IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION - MTHATHA)

CASE NO. 58/2015

Heard on: 09 April 2015

Date delivered on: 23 April 2015

In the matter between :

STANDARD BANK SA LTD Applicant

And

ANDILE DOCTOR MBANE Respondent

JUDGMENT

MAJIKI J:

[1] The applicant (plaintiff) applied for summary judgment against the respondent (defendant) for an order in the following terms:

1. Confirmation of termination of the agreement;

2. Return of the 2013 ISUZU KB 300 CREW CAB LX with engine number 4JJ1KY9683 and vehicle identification number ADMURCER7C4652260 (the "asset") to the plaintiff; and

3. Costs

[2] It is common cause that the applicant had sold the asset to the defendant. The parties had entered into a written agreement in terms of which the applicant would sell the asset to the respondent. Delivery of the asset would be given to the respondent but ownership would remain with the applicant until the respondent had fulfilled all his obligations under the agreement.

[3] The main obligation by the respondent was the payment of R9 789.85 per month for a period of 59 months from the date of the agreement (24 July 2013) to 23 July 2018.

[4] The respondent failed to pay the monthly instalments as agreed. On 2 January 2015 the total arrear amount owed by the respondent was R51 614.91 and the full outstanding balance was R470 127.46.

[5] With regard to remedies in the event of a default of payment by the respondent and or breach, the agreement made the following express provision:

The applicant may-

18.4 at its election and without affecting any other rights that it may have in terms of the agreement or otherwise, recover from the respondent payments of all amounts owing under the agreement by adhering to the default procedure described above.

[6] With regard to the breach or default by the respondent on any his obligations, the applicant in the particulars of claim averred that the material express alternatively tacit alternatively implied terms of agreement were as follows:

"the plaintiff would be entitled to :

a. Cancel the agreement;
b. Repossess and sell the asset;
c. Retain all payments already made by the defendant to the plaintiff."

[7] The applicant also averred that after the respondent had been in default of his obligations arising from the agreement for a period exceeding 120 business days, the applicant sent a letter, which was delivered to the applicant by registered post, in compliance with sections 129, 130 and 131 of the National Credit Act 34 of 2005. The respondent failed to make good of the arrears or make an election of any options provided for in the letter. In consequence thereof the applicant cancelled the agreement, alternatively it was cancelling the agreement therein.

[8] The letter referred to above is annexed to the summons, and state as follows with regard to cancellation of the agreement.

> *"if you do not respond to this letter or pay the arrears (sic) amount within 10 business days from date hereof, we may enforce the agreement and approach the court to cancel the agreement and claim damages".*

[9] The respondent opposed the granting of summary judgment on the basis that the agreement signed by the parties does not provide for the cancellation of the contract. The applicant cannot elect to cancel the contract, as that means invoking a cancellation clause, where there is no such clause in the contract, it cannot be invoked. The applicant

has also failed to state from where in contract (what clause) it bases the claim for cancellation.

[10] During the hearing of the application Mrs Nyobole also submitted that the applicant is seeking confirmation of the cancellation of the agreement, when it had not cancelled or given notice of cancellation of agreement between the parties.

[11] The issue to be determined is whether the defence raised by the respondent is good in law, (*bona fide*) as a basis to successfully resist an application for summary judgment.

[12] In order for the respondent to successfully resist summary judgment, the respondent must satisfy the court by affidavit or with leave of the court, by oral evidence of the respondent or any other person who can swear positively to the fact that he has a *bona fide* defence to the action, disclosing fully the nature and grounds of the defence and the material facts relied upon. According to **Herbstein and Van Winsen on the Civil Practice of the High Courts of South Africa, 5th edition, vol 1 p.532** a *bona fide* defence is disclosed if the defendant swears to a defence, valid in law, in a manner that is not inherently or seriously unconvincing, i.e. set out facts that, if proved at the trial, would constitute a defence to the plaintiff's action.

[13] Mrs Nyobole pleaded with the court to stand the matter down, so that she could bring the authorities she was relying on in support of her argument. She indeed provided me with the following authorities;
Absa Bank Ltd v Havenga and Similar Cases 2010 (5) at 533 GNP; Absa Bank Ltd v De Villiers and another 2009(5) SA 40.

