

REPUBLIC OF SOUTH AFRICA



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

15/12/15

CASE NO: 50868/15

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

15/12/2015  
DATE

  
SIGNATURE

FIRST RAND BANK LIMITED T/A WESBANK

APPLICANT

and

BARDGORY MAMPA

RESPONDENT

---

JUDGMENT

---

N V KHUMALO, J:

[1] The Applicant is applying for Summary Judgment to be granted in an action it instituted on 1 July 2015 against the Respondent seeking the return of its motor vehicle, a Mercedes Benz 2009 Model, sold to Respondent's deceased wife ("the debtor") in terms of an installment sale agreement ("IS") concluded in 2011 for the purchase price of R385 849.75. The Respondent is in possession of the motor vehicle and had entered an intention to defend.

[2] The cause upon which the plaintiff's action is founded is the death of the debtor in September 2014 alleging that since the debtor has passed away the Respondent is not entitled to be in possession of the vehicle. The Applicant has pleaded the following provisions of the IS agreement in support of its claim, that read:

[2.1] The Applicant is to remain the owner of the vehicle until debtor has paid all the amounts due under the agreement.

[2.2] "If the debtor, being a natural person dies, the Applicant **may proceed with the enforcement or termination of the agreement**, as set out in the Act upon which the Applicant shall be entitled at his election and without prejudice inter alia, to:

[i] Claim immediate payment of the outstanding balance together with the interest and all amounts owing or claimable by it irrespective of whether or not such amounts are due at that stage; or

[ii] **Take repossession of the goods in terms of an attachment order, retain all payments already made in terms hereof and to claim liquidated damages, payment of the difference between the balance outstanding and the market value of the goods which amount shall be immediately due and payable.**

[3] The death of the debtor being classified as a breach in the agreement. However the Applicant had sought neither termination nor enforcement of the agreement alleging during the hearing of the application that its claim is a *rei vindicatio* purely based on its ownership, against the Respondent as a person who is in unlawful possession of the motor vehicle.

[4] The Respondent is resisting the Application on the basis that as the debtor's husband and the holder of the letters of authority, duly issued by the Master he is duly authorized to take control of the assets of the debtor under the directorship of the Master, therefore in lawful possession of the vehicle. Also that there is no

cause for the Applicant's action in that as the person in authority, he has paid all arrears owed in terms of the IS agreement. The payment has been accepted by the Applicant and the outstanding debt is left with a meager balance of R77 000 consisting of a negligible amount of installments out of the 72 installments that were payable. The Respondent is also an heir therefore wants to be afforded an opportunity to finalise the payments so as to register the motor vehicle in his name.

[5] The letters of authority issued to the Respondent authorizes him to take control of the assets of the estate of the debtor as reflected in an inventory filed with the Master, to pay the debts, and to transfer the residue of the estate to the heirs entitled thereto by law. The inventory lists as assets furniture in the value of R10 000.00.

[6] Now the Applicant argues that as the debtor could not cede the debt, the Respondent cannot take over the payment of the installments and possession of the motor vehicle. Therefore whether or not payment of the arrears has been made is of no consequence to its claim. The Applicant also argues that the motor vehicle does not form part of the assets listed in the inventory purely because it is not the property of the debtor and therefore does not fall under the control of the Respondent. The letters issued are for the deceased estate that does not exceed an amount of R50 000. It insisted that purely on the basis of its ownership it is entitled to the return of the vehicle. The Respondent is in unlawful possession of the motor vehicle.

[7] The question that arises is If the Applicant can purely on the basis of ownership, claim *rei vindicatio ultra* the provisions of an installment sale agreement concluded with the deceased that it has pleaded?

[8] Whether or not the *rei vindicatio* as pleaded by the Applicant can be enforced against the Respondent in his personal capacity or in his capacity as the representative of the debtor's estate?

[9] Taking into account that in terms of the agreement the options that Applicant has in the event of the demise of the debtor, includes an option to terminate or to

proceed with the contract ..., only in the instance of termination of the contract can he then claim repossession of the goods in terms of an attachment order.

## LEGAL FRAMEWOK

[10] In our common law on death, the administration of the estate devolves upon the executor who does not succeed to the person of the deceased, and those whom we loosely describe as heirs are no more than residuary legatees to whom it is the executor's duty to transfer the residue of the estate after completing his duties and paying out any specific legatees; see *Fischer v Liquidators Union Bank* 1890 7 SC 46. The executor must therefore be a party to any action arising out of a contract to which the deceased was a party; see *Gatrell v Southern Life Association* 1909 TS 57. It is said in relation to contract it is not just to take over from where the deceased left off and carry on indefinitely (this may be in a particular case become the duty of the administrator, trustee or guardian to whom the executor will hand over) but to reduce the estate into possession, pay the liabilities out of the assets pay the legatees and transfer the residue to the residuary legatee or the administrator or as appropriate.

[11] In *Colly v Colly's Estate* 1946 WLD 83 Blackwell J adopted these words of the Privy Council:

**"Prima facie it is the duty of the legal personal representative to perform all contracts of his testator or intestate** that can be enforced against him whether by way of specific performance or otherwise. In the case of an onerous contract he ought not to neglect an opportunity of coming to terms. But it can never be his duty to break an enforceable contract."

[12] Although the Respondent is sued by the Applicant in his personal capacity not in his capacity as the holder of letters of authority, he has stated that he has defended the action in the latter capacity and claims that the motor vehicle has been taken into his possession by authority of his letters and therefore he is entitled (with *locus standi*) and in lawful possession as a legal representative of the intestate. The defence is legitimate, and tri-able therefore may meet the plaintiff's action.

[13] On the other hand as pleaded by the Applicant reliant on the terms of the contract, the question on the enforceability of the contract may be answered by the contract itself. According to *Hitzeroth v Brooks* 1965 3 SA 444 (A) 452B-D, the contract may expressly provide for its discharge on the death of one or either of the parties, or may bind the executor (as the representative of the estate) to perform or may make some other special provision; In the absence of such indication the general principle is that they are so transmitted and enforceable by or against the executor; *Friedlander v De Aar Municipality* 1944 AD 79 at 93.

[14] The Applicant has pleaded the provisions of the IS agreement as its cause of action that expressly indicates enforceability beyond the death of the debtor, referring to claims for repossession that is to be in the form of an attachment order, together with the other ancillary claims in respect of the balance and damages and an option to enforce the agreement, which actions can only be brought against the executor or the estate's legal representative.

[15] The Applicant cannot therefore rely upon a cause of *rei vindicatio* that is *ultra* the terms of the agreement when its cause is reliant on the terms of the agreement. In terms of the agreement termination should precede the claim for repossession which is to be directed or brought against the representative of the estate (transmitted to the estate).

[16] Under the circumstances the Respondent has disclosed the nature and grounds of his defence and on the facts so disclosed appears to have a defence that is bona fide or puts up a triable issue.

[17] It is ordered

[17.1] The Application for Summary Judgment is refused

[17.2] The Respondent is granted leave to defend

**N V KHUMALO**

**JUDGE OF THE HIGH COURT**

**Gauteng Division, Pretoria**

**For the Applicant: C SPANGENBERG**

**Instructed by:** Hack Stupel & Ross

**012 325 4185**

**Ref: B Jones/MB/BW21479**

**For the Respondent: T P Moloto**

**Instructed by:** **T P Moloto & Co Inc**

**(011) 421-1378**

**Ref: IMM/zm/M11099**