

SOUTH AFRICA / JUDGMENT

## Selesho v FNB (40719/16) [2020] ZAGPPHC 511 (7 September 2020)

[2020] ZAGPPHC 511

COURT

North Gauteng High Court, Pretoria

BEFORE

M V NQUMSE

CASE / FILE NUMBER

40719/16

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case no:

40719/16

7/9/2020

In

the matter between: -

J

SELESHO

Applicant

And

FNB

Respondent

### JUDGMENT

M V NQUMSE AJ

### Introduction

- [1] This is an interlocutory application in which the applicant (the defendant in this action) seeks an order in the following terms:

- a. that leave be granted to the applicant to withdraw the admission made under AD paragraph 15.3 of the respondent's list of admissions sought in terms of Rule 37 4 (a) to the fact that the applicant had authorized a certain Gary Holmes, now deceased, to take the delivery of the vehicle on his behalf. That current wording of the reply should read: "The content hereof is denied":
  - b. that the respondent is ordered to pay the costs of the application, on an attorney and own client scale in case of opposition; and
  - c. that the applicant be granted further and/or alternative relief.
2. The application is opposed.

#### FACTUAL BACKGROUND AND LITIGATION HISTORY

3. On 1 February 2013 an installment sale agreement was concluded between the applicant and respondent for the purchase of a vehicle.
4. On the same day of the conclusion of the agreement, the applicant signed a delivery note purporting that he has received the vehicle for which he had been financed by the respondent.
5. In keeping with the sale agreement and his obligations, the applicant commenced with payments to the respondent. He stopped making payments in April 2014 after he discovered that he was no longer registered as the titleholder of the said vehicle nor was the bank.
6. Owing to his default in making payments, this caused the respondent to dispatch for his attention a notice in terms of section 129 (1) the National Credit Act 34 of 2005 (NCA), which was subsequently followed by the issuing of summons on 23 May 2016.
7. In reaction to this development the applicant, on 30 May 2016, launched an application with the National Consumer Tribunal (NCT) seeking an interim interdict against the respondent in terms of section 136 of the NCA. It emerged in that application that the applicant had also acquired financial assistance for the purchase of three other vehicles from different credit providers, namely, Standard Bank of South Africa and Nedbank. The interdict sought from the Tribunal extended to the aforementioned financial institutions, restraining them from enforcing their contractual rights under their respective credit agreements with the applicant.
8. On 2 June 2016, applicant filed a complaint with the National Credit Regulator (NCR) wherein he sought rescission for all the agreements he concluded with the respondent and other banks, on the basis that he had since discovered that the ownership of the respective vehicles he had purchased with the financial assistance from the respective financial institutions had been transferred to a certain Mr Gary Holmes (Holmes) without his knowledge. A discovery he made shortly after he had concluded the respective agreements.

9. In the proceedings before the NCT, the applicant delivered a replying affidavit to which he attached a letter annexed thereto as H2 and which is attached to the respondent's affidavit in this application as "MV4". For sake of completeness I find it necessary to reproduce the entire contents of that letter in which the following is stated.

*"We are acting on behalf of Dr Jimmy Mmathate Selesho, our client in this matter. In terms of credit agreement signed with different*

institutions our client consented to certain debit order in terms of which our clients' account is debited monthly with different

amounts to cover for the instalments of certain vehicles totaling an amount of plus minus R46 000.00 per month. The different credit

transactions were initiated with the advice of one Mr Gary Holmes who went as far as arranging the financing with the different

institutions including Standard Bank which went on to finance our client under contract number 480521 8300 05. It appears that the said transactions were fraudulent transactions initiated at the instance of the said Mr Holmes who had since the initiation of the said agreements and the subsequent purchase of the vehicles took possession of the vehicles in issue with the promise that the vehicles are going to be utilized for business purposes. Our client has not seen the said nor taken possession of the said vehicles, however since inception of the agreement our client was paying for the vehicles as per the debit orders against his account believing that the agreements were genuine agreements with the different financial institutions. We had since learned that during the same months that the vehicles were purchased Mr Gary Holmes took transfer of ownership of the said vehicles without our client's consent and as per the e-natis programme of the registration of the vehicles it appears that not only did the ownership of the vehicles change but the said Mr Gary Holmes also took title over the vehicles.

