



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 546/09

In the matter between:

KHOOSIAL SINGH

Appellant

v

BMW FINANCIAL SERVICES (SA) (PTY) LTD

First Respondent

SMG AUTO DURBAN (SA) (PTY) LTD

Second Respondent

Neutral citation: *Singh v BMW Financial Services* (546/2009) [2010] ZASCA
121 (30 September 2010).

Coram: Mpati P, Cloete, Cachalia, Mhlantla JJA, Bertelsmann AJA

Heard: 13 September 2010

Delivered: 30 September 2010

Summary: Sale Agreement providing for motor vehicle to have a 'year of registration 2006' – whether an essential term of the contract – Where an order for restitution requires a seller to repay to the buyer the instalment payments made under a sale agreement, mora interest is only payable on those instalments paid pursuant to a legal obligation.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Niles-Dunér, K. Pillay JJ and Lopes AJ sitting as full court).

The following order is made:

1. The appeal is upheld with costs.
2. The order of the full court is set aside, and the following order is substituted:
 - 2.1 Save for the costs orders in paras 3, 4, 5 and 6, the order of the court below is set aside.
 - 2.2 The agreement between the applicant and the first respondent is declared to be cancelled;
 - 2.3 The applicant is directed to return to the first respondent the BMW vehicle currently in his possession bearing registration letters and numbers ND 595 676, by delivering it to the second respondent, against payment in terms of paragraph 2.4.
 - 2.4 The first respondent is directed to:
 - 2.4.1 repay to the applicant the sum of R236 653.81, being the initial payment the applicant made to it in terms of the agreement together with interest at the rate of 15,5 per cent per annum from 3 May 2007 to date of payment;
 - 2.4.2 repay to the applicant the 16 instalments totalling R127 552.11 paid to it before 3 May 2007 in terms of the agreement together with interest at the rate of 15,5 per cent per annum from 3 May 2007 to date of payment;
 - 2.4.3 repay to the applicant all instalments paid by the applicant to

it in terms of the agreement after 3 May 2007, together with interest at 15,5 per cent per annum from the date of this judgment to the date of payment;

- 2.5 The first and second respondents are ordered jointly and severally to pay the costs of the appeal.'

JUDGMENT

CACHALIA JA (Mpati P, Cloete, Mhlantla JJA, Bertelsmann AJA concurring):

[1] This appeal concerns a claim for restitution of monies paid and goods delivered under an instalment sale agreement. The dispute arose when the appellant, Mr Khoosial Singh, decided to buy a new BMW X5 4.41 automatic motor vehicle, which he had seen on display at the premises of the second respondent, a dealership trading as SMG Auto Durban (Pty) Ltd ('SMG') in December 2005. He agreed with a sales-representative at SMG that the vehicle would be 'first registered' in 2006, and was led to believe that the process of registering the vehicle would happen in January 2006. When the vehicle was delivered to Mr Singh, it transpired that it had previously been registered – more than once – in 2005. Thus began the quarrel between the parties.

[2] The purchase price of the vehicle was agreed to be R509 850. Mr Singh paid a deposit of R236 653.81, leaving a balance of some R373 000. To finance the balance Mr Singh entered into an instalment sale agreement with the first respondent, BMW Financial Services (Pty) Ltd ('BMW'), which has its place of business in Midrand, Gauteng. The document embodying the agreement was completed by the sales representative at SMG and Mr Singh signed it on 22 December 2005. The agreement specified, as agreements of this nature

invariably do, that the finance house would retain ownership of the vehicle until Mr Singh had met his obligations, which included settling the principal debt and finance charges.

[3] The cover page of the three-page agreement included a description of the make of the vehicle, details of the purchase price, its chassis and engine numbers, registration (licence) number, and a reference to the 'year of first registration 2006' ie the requirement that it be 'first registered' in 2006.

[4] Clause 2.2 of the agreement provided that SMG, which acted as the agent for BMW Finance 'for the purposes of delivery', would deliver the vehicle to Mr Singh within 30 days of the agreement being signed. On 31 December 2005, nine days after the agreement was signed, the vehicle was delivered with temporary licence plates to permit its usage for 21 days pending its registration.