[14] Firstly in the ***Havenga and Similar Cases***, the issue involved the cancellation of motor vehicles' lease and sale on instalment of the motor vehicles concerned agreements by reason of *lex commissoria.* This term was alleged to be express and vesting the credit provider with a right to cancel the agreement by reason of a breach of the term. Horwitz AJ emphasized that the distinction in those cases was important for a different reason and not for the judgment to serve as a discourse in the law of contract. He observed that "it is a trite principle of the law of contract that the right of a party to a contract, to cancel it, is not restricted to cases in which there is such an express term: generally speaking, in the absence of an express term allowing for cancellation of a contract, a party may cancel a contract by reason of the breach of a material term by the other party to the contract, or the breach of a term which the first-mentioned party has by notice to the other party made material."

[15] He referred to legal representatives' use of a singular. computerised template as a precedent for all their matters, on the simple basis that one size fits all. The observation was that there was no correlation between the terms alleged in the founding affidavit or particulars of claim and the actual agreement. When one has taken to read the entire agreement and has found that it contains no cancellation clause at all, to allege that the agreement contains one of the standardised, hackneyed cancellation provisions that is embodied in the template amounts to careless pleading. In conclusion he stated that the nature of relief sought is specific performance and therefore discretionary. If the legal representatives insist upon imposing on judges to wade through files that contain incorrect allegations they should not be surprised if the relief they seek does get refused. The relief should be refused if the agreement is alleged to contain an EXPRESS (my emphasis) cancellation provision in circumstances in

which it contains none. He qualified this though and went on to state that "the fact that an agreement does not contain an express cancellation provision is not to say that cancellation is therefore never possible: the common law may well avail the credit provider. But in that instance, the appropriate allegations must be made in the founding papers; not some absurd allegation, based on a template, that the agreement contains an express provision to that effect." The right to cancel an agreement arises out of an application of the rules of law of contract.

[16] Without analysing each and every statement that the court made in those cases, it is clear that the court was aggrieved by the caseless pleading by legal practitioners, relying on precedents without making the necessary averments in accordance with the peculiarity of each agreement on which the particular facts of the case arose.

[17] In the ***Devilliers*** case, the application was for a final order authorising the attachment of the vehicle, Absa had not instituted an action for cancellation of the agreement, nor was it alleged that it intended instituting an action of any kind in relation to the vehicle. The order was refused by the magistrate. The High Court confirmed that order on review. On appeal to the Supreme Court of Appeal the issues in the matter also invoked the interrogation of the correctness of a review procedure.

[18] The Supreme Court of Appeal did not agree with the case of the procedure used by Absa by seeking to review the magistrate's decision, instead of appealing against it. The Supreme Court of Appeal had no problem confirming the refusal of the review application but did not confirm the high court's reasons for doing so. In my view, the Supreme Court of Appeal did not pronounce on the magistrate's reason for

refusing the attachment of the vehicle, instead the court stated that the magistrate would have been entitled to refuse to entertain the application for the reason of the exclusion of the respondent in the proceedings for flimsy reasons.

[19] In my view, the cases I have been referred to are not on point as Mrs Nyobole would have wanted me to believe. Let me, restate what the applicant alleged in his particulars of claim:

> "4. The material express alternatively tacit alternatively implied terms of the agreement were as follows :-
>
> 4.2 The Plaintiff would deliver the Asset to the Defendant, on the date the Agreement was concluded alternatively within a reasonable period thereafter;
>
> 4.3 Ownership of the Asset would remain vested in the Plaintiff until the Defendant has fulfilled all his obligations under the Agreement;
>
> 4.4 The Defendant would pay for the Asset as is set out below.
>
> (a) An initial payment of R0.00;
>
> (b) Fifty nine, 59 equal instalments of R9 789.85 each at one (1) monthly intervals beginning on 30 AUGUST 2013;
>
> (c) A final payment of R9 789.85 payable on 23 JULY 2018;
>
> 4.5 ....
>
> 4.6 Furthermore, in the event of the defendant defaulting on any of his obligations in terms of the agreement, the plaintiff would be entitled to

(a) cancel the agreement

(b) repossess and sell the asset

(c) ...."

[20] It may be that the applicant did not state in the most explicit terms that it was basing its right to cancel the contract on the application of the rules of contract. It also did not say it was relying on the express cancellation provision in the agreement, rather on material express, alternatively tacit alternatively implied terms of the agreement.