Currently two of the vehicles had been sold to two different individuals and two of the vehicles are registered under Mr Gary Holmes. Our client was never at any stage approached by either the financial institutions concerned or Mr Gary Holmes regarding the transfer of ownership over the vehicles, which implies that from the first month our client has been paying for vehicles that were not his and will never be his at any stage. We were only made aware by a Mr Mnguni, a fraud investigator from Standard Bank that the ownership of the vehicles has been transferred to someone other than Gary Holmes himself. In view of the above we advised our client that the whole transaction regarding the purchase of the vehicles was fraudulent including the transfer of the vehicles into Mr Gary Holmes's names. We have also noted that Mr Gary Holmes has been the title holder from the 1st month of the vehicle being purchased and as such it implies that the financial institutions have as well been defrauded by the said Mr Gary Holmes. Our client had at no stage received the copies of the agreements and the vehicles registration papers until recently on demand after learning from Standard Bank that there was fraudulent activities regarding the vehicles. We are of the opinion that in view of the fact that our client is not the owner of the vehicles anymore, that he cannot be held responsible for the payments of the vehicles and that

all payments received by the different institutions should be repaid to our client pending the finalization of the relevant financial institutions and the registered authorities. We trust that you find in order and await your response. We shall appreciate if all future communications regarding the investigations are communicated with our office to enable us to advise our client accordingly”.

10. In dismissing the application, the NCT made the following remarks.

*“It seems that there was a business arrangement between the applicant and the respondent and another person referred to as Gary Holmes in terms of which these vehicles were purchased for a business venture which was to be conducted between South Africa and Mozambique. The applicant did not set out the details regarding his business arrangements in his papers but it seems that the applicant never took possession of the vehicles or even had sight of them. The applicant did however, sign a delivery purchase note in respect of the vehicle purchased in terms of the credit agreement entered into with Nissan [the plaintiff]. A dispute subsequently arose between the applicant and the various credit providers and those were allegations of fraudulent practices on the part of Holmes, the details of which are rather sketchy.*

The applicant honored his commitments made under the credit agreement until he discovered that two of his vehicles had apparently been transferred and registered on the eNatis system into the name of Holmes, in terms of a “sinister practice” that the applicant did not consent to.

How and why Holmes had possession of the vehicles remains a bit of a mystery but it seems that this in accordance with the business

arrangement which was concluded between the applicant and Holmes”.(sic)

11. Following the outcome of the Tribunal, the main action against the applicant commenced, in which the applicant filed a plea. In his plea he admits the contract he entered into with the respondent. He, however, denies the delivery of the vehicle to him. He further stated in his plea that he has never set sight on the vehicle or the showroom from which the vehicle were purchased. He further pleaded that the respondent was aware that the purchase of the vehicle was for an investment purpose and in the ordinary and reasonable course of an investment of that nature, the investor would not have “sight”

of the goods purchased. The applicant further alleged in his plea that the respondent has breached the agreement by selling the vehicle to a third party, Holmes.

12. After the closing of pleadings a pre-trial conference was arranged for the 21 November 2017. The respondent acting in terms of Rule 37

(4) (a) of the Uniform Rules, sought a list of admissions from the applicant. However, before the commencing of the pre-trial conference the attorneys of record for the applicant (Berndt & La Vita Attorneys) withdrew resulting in the postponement of the pre-trial conference to 1 March 2018. At this time the applicant was represented by Mr Nysschens (Nysschens) of Grosskopf Attorneys. In response to the admissions sought by the respondent, Nysschens caused an email to be sent to the respondent in which he incorporated an admission to the

effect that the applicant, in entering into the sale agreement with the respondent, had authorized one Gary Holmes, to take delivery of the vehicle on his behalf.

