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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2025-008446

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
DATE _____ SIGNATURE _____	

In the matter between:

WESBANK, a division of FirstRand Bank Limited

Applicant/Plaintiff

and

V MAILULA INC

First Respondent/Defendant

VUSI JAMES MAILULA

Second Respondent/Defendant

JUDGMENT

WENTZEL -THOMPSON J

Introduction

[1] This is an opposed application for summary judgment. The plaintiff, WesBank, sues upon an electronic instalment sale agreement concluded on 25 October 2023 with the first defendant, a firm of attorneys, and upon a suretyship provided by who would

seem to be the sole proprietor of this firm of attorneys, bearing the same surname as the name of the first defendant.

- [2] The plaintiff seeks cancellation of the agreement, rectification of the description of the motor vehicle, return of the vehicle, postponement of the determination of the quantum of the arrears, and costs on an attorney and client scale as provided for in the agreement.
- [3] The defendants resist the application. Their opposition is not directed only at the amount said to be owing; it is directed at the foundation of the plaintiff's cause of action. They say that no valid and enforceable instalment sale agreement was concluded; that they did not sign the agreement attached to the particulars of claim; emphasise that the vehicle description is materially incorrect, and that the plaintiff's resort to summary judgment is premature or procedurally defective because the dispute ought first to have been referred to mediation.
- [4] The essential question is whether the defendants have disclosed a bona fide defence which is good in law and which raises an issue for trial. The court is not concerned at this stage with whether the defence will probably succeed; it is concerned with whether there is a real issue which should not be disposed of summarily.¹
- [5] However, this is not the end of the inquiry; the court is also enjoined to determine whether the defences raised, although on the face of it raising triable issues, have been *bona fide* and genuinely advanced by the defendants.
- [6] For the reasons which follow, I conclude that summary judgment authorising the attachment of the vehicle should be granted as the defences have not been *bona fide* advanced and are dilatory in nature. My view in this regard has been coloured by the nature of the technical *in limine* defences raised by the defendants.

The points in limine raised by the defendants.

- [7] The defendants have raised a number of technical arguments *in limine*:
 - a. First, the defendants have disputed the authority of the plaintiff to institute the current proceedings and point out that the resolution attached was signed by the

¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-C; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228B-E

then Chief Executive Officer of the plaintiff on 14 June 2022. However, he went on pension on 30 June 2022. Thus, it is argued that there is no valid resolution authorising the institution of the action against the defendants.

- b. The plaintiff's counsel states that the deponent to an affidavit does not require authority; it is the attorneys acting for the plaintiff that require authority.² In any event, it is argued that summary judgment proceedings are not the appropriate forum to challenge authority-the defendants ought properly to have challenged the plaintiff's authority in terms of Rule 7 of the Uniform Rules of Court. Had the defendants had a genuine concern about the authority of the attorneys, or indeed the plaintiff, to institute the current proceedings, this could have been raised and properly dealt with.
- c. In this forum, however, the plaintiff's counsel point out that the plaintiff does not have a right to reply and thus are prejudiced.
- d. The second is that the deponent does not have personal knowledge of the facts. However, it is trite that all that is required is that by virtue of the position held by the deponent, she has records under her control that clothe her with sufficient knowledge of the claim.³
- e. The plaintiff's summary judgment affidavit is deposed to by a manager in Specialised Collections employed by the applicant. She says that she has access to and control over the accounts and documents relating to the matter, that she can swear positively to the facts, and that she verifies the cause of action and the relief claimed. She confirms that the cause of action arises from contract and from an instalment sale agreement.
- f. The third is that the plaintiff failed to engage with the defendants through mediation as required in terms of Rule 41A prior to instituting the action. The plaintiff, however, served a Rule 41A notice at the same time as the summons in which it indicated the reasons why it did not regard mediation as fruitful. These included that multiple attempts had been made to conclude a payment arrangement that were breached. In any event, the instalment sale agreement has been cancelled and cannot be re-instated.

² *Ganes and another v Telkom Namibia Ltd* 2024 (3) SA 615 (SCA); *Firststrand Bank Ltd v Fillis and Another* 2010 (6) SA 565 (ECP) at [13]

³ *Rees and Another v Investec Bank Ltd* -2014 (4) SA 220 (SCA) at [10] - [12]; *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A) at 423A-H

- g. The plaintiff's counsel points out that mediation is only fruitful where genuine disputes exist that the parties can engage upon in good faith.⁴ The plaintiff's counsel insists that no genuine disputes exist and that the defendants have raised opportunistic defences for the sole purpose of delaying the proceedings.
- h. Parties are not bound to go through a mediation process where it can be established that to mediate the dispute would be fruitless.

[8] I am satisfied that none of these points in limine have any merit.

