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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 2025-155053

Of Interest

In the matter between:

TOYOTA FINANCIAL SERVICES

PLAINTIFF

and

DUDUZILE MAQUNGO

DEFENDANT

JUDGMENT

Rugunanan J

[1] The plaintiff seeks summary judgment against the defendant claiming return of a Toyota Fortuner motor vehicle. The vehicle is the subject of a written instalment sale agreement concluded on 20 September 2018 (the agreement) in default of which the defendant failed to pay the agreed monthly instalments of R8 743.13 accumulating arrears amounting to R110 588.12 as at the date of institution of the action out of this court on 1 September 2025.

[2] In defending the action the defendant delivered a special plea without pleading to the merits, and following institution of the summary judgment proceedings she delivered an opposing affidavit.

[3] The special plea alleges, in summary, that the High Court in Mthatha is the court having ‘proper territorial jurisdiction’ – a conclusion posited on allegations that the defendant resides and carries on business in Mthatha, and it is there that the agreement was concluded and performed.

[4] The main relief prayed for is that the ‘plaintiff’s claim be dismissed for want of jurisdiction’. In the alternative, the matter be transferred to the High Court in Mthatha.

[5] Outwardly, the special plea is attractive but in my view, it is unsound.

Jurisdiction

[6] The High Court of South Africa consists of the main divisions established in s 6 of the Superior Courts Act 10 of 2013 (the Act). The Act did away with provincial and local divisions and, in their stead, put in place nine divisions of the High Court corresponding to the nine provinces of the Republic of South Africa. The Act states that the Eastern Cape Division of the High Court has its main seat in Grahamstown (now Makhanda).

[7] The former local seats in Bhisho, Mthatha, and Port Elizabeth (now Gqeberha) are recognised as courts of the Eastern Cape Division, this in accordance with the proclamation in the Judge President's Directive on Change of Names of the Court Seats: Eastern Cape Division of the High Court of South Africa.¹

[8] The persons over whom and matters in relation to which a division has jurisdiction are dealt with in s 21 of the Act – stating in essential terms that a division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within its area of jurisdiction.²

[9] In *Thembani Wholesalers (Pty) Ltd v September and Another*³ (*Thembani*), a full court judgment of this division, it was made clear that the jurisdiction conferred by s 21 on the main seat of the Eastern Cape Division (Makhanda) comprised the entire province of the Eastern Cape and that the (former) local seats identified as the Eastern Cape High Courts, Bhisho, Mthatha, and Port Elizabeth (now Gqeberha) are endowed with concurrent jurisdiction over smaller territorial areas than that enjoyed by the main seat.⁴

[10] In practical terms the aforesaid means that the main seat has original and province-wide territorial jurisdiction and is competent to entertain a matter even if a person such, as the defendant, resides in Mthatha (or in any of the other former local seats).

¹ Directive on Change of Names of the Court Seats: Eastern Cape Division of the High Court of South Africa issued by the Judge President the Honourable S M Mbenenge on 7 September 2022.

² S21(1) of the Superior Courts Act 10 of 2013.

³ *Thembani Wholesalers (Pty) Ltd v September and Another (Thembani)* (47/2014) [2014] ZAECHC 54; 2014 (5) SA 51 (ECG) at 56D.

⁴ *Thembani* paras 9-13, cited with approval in *Sikhosonke Trading and Investments (Pty) Ltd v ABSA Bank Limited and Another* (2388/2020) [2023] ZAECHC 36 (17 March 2023) para 19.

[11] Appositely, this court is not entitled to decline to hear the matter properly before it in the exercise of its jurisdiction vested by law.⁵ Its doors should at all times be open to litigants falling within its jurisdiction.⁶ And it is bound to approach the matter on the basis that the plaintiff has elected, as of right, to choose the court in which it intended to institute the present action.