13. Following this admission the respondent sought further particulars, more particularly in regard to the aspect that the vehicle was for investment purposes and that this fact was known to the respondent. The applicant in his response said, the issue regarding the investment was a 'side issue' and irrelevant.
14. Subsequently, on 22 August 2019 the matter was allocated to the honorable Acting Judge Fourie, who requested the parties to present him with a statement of common cause facts. However, contrary to the admission earlier made, the applicant denied that the delivery of the vehicle was common cause. This led to the honorable Judge Fourie to remark that the admission remains, unless the applicant applies formerly for its withdrawal.
15. The ground for the withdrawal of the admission is stated in paragraph 14 of the founding affidavit as follows:

*"... In reply to the abovementioned question, my attorney of record made an admission which was contrary to my instructions under paragraph 15.3 of the said Rule 37 (4) (a) to the effect that, I have authorized the aforesaid Holmes as my agent to take delivery of the aforesaid vehicle on my behalf". He continues in paragraph 15 as follows: "On the contrary I have specifically mentioned to him that I have never seen the vehicle in question and further took delivery of same. There is no document which I signed and authorized Gary Holmes as my agent to take delivery of the vehicle which my then attorney of record (Grosskopf Attorneys) could have relied on in making that admission. I must add that the issue of the delivery of the vehicle remain denied in the plea to the particulars of claim". (Sic)*

16. The grounds of opposition which are gleaned from the answering affidavit of the respondent are ostensibly that;
  - 16.1. the defendant has failed to make a full and honest explanation for the proposed amendment;
  - 16.2. the withdrawal of the admission would be inconsistent and contradictory with his pleadings particularly those which are prepared by Berndt & La Vita Attorneys. Including submissions by his attorney Mr Essa in June 2014, as well as those made by Mr Mtlane, a dispute resolution officer before the NCT; and
  - 16.3. the prejudice that will be suffered by the respondent should the application be granted.
17. In his replying affidavit the applicant reiterated his denial that he had authorized a third party, Holmes, to take delivery of the vehicle on his behalf. He further pointed to the proceedings that took place at the pre-trial, wherein the delivery of the vehicle was disputed. Therefore, the respondent was aware even at that stage that the issue of admission of the delivery of the vehicle was not settled.

18. Whilst the applicant confirms the signing of the sale agreement that was brought to him by Holmes, as well as the delivery note of the vehicle, he maintains that he has never set his foot at Nissan, Kempton Park, where the delivery is alleged to have taken place. He also contends that the delivery note he signed was only an instruction to Nissan Kempton Park, to deliver the vehicle in good order and in satisfaction of the client (himself). The delivery note did not state that the delivery of the vehicle must be effected on Holmes, nor did he sign any document or power of attorney which authorized Holmes to represent him in dealing with the respondent.
19. He further stated that according to a Fraud Risk Preliminary Report which was conducted at the instance of the respondent in order to establish the delivery of the vehicle, it led to the respondent laying a criminal complaint with the South Africa Police Service against Holmes and this led to the arrest of Holmes. Nevertheless, the respondent chose not to repossess the vehicle from Holmes but instead continued to demand instalments from him, to enrich themselves unjustly at his expense. He further contends that the responded has not produced any evidence that he has authorized Holmes to take delivery of his vehicle save to rely on circumstantial evidence. He further contends that it is Holmes who advised him that he was working with someone at Auto Nissan to make the deal for purchasing four vehicles possible. Holmes had indeed made it possible for him to purchase four vehicles which were registered in his name and were later fraudulently transferred from his name to Holmes. In paragraph 28 of the replying affidavit the following is stated:

*“the respondent is confusing the agreement I made Mr Gary Holmes to the issue whether I signed or gave any impression on the respondent to deliver the vehicles to whoever the vehicles were delivered to”.*  
(sic)

