

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA

Case No.: 1697/2024

In the matter between:

TOM CAMPHER MOTORS (PTY) LTD

t/a TOM CAMPHER VOLVO CARS, JOHANNESBURG

Plaintiff

and

PAUL JACQUES ANDRE

Defendant

JUDGMENT - REASONS FOR ORDER

RONAASEN AJ:

Introduction

The order of 22 October 2024

[1] At the instance of the plaintiff, I granted an order for summary judgment (“the order”) against the defendant, on 22 October 2024, as follows:

1. Summary judgment is granted against the defendant:

1.1 In respect of the BMW:

1.1.1 Payment in the sum of R830 000.00 together with interest at the rate of 11.75% per annum *a tempore morae* from 22

June 2024 (being the date of service of summons) until the date of payment.

1.1.2 In the event that the defendant fails to make payment referred to in paragraph 1.1.1 above within 5 (five) days of service on the defendant of the court order, the Sheriff is authorised to attach the BMW wherever he may find it and deliver it to the plaintiff who shall have the BMW valued by a sworn valuator and thereafter set off the valuation against the sum referred to in paragraph 1.1.1 above.

1.2 In respect of the Audi:

1.2.1 Payment in the sums of R140 000.00 and R1 501.45, totalling R141 501.45 together with interest at the rate of 11.75% per annum *a tempore morae* from 22 June 2024 (being the date of service of summons) until the date of payment.

1.2.2 In the event that the defendant fails to make the total payment referred to in paragraph 1.2.1 above within 5 (five) days of service on the defendant of the court order, the Sheriff is authorised to attach the Audi wherever he may find it and deliver it to the plaintiff who shall have the Audi valued by a sworn valuator and thereafter set off the valuation against the sum referred to in paragraph 1.2.1 above.

2. Costs of the action.

[2] I invited the parties to request reasons for my granting the order. These reasons are provided, pursuant to such a request by the defendant.

Litigation history

- [3] On 10 May 2024 the plaintiff instituted action against the defendant. The relief sought by the plaintiff foreshadowed the relief granted in terms of the order.
- [4] The combined summons and accompanying particulars of claim were served on the defendant on 24 June 2024.
- [5] The defendant delivered a plea and claim in reconvention on 24 August 2024, only after a notice of bar had been served on 6 August 2024.
- [6] The delivery of the plea prompted an application for summary judgment by the plaintiff, which was launched on 10 September 2024.
- [7] The defendant failed to respond to the application for summary judgment, which was enrolled for hearing on 8 October 2024. On that date the application for summary judgment was postponed, at the cost of the defendant, to 22 October 2024. The defendant, furthermore, was directed by this court to deliver its affidavit opposing summary judgment by 15 October 2024.
- [8] The defendant did not deliver an affidavit opposing the application for summary judgment as directed or at all, but rather, on 22 October 2024, the date on which the application for summary judgment was enrolled for hearing, delivered a notice of intention to amend its plea, as contemplated in rule 28 as well as a so-called “explanatory affidavit” (to which I shall revert, below).

The proceedings on 22 October 2024

- [9] When the matter was called on 22 October 2024, counsel for the defendant applied from the bar for a postponement of the application to allow the defendant to file an affidavit in opposition to the application for summary judgment. This application was resisted by the plaintiff.

[10] In motivating for a postponement, the defendant's counsel relied on the explanatory affidavit, although no reference to a postponement was made in the affidavit.

[11] After hearing the parties on the application for postponement I adjourned to consider that application. After due consideration I refused the application for a postponement for the following reasons:

11.1. the explanatory affidavit did not contain a request for a postponement, but simply suggested that the summary judgment application would proceed at some unspecified future time after the proposed amendment had been effected;

11.2. there was no application for condonation for the failure to comply with the order directing the filing of an opposing affidavit by a specified date contained in the explanatory affidavit, nor was a further extension sought for its later delivery;

11.3. the defendant, in the explanatory affidavit, offered no plausible explanation as to why an affidavit opposing summary judgment, which was in harmony with the proposed amendment, could not be filed at the same time as the notice of amendment;

11.4. the defendant rather sought to prescribe a procedure, of its own making, for the further conduct of the summary judgment application.

