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

Case Number: 88862/2015

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

DATE: 01/11/2023

In the matter between:

**WESBANK, a division of FIRSTRAND
BANK LIMITED**

Applicant

And

DITIRISANO TRADING (PTY) (LTD)

1st Respondent

**RO METRICKS TRADING (PTY) LTD t/a
JAGUAR LAND ROVER N4**

2nd Respondent

In Re:

Case No. 8545/2019

In the matter between:

WESBANK, a division of FIRSTRAND

Plaintiff/Applicant

BANK LIMITED

And

DITIRISANO TRADING (PTY) (LTD)

1st Defendant/ 1st Respondent

**RO METRICKS TRADING (PTY) LTD t/a
JAGUAR LAND ROVER N4**

2nd Defendant/2nd Respondent

JUDGEMENT

MNYOVU AJ:

INTRODUCTION

[1] This is an application to seek interim relict *inter alia*, of an order directing the first respondent to deliver into the possession of the Sheriff a 2015 Range Rover 4.4 SD V8 Autobiography Land Rover motor vehicle with chassis number: SAL[...] and engine number: 044[...], and transport the motor vehicle to the Applicant's garage premises situated at Auction Operation, 135 Albertina Sisulu Road, Roodepoort, the applicant shall retain the motor vehicle at such garage premises under the security pending the outcome of the action under the aforesaid case number. The applicant shall not use or permit that the motor vehicle be used, pending the outcome of the aforesaid action. Should the first respondent fail to comply with the order within five (5) days of the service, the sheriff is authorised and directed to take possession of the motor vehicle from wheresoever he/she may find and return the motor vehicle to the Applicant.

BACKGROUND

[2] On or about 25 March 2015 and at Polokwane, the applicant and the first

respondent entered into written Instalment Sale Agreement ("the credit agreement") for the purchase of a Range Rover motor vehicle. In terms of the credit agreement, the total price payable was the sum of R2 154 000.00 including interest charges in the sum of R379 971.09, calculated at 9.9 I% to the prime rate by a margin of plus 66% then. The purchase price was to be payable in 61 equal monthly amounts of R 13 499.51 plus a monthly service fee of R57.00, amounting to R 13 556.51 instalment.

[3] The ownership of the vehicle would remain vested to the applicant, such ownership thereof will not pass to the first respondent until receipt of all amounts payable by the first respondent to the applicant, should the first respondent fails to pay any amount due to the applicant, then the applicant would *inter alia*, have the right to claim from the first respondent the amount which would have been paid in terms of the Credit Agreement, and the applicant be entitled to cancel the agreement, take possession of the vehicle in terms of Attachment order. retain all payments already made and claim as liquidated damages the difference between the balance outstanding and the net proceeds of the vehicle, less permitted default charges, and the reasonable expenses incurred in connection with the sale of the motor vehicle.

[4] Under the same breath, the Second respondent bounded herself in writing as the Surety, in solid um and as co-principal debtor for the payment of all sums due to the Applicant by the first respondent in terms of or arising out of or incidental to the Agreement. At the time of the conclusion of the agreement. the credit agreement and the surety fell outside of the ambit of the *National Credit Act* 34 of 2005, *by* virtue of the provision of Section 4(1)(b) as stipulated.

[5] On or about 2015 the first respondent as the Plaintiff instituted legal action to this above Honourable Court against the applicant, who is the Defendant, in its particulars of claim claiming Latent Defect on the same motor vehicle, Range rover under the case number 88862 /2015, and cancelled the credit agreement between the parties, the matter is pending in this above Honourable Court. On or about 07 February 2019 the applicant as the Plaintiff instituted legal action to this above

Honourable Court under case number 8545/2019 against the first respondent who is the Defendant in the action, claiming return of the motor vehicle Range rover from the first respondent, applicant contended on its particulars of claim that they are entitled to return of the motor vehicle by virtue that the respondent has cancelled the Credit Agreement in their summons in the pending action, they are still registered owners of the motor vehicle as it was in arrears to the sum of R102 824.74 as at 05 June 2018. This action is also pending to this above Honourable Court.