20. In paragraph 31.1 he continues and states:

*“I respectfully submit that it was Nysschens who was my legal representative and I submit that he knew the processes than I do. It*

was Nysschens who would have arranged any consultation if he saw the need to and I was not in position to arrange the consultation on my own without full knowledge of the proceedings of the litigation. The fact that there were no consultations between myself and Nysschens cannot be implied that he was within his authority to make the admission that he made without seeking an instruction from myself first”. (sic)

21. In an email to Mr Nysschens dated 22 August 2019 annexed as “JSM12” the applicant wrote the following:

*“In our last correspondences, I told you that I was suspicious that you were colluding with the Westbank attorneys to set me up in favor for them winning the case. You have said that you saw the original Title Holder Certificate of the car by Westbank, but Westbank is proving the contrary. Today 22 August 2019 on the day of trial it emerges that you have stated in your pleadings that I have collected the car from I C Nissan knowing well that you were lying because I always emphasized to you that I*

*have never seen any of those cars, and nobody from IC Nissan has ever delivered a car in Witbank, and until today I do not know where IC Nissan is and I have never met any IC Nissan agent, nor anybody from Westbank except Gary Holmes himself. The case was postponed sine die because of those lies. I want you to tell me who told you that I have been to IC Nissan because this is a lie, police investigations are my witness, even the investigations by the banks has no records of myself collecting a car from IC Nissan. This findings truly confirm that you were colluding with the banks as I once reported to you.*

The matter is very serious both legally and psychologically to myself and my family.

Please respond in no less than 5 working days because I want to seek further Legal Practice Council opinion and further legal representation parallel to the present case. Whose instructions were you serving at the time you were on the case?”

22. This email attracted a response from Nysschens which is contained in an email dated 26 August 2019 annexed to the founding affidavit as “JSM 13” in which the following is stated:

*“your communication, hereunder of 23 August 2019 refers; please be advised that we do not intend responding to each and every aspect and allegation contained in your aforementioned correspondence; upon perusal of the pleadings/pre-trial questions in the action (of which the plea was prepared by our predecessor) there are no admissions made in respect of you personally collecting or having sight of the vehicle. On the contrary, the pleadings specifically state that, you have not done so. As much as we are uncertain of the basis of your contentions in this regard. Further to the above, we deem it relevant to point that our firm withdrew from the matter over 6 months prior to trial. As such, and if required, your newly appointed attorney had more than sufficient time to amend any aspect contained in the pleadings; we at all times attended to the matter professionally and ethically and do not collude with colleagues and /or third parties. Your statements and contentions in this regard are, with respect, absurd to say the least. You were provided with sound advice based on the legal and factual position following consultations and discussions, but you however do not agree with such advice from ourselves or counsel; as such, your statements are, with respect, not only without merit, but highly defamatory to which exception is taken. All rights in this regard are reserved in full”.*

23. What is patently clear in this email addressed to Nysschens, it is about the admission made in terms of Rule 37, that Holmes was authorized by the applicant to collect his vehicle. Instead the accusations against Nysschens are in respect of other issues that have not been pleaded. This is made clear in the response by Nysschens that there are no admissions made in respect of the applicant collecting the car. I cannot help but find it curious why the applicant avoided deliberately to raise it with Nysschens that it is not correct that he had authorized Holmes to collect his vehicle or to act as his agent whereas this is the nub of the admission that was made.
24. I also find it curious that in the email to Nysschens the applicant denies having met any agent nor anybody from Westbank but he qualifies his statement by saying, except Gary Holmes. He deliberately does not describe Holmes’ role or his tittle in the scheme of things. However, in his replying affidavit he alleges that Holmes was in cahoots with respondent and that led him to believe that there was a trust relationship between Holmes and the

respondent. If that was the case, why did the applicant fail to bring it to Nysschens' attention as another reason to show that he could not have authorized Holmes who was an agent of Westbank, to also act as his agent.

