/SG

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE:
CASE NO: 59378/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

8·10·2014
DATE SIGNATURE

9/10/2014

In the matter between:

FIRSTRAND BANK LIMITED T/A WESBANK APPLICANT

And

MONICA KOENA MABOJA RESPONDENT

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] This is an application for summary judgment against the defendant/respondent as follows:

"1. Confirmation of Cancellation of the Agreement;

2. That the Defendant/Respondent be ordered to return the following motor vehicle to the Plaintiff/Applicant:

   2010 MERCEDES-BENZ C180K BE AVANTGARDE A/T
   ENGINE NUMBER: 27191031316964
   CHASSIS NUMBER: WDD2040452R127930;

3. That the Damages component of the Plaintiff's/Applicant's claim, arising out of the Defendant/Respondent's breach of the Agreement entered into between the parties, to be postponed *sine die*;

4. That the Defendant/Respondent be ordered to pay the Plaintiff's/Applicant's costs related to the summary judgment application.

5. Further and/or alternative relief."

[2] The parties hereto will be referred to as in convention.

BRIEF FACTS

[3] The plaintiff, by way of a combined summons, instituted an action against the defendant for the relief that is similar to the relief that it seeks in this application. Upon service of the summons on the defendant, appearance was entered on her behalf. A notice in terms of rule 35(14) of the Uniform Rules of Court and a Notice of Exception were

simultaneously filed. These were served on the same date and place with the intention to defend the action. The plaintiff, without responding to the notices, launched this application against the defendant.

[4] This then meant that two applications served before my sister KUBUSHI, J. These are the plaintiff's summary judgment application and the defendant's exception. KUBUSHI J decided to deal with the exception as the parties agreed that the exception should be heard first and that the summary judgment application would be continued with only in the event that the exception was dismissed.

[5] The matter, on the exception, was heard and the exception was dismissed with costs on 27 August 2013.

[6] The summary judgment application was reinstated by notice dated 28 August 2013 for hearing on 24 October 2013. However, the notice was withdrawn by another notice dated 8 October 2013. The application was again reinstated by notice dated 4 October 2013. The application in terms of this notice was to be heard on 24 October 2013. By another notice dated 1 November 2013 the application was placed on the roll of 10 January 2014 for hearing. By notice dated 14 January 2014, the application was reinstated for hearing on 6 March 2014 when the matter served before me.

[7] I must point out that KUBUSHI J aptly dealt with the issue of exception and touched on some aspects which are relevant to this application. Lack of jurisdiction was raised in the exception of the defendant. All the

jurisdictional factors were, one by one, appropriately dealt with by KUBUSHI J and I find nothing wrong with her judgment.

[8] The defendant's view is that the court does not have jurisdiction to hear and adjudicate this matter. This, it would appear, because the magistrate's court has unlimited monetary and incidental jurisdiction in all matters arising from the National Credit Act, 34 of 2005 (the NCA). Specific reference was made to section 90(2)(K)(vi)(aa) of the NCA.

[9] The issue came under the scrutiny of the full court in the matter of *Nedbank Ltd v Matemann and Others* 2008 4 SA 276 (T). There, the Court had to answer the question whether the provisions of the NCA preclude the High Court from hearing and adjudicating matters involving issues which emanate from the NCA. The Court found that the NCA has no express section which specifically excludes the jurisdiction of the High Court and that of its registrar. See section 2(7) of the NCA. There is a strong presumption against the ouster or curtailment of the High Court's jurisdiction. See, *Lenz Township Co (Pty) Ltd v Lorentz NO en Andere* 1961 2 SA 450 (A) 455B; *Minister of Law and Order and Others v Hurley and Another* 1986 3 SA 568 (A) 584A-B and *Millman and Another NNO v Pieterse and Others* 1997 1 SA 784 (C) 788G-J.