[5] Early in January 2006, SMG realized that the vehicle had previously been registered in 2005. It notified Mr Singh of this fact and undertook to rectify the 'licensing error' with the licensing office by reversing the prior registration. By 21 February 2006, despite Mr Singh having had several discussions with SMG concerning the problem, it remained unsolved. Mr Singh decided to investigate the matter himself and contacted the Pinetown Registering Authority to this end. He discovered that the vehicle had been registered on three previous occasions in 2005, on one occasion in SMG's name.

[6] Mr Singh then consulted his attorney who, on 2 March 2006, wrote to SMG demanding delivery of a vehicle, which accorded with the description of the vehicle he had purchased – in particular one that was registered for the first time in 2006. On 17 March 2006, after SMG had not responded to the letter, Mr Singh's attorney wrote another letter informing SMG that his client would not renew the temporary permit, which had already been renewed several times and was to expire on 20 March 2006. The letter went on to tender return of the

vehicle that had been delivered to Mr Singh and demanded that it be replaced. Again, SMG did not respond. Two further letters to SMG on 1 and 3 April 2006 also failed to elicit a response.

[7] On 5 April 2006 Mr Singh queried the registration status of the vehicle with the Motor Licensing Bureau of Windsor Park, Durban. He established that he had been registered as the owner as of 4 April 2006 and that the vehicle's current licence number and two previous licence numbers bore no resemblance to the licence number that appeared on the agreement. Importantly, a confirmation certificate issued by the Bureau reflected the 'date of liability for first licensing' as 21 October 2005 and the vehicle's status as 'used' even though he had purchased it as 'new'.

[8] On 21 April 2006 SMG informed Mr Singh that 'the correct licensing had now been received from the licensing department'. This was a reference to a new Certificate of Registration that SMG had obtained from another licensing body, the Umhlanga Rocks Registering Authority. The certificate reflected Mr Singh as the owner, the 'date of liability for first licensing (not year model)' and the 'date liable for registration' as 4 April 2006, and the status of the vehicle as 'new', which contradicted the documentation that Mr Singh had acquired indicating that the vehicle was used. The name of the title holder was given as 'BMW Finanz (Pty) Ltd Umhlanga Rock' (sic) and the vehicle's previous three licence numbers, which I referred to in the previous paragraph, were also displayed on the certificate.

[9] In summary Mr Singh was unhappy that:

- (a) the vehicle was 'first registered' in 2005 in the name of SMG and other persons unknown to him before being registered in his name in 2006;
- (b) his investigations had revealed that the vehicle's status was 'used' whereas the certificate that SMG had obtained from the Umhlanga Rocks

- Registering Authority stated that the vehicle was 'new'; and that
- (c) the registration (licence) number on the agreement differed from any of the vehicle's previous licence numbers.

[10] He now believed that the vehicle that had been delivered to him was not the one he had contracted for. So he instituted proceedings in the Durban High Court against BMW and SMG on 11 May 2006 in which he sought an order for specific performance, namely delivery of a new BMW X5 4.4i automatic motor vehicle, first registered in the year 2006, and bearing the same registration number as reflected in the sale agreement. On 13 June 2006, to protect itself against any possible wrongdoing on the part of its agent SMG, BMW served a third party notice on SMG claiming a contribution and indemnification from it. SMG did not oppose this application. On 27 June 2006 BMW filed its answering affidavit. Its answer to Mr Singh's claim for specific performance was that he had contracted for a 'used' vehicle registered in 2006 and this is what he had received. To support its stance that the vehicle was a used one it attached an invoice from SMG dated 9 January 2006 indicating as much. And it also denied that it was the title holder of the vehicle because the registration certificate identified the title holder incorrectly as being 'BMW Finanz (Pty) Ltd Umhlanga Rock' (sic) instead of 'BMW Financial Services (Pty) Ltd', which has its place of business in Midrand, Gauteng. In his replying affidavit, which is dated 25 July 2006, Mr Singh expressed astonishment that it was now being alleged that he had not bought a new vehicle.