25. I find myself constrained to agree with the respondent that the criticism levelled against Nysschens is unwarranted and unjustified.
26. Applicant further contends that individuals in the employ of Nissan Kempton Park, knew or ought to have known about the fraud that took place. Further, if all his applications for the finance of the four vehicles were dealt with properly, some of the transactions would not have passed through, in light of the requirements of the NCA. Therefore individuals at Nissan Kempton Park cannot be shielded from taking responsibility of their actions. This wild guess by the applicant is not supported by any shred of evidence neither is it clear what is the relevance of the 'veil suggestion of reckless lending' have to do with the admission that is sought to be withdrawn.

#### ISSUE TO BE DETERMINED

27. The issue that falls to be determined is whether the applicant can be granted leave to withdraw the admission made during the pre-trial conference.
28. During oral argument, Mr Mohlala, counsel for the applicant relying on MEC of Economic Affairs, Environmental & Tourism V Kruizenga[1], Submitted that this matter bears special circumstances that warrants the launch of this application on the following grounds. First, the admission that was made by applicant's erstwhile attorney, was not at the instance of the applicant. Second, the terms of the sale agreement provide specifically that any cancellation or variation of the contract is valid unless signed by both parties. He further submitted that the respondent has, contrary to the clear terms of the signed delivery note, breached the sale agreement by its failure to deliver the vehicle to the applicant but instead delivered it to another person without the applicant's written authorization.
29. In his heads of argument he submitted that irrespective of the breach of the agreement, that was caused by "supervening impossibility" which was nor brought about but neither the conduct of the applicant nor that of the respondent. The respondent nevertheless pursues the applicant to continue with monthly instalments whereas the respondent is not be able to reciprocate in terms of the agreement. I find this submission irreconcilable with the applicant's founding affidavit, in which it is alleged that the respondent was part of a fraudulent scheme to have the applicant's vehicles deregistered from his name and be registered on the names of Holmes. This argument, also lacks support if regard is had to the legal principles applicable in a defense of "impossibility of performance".
30. In Unlocked Properties CC 4 (PTY) Ltd v A Commercial Properties CC[2] , Meyer J, dealing with a defence of impossibility of performance had this to say "The impossibility must be absolute or objective as opposed to relative or subjective. Subjective impossibility to receive or to make performance does not terminate the contract or extinguish the obligation[3]. At

paragraph [9] the learned judge referred to LAWSA VOL 5 (1) First Reissue paragraph 160 where it is stated: “The contract is void on the ground of impossibility of performance only if the impossibility is absolute (objective) this means in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a particular contracting party because of his personal situation, that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract”.

31. The impossibility that is raised by the applicant only is argued in my view not sustainable or is at the least relative. Therefore, since the contract between the parties still subsists, it is no surprise that the respondent persists in demanding payment of instalments from the applicant.
32. It was further submitted that the delivery note formed part of the sale agreement which could only be varied and cancelled unless any changes or cancellation is reduced in writing by both parties. It was submitted that the only meaning that can be given to the wording of the delivery note, is that the vehicle should have been delivered on the applicant himself and any deviation therefrom, is a breach of the sale agreement. However, what is not explained in the papers of the applicant who is a medical doctor and not an illiterate person is what was understanding of the delivery note he signed.
33. Mr Botha for the respondent submitted that the applicant misconstrues the legal consequences of his actions. He referred me to various authorities which confirm the principle that the purpose of an admission is to render it unnecessary for the applicant to prove the admitted facts. He also relied on President Versekeringmaatskappy Bpk V Moodley[4] where the court after considering a number of authorities delineated guidelines that must be applied when considering a withdrawal of an admission as the following;
  - (i) There must have been a bona fide mistake on the part of the party seeking to amend.
  - (ii) The amendment must not cause prejudice to the other side which cannot be cured by an appropriate order as to costs.
34. Mr Botha further submitted that the applicant lacks bona fide as he failed to explain the lengthy delays in launching the application for the withdrawal of the admission. Instead, so he argued, the applicant's aim is to gain a tactical advantage that is intended to prejudice the respondent by its inability to find a witness, seeing that Holmes is deceased, to prove the authority he possessed to receive the vehicle on behalf of the applicant.
35. Our law is replete with authorities that have pronounced on the importance and the efficacy of Rule 37 of the Uniform Rules of Court[5].