[10] Where the jurisdiction of the High Court is inferentially excluded the inference so ousting the jurisdiction of the High Court has to be clear and unequivocal. See *Reid-Daly v Hickman and Others 1981 2 SA 315 (ZA) 318F-G.*

[11] Section 90 of the NCA is of paramount importance. It deals with "unlawful provisions of credit agreements". A credit agreement is not supposed to contain unlawful provisions. Provisions declared unlawful are found in section 9(2) of the NCA. An unlawful provision in a credit agreement is unlawful from the date that the provision purported to take effect. See *Nedbank Ltd v Matemann and Others* (*supra*) and section 90(3) of the NCA.

[12] Section 90(4) of the NCA provides:

> "(4) In any matter before it respecting a credit agreement that contains a provision contemplated in subsection (2), the court must –
>
> (a) sever that unlawful provision from the agreement or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or
>
> (b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect,
>
> and make any further order that is just and reasonable in the circumstances to give effect to the principles of section 89(5) with respect to that unlawful provision

or entire agreement as the case may be." (My emphasis)

It is significant to note that a credit agreement may be severable.

[13] Mr S N Mokone informed the court that the defendant abandoned two of the defendant's points *in limine*. These are previous unpaid costs and non-compliance with Act 62 of 1995. He, however, persisted with the excipiability of the combined summons; defective grounds for summary judgment and defective affidavit.

[14] I shall deal with the remaining three points *in limine* raised by the defendant.

1. EXCIPIABILITY OF COMBINED SUMMONS

This was adequately dealt with by KUBUSHI J in her judgment referred to above. She, in my view, correctly found that none of the points raised had merit. I agree with her judgment and the order that she ultimately made. The exception was correctly dismissed with costs. I see no need to add anything to what she said when she appropriately dealt with the issues.

2. DEFECTIVE GROUND FOR SUMMARY JUDGMENT

Rule 32(1) of the Uniform Rules of Court provides:

"(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only –

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for …;

together with any claim for interest and costs.

(2) The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay. If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a

stated day not being less than 10 days from the date of the delivery thereof.

(3) Upon the hearing of an application for summary judgment the defendant may –

(a) give security to the plaintiff to the satisfaction of the registrar of any judgment including costs which may be given, or

(b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence *viva voce* or on affidavit: Provided that the court may put to any person who

gives oral evidence such question as it considers may elucidate the matter.

(5) If the defendant does not find security or satisfy the court as provided in paragraph (b) of subrule (3), the court may enter summary judgment for the plaintiff." (My emphasis)

[15] The plaintiff, in this application, is claiming delivery and return of specified movable property under rule 32(1)(c). Clause 12.2.2 of the lease agreement allows the plaintiff the right to claim return of the motor vehicle in the event of the defendant failing to honour her obligations in terms of clause 12.1.1 up to 12.1.8 of the lease agreement. The plaintiff has duly dealt with the defendant's breach in paragraph 5.11 of its particulars of claim. Indeed, as correctly submitted by Mr JA Du Plessis, on behalf of the plaintiff, the respondent's contention that the order for cancellation of the lease agreement and the order for the return of the motor vehicle are extricably interwoven, is without any foundation or merit. The lease agreement entered into by the parties on 14 January 2011, indeed, affords the applicant the right to claim return of the motor vehicle without first having to cancel the written lease agreement. See clause 12.2.2 of the lease agreement:

[16] DEFECTIVE AFFIDAVIT

The objection here relates to the fact that the deponent to the affidavit in support of the summary judgment application, instead of averring:

"In her opinion there is no *bona fide* defence to the action."

She declared that:

"she verily believes that the defendant/respondent has no *bona fide* defence to the action."

In *Wonder Flooring v North West Development Corporation Ltd* 1997 1 SA 476 (BSC) 478D-E,

the court found that to suggest that there is a difference between "verily believe" and "in my opinion" was overly technical and that both would be adequate. I agree.

[17] DELIVERY OF RULE 35(14) NOTICE

The defendant avers that failure to respond to the notice simply means that the plaintiff is not a registered bank. The averment has no merit.

[18] Rule 32(3)(a) and 32(3)(b) are very important in summary judgment applications.

Rule 32(3)(a) provides that upon the hearing of the application, the defendant may give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given. The defendant has not done this.

