

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

Case Title: Bank Windhoek Limited and Michael Ndali Saddam Amushelelo	Plaintiff Defendant	Case No: HC-MD-CIV-ACT-CON-2021/02861 Division of Court: Main Division Heard on: 16 September 2022
Heard before: Honourable Mr Justice Usiku	Delivered on: 14 October 2022	
Neutral citation: <i>Bank Windhoek Limited v Amushelelo</i> (HC-MD-CIV-ACT-CON-2021/02861) [2022] NAHCMD 555 (14 October 2022)		
Order:		
1. Summary judgment is granted in favour of the plaintiff against the defendant in the following terms: (a) The plaintiff's cancellation of the agreement relating the vehicle described herein, is confirmed, namely: a 2015 Mercedes Benz E63 AMG S, bearing engine number 1579 8160 0636 09, chassis number WDD212 0752 B131084 and registration number N185-652W. (b) The amounts paid by the defendant in terms of the agreement are declared forfeited in favour of the plaintiff. (c) Payment in the amount of N\$220 124.37 plus interest at a prime rate (7.00%) plus 2.00% per annum capitalized monthly from 21 July 2021 until the date of final payment. (d) Costs of suit on attorney and own client scale.		
2. The matter is removed from the roll and is regarded finalised.		

Reasons for order:

USIKU J:

Introduction

[1] This is an application by the plaintiff against the defendant for summary judgment. In the application, the plaintiff seeks an order confirming the cancellation of an agreement entered between the parties, repossession of a Mercedes Benz motor vehicle, a declaration that the amounts paid by the defendant be forfeited in favour of the plaintiff, payment of N\$220 124.37 plus interest and costs suit.

[2] During the hearing of the application, the plaintiff abandoned the prayer relating to the repossession of the motor vehicle.

Background

[3] On 3 July 2019, the plaintiff and the defendant concluded a written instalment sale agreement, in terms of which the defendant purchased a 2015 Mercedes Benz E63 AMG S motor vehicle with engine number 1579 8160 0636 09, chassis number WDD2120 752B 1310 84 and registration number N185-652W, from the plaintiff.

[4] The purchase price of the motor vehicle was N\$982 084.50. The purchase price was payable in monthly instalments of N\$18 186.75 commencing from 1 August 2019. Ownership of the motor vehicle would remain vested with the plaintiff until the full amount due has been fully paid.

[5] It was also a term of the agreement that a certificate by any manager of the plaintiff shall be *prima facie* evidence of the defendant's indebtedness to the plaintiff. The plaintiff alleges that the defendant failed to pay his monthly instalments as from 1 November 2019.

[7] On 4 December 2020, this court granted a provisional preservation order against the defendant and others, in terms of the Prevention of Organised Crime Act 29 of 2004, with a *rule nisi* calling upon interested parties to show cause, if any, on or before 29 January 2021 why the order should not be confirmed. On 29 January 2021, the *rule nisi* was confirmed and a final

preservation order was granted in respect of the defendant's properties, including the motor vehicle in question.

[8] The plaintiff avers that by reason of the defendant's breach, it cancelled the agreement.

[9] In July 2021, the plaintiff initiated action against the defendant. The defendant entered appearance to defend. Subsequently, the plaintiff brought the present application for summary judgment

[10] The defendant opposes the application for summary judgment.

[11] The plaintiff's heads of argument were filed late. As a consequence, the defendant also filed his heads of argument late. Both parties have filed respective applications for condonation of the late filing of their heads of argument. Having regard to the respective explanations for the late filing of the heads of argument, the absence of opposition and the need to have the matter attended to, expeditiously, the court is of the view that condonation should be granted. The late filing of both parties' heads of argument is therefore hereby condoned.

Application for summary judgment

[12] In its application for summary judgment, the plaintiff avers that the defendant breached the terms of the instalment sale agreement by failing to pay monthly instalments and that the plaintiff is entitled to the relief it seeks. The plaintiff further avers that the defendant does not have a *bona fide* defence to the plaintiff's action and the notice of intention to defend has been delivered solely for the purposes of delay.