[11] On 18 January 2007 SMG filed its answering affidavit. Regarding the vehicle's multiple registrations, it explained that the vehicle had initially been erroneously registered in the name of another customer, a Mr Merrick, on 21 October 2005 with the licence number ND 164772. When the error was detected the vehicle was re-registered in its name on 27 October 2005 under a different licence number. The vehicle remained part of SMG's stock. Thereafter one of SMG's directors arranged for the new registration number to be allocated

to another vehicle. This meant that the vehicle had to be re-registered yet again – this time under another licence number. It had thus been registered three times. SMG states that its salesman who sold the vehicle to Mr Singh was unaware of this history. In summary SMG's defence, in contrast to the stance adopted by BMW, was that the vehicle was new and registered in 2006 (having been erroneously registered previously). However, when the matter came to be argued in the high court, BMW accepted SMG's facts and also did not persist with its denial that it was not the title holder of the vehicle.

[12] SMG does not, however, explain how its invoice to BMW dated 9 January 2006 came to describe the vehicle as 'used'. Nor does it explain the origin of the licence number on the agreement, which differs from all the vehicle's other licence numbers.

[13] A year after Mr Singh had instituted proceedings the matter had not yet been heard, and it was no longer possible for the respondents to comply with an order for specific performance. So, Mr Singh amended his notice of motion. He now sought a declaration that the agreement was of no force and effect. He tendered return of the vehicle in his possession and claimed repayment of the monies he had paid thus far.

[14] The high court (Rowan AJ) granted the relief claimed. The learned judge found that having been registered on three previous occasions in 2005 the vehicle was thereafter not capable of being 'first registered' in April 2006. He also held that, because the registration requirement was an essential term of the sale agreement, Mr Singh had not received the vehicle for which he had contracted. And it followed, the judge said, that as specific performance was no longer possible, the appellant was entitled to cancel the contract and assert his right to claim restitution. However, the full court, sitting in Pietermaritzburg, (Niles-Dunér J, K. Pillay J and Lopes AJ concurring) reversed that order. Mr Singh now comes on further appeal with special leave of this court.

[15] The full court approached the matter differently to the high court. First, it considered that Mr Singh had entered into two contracts: the sale agreement with BMW for the purchase of the vehicle, and the oral agreement with SMG in terms of which the latter undertook to register the vehicle on his behalf. And since, in its view, the contracts were severable, if there was a breach of the oral agreement this had no bearing on the sale agreement. Accordingly, so it held, there was no legal basis for Mr Singh to resile from the sale and to claim restitution. Secondly, it said that even if it was a term of the contract between Mr Singh and BMW that the vehicle was to be 'first registered' in 2006, the certificate was procured in April of that year. So, it held that the obligation had been fulfilled. Thirdly, the date of registration, said the full court, had no bearing on the vehicle's intrinsic characteristics or qualities, but only on its value. It thus concluded that if the date of first registration was an essential element of the contract Mr Singh received what he had contracted for. Finally, it held that even if he did not get what he contracted for his claim was limited to one for damages against SMG for breach (of the second contract) – a claim, said the court, he had not and could not make in these proceedings. The full court accordingly set aside the decision of the high court and dismissed the claim. It will be convenient to deal with the issues in the same sequence as the full court did.

[16] I turn to consider the first question, whether the requirement that the vehicle was to be 'first registered' in 2006 was a term of the sale agreement, or a separate severable oral agreement or arrangement between Mr Singh and SMG. In finding that there were two agreements the full court reasoned that even though the description of the vehicle in the sale agreement included a reference to the year of registration, once the vehicle had been delivered to Mr Singh on 31 December 2005, BMW's obligation under the sale agreement came to an end. All that remained were the registration formalities to be undertaken by SMG afterwards. Moreover, said the full court, because the sale agreement contained a non-variation clause, there was no room to import a term relating to the

registration of the vehicle into it.