Rule 32(3)(b) makes provision for the defendant to, by way of an affidavit or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that the defendant has a *bona fide* defence to the action. The affidavit or evidence, however, has to disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

[19] The defendant has to set out facts which, if proved at the trial will constitute an answer to the plaintiff's claim. This must be done with a sufficient degree of clarity to enable the court to establish whether the defence deposed to, if proved at trial would constitute a good defence to the action. The court, from the affidavit, must be able to enquire whether the defendant has disclosed the nature and grounds of her defence, and whether the facts disclosed show that the defendant has a *bona fide* defence which is good in law to either the whole or part of the claim. The defence must be valid in law and must be set out in a manner which is convincing. See *Maharaj v Barclays National Bank Ltd* 1976 1 SA 418 (A); 426 *Breitenbach v Fiat SA (Edms) Bpk* 1976 2 SA 226 (T) and *Marsh v Standard Bank of South Africa Ltd* 2000 4 SA 947 (W).

[20] One has to ask oneself if the defendant's affidavit is such that it meets the requirements of rule 32(3)(a) and/or rule 32(3)(b). Mr Du Plessis' submissions is that the affidavit does not. The defendant, he further submitted, in the affidavit, fails to raise specific merits defences to the plaintiff's claim. It is his view that the defendant merely raised technical defences which have no merits and fail to disclose a *bona* defence to the plaintiff's claim. A conspectus of the contents of the affidavit, indeed,

reveal that no *bona fide* defence to the plaintiff's claim has been raised by the defendant.

[21] RECEIPT OF SECTION 129 NOTICE

The plaintiff, in paragraph 9 of its particulars of claim, has on a balance of probabilities, demonstrated that the notice was delivered to the defendant. A copy of the notice, proof of postage and the "track and trace" report from the website of the post office are annexures "D" and "E" to the particulars of claim.

[22] Mr S N Mokone, for the defendant, advised the court that they were not dealing with the remaining three points *in limine*. All they were referring the court to was the aspect of jurisdiction which formed the basis of their appeal against the jurisdictional part of KUBUSHI J's judgment including the entire costs order handed down on 27 August 2013.

[23] It was Mr Mokone's further submission that only the Magistrate Court ought to have dealt with the matter. He argued that the Full Court in the matter of *Nedbank Ltd v Mateman and Others* (*supra*) had committed errors. A close reading of the judgment never reveals any errors to me. The full court judgment which is good, in any event, binds us. It must be remembered that section 90(4)(a) covers instances where a credit agreement has a provision which is unlawful. That provision can be severed. The lease agreement does not seem to have a provision which requires the application of section 90(4)(a) of the NCA.

[24] Mr Du Plessis submitted that the matter had been dragging since 2012. He held the view that leave to appeal in a matter such as this should not be a bar to a summary judgment application where the appeal has no merits. Mr Du Plessis argued that an application for leave to appeal was only filed last year and that same was never proceeded with until the application was argued. The defendant, according to him, was procrastinating with the hope of buying time. This seems to be the ease here. The Court, in the circumstances of the current application, he further argued, should not concern itself with the pending appeal. I agree. In any event, should the appeal, if any, be successful, the plaintiff will always be in a position to satisfy whatever remedy the defendant may have against it. Summary judgment, by its nature, is meant to assist the plaintiff as speedily as possible where the application is warranted. This is one such application which, in my view, should succeed.

[25] I make the following order:

Summary judgment is granted against the defendant as follows:

1. Cancellation of the agreement is confirmed.

2. The defendant is ordered to return the following motor vehicle to the plaintiff:

   2010 MERCEDES-BENZ C180K BE AVANTGRADE A/T
   ENGINE NUMBER : 27191031316964
   CHASSIS NUMBER : WDD2040452R127930

3. The damages component of the plaintiff's claim arising out of the defendant's breach of the agreement entered into between the parties is postponed *sine die*.

4. The defendant is ordered to pay the plaintiff's costs related to the summary judgment application.

M W MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

59378/2012/sg

Heard on: 6 March 2014
For the Applicant: Adv J A du Plessis
Instructed by: Hack Stupel & Ross Attorneys
For the Respondent: Mr S N Mokone
Instructed by: Mokone & Mokone Attorneys
Date of Judgment: 09/10/2014