

SOUTH AFRICA / JUDGMENT

BMW Financial Services (SA) (Pty) Ltd v Wikus Muller Rental CC (1792/11, 1793/11) [2011] ZAWCHC 212 (4 May 2011) [2011] ZAWCHC 212

COURT

Western Cape High Court, Cape Town

BEFORE

P B Fourie

CASE / FILE NUMBER

1792/11, 1793/11

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IN

THE HIGH COURT OF SOUTH AFRICA

[WESTERN

CAPE HIGH COURT, CAPE TOWN]

Case No: 1792/11

& 1793/11

In the matter

between:

BMW

FINANCIAL SERVICES (SA) (PTY) LIMITEDPlaintiff

v

WIKUS

MULLER RENTALS CC

.....Defendant

JUDGMENT

DELIVERED: 4 MAY 2011

FOURIE, J:

- [1] These are two opposed summary judgment applications. In both matters the parties and the cause of action are the same, while the pleadings are similar too. It is accordingly convenient to dispose of both matters in one

judgment.

- [2] Plaintiffs claim in both actions IS based on written instalment sale agreements in terms of which BMW motor vehicles were sold to defendant. Plaintiff alleges that defendant failed to fulfil its obligations in terms of the respective agreements, with the result that same have been terminated. Plaintiff seeks re-delivery of the motor vehicles and ancillary relief.
- [3] Defendant has given notice of its intention to defendant both actions. This prompted plaintiff to apply for summary judgment in both matters. At the hearing of the applications both parties were represented by counsel, but defendant chose not to file any opposing affidavits. Instead, defendant, as it is entitled to do, raised several legal grounds upon which it contends that plaintiffs

pleadings are defective to the extent that summary judgment should be refused.

- [4] It is trite that summary judgment is a stringent measure and that an applicant who seeks this relief has to strictly comply with the rules of court. If it is reasonably possible that the plaintiff's application is defective, the court should tend to decide the application in favour of the defendant. It is so, as submitted on behalf of plaintiff, that the court has a discretion to condone

irregularities in the plaintiffs papers, but it is trite that in summary judgment proceedings this discretion will only be exercised

sparingly.

See Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd 1959

- (3) SA 362 (W) at 366; Maharaj v Barclays National Bank Ltd 1976 (I) SA 418 (A) and Tesven CC v SA Bank of Athens 2000(1) SA268 (A).
- [5] I firstly consider defendant's reliance on rule 18 (1), the relevant portion whereof reads as follows:

"A combined summons shall be signed by both an advocate and an attorney ok in the case of an attorney who, under section 4 (2) of the Right of Appearance in Courts Act No. 62 of 1995, has the right of appearance

in the Supreme Court, only by such attorney,.. "

- [6] In the instant matters plaintiff's particulars of claim to the summons, make provision for a signature to be appended immediately-above the following:

NEL & RICHTER INC, JOHANNESBURG

Plaintiff's Attorneys

Sgd. C R NEL

CERTIFIED in terms of Section 4 (2) of the Right of Appearance in Court Act 62 of 1995

UNIT 1 NETWATER PLACE

252 OAK AVENUE

RANDBURG

Tel:

(011) 787-5051

Fax: (011)326-0758

DIRECT FAX: 086 685 3123

Ref: MR CR NEL/E VENTER/B5563

C/O VISAGIEVOS

501 WALE STREET CHAMBERS

33 CHURCH STREET

CAPETOWN

Tel: (021)423 6331

Fax: (021)422 1996

CORR REF: B1276"

[7] A signature appears in the space indicated therefor, but to the immediate left of the words "NEL & RICHTER INC, JOHANNESBURG", the handwritten letters 'pp' appear. This abbreviation indicates that the person who signed the particulars of claim did so on behalf of CR NEL. This means that CR NEL, the attorney authorised in terms of section 4 (2) of Act 62 of 1995, has not appended his or her signature to the particulars of claim.

[8] It is not possible to say whose signature appears on the particulars of claim, although it could be the signature of one Mr. JA De Wet, an attorney in the firm acting as the Cape Town correspondents of NEL & RICHTER INC. However, this is mere conjecture, as there is no indication in the particulars of claim that it is in fact Mr. De Wet who signed same.

[9] Even if it is assumed that Mr. De Wet signed the particulars of claim on behalf of NEL & RICHTER INC, it cannot be assumed that Mr. De Wet is an attorney certified in terms of section 4 (2) of Act No. 62 of 1995. All of this means that, ex facie the pleadings before the court, it cannot be said that the particulars of claim have been signed by an attorney who, under section 4 (2) of Act 62 of 1995, has the right of appearance in the High Court. The particulars of claim are accordingly irregular, particularly if regard is had to rule 18 (12), which provides that if a party fails to comply with any of the provisions of rule 18, the relevant

pleading shall be deemed to be an irregular step and the opposite party shall be entitled to have it set aside in terms of rule 30.

[10] There also appears to be another obstacle in plaintiff's way. This is expressed as follows by Hcrbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th edition, at page 280:

"One attorney cannot sign a summons for another unless a proper power so to sign is produced. "

See also *Bowness v Du Preez* (1889) 3 SAR 74.

[11] It may be that the attorney who signed the particulars of claim, holds a power of attorney to sign pleadings on behalf of attorney CR NEL OF JOHANNESBURG, but such power of attorney does not form part of the papers before me. The court is, in any event, not entitled to consider extraneous evidence in deciding a summary judgment application.

[12] In these circumstances, particularly in view of the irregularity in the particulars of claim, the summary judgment applications are defective to the extent that same should be refused. It is accordingly not necessary for me to deal with the other legal defences raised by defendant.

[13] In the result the following orders are made in both matters under case numbers 1792 11 and 1793/11:

The application for summary judgment is dismissed.

The defendant is granted leave to defend the action.

The costs of the application for summary judgment are to be costs in the cause in the main action.

P B Fourie, J

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Prepared on 11 October 2026 · Esheria