[13] The defendant opposes the granting of summary judgment application on the basis that:

- (a) the relief sought by the plaintiff in its particulars of claim is in contravention of s 17 of the Credit Agreements Act No 75 Of 1980 ("the Act") and is not competent, and that,
- (b) the plaintiff is not entitled to an order for the repossession of the motor vehicle and the payment of N\$220 124.37 without complying with s 17 of the Act. The defendant further contends that, since the plaintiff has not caused the valuation of the motor vehicle as required by s 17 of the Act, the amount being claimed is not liquid or liquidated as contemplated under rule 60 of the Rules of the High Court.

[14] The defendant confirms that he concluded the instalment sale agreement with the plaintiff. The motor vehicle was seized in terms of a search and seizure warrant. All his bank accounts were frozen and he was prohibited from transacting on those accounts. Due to the preservation of property order, the plaintiff could not debit his account in accordance with the agreement.

[15] The defendant contends further that in terms of clause 23 of the agreement, the plaintiff has a right of intervention in the Prevention of Organised Crime proceedings and protects its title in the motor vehicle, but plaintiff did not exercise that right. The defendant argues that the plaintiff cannot seek cancellation of the agreement as such remedy is not ripe under the circumstances.

[16] The defendant urges that court to dismiss the application for summary judgment.

Analysis

[17] The court is now called upon to decide whether, on the facts disclosed in the defendant's affidavit resisting summary judgment, the defendant has a defence which is *bona fide* and good in law. In other words, the issue now is whether what has been alleged by the defendant, if proved at trial, will constitute a defence to the plaintiff's claim that is good in law.

[18] The defendant's main defence is founded on the provisions s 17 of the Act. Section 17 provides as follows:

'In any proceedings instituted by a credit grantor for the return of goods to which a credit agreement which is an instalment sale transaction relates, the court may, without derogating from any other power, make an order providing for the return of such goods, or any part thereof, to the credit grantor on condition that –

- (a) the amount then still owing by the credit receiver in terms of that credit agreement be reduced by an amount equal to the value of the goods to be so returned to the creditor grantor; or
- (b) if such value exceeds the amount then still owing as aforesaid, the credit grantor shall pay to the creditor receiver an amount equal to the difference between such value and the amount then still owing as aforesaid.'

[19] As it appears from the provisions of s 17, the section deals with the power of the court when confronted with proceedings instituted by a credit grantor for the return of goods.

[20] In the present matter, the plaintiff has abandoned its claim for the return of the motor

vehicle, and therefore any reference to s 17 of the Act is not relevant. The defence put forth by the defendant based on the provisions of s 17 of the Act is therefore dismissed.

[21] From the evidence, it is apparent that the defendant does not dispute his indebtedness to the plaintiff. The certificate of balance set out the amount due to the plaintiff. In terms of the agreement concluded by the parties, the certificate of balance is regarded as sufficient proof of the amount owing as at the time that summons was issued.

[22] On the evidence before court, I am of the opinion that the defendant has not furnished a *bona fide* defence in law, which would justify the court to dismiss the application for summary judgment. On the facts before court, I am of the view that there are no triable issues that need to be ventilated at trial proceedings. The application for summary judgement, therefore, stands to be granted.

[23] As regards the issue of costs, I am of the view that the general rule that costs follow the result must find application in this matter.

[24] In the result, I make the following order:

1. Summary judgment is granted in favour of the plaintiff against the defendant, in the following terms:
 - (a) The plaintiff's cancellation of the agreement relating the vehicle described herein, is confirmed, namely: a 2015 Mercedes Benz E63 AMG S, bearing engine number 1579 8160 0636 09, chassis number WDD212 0752 B131084 and registration number N185-652W.
 - (b) The amounts paid by the defendant in terms of the agreement are declared forfeited in favour of the plaintiff.
 - (c) Payment in the amount of N\$220 124.37 plus interest at a prime rate (7.00%) plus 2.00% per annum capitalized monthly from 21 July 2021 until the date of final payment.
 - (d) Costs of suit on attorney and own client scale.
2. The matter is removed from the roll and is regarded finalised.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
ENT Shigwedha Dr Weder, Kauta & Hoveka Inc., Windhoek	T Iileka-Amupanda Sisa Namandje & Co. Inc., Windhoek