IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No: A 1044/05

Date heard: 30/04/2007

Date of judgment: 17/08/2007

UNREPORTABLE

In the matter between:

S. L. Sello APPELLANT

and

W. R. Nasson RESPONDENT

DU PLESSIS J: JUDGMENT

Towards the end of 1998 the appellant (defendant in the court a *quo)* bought a Golf motorcar in terms of an instalment sale agreement that he had concluded with Wesbank. On 16 June 1999 the appellant and the respondent (plaintiff) entered into a "use agreement" in terms whereof the respondent took possession of the motorcar and undertook to pay to Wesbank the instalments due under the instalment sale agreement.

After the respondent (plaintiff) had paid R48 211,88, in October 2002, the appellant (defendant) took repossession of the car. Alleging that the appellant had repudiated their agreement and the he had accepted the repudiation, the respondent sued the appellant for repayment of the R48 211,88. The magistrate's court at Cullinan granted judgment in favour of the respondent for the amount. This is an appeal against that order. I shall refer to the appellant and the respondent respectively as the defendant and the plaintiff.

The written user agreement provided in clause 9 thereof that, after he had paid all the instalments in respect of the car, the plaintiff was to restore possession thereof to the defendant. In the magistrate's court the plaintiff sought rectification of the written agreement by deleting clause 9 thereof and by inserting in its stead a clause that reads as follows:

> "Once all payments due to the Bank have been paid by the User (plaintiff) to the Bank, the Owner (defendant) will transfer ownership of the vehicle to the User."

The magistrate's court granted an order so rectifying the user agreement. Against that order there is no appeal and I proceed on the footing that the agreement has been rectified and reads as set out above.

The facts relating to the defendant's alleged repudiation of the user agreement are to a large extent common cause and I briefly set them out. In June 2000 the plaintiff failed to pay the required instalment of some R 1400 to

Wesbank. In the following two months, however, he rectified the position by paying 1 % instalment in each of these months. After that the plaintiff, on several occasions, made late payments but he did not fail to pay until June 2002 when he again missed an instalment. The plaintiff consulted an employee of the bank and told her that he was at that stage having difficulty to make the required payments. She told him that, as long as he made some payments in order to show his commitment, Wesbank would not take action. Accordingly, while paying the full instalment in July 2002, in August 2002 he paid only R250 and in September 2002 he paid only R700. At the beginning of October 2002 he regularly paid the full instalment again.

When the contract was entered into in June 1999 the plaintiff worked and lived in the vicinity of Witbank. He furnished the defendant with his contact details, including his cellular telephone number. The parties had contact with each other. In the course of 2001 the plaintiff started with a new employer and he relocated to Mandini, KwaZulu-Natal. The plaintiff testified that he gave to the defendant his new contact details while the defendant denies that. Although in general she preferred the testimony of the plaintiff to that of the defendant, the learned magistrate held that the plaintiff did not furnish the defendant with his contact details when he relocated to KwaZulu-Natal. I am not convinced that this finding by the learned magistrate was entirely correct, but as this aspect was not fully argued before us, I proceed on the assumption that the plaintiff did not give his contact details to the defendant when he relocated.

In about June 2002 Wesbank contacted the defendant and told him, so he said, that the instalments were about three months in arrears and that his account was not conducted satisfactorily. In view of the facts that I have summarised, I cannot understand how Wesbank could have told the defendant that the account was about three months in arrears. It must be accepted, however, that the bank told the defendant that the account was not conducted satisfactorily. According to the defendant, the bank also sought repossession of the car.

Being unable to contact the plaintiff, the defendant went to the South African Police Services (SAPS) and laid a charge of theft of the car against the plaintiff. In his statement to the police, the defendant gave the impression that, since the user agreement had been entered into, the plaintiff had just disappeared. That, on the defendant's own version, was incorrect as it was common cause that the parties had had contact on several occasions. The statement further conveyed that the plaintiff had made regular payments until about April 2002 and, incorrectly, that he had then stopped paying. It will be recalled that, since April 2002, the plaintiff did not pay in June 2002 but paid the full instalment in July 2002. In August he paid only R250.