[6] The applicant brought this Interlocutory application under case number 88862/15, for an order to grant it interim relief *inter -alia* to direct the first respondent to return the same motor vehicle into their storage until the finalisation of the pending action under the aforesaid action instituted *by* the first respondent as the Plaintiff and further the first respondent has cancelled its sale of agreement with the Applicant.

[7] The first respondent tiled its opposing papers with the application requesting the above honourable court to condone its late filing of the notice of intention to oppose, and its Answering affidavit, if granted, address the court with points in *limine* on *lis pendens* and on lack of jurisdiction before addressing the merits of the case with requirements of interim relief sought by *the* applicant. The applicant is opposing the first respondent's application for condonation. I will deal with the reasons below.

CONDONATION -THE LAW

[8] On condonation applications, to determine whether applicant has shown good cause for the delay, I am guided by *the* following factors: degree of lateness, the explanation for the delay, the degree of non-compliance with the rules. the importance of the case, the prospects of success, interest in the finality of its judgement and the avoidance of unnecessary delay in the administration of justice. These factors are not individually determinative, but must be weighed. one against the other. (See *Dengetenge Holdings (PTY) (Ltd) v Southern Sphere Mining and Development Company Ltd and Others* 2013 (2) All SA 251 (SCA) at para 11.

[9] In the present case, it is trite that the applicant who seek condonation who is the first respondent in this application is required to meet the two requisites of good cause before they can succeed for condonation. The first entails establishing a reasonable and acceptable explanation for the delay, degree of lateness, non-compliance with the rules, and secondly. interest in the finality of its judgement and the prospects of success.

[10] The first respondent on its answering affidavit applied to this honourable court for condonation for late filing of the Notice of intention to oppose, stating the reasons of its late filing, on the grounds that at the time applicant served its papers during February and March 2020, the respondents were legally represented by their erstwhile attorneys, Bowman Attorneys the first respondent contended that they personally instructed their erstwhile attorneys to file the notice of intention to oppose this interlocutory application, upon appointment of the new current attorneys, and accessing the application itself , the parties engaged *in* negotiations to settle the matters, which negotiations were unsuccessful.

[11] The first respondent's counsel submitted to this court that the Applicant's Notice of Motion, failed to set forth a day or period within which first respondent was required to file its Notice of intention to oppose as required in terms of Rule 6 (5) (b) (iii) therefore no legal basis upon which the Notice of intention to oppose was filed out of time, further submitted that it was not the first respondent's answering affidavit that would have been out of time, but it would have been the notice of intention to oppose which preceded the answering affidavit, the respondent's notice to oppose was therefore not out of time because there was no time limit for its service and filing in terms of the notice of motion. Therefore, its notice of motion was defective for failure to comply with Rule 6(5) (a) and 6 (5) (b) (iii).

[12] The first respondent's counsel argued further that the late filing of the Notice of intention to oppose a year later was triggered by the unreasonable demand of the

applicant for the first respondent to waive its rights in a pending matter before this Court, and the parties could not reach Settlement Agreement. The Notice of intention to oppose was not out of time. should the court find it was late, condonation be granted for such lateness as prayed for. The applicant in this matter does not stand to suffer any prejudice if the condonation is granted.

[13] The applicant on its replying affidavit contended that the first respondent did not made out a case for condonation for its late filing of notice of intention to oppose and answering affidavit, they delayed for whole year to serve and file theirs papers even after appointment of their new attorneys, the first respondents simply ignored the Rules of the Jaw, they took a *whole* year to file its papers, which is not an excuse and further they have not provided sufficient explanation for their default to warrant a condonation.

[14] The counsel for the first respondent further argued to this Court, there are pending actions in the same matter and applicant *has* received payments from the first respondent, and the motor vehicle is in safe hands in the possession of the respondents, therefore, the applicant will not suffer any pr judice of condonation for the late filing of the answering affidavit.

