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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case no: 2370/15

Heard on: 26/04/2016

Delivered on: 10/06/2016

In the matter between

ABSA BANK LIMITED

Applicant/Plaintiff

And

FUMANI SHIKWAMBANA

Respondent/Defendant

JUDGMENT ON SUMMARY JUDGMENT

PAKATI J

- [1] The plaintiff, Absa Bank Limited, applies for summary judgment against the defendant, Ms Fumani Shikwambana, in the following terms:

“1. The Plaintiff’s cancellation of Instalment Sale Agreement is confirmed.

*2. The Defendant is directed to forthwith return to the Plaintiff the goods, being a **2011 RENAULT MEGANE 1..... 1.6 SHAKE IT** with **ENGINE NO: K4MR8.....** and **CHASSIS NO: VF 1B.....**, failing which the Sheriff is authorised to attach the aforesaid goods and hand the goods to the Plaintiff;*

3. Costs of suit.”

[2] The plaintiff issued summons against the defendant on 12 November 2015 for cancellation of the instalment sale agreement and the return of the motor vehicle described above. On 14 December 2015 the defendant filed a notice of intention to defend the action. Consequently, on 17 December 2015 the plaintiff filed a notice of set down of the application for summary judgment for 15 January 2016. On 12 January 2016 the defendant filed a notice to oppose the application accompanied by an affidavit disclosing the nature and grounds of opposition and the material facts upon which she relied for her defence.

[3] It is common cause that on 25 October 2012 at Kimberley the plaintiff and the defendant entered into a written instalment sale agreement in terms of which the plaintiff provided motor vehicle finance to the defendant upon payment of a deposit. In compliance with the agreement Audi Centre Johannesburg, a third party, delivered the said motor vehicle to the defendant. The principal debt was R311 296-64 payable in 72 monthly instalments of R3616.62 from 01 December 2012. The following were *inter alia* express, alternatively implied, further alternatively, tacit material terms of the agreement:

3.1 Ownership of the goods would at all times remain vested in the seller until the defendant has complied with all the obligations in terms of the agreement including payment of the outstanding

balance to the plaintiff from which date the defendant would be the owner;

3.2 The agreement may be ended by surrendering the goods to the bank in terms of Clause 21 which states in part:

“21.1 Where you have sent us a written notice to end this agreement (“termination notice”), you may, if the goods are in our possession, request us to sell the goods or otherwise return the goods to us within 5 (five) business days after the date of your termination notice.”

[4] Ms Shikwambana disputes that the instalment sale agreement was cancelled by the plaintiff. She alleged that she returned the motor vehicle and thereby cancelling the agreement. She relies on Clause 19.3 of the agreement which reads:

“19.3 If this agreement was entered into at any place other than our registered business address, you may end this agreement within 5 (five) business days after the date on which it was signed by you, provided you:

19.3.1 Deliver a notice in the prescribed form to us; and

19.3.2 Offer to return the goods to us.”

[5] Ms Shikwambana disputes further that she filed the appearance to defend solely for purposes of delay. She raised two points *in limine*, namely: *dies non* and *lis pendens*.

DIES NON

5.1 The defendant contended that the plaintiff served the application for summary judgment on 15 December 2015 and set the matter down for hearing on 15 January 2016 knowing that the period between 16 December 2015 and 15 January 2016 are *dies non*. It

should be noted that in argument Mr D Masia, counsel for the Ms Shikwambana, no longer pursued this point.

5.2 **LIS PENDENS:**

Ms Shikwambana instituted motion proceedings against the plaintiff (Absa Bank) and other defendants in North Gauteng High Court under Case No. 19332/15. She contends that the issues raised in that case are similar to those advanced by the plaintiff in the summons as well as the application for summary judgment in this Court and the parties are the same.

- [6] Ms Shikwambana maintained that she has a *bona fide* defence to the plaintiff's claim. She contended that the motor vehicle in question had latent defects as a result of which she returned it on 27 October 2012 to Audi Centre Johannesburg and that occurred within 24 hours of it being delivered to her. According to her this is the *lis* that is still pending in North Gauteng High Court.
- [7] Mr JA Fourie, counsel for the plaintiff, argued that the point of *dies non* raised by the defendant is not applicable in an application for summary judgment. He argued further that no *lis* is pending between the parties.
- [8] Rule 26 and 32 (2) of the Uniform Rules of Court provide respectively:

““26 Failure to deliver pleadings-barring

Any party who fails to deliver a replication or subsequently pleading within the time stated in rule 25 shall be ipso facto barred. If any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and ipso

facto barred: **Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading.**” (My emphasis)

“32 (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.” (Emphasis added)

- [9] Clearly the days between 16 December and 15 January cannot be reckoned in the computation of days allowed for delivery of any pleading as contained in the proviso in Rule 26 above. “Any pleading” means just that. Summary judgments were not made an exception. The plaintiff’s conduct is therefore inconsistent with the rules and practise of this Court. This application was not urgent and the departure from established filing and sitting times of the court was irregular. The matter was accordingly set down pre-maturely.

Be that as it may, I will deal with the other point *in limine* and the merits of this matter for the sake of completeness.

- [10] The requirements for a defence of *lis pendens* are set out by Miller AJ in the case of **SIKATELE AND OTHERS v SIKATELE AND OTHERS**¹ as follows:

¹ [1996] 1 ALL SA 445 (Tk)

“The requisites of the defence are: (a) that there must be pending litigation. See Van As v Appollus 1993 (1) SA 606(C); (b) that the pending proceedings had to be based on the same cause of action. See Mtshali v Mtambo 1962 (3) SA 469 (G); and (c) that the other proceedings must be pending between the same parties or their privies. See Cook v Muller 1973 (2) SA 240 (N). The onus of proving the requisites rests on the party raising the defence. See Dreyer v Tuckers Land and Development Corporation (Pty) Ltd 1981 (1) SA 1219 (T) at 1231. ”

In terms of the authorities a court still retains a discretion to stay either of the proceedings.

