



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: 3073/2015

In the matter between:

**MERCEDES BENZ FINANCIAL SERVICES
SOUTH AFRICA (PTY) LTD**

Excipient

and

SEASON STAR TRADING 121 CC

Respondent

JUDGMENT

Heard: 30th April 2015
Delivered: 25th May 2015

JEFFREY AJ:

[1] The excipient is the defendant in an action instituted against it by the respondent. Four exceptions have been taken to the respondent's particulars of claim on various grounds that no cause of action has been disclosed.

[2] The principal legal issue that arises in this matter is whether or not a properly cancelled agreement can be revived, not by consent between the parties, but solely as a result of one party's withdrawal of an action instituted by it after such cancellation for relief based on breach of that agreement.

[3] After the excipient had withdrawn its action against the respondent, the respondent instituted an action against the excipient. It pleaded in its particulars of claim, which are now excepted to, that in 2008 the parties concluded a written instalment sale agreement in respect of a motor vehicle. Thereafter, in 2011, the excipient obtained default judgment against the respondent for *inter alia* confirmation of the termination of the agreement, return of the vehicle and ancillary relief. The respondent pleaded that, in ignorance of the default judgment being granted, on 16 March 2011 it 'surrendered' the vehicle to the excipient 'under duress'; in June 2011 the respondent became aware of the default judgment; in September 2011 an order rescinding this judgment was obtained; and in October 2011 the respondent delivered its plea. In April 2013 the excipient withdrew its action against the respondent and tendered to pay the latter's costs. The circumstances leading to the withdrawal of the action were not pleaded.

[4] The respondent then instituted an action against the excipient

based on the instalment sale agreement claiming specific performance, return of the motor vehicle and various other relief. Pivotal to all these claims is the requirement that the agreement must still be extant. The respondent has pleaded that this is the position because:

16.1 The effect of the withdrawal (of the of the excipient's action) ... has the result that *inter alia* the (instalment) agreement is in force.

16.2 The parties are therefore obliged to perform under the agreement.

[5] The excipient's first exception is that this pleading is bad in law and, consequently, the particulars of claim lack averments necessary to sustain the respondent's action.

[6] It is not specifically pleaded by the respondent that the summons in the withdrawn action contained reference to the excipient's cancellation of the agreement. But it probably did because the court's default judgment order - that was pleaded - included a declaratory order confirming the termination of the agreement. The respondent did not plead that the excipient had not properly cancelled the agreement; or, if it had, that the cancellation was invalid for some reason; or that parties had agreed to the agreement being revived. The respondent simply pleaded as I have set out above that the excipient's withdrawal of the action had the result that the agreement was in force.

[7] That is a misconception. The withdrawal of the action did not

revive the agreement because, while the cancellation of an agreement may be a unilateral act - and it usually is in instances following a breach - the withdrawal of a cancellation and the revival of the agreement is consensual. That is settled law. And as Maya JA said in *Sewpersadh v Dookie* 2009 (6) SA 611 (SCA) 616D-F at para [16] (with reference to *Desai v Mohamed* 1976 (2) SA 709 (N) 712H-713D; *United Bioscope Cafes Ltd v Moseley Buildings Ltd* 1924 AD 60 at 67-68; *Neethling v Klopper en Andere* 1967 (4) SA 459 (A) 466C-467D): “An agreement to revive requires 'a fresh meeting and concurrence of the minds' of the parties to restore the *status quo ante*.”

[8] The mere withdrawal of the action cannot unilaterally revive an agreement. As Botha J said, correctly with respect, in *Absa Bank Ltd v Cooper NO* 2001 (4) SA 876 (T) 882B: “The ... withdrawal of the action could not undo the contents and effect of the notices of cancellation contained in the summonses.”

[9] All the relief sought by the respondent in the particulars of claim is predicated on the instalment sale agreement being extant. All the remaining exceptions relate to that relief. It follows that the determination of the first exception is decisive of the remaining exceptions.

[10] For these reasons I am of the view that the first and the

remaining exceptions were all well taken and should be upheld. I make the following order:

1. The exceptions are upheld with costs.
2. The respondent is given leave to amend the particulars of claim within 10 days of the date of this order.

JEFFREY AJ

Appearances:

Counsel for the excipient	:	Mr M C Tucker
Excipient's attorneys	:	Strauss Daly Inc. Ref. Ms V Naidu MER / DD1071 Tel. 031 570 5600
Counsel for the Respondent	:	Mr T E Seery
Respondent's attorneys	:	M P Lutge Inc. Ref. M P Lutge PR/S6463 Tel. 031 303 7122
Date of hearing	:	30 April 2015
Date of judgment	:	26 May 2015