[17] I am unable to agree with the full court in this respect. It was an express term of the sale agreement that the vehicle which SMG was to deliver to Mr Singh would be 'first registered' in 2006. That much is clear on the face of the contract itself. As the seller's agent 'for purposes of delivery' SMG was thus required to deliver a motor vehicle, which bore the registration details provided for in the sale agreement or was capable of being registered so that it would. I accept that the delivery of the vehicle and the registration certificate did not have to take place simultaneously. But this does not mean that SMG had a separate agreement with Mr Singh concerning the delivery of the certificate. SMG remained the seller's agent and was obligated to deliver to the buyer the vehicle and certificate of registration as contemplated by the sale agreement. There was, therefore, only one agreement – the sale agreement between Mr Singh and BMW.

[18] As to whether the term was in any event fulfilled, as the full court found it had been, by the delivery of the certificate of registration in April 2006 purporting to show that the vehicle was registered on 4 April 2006, I also respectfully disagree. Apart from the fact that I have serious reservations regarding the circumstances of how SMG procured this certificate, and the three-month delay in doing so, which was not explained, the certificate does not accord with the common cause facts: The printed certificate has a standard line, which provides for a 'date liable for registration'. The date that was filled in, in the space provided, was 4 April 2006. There is no explanation in the affidavits what the 'date liable for registration' refers to, but whatever it means, it does not indicate that it is the date of 'first registration'. That much is clear as the certificate allows for the registration date of both new and used vehicles to be filled in this space. Furthermore, the certificate provides for the vehicle's last three licence numbers to be filled in. This indicates that a vehicle could have had previous licence numbers and, therefore, a prior registration history. The certificate reveals that

the vehicle in question indeed had three previous licence numbers, none of which is the number appearing on the sale agreement.

[19] Mr Marnewick, who appeared for both respondents, submitted, though somewhat faintly, that the errors in the registration had been explained and that the date 4 April 2006 reflected what the parties had agreed. It may be that the initial registration in the name of Mr Merrick was done in error. But the vehicle was thereafter registered twice in 2005 – ‘deliberately and intentionally’, as Rowan AJ correctly found in the high court. The certificate does not reflect the true facts. In the circumstances it clearly does not comply with the requirement that the vehicle was to be ‘first registered’ in 2006.

[20] There are two other troubling aspects arising from the certificate. The status of the vehicle is described as ‘new’. But the respondents do not provide any explanation why the receipt from SMG to BMW on 9 January 2006 indicates that the vehicle was ‘used’. Indeed in its answering affidavit BMW relied on the very receipt to support its assertion that Mr Singh bought the vehicle as ‘used’. BMW also initially disavowed the certificate asserting that it was not the title holder of the vehicle described therein. For present purposes, because of the rule that in application proceedings the facts averred by the respondents must be accepted, I accept that the vehicle was purchased as new. But this does not detract from the fact that BMW made false assertions, on oath, without verifying the true facts. Its conduct in this regard was reprehensible.

[21] Once it is found, as I have, that the ‘year of first registration 2006’ was an essential term of the contract it follows that delivery of the vehicle, which did not meet this requirement, was not in accordance with the terms of the sale agreement. BMW’s failure therefore meant that it was in breach of the contract.

[22] This brings me to the third issue, whether the breach related to the intrinsic qualities of the vehicle or, put another way, went to the root of the

contract. If not, as the full court found, Mr Singh was only entitled to claim damages to compensate him for the shortcomings. This would be the situation where the breach did not affect the substance of what the buyer expected to receive.

[23] Again, I must respectfully join issue with the approach of the full court. The view I take of the contract and of the common cause facts is that Mr Singh wanted to purchase and was promised a particular vehicle, which was new, and which had to be registered for the first time in 2006 – probably to secure some financial advantage in the event he decided to sell the vehicle. It may be that some would consider the requirement of ‘first registration’ to be trifling. But this is immaterial. If this term was important to the parties, as it was in this case, BMW was obliged to comply. It failed to and this entitles Mr Singh to resile from the contract and to claim restitution.

[24] After the dispute arose Mr Singh continued to perform his obligations under the contract by meeting his instalment payments as and when they became due under the agreement. When the matter was argued before us on 13 September 2010 we were informed that only one instalment remained. He also tendered return of the vehicle on 17 March 2006. We were told that it remains unused and is parked in his garage.