[12] The power to refuse to entertain a claim can only arise if the institution of the action amounted to an abuse of the process of court. This can be said to take place when the procedure used by a party is for a purpose for which it was not intended or designed, and is invoked to the prejudice or potential prejudice of the other party to the proceedings.⁷

[13] The preceding analysis indicates that there is no basis in law suggesting that this court does not have jurisdiction and that it is, in consequence, precluded from entertaining the matter. The extant jurisdictional concurrency of the High Court in Mthatha does not invalidate the proceedings in this court – it bars the dismissal relief.

[14] The main relief, therefore, is not competent and the jurisdictional challenge must fail.

Removal

[15] The removal of a matter from one division to another, or from one seat to another in the same division is dealt with in section 27(1) of the Act. It directs that the court may, upon application by any party, order the removal of proceedings.

⁵ *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* 2013 (5) SA 484 (SCA) para 19.

⁶ *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) at 820I.

⁷ *Sealandair Shipping and Forwarding v Slash Clothing Co (Pty) Ltd* 1987 (2) 635 (W) at 642A-C.

[16] The section is drawn to the defendant's attention in the summons, the plaintiff as a result contending that the special plea is ineffective without the defendant having initiated an application for transfer. Contrary to the plaintiff's contention, the application procedure is not mandatory. As was said in *Thembani*:

‘Although the section provides the machinery for the removal of a matter to another court on application, there is ... nothing to preclude a judge, sitting as a court of first instance in the Eastern Cape High Court, [Makhanda], from mero motu concluding that, notwithstanding the court having original territorial jurisdiction, the balance of convenience clearly dictates that the matter properly be heard at a particular local seat, and order that it be so removed.’

[17] The balance of convenience is an inquiry that relates to prejudice. It postulates that the court considers which of the two parties will suffer greater from the granting or refusal of temporary relief pending a decision on the merits. Put another way, there is usually in matters of this kind, something to be said on both sides but because the court cannot decide in favour of both parties it must go by the ordinary rule, which is looking at the circumstances on the one side and then on the other.⁸

[18] Referring to authority preceding the Act, *Thembani* exemplified circumstances such as the inconvenience to a litigant hauled before a far-flung court, the places where witnesses were residing, and the expense to which the parties would be put. The defendant did not, in any of these respects, contend for prejudice or raise an abuse of process. Abuse of process is not a discretionary matter but rather, a factual issue that must be considered in the light of all relevant facts and circumstances.⁹ No factual substrate has been laid in the special plea, nor have specific averments been made by the defendant in her affidavit.

⁸ An approach endorsed by Kotze JP in *Morgan v Erskine* 1913 EDL 94 at 95 and supported in *Thembani supra* at 56A.

⁹ *Mofokeng v General Accident Versekering Bpk* 1990 (2) SA 712 (W) at 713E.

A bona fide defence

[19] The delivery of a plea is a prerequisite to an application for summary judgment. The rules of pleading require a defendant to either admit or to deny, or to confess and avoid all the material facts alleged in the combined summons, or to state which of the facts are not admitted and to what extent, and to clearly and concisely state all the material facts upon which reliance is placed. Every allegation of fact in the combined summons which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted.¹⁰

[20] Whether ill-advisedly or misguidedly, the defendant did not plead to the material facts alleged in the combined summons but incorporated matter purportedly as defences in her affidavit. Taking into consideration that the plaintiff is not entitled to deliver a further affidavit, it has no opportunity to reply.

[21] A defendant who elects to deliver an affidavit¹¹ is obliged to satisfy the court that he/she has a bona fide defence to the action. This is a legal requirement – the gist of which is that a defendant is required to present a defence valid in law with sufficient particularity setting out its nature and grounds to enable a court to assess whether there is a reasonable possibility that the defence advanced may succeed on trial.¹²

[22] The defence ought not to be raised orally from the bar – it must be put on affidavit with reference to the plea.¹³

¹⁰ Uniform rule 22(2) and (3).