[12] I then proceeded to hear the application for summary judgment. Although the defendant's counsel remained present throughout the hearing of the application, he declined to address me on the merits of the application.

Discussion

[13] Rule 32(3) allows a defendant to resist summary judgment in three possible ways, namely by providing security to the plaintiff to the satisfaction of the court

for any judgment including costs which may be given; or to satisfy the court by affidavit or by way of oral evidence (with the leave of the court), that the defendant has a *bona fide* defence to the plaintiff's claims.

[14] When the application was postponed on 8 October 2024, the defendant had indicated that it wished to establish its defence by way of affidavit, and to that end was granted a postponement and directed to file its opposing affidavit by 15 October 2024.

[15] On the dated I gave the order the defendant did not avail itself of the other options afforded by rule 32(3), but rather, from the bar, sought a further postponement for the delivery of an affidavit in opposition to the application for summary judgment. On the date of the hearing of the summary judgment application it delivered its notice of amendment and thus, quite obviously, in terms of rule 28 (2), the time within which the plaintiff was entitled to raise an objection to the proposed amendment had not expired.

[16] Against this background it is apposite to refer to the judgment in *Belrex 95 CC v Barday* 2021 (1) SA 178 (WCC) where the following was stated:

“[32] The difficulty in this case, however, was that in terms of rule 28(2) the time period within which the plaintiff was entitled to raise its objection and not expired (being only 6 court days) when the application for summary judgement was heard. The notice to amend was served via email on 4 August 2020, as was the filing of the special plea. The amendment therefore had not yet been effected at the time of the hearing of the application for summary judgment. In my view the initial plea was still effective at the time of the hearing of the application. *Van Loggerenberg* (a reference to the work *Superior Court Practice*, Volume 2 (second edition) at D1 Rule 32-72), to a certain extent addresses the issue which this court is grappling with, where he says a court hearing a summary judgment application is not entitled, in the absence of an affidavit contemplated in subrule (3)(b), to give leave to defend on the basis of purely a plea or notice of intention to amend, because rule 32 does not provide for such a procedure.

[33] The learned authors then pose the question as to what should transpire in the event of the defendant giving notice of intention to amend its plea after an application for summary judgment was delivered, and to which proposed amendment the plaintiff raised an objection as contemplated in rule 28(2). In regard to this, the authors submit that a defendant must deliver an affidavit which is in harmony with the notice to amend its plea, failing which the summary judgment should be granted, but if the defendant delivers an affidavit which is in harmony with the proposed amendment of the plea, which complies with the provisions of subrule (3(b), the application for summary judgement should be postponed *sine die* in order for the defendant to bring an application to amend its plea.”

[17] The above-mentioned passages, in my view, are favourable to an adoption of the course of action proposed by *Van Loggerenberg* in the circumstances postulated in the passages. In any event, I find myself in respectful agreement with the course of action proposed by *Van Loggerenberg* in the circumstances postulated.

[18] Applying the author’s proposals to this matter, and in the absence of the delivery of an affidavit in harmony with the proposed amendment, foreshadowed in the notice of amendment delivered on the morning of the hearing of the application, by the defendant, the plaintiff was entitled to an order for summary judgment. I agree with the author that rule 32 does not allow for a procedure where summary judgment can be resisted purely on the basis of a plea or a notice of amendment.

Conclusion

[19] For these reasons I exercised my discretion in favour of the plaintiff and gave the order.

O H RONAASEN
ACTING JUDGE OF THE HIGH COURT

The parties were represented as follows:

The plaintiff: Adv. L. Ellis;
Gerrie Nel Inc., 37 The Baid Street, Greenside,
Johannesburg c/o Joubert Galpin & Searle, 173 Cape
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The defendant: Adv. A.A. Mbenyane
Ivan Levitt Attorneys, The Leonardo, Office Level 12, 75
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The reasons for the order granting summary judgment in favour of the plaintiff on 22 October 2024 were circulated to the parties electronically on 17 December 2024.