The defence on the merits-the denial that a valid instalment sale agreement exists

- [9] The pleaded agreement is said to have been executed electronically. The particulars of claim allege that, on 25 October 2023, the plaintiff, represented by a duly authorised employee, and the first defendant, represented by the second defendant, entered into an electronic instalment sale agreement. The plaintiff invokes sections 13 and 14 of the Electronic Communications and Transactions Act 25 of 2002 (ECT) and says that the agreement attached to its particulars was retrieved from its central computer database as a data message.
- [10] The defendants allege that at no stage did the first defendant sign or enter into any valid, binding and legally enforceable instalment agreement with the plaintiff. They further allege that the plaintiff has failed to attach any agreement or document in which the second defendant, on behalf of the first respondent, appended his signature agreeing to any terms regarding the repayment of the purchase price of the vehicle delivered to the first defendant.
- [11] In addition, the defendants rely on the fact that the plaintiff failed to record the correct details of the vehicle alleged to have been sold to the defendants and that, in consequence, it is argued that the purported instalment agreement is invalid and of no force and effect. This relates to the recordal of the chassis number in the instalment sale agreement that has an "A" in front of it that does not appear on the chassis number of the motor vehicle delivered to the defendants.
- [12] It appears *ex facie* the documents before me that all the remaining letters and numbers accurately reflect the chassis number on the vehicle delivered to the defendants. There also is no dispute that the make and model of the vehicle delivered

⁴ Shanike Investments No 85 (Pty) Ltd and Another v Ndimma and Others - 2015 (2) SA 610 (GJ)

to the defendants is the same as that described in the instalment sale agreement, namely a 2021 Mercedes-Benz V300D Exclusive.

[13] The plaintiff's counsel submits that the inclusion of the letter "A" in front of the chassis number was payently a *bona fide* error that the plaintiff seeks to rectify in order to reflect the common continuing intention of the parties. In this respect the plaintiff's counsel referred me to *Cellsecure Monitoring and Response (Pty) Ltd and Others v South African Securitisation Programme (RF) Limited* ⁵ in support of the proposition that rectification is available in summary judgment proceedings where it is clear that the agreement does not reflect the common intention of the parties.

[14] Returning to the defendants' denial that they signed the electronic instalment agreement relied upon by the plaintiff and attached to the particulars of claim, this is answered by the plaintiff's counsel by pointing out that agreements can be signed electronically in terms of the ECTA⁶ and that a watermark may serve as proof of the signature and the identity of the signatory of the agreement. In this respect several cases were relied upon that indeed support this submission. ⁷

[15] The watermark on the instalment sale agreement reflects the name of the second defendant, the account number held at Wesbank as well the date and time that the agreement was entered into as follows:

"Agreement entered into by Vusi Malula

Account number 8[...]

2023/10/25 11:00:47"

[16] The plaintiff's counsel raised a further response to the defendant's denial that they had concluded the instalment sale agreement electronically and that is one of estoppel and submits that the defendants lead the plaintiff to believe that they had concluded a valid instalment sale agreement and induced it to act in terms of the agreement in arranging delivery of the vehicle to the defendant upon which it relied to its detriment.

⁵ 2025 JDR 0594 (GP) at [47]; *South African Securitisation Programme (RF) Ltd and others v Cellsecure Monitoring and Response (Pty) Ltd* 2022 JDR 3675 (GP) at [35] - [43]

⁶ *Nedbank Limited v De Klerk and others* 2022 JDR 3529 (FB) at [14.13]

⁷ *Spring Forest Trading CC v Wilberry (Pty) Ltd ta Ecowash and Another* 2015 (2) SA 118 (SCA) at [25] - [27]; *Firststrand Bank Limited v Govender* 2023 JDR 1918 (GJ) at [11] and [24] - [31]; *Firststrand Bank Limited v Shakgapicle Trading and Project (Pty) Ltd and others* -2023 JDR 2341 (NWM) at [22] - [23]; *Toyota Financial Services (SA) Ltd v JXL Trading Services (Pty) Ltd* -2023 JDR 4078 (ECMA) at [16] (though the existence of the agreement was admitted); *Schoeman v Firststrand Bank Limited* 2024 JDR 0330 (GP)

[17] In these circumstances the plaintiff's counsel argues that the defendants are not entitled to resile from the agreement, making reference to several cases in support of this proposition.⁸ In this regard, the plaintiff's counsel refers to the fact that the defendants represented themselves as being bound by the agreement by paying the deposit, taking possession of the vehicle and initially paying the instalments as evidenced in the statement of the account held by the first defendant with the plaintiff.

[18] However, this has not been raised as an alternative cause of action in the particulars of claim; nor did it apply to file a replying affidavit to deal with new matter in the answering affidavit.

Analysis of the plaintiff's claim and the defences

[19] While I accept that the defences on the merits might conceivably represent triable issues sufficient to justify my granting leave to defend to the defendants and referring the matter to trial, I am not inclined to do so in the current circumstances as I do not accept that the defences have been *bona fide* raised or are genuinely advanced by the defendants; in my view the defences advanced are purely dilatory tactics employed to delay the inevitably of a judgment against them.

[20] I have a number of reasons for doubting the *bona fides* of the defendants and the genuineness of their defences:

- a. The first is that purely technical defences were raised *in limine* without any merit.
- b. The second is that on the exact date that the watermark indicates that the electronic instalment sale agreement was concluded, the second defendant bound himself as surety for the first defendant's indebtedness. This suretyship was not concluded electronically and was physically signed by the second defendant. He would not have done so had he not genuinely believed that the first defendant did not owe the principal debt of R1, 120,775.00 to the plaintiff and had not signed the instalment sale agreement.
- c. This is the exact same amount of the principal debt reflected in the electronic instalment sale agreement.