¹¹ Uniform rule 32(3)(b).

¹² See generally Van Loggerenberg Erasmus *Superior Court Practice* Vol 2 at D1-410E, D1-411, and D1-413 [Service 21, 2023].

¹³ Van Loggerenberg *supra* at D1-410A [Service 21, 2023].

[23] Holding a defendant to a properly drafted plea is not pedantry. It fosters legal certainty as an element of the rule of law and it directs an opponent to the case it is expected to meet.¹⁴

[24] To pardon the defendant's approach would fuel speculation and conjecture and put in place an unpredictably porous regime setting a standard of disquieting neglect that augments dysfunction of the rules of court.

[25] When considering a defendant's affidavit a court does not attempt to decide the issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.¹⁵ The standard is that when an affidavit advances contentions in resistance to a plaintiff's claim for summary judgment, they must be done with a sufficient degree of clarity to enable the court to ascertain whether the defendant has deposed to a defence which, if proved at trial, will constitute a good defence to the action.¹⁶ What is required is that the character or essential qualities of the defence be set out.¹⁷ If contentions are advanced in a manner which appears to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides.¹⁸

[26] The tangled and incoherent composition of the defendant's affidavit does not measure up to the legal requirement and standards aforementioned and presents a challenge in assessing whether there is a reasonable possibility of success on trial, particularly when time is very often at a premium on a heavily laden roll in motion court.

¹⁴ *South African Transport and Allied Workers Union and another v Garvas and others* 2013 (1) SA 83 (CC) para 114.

¹⁵ Van Loggerenberg *supra* at D1-410A [Service 21, 2023].

¹⁶ Van Loggerenberg *supra* at D1-410B [Service 21, 2023].

¹⁷ Van Loggerenberg *supra* at D1-416 [Service 21, 2023].

¹⁸ Van Loggerenberg *supra* at D1-410B, also at D1-416A [Service 21, 2023].

[27] By not having pleaded to the combined summons the defendant must be regarded as having admitted all the allegations therein and in effect, has no bona fide defence.

[28] If wrong in that regard, I consider nonetheless the matters raised in the defendant's affidavit.¹⁹ My inclination must not be construed as one that should uniformly be propagated in all other cases similarly circumstanced and presented.

Non-compliance with notice requirement in s 129 of the National Credit Act 34 of 2005 (NCA)

[29] Contending that the notice was not delivered to her designated/chosen *domicilium* address, the defendant denies that she received it. The agreement records her designated address as Corana Location, Libode, and her cellphone number as 0[...].

[30] Annexed to the combined summons is: (a) a notice in terms of s 129 addressed by the plaintiff's attorneys to the defendant in which notice the defendant's designated address appears; (b) a proof of delivery certificate, indicating that on 15 August 2025 at 19h00 the defendant was notified via SMS of a registered item awaiting collection by her; (c) a notice dated 18 August 2025 from the post office notifying the defendant (at her designated address) that a registered item is awaiting her collection; and (d) a parcel tracking report indicating that as at 27 August 2025 the registered item was still at the Libode post office awaiting collection.

[31] There is no general requirement that the notice be brought to the defendant's subjective attention, or that personal service is necessary for a valid delivery under the NCA. The annexures in the plaintiff's papers evince clear

¹⁹ Which matters, counsel for plaintiff addressed succinctly in argument.

indications that notification for collection was sent to the defendant at the correct post office. Beyond ensuring that the s 129 notice was sent to the correct post office for collection, there was no further obligation on the plaintiff and it was at all times entirely up to the defendant to collect the registered item. Accordingly, the onus was on the defendant, as a reasonable consumer, to ensure retrieval from the post office.²⁰

Waiver/election

[32] The combined summons indicates that the agreement was cancelled by the plaintiff upon institution of the action. Parenthetically, there is no difference in law whether cancellation of an agreement is conveyed to a defendant prior to the institution of an action or subsequent thereto.²¹ I am satisfied, in any event, that the necessary averments in respect of cancellation are present and that the cancellation of the agreement was conveyed to the defendant, at least when the combined summons was served on her.