[25] I turn to consider what the appropriate order should be. The parties agreed that in the event that the appeal succeeded the costs orders of the court of first instance should be reinstated. They also concurred that BMW must repay all the monies that Mr Singh has paid in terms of the agreement against the return by him of the vehicle that was delivered to him. They, however, disagreed on what mora interest should be paid.

[26] Ms Julyan, who appeared for Mr Singh, submitted that he is entitled to repayment of the sum of R236 653.81 being the initial payment made in terms of

the agreement on 22 December 2005 together with interest thereon at the rate of 15,5 per cent calculated from this date to the date of payment; and also to repayment of all instalments paid by Mr Singh, at the same rate of interest, calculated from the date of such payment to the date of repayment. Ms Julyan cites no authority to support her contention. Mr Singh initially sought an order for specific performance and cancelled the agreement only on 3 May 2007. He is, therefore, not entitled to mora interest before this date. So, in respect of the initial payment of R236 653.81 and the 16 instalment payments made until then, totalling R127 552.11, mora interest is payable only from 3 May 2007. The total of the two amounts in respect of which mora interest is payable as from 3 May 2007 is therefore R364 205.92.

[27] Concerning the payments made after cancellation of the contract, Ms Julyan submitted that Mr Singh is entitled to interest on these payments from the date of payment to the date of repayment. This is, so the submission went, because the payments were made 'as a matter of commercial reality . . . under protest'. I am not sure what this means but once the contract had been cancelled, Mr Singh was under no legal obligation to continue making instalment payments totalling R460 866.05. He is therefore only entitled to claim interest on this amount from the date of this judgment to the date of repayment.

[28] There remain two other matters. The first relates to whether this court should order the costs of senior counsel because the Taxing Masters in the high courts of Pietermaritzburg and Durban apparently refuse to allow such costs unless specifically ordered to. I accept that this matter involved some complexity and it was prudent for both parties to engage the services of senior counsel. But this court does not make orders stipulating that the costs should include the costs of senior counsel, and the Uniform Rules of Court make no provision for such an order.

[29] The second issue concerns the condition of the vehicle when it is returned. Mr Marnewick submitted that an order for the return of the vehicle

presupposes that Mr Singh is able to restore possession in an undamaged and unused condition, save for its use before the agreement was cancelled. I do not agree that such an order is competent. Once the agreement was cancelled, and restitution was sought, the risk of the deterioration of the vehicle's condition passed to BMW. It must now take possession of the vehicle in the condition that it finds it, subject of course to Mr Singh not having used it, after the contract was cancelled.

[30] The following order is made:

1. The appeal is upheld with costs.
2. The order of the full court is set aside, and the following order is substituted:
 - 2.1 Save for the costs orders in paras 3, 4, 5 and 6, the order of the court below is set aside.
 - 2.2 The agreement between the applicant and the first respondent is declared to be cancelled;
 - 2.3 The applicant is directed to return to the first respondent the BMW vehicle currently in his possession bearing registration letters and numbers ND 595 676, by delivering it to the second respondent, against payment in terms of paragraph 2.4.
 - 2.4 The first respondent is directed to:
 - 2.4.1 repay to the applicant the sum of R236 653.81, being the initial payment the applicant made to it in terms of the agreement together with interest at the rate of 15,5 per cent per annum from 3 May 2007 to date of payment;
 - 2.4.2 repay to the applicant the 16 instalments totalling R127 552.11 paid to it before 3 May 2007 in terms of the agreement together with interest at the rate of 15,5 per cent per annum from 3 May 2007 to date of payment;
 - 2.4.3 repay to the applicant all instalments paid by the applicant to

it in terms of the agreement after 3 May 2007, together with interest at 15,5 per cent per annum from the date of this judgment to the date of payment;

- 2.5 The first and second respondents are ordered jointly and severally to pay the costs of the appeal.'

A CACHALIA
JUDGE OF APPEAL

APPEARANCES

APPELLANTS:

J A Julyan SC

Instructed by Gounder & Associates, Durban
Claude Reid Inc, Bloemfontein

RESPONDENT:

C G Marnewick SC (1st and 2nd respondents)
Instructed by John Hudson Attorneys, Durban
Lovius Block, Bloemfontein