⁸ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471B-C; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) 234 (A) at 2391-240B

- d. The third is that the second defendant signed the delivery note in respect of the make and model of vehicle reflected in the electronic agreement. It was on signature of this delivery note that the plaintiff undertook to effect payment of the purchase price to the dealership.
- e. Fourth, the plaintiff alleges and it is not meaningfully disputed that the plaintiff handed the second defendant with a copy of the instalment sale agreement together with the Pre-Agreement Statement regarding the terms and conditions of the contemplated instalment sale agreement.
- f. At all material times the second defendant represented the first defendant.
- g. In these proceedings the defendants do not dispute that they acquired a Mercedes-Benz V300D Exclusive and are in possession of this vehicle. This is the exact same vehicle (save for an error in the chassis number) described in the electronic sale agreement.

[21] I thus do not accept that the defences raised are genuinely raised and view them as nothing more than delaying tactics.

The relief sought

[22] In rejecting the defences raised I am mindful that at this stage the plaintiff seeks only repossession of the vehicle to protect its asset which is depreciating each day that the first defendant remains in possession of it. The plaintiff does not seek a money judgment.

[23] There can be no dispute that the first defendant is in possession of a vehicle supplied to it from a dealership on the basis of finance offered by the plaintiff. It was only on the first defendant accepting delivery of this vehicle that the plaintiff paid the purchase price to the dealership.

[24] The first defendant has not meaningfully denied that they have ceased paying the instalments for this vehicle delivered to it and that the plaintiff has cancelled the instalments sale agreement with the first defendant. It is trite that bare denials are not sufficient in summary judgment proceedings.

[25] The plaintiff's counsel rightly points out that a party cannot attack the validity of the agreement, but at the same time insist on retaining possession of the vehicle delivered to it pursuant to an agreement with the plaintiff, whether written or oral, to finance it. In

this respect I was referred to authority to the effect that even if an instalment agreement was reckless and void, it would not entitle a taxi owner to keep the taxi financed by SA Taxi Securitisation (Pty) Ltd.⁹

[26] I am thus satisfied that the plaintiff has established a proper case for repossession of the vehicle delivered to the first defendant. Indeed, the defendants have not addressed the relief sought or justified their continued possession of the vehicle.

[27] I intend to grant the defendants leave to defend the enforcement of the terms of the electronic contract and the quantification of the plaintiff's claim in the event that they are able to demonstrate that no valid instalment sale agreement was entered into between the plaintiff and the first defendant. The trial court can also decide after evidence whether or not to grant rectification of the electronic instalment sale agreement.

[28] In that event the trial court would be able to evaluate the enforceability of the suretyship signed by the second defendant. It would also be able to determine whether an oral agreement was concluded on the terms sent to the first defendant prior to alleged conclusion of the instalment sale agreement and issues of estoppel and unjust enrichment.

[29] This I believe to be a just result in all the circumstances.

Costs

[30] The plaintiff has sought attorney and client costs, not as a punitive measure, but on the terms agreed in the instalment sale agreement. As the validity of this agreement is in dispute, I cannot grant the cost order sought at this stage.

[31] I thus intend to reserve the costs for determination by the trial court. Should it be proved at the trial in due course that a valid electronic instalment sale was concluded between the plaintiff and the first defendant, the plaintiff will be entitled to attorney and client costs.¹⁰

Order

⁹ *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar cases* -2011 (1) SA 310 (GSJ) at [26] & [50]

¹⁰ *Prithilal v Akani Egoli (Pty) Ltd and Another* 2006 (1) SA 203 (CC) at [27]. See also *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1949 AD 597 at 607

[32] The following order is made:

1. The defendants are directed and compelled to return to the plaintiff the 2021 MERCEDES-BENZ V300D EXCLUSIVE with CHASSIS NUMBER: W[...] and ENGINE NUMBER: 6[...].
2. In the event that the defendants fail to return the aforementioned vehicle within 5 days of this order, authorising the Sheriff or his Deputy to attach and repossess the vehicle described above and retain it in safe custody pending the finalisation of this matter.
3. The first defendant is granted leave to defend the validity of the electronic instalment sale agreement dated 25 October 2023 and consequently, the terms contained therein and the arrear amount calculated in terms of the agreement.
4. The determination of the arrear amount owing to the plaintiff by the first defendant, if any, and consequently the second defendant by virtue of the suretyship entered into by him in favour of the plaintiff, is postponed *sine die* for determination by the trial court.
5. The claim for rectification of the electronic agreement is reserved for the determination of the trial court.
3. The costs of the application are reserved for determination by the trial court.

WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: KM Boshomane
Instructed by: Rossouws, Leslie Inc.

For the Respondent: Mailula Vusi
Instructed by V Mailula Attorneys Inc.

Date of the hearing: 9 March 2026

Date of judgment: 4 May 2026