

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)**

12/CS/2011

Case Number: 55016/2010

Case Number: 55017/2010

In the matters between:

**BMW FINANCIAL SERVICES (SOUTH)**

**AFRICA (PTY) LTD**

Plaintiff

and

**HOMEWARE BUILDING CONSTRUCTION CC**

First Defendant

**TSHAWWE JOSEPH**

Second Defendant

**TSHAWWE GEORGE**

Third Defendant

**MANDLAZI, LYNNETH BASANI**

Fourth Defendant

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**JUDGMENT**

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In both these matters the Plaintiff entered into an instalment sale agreement with the First Defendant for the sale of certain BMW motor

vehicles. In case number 55016/10 the agreement was concluded on 27 June 2008 and in case number 55017/10 the agreement was concluded on 23 May 2008.

In both cases, the Second, Third and Fourth Defendants signed suretyship agreements in respect of the First Defendant's debts in respect of the respective instalment sale agreements.

The total outstanding debts were payable in monthly instalments of R6 387,84 and R6 817,94 respectively.

In both cases reference were made in the particulars of claim of certain annexures, i.e. Annexure "A", the instalment sale agreement, Annexure "B", a notice in terms of section 129(1)(a) of the National Credit Act and Annexures "C", "D" and "E" being the respective suretyship agreement signed by the Second, Third and Fourth Respondents.

When the summonses were served these annexures were not annexed and when the Defendants entered their appearances to defend on 18 October 2010, notices in terms of Rule 25(12) were simultaneously filed, calling for the production and inspection of the said Annexures.

On the 29<sup>th</sup> October 2010 the Plaintiff filed a notice to apply for summary judgment in both cases and it was set down for hearing on 7 February 2011. The Defendants were out of time with the filing of their opposing affidavits which were only handed to the Plaintiff on the day of the hearing on 7 February 2010, which necessitated a postponement of the summary judgment application and the Defendant thereupon moved a formal application for condonation. The condonation application is not being opposed and it was therefore granted.

In their opposing affidavits the Defendants advanced 7 points *in limine* and further contended that they have a counterclaim against the Plaintiff. Mr Springveldt, who appeared on behalf of the Defendants, conceded the first and third of these points but persisted in the remaining thereof in his argument addressed to me in Court.

Mr Groenewald, who appeared for the Plaintiff, argued that none of the remaining points had any merit and requested my to grant summary judgment against the First Defendant for re-delivery of the two motor vehicles respectively to the Plaintiff.

Mr Groenewald's argument goes a long way in exposing the demerits of the Defendants arguments in defence of the remaining points *in limine* and as far as the alleged counterclaim could possibly stand as a defence, but I do not find it necessary to further deal with any of these arguments because of what follows:

The relevant terms of the agreements which were identical as far as the terms thereof are concerned, *inter alia* read as follows:

*"11.1 An event of default shall occur if you:*

*11.1.1 - fail to make punctual payment of any of the amounts payable.*

*11.3 – Upon an event of default the seller may...*

*11.3.1 – If this agreement is not subject to the provisions of the NCA:*

*11.3.1.1 – Claim immediate payment of all amounts payable, whether then due or not, provided however that if you do not make immediate payment the seller may, notwithstanding the election to claim immediate payment in terms of this sub-clause, claimed the relief set out in 13.3.1.2 below".*

Clause 13.3.1.2 then reads as follows:

*"After due demand, cancel this agreement (and) obtain possession of the goods..."*

Clause 11.3.2 makes provision for the procedure to be followed if the NCA is applicable to the agreement and then makes provision for a section 129 notice in terms of the said Act to be delivered to the buyer and then provides, if not responded thereto that:

*"11.3.2.2 ...The seller may claim payment of all amounts payable whether then due for payment or not, provided however that if you do not make payment the seller may notwithstanding the election to claim payment in terms of this sub-section, claim the relief set out in 11.3.2.3 below".*

Section 11.3.2.3 referred to states as follows:

*"After due demand referred to in 11.3.2.1 above cancel this agreement (and) obtain possession of the goods..."*

Whether or not the NCA is applicable to the agreement, the contracts make provision for cancellation of the agreement on default of payment after due demand has been made.

The Plaintiff's causes of action as set out in the particulars of claim can be summarised as follows:

1. The conclusion of the instalment sale agreements.
2. Delivery of the BMW motor vehicles to the First Defendant pursuant thereto.
3. The First Defendant is in default of payment in each instance.
4. Due demand has been made.

