

NOT REPORTABLE 21 SEPTEMBER 2007

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

CASE NO: 36540/06

In the matter between:

**BMW FINANCIAL SERVICES SA
(PTY) LTD**

Plaintiff/Respondent

-and-

RE-MARIUS HAMEL

Defendant/Excepiant

JUDGMENT

PHATUDI AJ

1.

This is an exception noted by the Excepiant/Defendant against the Plaintiff's (Respondent) combined summons that were issued on 08 November 2006.

2.

In the said Combined Summons the Plaintiff claim damages sustained or a result of the breach of a written installment sale agreement annexed and pray for:

"1 Payment of the amount of R168 641.66

2. Interest on the aforesaid amount at the rate of 15.5 % per annum from date of cancellation until date of final payment;

3. Costs of suit on the attorney and client scale

4. Further and/or alternative relief'.

4. The Excepiant/Defendant alleges that the Plaintiff's particulars of claim do not sufficiently disclose the cause of action in that:

3.1 The Plaintiff failed to aver the breach that entitle the Plaintiff to exercise its remedies in terms of the agreement;

3.2 The Plaintiff failed to aver that its claim for damages in the Magistrate's Court was withdrawn

3.3 The Plaintiff failed to plead and prove the fulfillment of the conditions of the agreement.

3.4 The Plaintiff failed to allege that the action was truly withdrawn for quantification of damages at High Court.

4.The Excepiant / Defendant stated that the Notice of Withdrawal annexed is the facta probatia and not facta probanda.

5.The Excepiant/Defendant further stated that the withdrawal was for quantification of damages and not the action and referred to the provisions of Rule 27(2) of Magistrate's Court Rules that reads as follows:

"Save as provided by sub rule (1), a plaintiff or application desiring to withdraw an action or application against all or any of the parties thereto shall deliver a notice of withdrawal. "

6.Further thereto, the Excepiant referred to Cassimie v Vather Bras 1958 (2) SA 310 (N) where the court dealt with the procedure, as provided in Rule 27(2) of the Magistrate Court Rules to be followed by the Plaintiff who wishes to withdraw an action.

7.The Excepiant emphatically stated that the notice of withdrawal annexed marked 8 is not the withdrawal of action. Thus, as further stated, the withdrawal does not to comply with Rule 27(2) of the Magistrate's Court Rules.

8.Based on the above, Mr Muller, counsel for the Excepiant, submitted that the Plaintiff's particulars of claim do not disclose the cause of action and prayed that the exception be upheld with

costs and that the Plaintiff be given an opportunity to amend his particulars of claim.

9.Mr De Beer, counsel for the Respondent/Plaintiff, submitted in opposing that the Plaintiff clearly pleaded that an agreement was reached between parties to withdraw the claim for damages and to institute same in the High Court, as per annexure B.

10.He stated that the withdrawal of the claim for damages in the Magistrate's Court and to institute same in the High Court, supersedes the once and for all rule. He emphasised the fact that the agreement to have the damages claim withdrawn and institute in the High Court, puts an end to the exception.

11.He further stated that the agreement made provides that in the event of breach, which is averred, the Plaintiff would be entitled to:

"retain all payments already made ... and recover payment of such damages, as it will be entitled to under the circumstances."

12.He finally submitted with respect that the averment made in paragraph 6.10 of particulars of claim sufficiently disclosed the cause of action and prayed for dismissal of Excepiant's exception with costs.

13. It is clear from the above submissions and decisions referred to, more especially that of National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International LiQuor Distributions (Pty) Ltd 2001 (2) SA 232 (SCA) where it was held that the two claims did not arise from one singular cause of action and that the "once and for all" rule did not require them to be brought in the same action.

14. What puzzled me is the institution of the claim for damages by the Plaintiff in the High Court instead of the Magistrate's Court as claimed for cancellation and repossession.

15. In scrutinizing the Installment Sale Agreement annexed marked A, I realised that: (clause 13.1 at page 19) provides that "the Purchasers, being Excepiant/Defendant, consented to the jurisdiction of the Magistrate's Court having jurisdiction ... irrespective of the amount in dispute." (my emphasis).

16. It is correct to state that the cause of action need to be set out in the Particulars of Claim, that being the Facta probanda. I however, find that the cause of action is clearly established in the Plaintiff's particulars of claim.

17.I further find that the relevant terms of the contract was rightly averred by the Plaintiff in paragraph 6.10 at page 8 of the record that:

"Should the Defendant default in the punctual payment of any amounts payable under the agreement or should the defendant be in breach of any other form of the agreement, the Plaintiff would be entitled to ... recover payment of such damages... "

18.I finally find that an order was made at the Magistrate's court for the repossession of the vehicle and not damages.

19.In my opinion, I find that the Plaintiff did set out the cause of action and thus succeed in dismissing the Excepiant's exception.

20. I, as a result, make the following order.

ORDER

3. THE EXCEPIENT'S EXCEPTION IS DISMSISED WITH COSTS.
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AM L PHATUDI ACTING JUDGE OF THE HIGH
COURT
OF SOUTH AFRICA (TRANSVAAL PROVINCIAL
DIVISION)