures.

[22] A particular important factor is the question of prejudice suffered by the parties and in this instance the Plaintiff, should the application for postponement be successful. The prejudice that the Plaintiff would have suffered is self-evident: while the Plaintiff would have to await a new trial date, the First Defendant would have been in possession and use of the asset, an asset which are subject to depreciation and to the risk of physical damage.

[23] I am therefore satisfied that for all the above reasons the appropriate judgment to the application for postponement, was to dismiss the application, as I did.

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[3] See below.

[4] See below.

[24] Since the trial proceeded, for all practical purposes on an unopposed basis, and there was no version for the First Defendant on record, the Plaintiff would have been entitled to judgment, for all practical purposes on a default basis.

[25] I will however very shortly, in fairness to the First Defendant, deal with the special pleas and the merits as it appears from the pleadings.

SPECIAL PLEAS

[26] The first special plea of the first the defendant was that the Plaintiff failed to comply with section 129 of the National Credit Act, 2005 (Act 34 of 2005)("NCA").

[27] This special plea is untenable. It is common cause that the First Defendant is a juristic person, and that the First Defendant entered into a large agreement as described in section 9(4)(b) of the NCA, in that the value of the transaction exceeded R 250 000 – 00[5]. The entire transaction falls outside the scope of the NCA, and there was no need for the Plaintiff to comply with the stipulations of the NCA.

[28] The second special plea was that the Plaintiff failed to comply with the stipulations of Rule 41A, in that the Plaintiff failed to file the necessary notice in terms of the rule and that for that reason the combined summons of the Plaintiff was a nullity and completely defective.

[29] This plea is equally untenable. It is clear that the Rule 41A does not provide for any sanction for non-compliance with the rule. It has been held that mediation in terms of this rule is an entirely voluntary process and that an unwilling party

[5] Annexure C to the particulars of claims a copy of instalment sale agreement and the first the defendant admits having entered into the agreement. In terms of this annexure, the value of the transaction was R 1 7997 000 – 00.

cannot be compelled to mediate.[6]

[30] Furthermore, it has been held that non-compliance with Rule 41A and its provisions are not fatal to the proceedings.[7]

[31] The Plaintiff did eventually file a Rule 41A notice, indicating clearly that the did not wish to consider mediation proceedings in terms rule 41A, lead to any tangible outcome.

[32] There is no indication that the First Defendant pursued this objection seriously by employing the mechanisms in the uniform rules of court in the event of any of the parties committing an irregular proceeding. It simply relies on the fact that non-compliance results in the entire proceedings to be a nullity. For all the above reasons therefore, the second special plea is dismissed.

MERITS

[33] In my view, there can be no dispute as to the merits of the claim of the Plaintiff.

[34] The First Defendant pleads that the official that signed the agreement was not authorised to do so. This is a bald denial, and not explained in any way at all. This failure to place an explanation before the court is odd, since it is clear from the pleadings that after the signing of the agreement, the contract was carried into effect by both parties. The First Defendant received the grader and made certain payments, although it defaulted in the end. The testimony of the Plaintiff's witness confirmed the authority of the official that signed the agreement and the First Defendant did not present any contrary evidence. This defence was disingenuous and can only be rejected.

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[6] *Kalagadi Manganese (Pty) Ltd & Others v Industrial Development Corporation of South Africa & (*2020/12468) [2021] ZAGPJHC 127 at paragraph 30

[7] *Sokhani Development & Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality* (1254/2024) [2024] ZAECGHC 40 (26 April 2024). See also *Growthpoint Properties Limited v Africa Master Blockchain Company (PTY)* Ltd (2020/43806) [2022] ZAGPJHC 836 (26 October 2022) , Pars 26 – 27.

[35] The only remaining defence, on the merits, is that the First Defendant should be excused from performance because of supervening impossibility, owing to the Covid 19 lockdown measures. This defence can be rejected with reference to the pleadings only. The Plaintiff's case is that by the end of February 2020, the account of the First Defendant was in arrears, and it is based on these arrears that the action was instituted. The Covid 19 lockdown measures were only in effect (and this was even pleaded by the First Defendant itself), as from March 2020. On the basis of this fact that this defence should be dismissed.

[36] Apart from the above, the question as to whether financial inability to pay, caused by the Covid 19 lockdown measures, was repeatedly raised before South African courts and the courts have consistently ruled that the lockdown measures could only cause a temporary inability to perform, and moreover it did not necessarily bring about objective impossibility to perform[8]. This defence should therefore also be dismissed.

CONCLUSION

[37] For all of the above reasons I am of the opinion that judgment should be granted in favour of the Plaintiff.

It is hereby ordered:

1. The cancellation of the instalment sale agreement concluded by the Plaintiff and the First Defendant, that commenced on 14 August 2019, is confirmed.

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[8] *SeeFirstrand Auto Receivables (RF) Limited v Zungunde (19875/2021*) [2023] ZAGPPHC 60 (27 January 2023), Par
21 – 23.

2. The First Defendant or anybody in possession of it is ordered to forthwith deliver to the Plaintiff:

CATERPILLAR 140H MOTOR GRADER
ENGINE NUMBER 1[…]
SERIAL: NUMBER X[…]
YEAR OF FIRST REGISTRATION 2007

3. The Sheriff for the district of the High Court wherein the asset has been situated is to give effect to prayer 2.

4. The Plaintiff is granted leave to apply to this court on the same papers, supplemented in so far as may be necessary for judgment in respect of any damages, and further expenses incurred by the Plaintiff in the repossession of the said goods.

5. The First Defendant is to pay the costs of suit of the Plaintiff on a scale as between attorney and client.

DIAMOND AJ
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

HEARD ON : 22 July 2024

JUDGMENT DELIVERED ON: **29 OCTOBER 2024**.

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 29 OCTOBER 2024.

FOR THE PLAINTIFF:	Adv Z Marx du Plessis
INSTRUCTED BY:	VZLR INC.