The Plaintiff claims an order for *inter alia*:

- (a) Confirmation of the cancellation of the instalment sale agreement;

(b) Re-delivery of the motor vehicles respectively.

For its due demand Plaintiff relies on notices sent in terms of section 129(1)(a) of the National Credit Act and to which reference were made in the particulars of claim. As mentioned, these notices were not attached and the response to the Defendant's Rule 35(12) notice was only forthcoming on the 19<sup>th</sup> April 2011.

In its reply to the Rule 35(12) notice, Plaintiff states in paragraph 2 thereof, that copies of the section 129(1)(1) notices are furnished, as well as proof of posting thereof.

I will accept, without deciding, that these notices were properly sent to the Defendants and I will further accept without deciding that it may be regarded as proper actions taken in terms of clause 11.3.1.1 alternatively clause 11.3.2.2 of the agreements.

I will accept therefore, in the Plaintiff's favour, that the notices dated 11 May 2010 constituted a proper demand as required by clause 11.3.1.1 alternatively clause 11.3.2.2 depending on whether or not the NCA is applicable to the agreements.

It becomes clear, therefore that the Plaintiff, in order to succeed in an action to claim re-delivery of the respective motor vehicles, will have to allege and prove, in addition to the allegations presently made, that the contracts were duly cancelled.

The demand, contained in the said notices only state:

*"Should you fail to respond to this notice, or respond by rejecting BMW Financial Services' proposal within 10 business days of delivery of this notice and you have been in default for 20 business days, we will proceed to institute legal action against you to enforce the provisions of the agreement." (My emphasis)*

The provisions of the agreement have been referred to above. In order to entitle the Plaintiff to claim re-delivery of the vehicles it is essential that the agreements must first be cancelled lawfully. As long as the agreements remain in force the First Defendant is not only entitled but obliged to in terms of clause 7.1.1 thereof *"keep the goods in (its) possession or under (its) control at all times"*.



It is therefore an essential allegation and central to the causes of action of the Plaintiff that the particulars of claim should contain an allegation that the agreements have been cancelled. Only in such an event would the Plaintiff be entitled to re-delivery of the vehicles.

In my view the causes of action set out in the respective particulars of claim are therefore fatally defective and do not sustain the relief claimed.

The prayer for an order confirming the cancellation hangs in the air, and in any event such a declaratory order falls outside the ambit of orders that may be granted in terms of Rule 32(1).

In the absence of an allegation that the contracts have been cancelled no cause of action is set out to sustain the relief claimed in prayer 2, for the return of the respective motor vehicles.

It would appear from the Plaintiff's response to the notice in terms of Rule 35(12), that apart from furnishing copies of the section 129(1) notices as well as proof of posting thereof, a copy of a further letter, apparently addressed to the Second Defendant was also furnished. The letter states in its concluding paragraph that:

*“...we hereby notify you that the agreement has been duly cancelled”.*

The status of this letter is unclear. No reference thereto is made in the particulars of claim and it was also not annexed thereto. It therefore does not form part of or amplify the Plaintiff's cause of action as set out in the particulars of claim.

It remains to mention that the issue of cancellation dealt with in this judgment was not canvassed or argued before me. It is only after I read the papers after having had reserved judgment in both matters, that I discovered this omission in the Plaintiff's particulars of claim. I did not find it necessary to call for further arguments from counsel in this regard.

In the result the Plaintiff failed to make out a proper case for summary judgment and I therefore intend not to only grant leave to defend but to dismiss the applications for summary judgment.

Such a dismissal would normally be accompanied by a costs order against the unsuccessful Applicant but in the present two matters I intend to follow a different course.

Quite some time was spent in open Court in arguing these two matters by both counsel. Neither of them at any stage brought my attention to, what I now have find to be a fatal defect in the particulars of claim, disentitling the Plaintiff to claim summary judgment on the papers as they stand.

As pointed out earlier in this judgment, this is something that I only discovered after I had re-read the papers after the matter had been postponed because judgment was reserved. If this matter was brought to my attention immediately once this matter was called it would have saved a lot of time and trouble. I am therefore of the view that the costs order that I intend to make is fair to all the parties.

I therefore make the following order:

1. The application for summary judgment is dismissed in both cases.
2. The Defendants are ordered to file their pleas within 10 Court days from date hereof.

3. Each party is to pay its own costs.
4. The costs occasioned by the granting of the condonation application are to be paid by the Defendants jointly and severally, the one paying to other to be resolved.

  
VAN DEN HEEVER AJ