[15] The counsel for the applicant argued that first respondent failed to demonstrate that its case carries any prospect of succeeding in the main action particularly that the first respondent cancelled the agreement between it and the applicant; and this is an important factor that should be taken into account by the Court in determining whether or not to grant condonation, as it is clear from the above that the first respondent failed to demonstrate good cause for the condonation sought therefore above honourable ought to dismiss this application for condonation and ought to regard first respondent's answering affidavit as *pro non scripto*.

Analvsis And Reasoning

[16] I am encouraged by the case of *Dengetenge Holdings (PTY) (Ltd) v Southern*

Sphere Mining and Development Company Ltd and Others 2013 (2) All SA 251 (SCA), in a case where aspect of prospecting rights its appeal lapsed for failure on the appellant to prosecute the appeal timeously.at paragraph 13, the following is stated :

"what calls for some acceptable explanation is not only delay in the filing of the heads argument, but also the delay in seeking condonation. An appellant should, whenever it realises that it has not complied with a rule of court, apply for condonation without delay (see *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449 G- H.

[17] The best that can be gleaned from the first respondent's delay in failing to apply for condonation *in* reasonably good time, is that the first respondent cancelled the sale of agreement, the first respondent has made payments to the applicant , and the first respondents did file the Notice of Intention to oppose in time and admit to have delayed for the whole year to file its answering affidavit in time, as they were engaging in settlement negotiations *with* the applicant and were legal represented by their erstwhile attorneys.

[18] As alluded on paragraph 8 above, I have to weigh the factors, one against the other, to determine whether first respondent has shown good cause for the delay. I have come to the conclusion that the first respondent did not satisfy this court as to what was the reason for the entire period of the delay to file its answering affidavit, after the settlement negotiations have dismally failed regardless they were legally represented at the time, I am of the view that failure of the settlement negotiations between the parties cannot be reasons for the delay, as the first respondent was legally represented at the time, in my view, the cancellation of the sale of the agreement by the first respondent was the reason why the first respondent delayed to file their answering affidavit, in that, not good cause was shown of delay by the first respondent who is seeking condonation. The first respondent refused to waive its right on the pending action against the applicant. which led to settlement negotiations to fail, which in my view success of settlement negotiations \ould have hold a weight in demonstrating prospect of success

to first respondent's pending action against the applicant, in which this honourable court has jurisdiction. Having considered that the applicant seeking condonation has also cancelled the sale of agreement prior to this application, it would not be in the best interest of this court to grant condonation as prayed for by the first respondent. In that view, the application for condonation by the first respondent is dismissed.

RELIEF SOUGHT

[19] The relief sought by the applicant amounts to an interlocutory mandatory interdict, an interim interdict aimed at ensuring, as far as is reasonably possible that the party who is ultimately successful will receive adequate and effective relief.

[20] A party seeking an interim interdict must allege and prove the following:

20.1 a *prima facie* right:

20.2 a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted

20.3 a balance of convenience in favour of the granting of the interim relief, and

20.4 the absence of any other satisfactory remedy.

[21] I have been following the case on caselines since the hearing of this matter on the 10th October 2022 and reserved my judgement because of the pending actions between the parties, I am satisfied that the applicant has met the requirements for an order of an interim relief they seek against the respondents.

ORDER:

[22] In the result, I make the following order:

22.1 The first respondent's application for condonation is dismissed;

22.2 The applicant's application for the interim interdict is granted.

22.3 The respondents shall pay the costs of suit on the Attorney and client scale, jointly and severally, the one paying the other to be absolved.

B. F MNYOVU
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	Adv N S Nxumalo
Instructed by:	Smit Jones & Pratt Inc

Counsel on behalf of Respondent:	Adv M Mamponya
Instructed by:	Matuba Maponya Attorneys

Date heard:	10 October 2023
Date of Judgement:	01 November 2023