[21] The notification letter to the respondent stated that ;

"If you do not respond to this letter or pay arrear(s) amount within 10 business days from date hereof we may enforce the agreement and approach the court to cancel the agreement and claim damages."

[22] In the agreement, the applicant reserved its rights, which it had under the agreement or otherwise, to so to speak, enforce the agreement. This cannot in anyway be construed to compel the applicant to only elect to enforce the agreement by asking for an order for adherence to the default procedure in the agreement only.

[23] Furthermore, in the particulars of claim the applicant averred that it cancelled the agreement alternatively it was cancelling the contract therein. The issue of the applicant not first cancelling the agreement with the consumer cannot arise under these circumstances.

[24] During the hearing of the application Mr Kunju on behalf of the applicant submitted that the point raised on behalf of the respondent does not constitute a triable defence. The applicant elected to cancel

the agreement, which is an option availed to it by the principles of the law of contract. The respondent was given due notice of cancellation.

[25] According to Christie's Law of Contract in South Africa, 5th edition at page 538, material breach of an essential term and repudiation all entitle the other party to cancel the contract. The act of cancellation may be performed by the innocent party himself, without the assistance of the court, in which case, technically, a subsequent court order would simply confirm the cancellation that he had already carried out, but a claim for cancellation (that is, asking the court to cancel) is normal and the desirability of having an order of cancellation so that the status of the contract is not in doubt is well recognised.

[26] At page 539, the said authors state that notice of cancellation must be clear and unequivocal, but need not correctly identify the cause of action. It takes effect from the time it is communicated to the other party. If it has not previously been communicated, it takes effect from service of summons or notice of motion, unless the contract prescribes a particular procedure, such as notice, and notice of cancellation may be implied from the service of a summons claiming damages.

[27] The innocent party's choice is subject to what is usually known as the doctrine of election. Enforcement and cancellation being inconsistent with each other or mutually exclusive the innocent party must make his election between them. The doctrine is stated by Watermeyer AJ in ***Segal v Mazzur 1920 CPD 634, 644 – 645***

> *"Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has a choice of two courses.. He can either elect to take advantage of the event or he can elect not to do so.*

> *He is entitled to a reasonable time in which to make up his mind, but when once he has made his election he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by evidence. If, with the knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; this is, however not a rule of law, but a necessary inference of fact from his conduct:* See ***Croft v Lumley (1858) 6 HLC 672 at page 705***
>
> ***Per Bramwell B; Angehrn and Piel v Federal Cold Storage Co. Ltd 1908 TS 761*** at ***page 786 per Bristowe J"***

[28] In ***Shingadia v Shingadia 1966 (3) SA24R at 25R- 26A*** the court held that summary judgment should not be granted when any real difficulty as to a matter of law arises, but if the court is satisfied that the defence is unarguable, judgment will be granted. This was put differently and concisely in ***Joob Joob Investments (Pty) Ltd vs Stocks Mavundla Zek Joint Venture 2009 (5) (1) SCA*** *at* ***page 11***, courts have over time been trusted to ensure that a defendant with a triable issue is not shut out.

[29] I am in agreement with Mr Kunju's submission that the legal defence raised is not triable. In ***Maharaj v Barclays National Bank Limited 1976(1) SA 418*** at ***426*** *it was held that* on top of the examination of whether there has been a disclosure by the defendant of the nature and grounds of his defence and facts upon which it is founded, the further consideration is that such defence must be both

bona fide and good in law. In the exercise of my discretion on whether to grant the summary judgment or not, I have also taken into account that the amount of arrears due by the respondent as reflected in the certificate of balance. In January there were more than R47 000.00, which is equivalent to more or less a period of five months. The respondent has not even addressed this issue or indicated how he intends to bring the account up to date.

[30] In my view, the defence raised by the respondent is not *bona fide* and summary judgment ought to be granted.

In the result,

1. The order confirming the termination of the agreement is hereby made.

2. The respondent is hereby ordered to return the 2013 ISUZU KB 300 CREW CAB LX with engine number 4JJ1KY9683 and vehicle identification number ADMURCER7C4652260 to the applicant.

3. The respondent is hereby ordered to pay the costs.

B MAJIKI
JUDGE OF THE HIGH COURT

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