36. In *Filta-Matrix (Pty) Ltd v Freudenberg and Others*[6] the Supreme Court stated thus: “To allow a party without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37, which is to limit and to curtail the scope of the litigation”.

In *Kruizenga*[7] (*supra*) the following is stated:

*“The Rule was introduced to shorten the length of trials, to facilitate settlement between the parties narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise. Admissions of fact made at a Rule 37 conference, constitute sufficient proof of these facts. The minutes of a pre-trial conference may be signed either by a party or his or her representatives. Rule 37 is thus of critical importance in the litigation process. This is why the court has held that in the absence of any special circumstances a party is not entitled to resile from an agreement deliberately reached at a Rule 37 conference”.*

37. It is therefore clear that the full explanation that has required is to be accompanied by the demonstrable bona fides of the applicant and the absence of prejudice on the part of the respondent.
38. I now pause to deal with the conduct of the applicant after the he had concluded the sale agreement. In terms of the agreement the respondent was obligated to deliver the vehicle to the applicant, who in turn was required to fulfil his obligations by way of paying the stipulated monthly instalments as stipulated in the agreement.
39. However, it escapes any reasoning that the applicant for a period of 18 months acquiesced to making payments to the respondent for goods he has never received. Not only that, he has never demanded the respondent to act in accordance with his obligations, to deliver the vehicle as per their contract.
40. When counsel for the applicant was invited to give any plausible explanation for the applicant’s conduct in this regard, he was hard pressed to offer any convincing explanation.
41. Nowhere in his plea does the applicant make any averment that he has been demanding his vehicle from the respondent with no success and as a result had put the respondent in mora.
42. The applicant instead chose to offer a plea that is in my view self-destructive. In that he starts by saying, the goods were never delivered to him. But on the same breath, he says the plaintiff was aware that the purpose of the purchase of the vehicle was for an ‘investment purpose’ and in the ordinary and reasonable course of an investment of that nature, the investor (referring to himself) would not have had sight of the goods that were purchased’.
43. Whilst the plea is to the effect that the respondent never delivered on its obligations in terms of the contract; however, the difficulty I find in this proposition is, if the vehicle was never delivered to the applicant nor received on his behalf, how did it come about for the vehicle to be registered in the applicant’s name as reflected on the e Natis system document which is incorporated in the applicant’s discovery bundle.

44. In his replying affidavit applicant introduces Holmes as someone he had no dealings with but a person who was acting on behalf of the respondent. However, according to “MV4”, presented to the NCT, he states on paragraph 17.11.12 thereof, that the credit agreements with the respondent, Standard Bank and Nedbank were initiated with the advice from Holmes. In a subsequent paragraph of the same letter he states that, Holmes took possession of the vehicles with the promise that the vehicles would be utilized for business purposes.
45. The statement in “MV4” does not support the allegations that Holmes was an agent of the respondent. On the contrary it suggest that he (Holmes) acted as an agent of the applicant. This is in keeping with the admission made by Nysschens, that Holmes was authorized by the applicant to take delivery of the vehicle.
46. No explanation is given by the applicant as to how Holmes took possession of his vehicles nor does he take the court into his confidence on the business venture between him and Holmes. Applicant also prefers not to be transparent on the investment transaction or venture that resulted in him not to see the vehicles. In an attempt for the court not to pay regard to these aspects, applicant’s counsel implored the court to disregard what served before other forums and organs.
47. This submissions by counsel for the applicant cannot be countenanced if regard is had to the requirement that in for the applicant to succeed in such an application, he has to offer a satisfactory explanation that should convince the court that he is entitled to withdraw his admissions. In addition, his bona fide must be demonstrable in that explanation, which I struggle to find in the present facts presented by the applicant.
48. This leads me to the issue that despite what the applicant has averred in his plea and the facts in his affidavits, he chooses not to be candid with his very plea and the averments he has made. One does not need to look far, but to refer to the averments regarding his dealings with Holmes that have not been fully explained even when requested to do so by the respondent in the request for further particulars. He maintained his attitude to conceal his relationship and business relations with Holmes even in his papers before this court. Instead he held a stance throughout that is the issue of the investment, is a ‘side issue’ that is “irrelevant”.
49. What is boggling to the mind is how does this issue of the ‘investment’ become a side issue or irrelevant, when, as alleged by the applicant, it is an issue the respondent was aware of. In other words, it is an issue that formed part of the transaction of the purchasing of the vehicle. In this regard, the applicant’s attitude is not consistent with that of a person who is prepared to give this court a satisfactory explanation.
50. In dealing with the question of prejudice, I find the following remarks apposite:

