

**IN THE HIGH COURT OF PRETORIA
(TRANVAAL PROVINCIAL DIVISION)**

25/02/2009

CASE NO: 45520/2008

In the matter between:

FIRSTRAND BANK LIMITED t/a FIAT FINANCE

PLAINTIFF

And
MARTIENUS JOHANNES SMITH

DEFENDANT

TLHAPI, AJ

[1] On the 18 December 2008 I gave judgment for the plaintiff in terms of prayers "B" and "D" of the notice of motion, in an application for summary judgment by the plaintiff. The said application was opposed. The determination of the remainder of the prayers was postponed *sine die*. My reasons follow.

[2] Plaintiff's cause of action arose out of an agreement of lease. The plaintiff claimed summary judgment for:

A. Confirmation of cancellation of the AGREEMENT

B. Repossession of the GOODS:

FIAT PUNTA 1.4 ACTIVE

ENGINE NUMBER 350A010003310077

CHASSIS NUMBER : ZFA19900001115385

C. Damages, postponed *sine die*

D. Costs of suit on an attorney and client scale;

E. Interest calculated on prayer 4.3 at the rate of 15.708% per annum as from date of Summons to date of payment, calculated on the outstanding balance from time to time, postponed *sine die*;"

[3] It is common cause that the total amount of the agreement mentioned in the particulars of claim amounted to R198 369.00, which was payable as follows:

1. First rental payment of R3 306.15 payable on the 1 October 2006;
2. Thereafter 56 consecutive monthly payments of R3 306.15;
3. With a final payment of R3 306.15 payable of on the 17 August 2011.

Furthermore, the defendant was in breach of the agreement of lease and that as at the 4 September 2008, he was in arrears with his monthly payments in the amount of R39 340.28.

[4] The defendant submitted that, the parties were bound by two agreements, the Lease Agreement and an insurance agreement namely, the Fiat Finance

Protection Plan which was underwritten by International Underwriters Administrators. According to the defendant, the insurance policy was taken out at the instance of the plaintiff and was meant to protect the defendant in the event of him being unable to generate income sufficient to meet his monthly payment obligation, under the lease agreement.

- [5] The defendant was unable to meet his obligation under the agreement due to ill-health, which commenced in September 2006. Having received treatment over several months his health deteriorated as a result of which a claim was lodged with the underwriters of his insurer. The defendant liaised with the underwriter telephonically and by correspondence. It was submitted on behalf of the defendant that the existence of a relationship between the plaintiff and insurer was confirmed by the fact that it took plaintiff a long time before summons was issued, suggesting that the plaintiff was aware that defendant was at some time processing his claim with the insurer.
- [6] On the 3 September 2008 he was advised that his claim had prescribed due to his failure to provide full information relating to his condition despite the fact that full details had been forwarded to an employee of the plaintiff, a certain Mr Khan and confirmation by some employees of the insurer that such information had been received, Mr Khan's confirmatory affidavit was not availed.
- [7] It was submitted on behalf of the plaintiff that the applicable clauses in the lease agreement which were relevant in this application were:

4.1. The Lessor will remain the owner of the goods even after the end of the agreement unless you exercise the rights to purchase the goods

6. When signing this agreement you must make the first payment or give the required advance rental in terms of the agreement;

6 2... YOU MUST ENSURE THAT THE LESSOR RECEIVES THE FULL AMOUNT OF EACH PAYMENT AS SET OUT IN THE SCHEDULE AND YOU MAY NOT DEDUCT ANY AMOUNT FROM YOUR PAYMENTS.

10.1. IF YOU FAIL TO COMPLY WITH ANY OF THE CONDITIONS OF THIS AGREEMENT (ALL OF WHICH YOU AGREE ARE MATERIAL) OR FAIL TO PAY ANY AMOUNTS DUE TO THE LESSOR THEN THE

Lessor will have the right (without affecting any of its other rights):

10. TO CLAIM IMMEDIATE PAYMENT OF THE FULL AMOUNT THAT THE LESSOR COULD CLAIM IN TERMS OF THE AGREEMENT, AS IF IT WAS THEN DUE BY YOU.

12. Should the Lessor not have insisted that you follow any of the terms and conditions strictly at any previous stage you may not assume that the terms and conditions have been altered. These terms and conditions still apply.

12. THIS IS THE WHOLE CONTRACT AND NO CHANGES MAY BE MADE TO IT UNLESS THESE CHANGES ARE IN WRITING AND SIGNED BY BOTH YOU AND THE LESSOR/"

- [8] Except for a letter dated 11 October 2006 from Fiat Finance Customer Service Centre acknowledging the acceptance by the defendant of the Fiat Finance Customer Protection Plan, a copy of the actual policy document was not annexed to the opposing affidavit. In order to enable the court to exercise its discretion to grant an application for summary judgment, the court must be satisfied that plaintiff's claim is clear and the defendant has failed to present such facts in its opposing affidavit, to enable the court to conclude that there was a reasonable probability of something emerging at the trial, which would enable the defendant to properly defend his case. **Gulf Steel (Pty) Ltd v Rack-Rite Bop Ltd and Another 1998 (1) SA 679(0) at 683 H-J and, Visser v Incorporated General Insurance Ltd 1994(1) SA 472 (T) at 478 H.**

- [9] It was correctly submitted on behalf of the plaintiff that the clauses extracted from the lease agreement were relevant to the determination of this matter. As I understood it, in order for the defendant to succeed, they should have presented such information or reasonable positive indication that the plaintiff had placed a limitation on its rights under the lease agreement. Having regard to clause 13 of the lease agreement, it is clear, that no other agreement would have had the effect of cancelling or suspending the rights and obligations under the lease agreement, unless reduced to writing and signed for by the parties. In the absence of such agreement, formally concluded, the defendant would in my view have difficulty succeeding in his defence at trial and on the basis of the facts in his opposing affidavit.

[10] IN THE CIRCUMSTANCES, JUDGMENT FOR THE PLAINTIFF THEN FOLLOWED.

TLHAPI, V V

(ACTING JUDGE OF THE HIGH COURT)
ATTORNEYS FOR THE PLAINTIFF

HACK STUPEL & ROSS, PRETORIA

ATTORNEYS FOR THE DEFENDANT

PG DE JAGER ATTORNEYS PRETORIA