



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**DELETE WHICHEVER IS NOT APPLICABLE**

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

10/08/21

*[Signature]*

Case number: 6615/2020

In the matter between:

**FIRSTRAND BANK LIMITED T/A WESBANK**

Plaintiff

And

**MR DARRYL THOMAS PILLAY**

Respondent

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**JUDGMENT**

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**Baqwa J**

[1] In this application for summary judgment the applicant seeks an order for cancellation of the agreement, delivery of the 2012 Kia Cerato 1.6 5 door with chassis number KNAFU511LC5618166 and engine number G4FCCH234326 "the vehicle" together with costs of suit.

## Background

[2] On 10 July 2014 the parties entered into an Electronic Instalment Agreement ("The Agreement") in terms of which the defendant purchased the vehicle mentioned above which was delivered to the defendant.

[3] It was an express term of the Agreement that the defendant would pay the plaintiff an initial deposit of R8100.00 and the balance of the purchase price which amounted to R210 906.00 in 72 instalments of R2 929.25 on the same day of each successive month, the first instalment of which would be payable on 2 September 2014.

[4] It was a material term of the Agreement that plaintiff would remain the owner of the vehicle until the defendant had paid all amounts due and complied with the terms of the Agreement.

[5] A further term was that in the event of the defendant breaching any terms of the Agreement, the plaintiff would be entitled to immediately obtain possession of the vehicle and recover from the defendant, as pre-estimated liquidated damages, the total amount payable, but not yet paid, less the value of the vehicle as at the date of delivery.

[6] The defendant further agreed that in the event of him having to change his residential address he would immediately notify the plaintiff in writing thereof.

[7] The defendant has breached the terms of the Agreement in that he failed to maintain regular instalments on his account thus accumulating arrears in the sum of R54 105.85 with further instalments of R3 247.56 becoming due from 25 February 2020.

[8] The Defendant referred the Agreement to a debt counsellor in terms of Section 129 (1) read with Section 130 of the National Credit Act 34 of 2005.

[9] On 17 December 2019 when the defendant was in arrears in the amount of R41 069.71 the plaintiff addressed a letter in terms of Section 86 (10) of the National Credit Act to the defendant in which the provisions of that section were drawn to his attention. A similar letter was addressed to the Debt Counsellor and to the National Credit Regulator.

[10] The defendant has raised a number of defences in his affidavit resisting summary judgment the first one being *force majeure* or supervening impossibility. The defendant submits that as a result of national lockdown and his retrenchment he was unable to comply with the terms of the contract.



[11] In *Glencore Grain Africa (Pty) Ltd v Du Plessis NO + Others*<sup>1</sup> the court held that if provision is not made in the contract for the applicability of the *force majeure* principle, a party will not be able to raise it as a defence.

[12] *Force majeure* is not provided for in the agreement between the parties herein and the defence is therefore not sustainable. Moreover, it would appear that the applicant was never informed by the respondent of any change in his financial circumstances any time prior the launch of these proceedings. From a factual and a contractual point of view, therefore, this defence has never been a subject for consideration between the parties and would appear to be raised opportunistically.

[13] In *Scoin Trading (Pty) Ltd v Bernstein NO*<sup>2</sup> Pillay JA commenting on supervening impossibility of performance said: “*The law does not regard mere personal incapability to perform as constituting impossibility.*”

[14] In *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd*<sup>3</sup> Flemming DJP held: “*Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.*”

[15] In the present case the respondent seeks to rely on an impossibility applicable to himself namely retrenchment, when his financial strength was reduced. The impossibility was therefore not absolute in the sense that the obligation to render performance even during lockdown can generally speaking still be performed. Personal incapacity does not render a contract void.

[16] The next defence raised is non-compliance with Section 86 (10) of the NCA. The defendant submits that the 86 (10) notice was served at his domicilium address and not at his new address at which the plaintiff located the vehicle. He submits that the bank did not comply with the NCA because of non-service of the 86 (10) Notice. This cannot be correct because there was no written notice of change of domicilium served on the plaintiff as provided for in the contract.

[17] In the matter of *Absa Bank Ltd EFM Investments CC and Others v The Lake CC and Others*<sup>4</sup> Binns-Ward J dealing with a refusal of leave to appeal against summary judgment said: “[3] *The most recent wisdom of the Appeal Court on the subject of the summary judgment procedure is to be found in Majola v Nitro Securitisation (Pty) Ltd*<sup>5</sup> where Plaskett AJA, writing for the court (Brand, Ponnan, Bosielo JJA et Petse AJA concurring) observed (footnotes omitted):

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<sup>1</sup> [2007] JOL 21043 (0); (462/99) [2002] ZAFSHC 2 (28 March 2002) at 10

<sup>2</sup> 2011 (2) SA 118 (SCA) at paragraph 22

<sup>3</sup> 2000 (4) SA 191 (W) at 198 D - E

<sup>4</sup> (11461/2012) (11463/2012) ZAWCHC 342: 26 October 2012 para 3 Binns-Ward J

<sup>5</sup> 2012 (1) SA 226 SCA at para 25

*"It is necessary to say something regarding the grant of leave to appeal in cases in which summary judgment has been granted. The purpose of summary judgment is to enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim."* It is a procedure that is intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their right. If a court hearing an application for summary judgment is satisfied that a defendant has no *bona fide* defence to a plaintiff's claim and grants summary judgment as a consequence, it should be slow thereafter to grant leave to appeal, lest it undermines the very purpose of the procedure."

[18] Those remarks by Binns-Ward J pertinently bear relevance to the present application. It is quite evident even upon reading the respondent's affidavit resisting summary judgment that he is in arrears and that, therefore, he is in breach of the Agreement.


[19] Further, the said breach did not begin with the lockdown, he was in breach even before the lockdown began, yet he opportunistically clutches on the consequences generally arising from the impact of covid and the lockdown regulations to raise them as a defence.

[20] It is clear as daylight that the respondent has no *bona fide* defence to the plaintiff's claim.

[21] In the result, the following order ensues:

Summary Judgment is entered against the Defendant for:

- 21.1 Cancellation of the Agreement;
- 21.2 Delivery of the 2012 Kia Cerato 1.6 5 Door with Chassis Number: KNAFU511LC5618166 and Engine Number: G4fcch234326;
- 21.3 Costs of suit;
- 21.4 Claim for damages is postponed sine die.



**SELBY BAQWA**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**APPEARANCES:**

For the Applicant: Adv L Peter

Instructed by: Rossouws Leslie Inc.

For the Defendant: Mr S Kleynhans

Instructed by: Stephen Kleynhans Attorney