Acting on the defendant's charge against the plaintiff, the SAPS on 14 October 2002 in Mandini arrested the plaintiff on a charge of theft. He was

detained, but the charge against him was later withdrawn. The police took possession of the car and gave it to the defendant who remained in possession thereof.

It is the plaintiffs case, and the trial court held, that by repossessing the car with the help of the police, the defendant repudiated the agreement. It is not in issue that, if the defendant had repudiated the agreement, the plaintiff had duly accepted the repudiation, thereby cancelling the agreement. The defendant contends, however, that he did not repudiate the agreement.

In terms of the agreement the plaintiff was entitled to possession of the car and, once he had paid all the instalments, to transfer of ownership thereof. Clause 10 of the agreement provides that if the plaintiff breached the agreement, the defendant would be entitled "without notice to cancel" the agreement and to take repossession of the car. There is no other term in the agreement entitling the defendant to repossess the car. It follows that, unless and until the defendant had duly cancelled the agreement, he was not entitled to repossess the car.

The defendant did not plead that he had cancelled the agreement. Yet, he had the car removed from the plaintiff's possession and he took and retained possession thereof. He did not tender return of the car to the plaintiff. In so doing, the defendant, seen objectively, exhibited a deliberate and unequivocal intention no longer to be bound to the agreement, thus repudiating it (Highveld 7

Properties (Pty) Ltd and Others v Bailes 1999 (4) SA 1307 (SCA) at 1315B). It follows that when the plaintiff accepted the defendant's repudiation, the agreement was cancelled.

As a result of the cancellation of the contract, each party had to return to the other whatever he had received in terms of the contract. It is common cause that the defendant already is in possession of the car. Because the contract has been cancelled, he is obliged to repay to the plaintiff the amount that he had received in terms thereof which amount the parties agreed is R48 211,88. It stands to reason that the defendant cannot retain both the car and the money. In this regard it must be borne in mind that that agreement had been rectified and in terms of the rectified agreement the plaintiff did not pay for the mere use of the car.

The defendant pleaded that, since the plaintiff had breached the contract prior to the defendant's repudiation, the plaintiffs allegation that he had accepted the repudiation was "irrelevant in law". This contention also underlies one of the defendant's grounds of appeal. Although Mr Potgieter spent little time on this aspect in argument, I understood him to submit that, once a party is in breach of a contract, he cannot, while so in breach, cancel the contract based on the other party's repudiation thereof. As authority for this submission Mr Potgieter referred us to Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA) at 302E where Nienaber JA said: "One party, having repudiated a

contract, cannot retroactively nullify it as a potential cause of action by taking advantage of the opposite party's later breach and cancelling the contract before the opposite party thought of doing so." This dictum is not authority for the proposition that counsel put forward. What the learned judge of appeal was saying is that a party who has breached a contract cannot nullify that breach by subsequently cancelling the contract based on the opposite party's repudiation. Put differently, even if a party who has breached a contract subs the contract based on the opposite party's breach, the first breach remains exactly that with all its consequences. It could thus happen, the learned judge of appeal pointed out later, that both parties lawfully cancel a contract based on each other's breach. That did not happen in this case, as the defendant did not purport to cancel the contract but simply acted contrary to its term retaining possession of the car. I might add that, even if the defendant had cancelled the contract based on the plaintiffs breach, the result in this particular case w and eac re ed in terms thereof. That is so because neither party claimed that he had suffered damages as a result of the other's breach.

The following order is made:

The appeal is dismissed with costs.

B. R. DU PLESSIS
Judge of the High Court

I Ag ree

L. M. MOLOPA
Judge of the High Court

Appellants Attorneys: same PT. Rautenbach 012 323 8520 an end

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It follows that the learned magistrate correctly granted judgment for the plaintiff in the amount referred to plus interest and costs and that the appeal cannot succeed.