

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 51608/2020
REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED
Date: 4/5/2023

In the matter between:

ABSA BANK LIMITED Applicant

And

BEKKER, PIETER JOHANNES WILLEM Respondent
(IDENTITY NO: 6[...])

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This is an interlocutory application wherein the applicant (plaintiff in the main action) seeks an order for the amendment of its particulars of claim in terms of Rule 28, subsequent to align same with the defendant /respondent's default to comply with the terms of the restructured repayment of its debt to the applicant and following a Magistrate's Court declaratory that the respondent is over- indebted. In the main action the applicant seeks an order that the respondent returns the motor vehicle it had purchased from the applicant under an instalment sales agreement.

[2] The opposition to the amendment is buttressed on the contention that the applicant's claim of the had prescribed, in terms of section 10 of the Prescription Act 68 of 1969, at the time summons were issued

[3] For purposes of the determination in this hearing, the respondent who has filed a plea to the applicant's particulars of claim, does not specifically deny its indebtedness to the applicant. At para 6 of the answering affidavit the respondent states:

"6. I am advised that if it is evident that the applicant's claim, as per its intended amendment, has prescribed, the honourable court should not allow the amendment."

[4] While the issue of prescription *per se* is not before this court, reliance thereon by the respondent and his allegation quoted in the preceding paragraph enjoin this court to make a determination on the issue. A failure to do so may result in the order given being made without giving reason(s) therefor. The upshot of pronouncing on the issue is that the *lis* between the parties, save for technical defences raised in the respondent's plea, may be disposed of in the present proceedings.

FACTUAL MATRICS

[5] The parties entered into an instalment sale agreement on 26 November 2007 in terms of which the respondent obtained finance from the applicant for the purchase of the motor vehicle sought to be returned to the applicant. It is not in dispute that as at the 7 August 2020 the respondent was, in breach of the agreement, in arrears with his instalment payments to the tune of R61 138.63 and with the balance of R305 928.08 still outstanding.

[6] The respondent was declared over-indebted by an order of the Magistrate court on 18 June 2010 and the repayment of his debt to the applicant restructured commencing on 7 July 2010 and for respondent to effect payments on or before the 7th of every succeeding month until the debt was fully paid.

[7] The respondent defaulted on the rearranged repayment terms and last made payment on 14 June 2017.

[8] The applicant issued summons on 30 September 2020 claiming the balance of the debt, standing at R305 928.08.

THE AMENDMENT

[9] The applicant seeks to amend certain paras of its particulars of claim, to align same with the version of the defendant as follows;

“13.1 The debt restructuring order was granted by the Randburg magistrates Court on 18 June 2010. A copy of the is annexed herewith as annexure ‘D1-D3,” (sic) By the addition of sub-para 14.1 to para 14 as follows:

“14.1 The Defendant has failed to comply with the provisions of the aforesaid debt restructuring order and, consequently, the Plaintiff is entitled, in terms of section 88(3) of the National Credit Act 34 of 2005, to enforce the provisions of the instalment sale agreement.”

[10] The applicant also seeks to effect, by way of amendment, corrections to the chassis numbers of the motor vehicle sought to be returned to it as follow; 10.1 substituting the numbers **A[...]** with the numbers **A[...]**.

THE OBJECTION AND BASIS THEREOF

[11] The respondent has filed a notice of objection to the sought amendments and contends that the amendment be refused in light of the following facts:

11.1 The last payment made by the defendant was on 14 June 2017;

11.2 The defendant ought to have made payments on the 7th of each month in terms of the restructuring order;

11.3 The applicant was entitled in terms of section 88(3) of the Act to enforce the agreement, without notice, on 8 July 2017 when the breached of the order occurred;

11.4 *“In terms of section 11(d) of the Prescription Act, 1969, the period of prescription in respect of the debt is three years and, accordingly, the claim prescribed on 8 July 2020.”* (Sic)

11.5 The plaintiff issued summons only on 30 September 2020, just under three months after the claim had become prescribed, according to the respondent’s version.

ANALYSIS

[12] The respondent effectively admits that he defaulted and has been in breach of the restructuring order on 8 July 2017. He in actual fact has defaulted since 8 June 2017 and the applicant entitlement to enforce the instalment sale agreement would have arisen on 7 July 2017. That the applicant had not acted on that date and accepted late payment is of no moment. The applicant had by its non-action condoned the late payment.

LEGAL RESTRICTIONS ON APPLICANT

[13] The applicant’s present application for amendment is premised on the provisions section 88(3) of the Act which provide that:

“[3] subject to the Section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in Section 83 or 85, or notice in terms of Section 86(4)(b)(1), may not exercise or enforce by litigation or other judicial process any right or security under that agreement until;

(a) The consumer is in default under the credit agreement; and

(b) *One of the following has occurred;*

(i) *an event contemplated in sub –section (1)(a) through (c); or*

(ii) *the consumer defaults on any obligation in terms of a rearrangement agreed between the consumer and credit providers, or by a court or the tribunal.”*

[14] The respondent acknowledges to have been in default and, therefore, in breach of the restructuring order on 8 July 2017. The applicable principle applicable in such circumstances, and in the present matter, was aptly laid down in *Ferris & Another v First Rand Bank Limited* [2013] ZACC 46, namely, that once the restructuring order had been breached, the credit provider was entitled to enforce the credit agreement without further notice. The respondent's circumstances in the present matter fall, in all fours, within the radar of this principle.