*“where a proposed averments involves the withdrawal of an admission, the court will generally require a satisfactory explanation of the circumstances in which the admission was made and the reasons for seeking to withdraw it. In addition, the court must consider the question of prejudice to the other party if the result of allowing the admission to be withdrawn is to cause prejudice or injustice to the other party to the extent that a special order as to costs will not compensate him, then the application to amend will be refused” [8]*

51. The respondent has contended that in the absence of Holmes who is now deceased and who could have been a relevant witness and I may add, who appears to have played a very pivotal role in the acquisition of the of the vehicles by the applicant. The granting of the application will surely prejudice the respondent immensely. Although the applicant on the other hand contends that he will be equally prejudiced if he is not allowed to withdraw his admission, there is nothing meaningful to show in what way he will suffer prejudice.
52. Another hurdle which the applicant has failed to overcome, is his lack of an explanation as to why he delayed for over a year to launch this application. In the absence therefor, it is my view that the applicant has failed to show his bona fides in his application.
53. Finally, even if this court were to exercise its greatest latitude to grant an amendment as was stated in Whittaker v Roos, Morant[9] v Roos, the applicant has failed to give a satisfactory explanation that is convincing to the court, neither has he demonstrated bona fides in seeking the amendment to his plea. That having been taken together with the prejudice the respondent stands to suffer if the withdrawal is allowed; the application ought to be dismissed with costs.
54. Whilst respondent submitted that costs should to be awarded on a scale between attorney and client if regard is had to the applicant's lack of bona fides in bringing this application, I am however not persuaded that I should order costs on an attorney and client scale.
55. I therefore make the following order:

The application is dismissed with costs.

V M NQUMSE

Acting Judge Of The High Court

Gauteng Division, Pretoria

Date of Hearing : 27 July 2020

Date of Judgement :

For the Applicant : Adv N. Mohlala

Instructed by : T.P Ngcongco Attorneys

For the Respondent : Adv J.G Botha

Instructed by : Rossouw Leslie Inc

[1] 2010 (4) SA 122 (SCA)

[2] [2016} ZAGP 373 (29 July 2016)

[3] Ibid Para [7]

[4] 1964 (4)SA 109 (T)

[5] Rule 37 (4) of Uniform Rules Of Court Provides: Each party should not later than 10 days prior to the pre-trial conference, furnish every other party with a list – (a) the admissions which he requires; (b) the enquiries which he will direct and which are not included

in a request for particulars for trial; and (c ) other matter regarding preparation for trial which he will raise for

discussion.

[5] Rule 37 (4) of Uniform Rules Of Court Provides: Each party should not later than 10 days prior to the pre-trial conference, furnish every other party with a list –

(a) the admissions which he requires;

(b) the enquiries which he will direct and which are not included

in a request for particulars for trial; and

(c ) other matter regarding preparation for trial which he will raise for

discussion.

[6] 1998(1) SA 606 (SCA) at 614 B-C

[7] See MEC Foe Economic Affairs , Environmental and Tourism v Kruizenga at 126 E-G (paragraph 6)

[8] Herbstein and Van Winston Civil Practice In The High Court Of South Africa, Juta 5th Ed 2009 at 685 (Also see the authorities referred to therein)

[9] 1912 TPD 718 at 720

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