[33] The plaintiff's right to terminate by cancellation arose from the agreement in the event of failure by the defendant to pay the agreed instalments. The detailed statement of account attached to the plaintiff's affidavit reflects, as credit entries, uneven payments made by the defendant subsequent to the date of institution of the action. By accepting payments, the defendant contended that the plaintiff 'elected to affirm the agreement'. The appropriation of such payments is specifically provided for in the agreement that the plaintiff may, at any time before or after termination, in its discretion, appropriate or re-appropriate monies received towards the reduction of any amounts owed by the defendant.

²⁰ See generally *Sebola and Another v Standard Bank of SA Ltd and Another* 2012 (5) SA 142 (CC), and *Kubyana v Standard Bank of SA Ltd* 2014 (4) BCLR 400 (CC).

²¹ *FirstRand Bank Ltd t/a Wesbank v Weltman-Shmaryanhu, FirstRand Bank Ltd t/a McCarthy Finance a division of Wesbank v Weltman-Shmaryanhu* [2010] ZAWCHC 512 (25 October 2010) para 11.

[34] Waiver is a matter of intention. Whether it implicates a right or remedy, the starting point is invariably the will of the party said to have waived it. Because no one is presumed to waive their rights, the onus is on the party alleging it. The test is objective – the intention is adjudged by its outward manifestations which can consist of words or some form of conduct from which an inference may be drawn.²² Once a party has elected to cancel a contract, it is bound by that election.²³

[35] The defendant's affidavit evinces no indication that by accepting payments after cancelling the agreement, the plaintiff 'elected to affirm the agreement'. On the contrary the plaintiff's acceptance of payments is not anything inconsistent with the provisions in the agreement such as were expressly agreed upon by the parties.

Dispute on amount owed

[36] At the time of dispatching the s 129 notice the defendant's arrears amounted to R110 863.13. The statement of account bares this amount as at 1 August 2025, and exhibits the mix of the defendant's earlier mentioned payments. The defendant contends that her arrears amounted to 'approximately R65 000'. She does not do so by engaging with the entries in the statement, nor does she indicate by way of a counter-calculation or documentary evidence how the approximation is computed.

[37] In each of the above aspects the defendant's averments, contextualised in their totality, are needlessly bald, vague and sketchy, and does not satisfy this court that she has advanced a bona fide defence. Her initial protestation that more than the prescribed 15 days had lapsed before delivery of the notice of application for summary judgment, is confounding, and is, evidently, based on a

²² *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at paras 15, 16, 18, and 19.

²³ *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) at 542E-F.

misconception that court days and not calendar days are factored in calculating the timeframe.

[38] On a concluding note it is salutary to remind the practitioner who drafted the special plea of his/her obligation to ensure that his/her status is properly reflected in accordance with the requirements in uniform rule 18 relating to the manner in which a pleading must be signed.²⁴

[39] In the premises the following order issues:

1. Summary judgment is granted against the defendant for return by the defendant to the plaintiff of a 2018 Toyota Fortuner 2.4GD-6 R/B motor vehicle with engine number 2[...] and chassis number A[...].
2. The defendant shall pay the plaintiff's costs of suit on the Magistrates' Courts tariff.

S RUGUNANAN
JUDGE OF THE HIGH COURT

²⁴ The commentary to rule 18(1) in Van Loggerenberg *supra* is instructive.

Appearances:

For the Plaintiff: *M Somandi*, Huxtable Attorneys, Makhanda
Tel: 046-622 2694, (Ref. O Huxtable)

For the Defendant: *A N Gxagxisa*, Siya Maqungu Inc, Mthatha,
Tel: 067-720 1704

Date heard: 24 March 2026.

Date delivered: 07 April 2026.