[15] Besides, the provisions of clause 4.1 of the instalment sale agreement precludes the passing of ownership of the vehicle to the respondent until the full purchase price and interest has been paid. The provisions of the said clause read thus;

“4.1 The ownership of the goods would remain vested in the Plaintiff and would pass to the Defendant only upon receipt of all monies owing under the agreement.”

[16] The respondent has neither alleged nor demonstrated that he has fully paid for the motor vehicle, but in fact admits to being in default of both the agreement and the restructuring order. He consequently has no legal basis for the retention of possession of the vehicle or refusal to return same in the face of the applicant's demand therefor. The applicant's right of ownership is not susceptible to prescription in terms of the Prescription Act 68 of 1969. Acquired prescription occurs where the owner of goods that are, for some lawful reason, in the possession of another person and the lawful owner fails to reclaim possession despite the person resisting to restore possession to the rightful owner. The provisions of the Prescription Act do

not find application where the return of the physical possession of the goods is premised on the right of ownership. The respondent's contention otherwise stands to be rejected.

[17] The oasis of the respondent's incorrect invocation of the provisions of the Prescription Act is in his failure to comprehend the difference between the foundation of the relief sought by the applicant herein (the right of ownership) and a debt. The cancellation of the instalment sale agreement brings an end to reliance on the debt and leaves the parties in a situation governed by clause 4.1 of the agreement, in terms of which ownership of the vehicle has not passed onto the respondent, but vests in the applicant as the respondent has not fully paid therefor. The respondent would have had to wait for the lapse of a period of thirty years, from the date the demand for the return of the vehicle was made, to successfully invoke acquisitive prescription and would have to have pleaded same on its plea.

[18] In the circumstances of this case, the applicant is no longer pursuing payment of the debt, but would accept payment of the balance outstanding to relinquish its right of ownership. In the instance that the respondent fails to pay the balance, the applicant seeks the return of the vehicle and retains the right to sue the respondent for any damages or loss it (applicant) may suffer should the amount the vehicle is subsequently sold for be below the balance owed. The relief sought is not and cannot, consequently, be a debt and, therefore, not susceptible to extinctive prescription in terms of the Prescription Act. In drawing the distinction between extinctive prescription and acquired prescription, the court in *ABSA BANK LTD V KEET* 2015 (4) SA 474 (SCA) said the following:

"[25] In the circumstances the view that the vindicatory action is a 'debt' as contemplated by the Prescription Act, which prescribes after three years is in my opinion contrary to the scheme of the Act. It would, if upheld, undermine the significance of the distinction which the Prescription Act draws between extinctive prescription on the one hand and acquisitive prescription on the other. In the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of

action vested in the creditor, which is a corollary of a 'debt', becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose the right to a thing. To equate the vindicatory action with a 'debt' has an untended consequence in that by way of extinctive prescription the debtor acquires ownership of a creditor's property after three years instead of 30 years that is provided for in s 1 of the Prescription Act, this is an absurdity and not a sensible interpretation of the Prescription Act.

[27] In the circumstances, the court a quo erred in upholding the special plea on the basis of its finding that a claim for delivery of the tractor was a 'debt' that becomes prescribed after three years by virtue of the provisions of s 10 of the Prescription Act."

[19] In *Ferris & Another v First Rand Bank Ltd* [2013] ZACC 46 laid down the principle that once a restructuring order has been breached, the credit provider is entitled to enforce the credit agreement without notice. The court went further to hold that section 88(3)(2) precludes a credit provider from enforcing a debt under debt review, unless, *inter alia*, the debtor has defaulted on a restructuring order, as is the case in the present matter.

CONCLUSION

[20] It follows from the above exposition of the legal position that the claim *in casu* is a vindication of a right, can by no means be equated to a debt and, consequently, not susceptible to the provisions of the Prescription Act. I find, therefore, that the applicant's entitlement to the relief sought in the main action has not prescribe and, accordingly, that no reason exist for not granting the sought amendments. Importantly, there is absence of prejudice that may befall the respondent as a result of the amendment or the granting thereof. The opposition to the granting of the relief sought by the applicant, consequently, stands to be dismissed.

COSTS

[20] The principle that costs follow the outcome finds application in these proceedings. The applicant is, therefore, entitled to costs of this application.

ORDER

[21] Resulting from the findings in this judgment, an order is granted as follows:

1. The applicant is granted leave to effect the amendments sought in the notice of Motion.
2. The respondent is ordered to pay the costs of this application on an attorney and client scale.

M P N MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

APPEARANCES

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THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON
4 MAY 2023