- [11] Ms Shikwambana, in proving that there is pending litigation in North Gauteng High Court, attached Court Papers in Case No. 19332/15 wherein she made an application against Audi Centre Johannesburg as the first respondent and Absa Bank as the fourth respondent seeking an order in the following terms:

“1. An Order be given declaring the sale agreement between the Applicant and the First Respondent, Second Respondent, Third Respondent[s], as cancelled, and unenforceable between the parties.

2. An Order directing and enforcing the First, Second, Third Respondent, to take all the necessary steps to refund all the monies in the amount of R223 074.99 paid to them by the Fourth Respondent and that such money should be paid or refunded to either the Applicant (Fumani Shikwambana) or the Fourth respondent (Absa Bank).

3. An Order in the alternative, that pursuant to prayer 2 above and on condition that the Fourth Respondent (Absa Bank) accepts such refunds or payments from the First, Second and Third Respondent, the Applicant (Fumani Shikwambana), be excused and released from paying any /all instalments and/or all interests due to the Fourth Respondents in relation to any other sale agreement thereto.

4. Ordering Respondents, jointly and severally, payment by the one, the other to be absolved, to pay Applicant’s costs of this application, only in

the event, and if, any of the Respondents opt to oppose this application or relief to prayer(s) 1, 2 and 3 above.”

- [12] In para 3.5 of the Founding Affidavit attached to the Notice of Motion in the North Gauteng High Court application Ms Shikwambana described the fourth respondent (Absa Bank) as follows:

*“The Fourth Respondent is **ABSA BANK LIMITED** an authorised financial services provider being a company with limited liability, duly incorporated in terms of the Company Laws of the Republic of South Africa, with registered office at 170 Main Street, 3rd Floor, Absa Towers East, Johannesburg, **cited herein as an interested party** and the financier of the deal between [the] applicant and the First, Second and Third Respondent[s].” (Emphasis added).*”

- [13] From the above it is clear that the application in the North Gauteng High Court was for cancellation of the agreement because the motor vehicle had defects. Absa Bank was merely cited as an interested party. In my view, the cause of action in that case is different from the cause of action in the instant case. I am therefore not satisfied that the defendant discharged the *onus* resting on her in terms of the requisites in para 10 above.

- [14] To succeed in resisting an application for summary judgment a defendant is in terms of Rule 32 of the Uniform Rules of Court required to disclose fully the nature and grounds of his/her defence and his/her defence has to be *bona fide* and good in law. Navsa JA in **JOOB JOOB INVESTMENTS v STOCKS MAVUNDLA ZEK**² referred with approval to the case of **MAHARAJ v BARCLAYS NATIONAL BANK LTD**³ as follows:

² 2009 (5) SA 1 (SCA) at 12B-D

³ 1976 (1) SA 418 (A) at 425G-426E

“[32] ...Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are ‘drastic’ for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule...”

- [15] Paras 6 to 10 of the answering affidavit dated 02 July 2015, filed by Absa Bank in Case No. 19332/2015 (North Gauteng) the deponent, Ms Zamakhize Stofile, made the averment that:

“6. Although the Fourth Respondent [Absa Bank] took delivery of the vehicle the Applicant [Ms Shikwambana] returned the vehicle to the First Respondent [Audi Centre-Johannesburg] on or about 27 October 2012, as a result of an apparent dispute between the Applicant and the First Respondent.

7. The First Respondent informed the Fourth Respondent that the vehicle in question was on the premises of the First Respondent and further informed the Fourth Respondent that the Applicant refused to collect the vehicle.

8. As a result of the aforementioned the Fourth Respondent uplifted the vehicle from the First Respondent’s premises on or about 23 April 2013.

9. The Fourth Respondent uplifted the vehicle in order to secure the vehicle and to take it to a safe location as Fourth Respondent was concerned that the vehicle may be damaged or stolen.

***10. The aforementioned vehicle is still in safe storage with the Fourth Respondent [Absa Bank] at its storage facility in Boksburg.”** (Emphasis added)*

- [16] It is apparent from the above that the plaintiff is indeed in possession of the vehicle. Though Mr Fourie conceded that the motor vehicle is in the storage facility of the plaintiff he argued that the plaintiff is in *de facto* possession and that Ms Shukwamabna is the one in possession. Clause 16 of the agreement stipulates:

“16 OWNERSHIP

We are and will remain the owner of the goods, until you have fulfilled all your obligations to us under the agreement, at which point ownership of the goods will pass to you.”

- [17] The argument by Mr Fourie has no merit, taking into account Clause 16 *supra*. In my view, the facts alleged by Ms Shikwambana in her opposing affidavit constitute a *bona fide* defence as required by Rule 32 of the Uniform Rules of Court. In terms of the agreement the plaintiff is still the owner of the motor vehicle which is kept in its safe storage facility in Boksburg and therefore has control over it. By returning the motor vehicle Ms Shikwambana duly cancelled the agreement. The application for summary judgment has to be dismissed with costs.

In the circumstances I make the following order:

- 1. The application for summary judgment by the applicant, Absa Bank Limited, is dismissed with costs.**
- 2. The respondent, Ms Fumani Shikwambana, is granted the opportunity to enter and defend the action.**

BM PAKATI
JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the applicant: ***Adv JA Fourie***
Instructed by: ***C/OVAN DE WALL & PARTNERS***

On behalf of the respondent: ***Adv D Masia***
Instructed by: ***C/O VAN DEN HEEVER ATTORNEYS***