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

CASE NO. 76065/09

In the matter between:

17/10/2013

**NISSAN FINANCE T/A FIRSTRAND BANK LTD** **APPELLANT**

and

**JOHAN VAN AARDE** **RESPONDENT**

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**JUDGMENT**

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**HASSIM A AJ**

1. This is an application for the interim attachment of a motor vehicle by the Applicant pending the finalisation of a trial in which the Applicant seeks certain relief in satisfaction of the debt, including damages.

2. The Applicant is not the seller of the vehicle, but the finance institution that concluded a Master Discounting Agreement with the seller. The seller is Atlantis Nissan, also referred to as Atlantis Motors. During the hearing the Respondent's

counsel made much of the different description of the seller, submitting that this, inter alia, evidences the deficiency in the Applicant's founding papers. It is true that there is a discrepancy in the description of the name of the seller. I did not understand counsel for the respondent to be arguing that this discrepancy, in itself, is fatal to the applicant's case. It does however add to my concern regarding the probity of the applicant's evidence.

3. The Respondent purchased the vehicle from the seller on 17 May 2005. As at 5 February 2009 the Respondent was in arrears in the amount of R46 792.47. The Applicant has instituted action against the Respondent, which action is pending.

4. In the interim, the Applicant seeks an interim interdict for the attachment of the vehicle in question to be held in 'safe-keeping' by the Applicant pending the outcome of the trial.

5. The requirements for obtaining an interim interdict are long-settled: *Setlogolo v Setlogolo* 1914 AD 221 at 227. In summary they are:

    5.1. That the applicant is able to satisfy a prima facie right;
    5.2. A well-grounded apprehension of irreparable harm if interim relief is not granted and the main application is successful;
    5.3. That the balance of convenience favours the granting of interim relief; and that
    5.4. The applicant has no other satisfactory remedy.

6. In order to establish a prima facie right, the court will weigh the allegations of both parties in order to determine whether the applicant could succeed in obtaining final relief. See *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

7. The right that the applicant seeks to assert is that it is the owner of the vehicle. The Respondent filed a notice on a point of law, in terms of Rule 6(5)(d)(iii) of the Uniform Rules of the High Court raising two objections: first, that the Applicant

failed to make an allegation of authorization to have launched the application; and second, that no prima facie right is established.

8. On the question of authority, the R's counsel pointed to the fact that there is no allegation by Ms Vorster in the founding affidavit that she is authorized to bring the application on behalf of the applicant. It is a salutary rule that where a company brings motion proceedings that it has duly authorised the person bringing same: Griffiths & Inglis (pty) Ltd v Southern Cape Blaster (Pty) Ltd 1972 (4) SA 249 (C).

9. *Mall (Cape) (Pty.) Ltd.* v *Merino Ko-operasie Bpk.*, 1957 F (2) SA 347 at 351 -352: "The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the B company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the Court, then I consider that a minimum of evidence will be required from the applicant."

10. The Respondent has offered no evidence in support of the objection that the deponent is not authorized. At the hearing of this matter the applicant's counsel sought leave to hand up a supplementary affidavit by one Ms Lynette Fourie, the head of Collection Solutions, a division of Wesbank, which is a division of the Firstrand Bank. Ms Fourie states that she is duly authorized by the Applicant to act on its behalf. She confirms that that Ms Vorster has the necessary authority and power to act on behalf of the applicant, and she annexed a certificate date 14 January 2013 in which such authority is conferred upon Ms Vorster by Ms Fourie. She further states that Ms Vorster is on leave and therefore unable to file a supplementary affidavit, but that she will do so upon her return.

11. This is far from the best evidence that could be provided by the Applicant. However, I am prepared to accept it as minimum evidence showing authority.

12. The next question then is whether the applicant has established a prima facie right of ownership in the motor vehicle.

13. The approach to determining whether a *prima facie* right is established was set out in Webster v Mitchell 1948 (1) SA 1186 (W) at 1189:

"The use of '*prima facie* established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."

14. The Court was asked to have reference to the pleadings in the main matter. Counsel for the applicant submitted that that both the particulars of claim in the main matter and the founding affidavit in casu establish that the seller ceded all rights and title in the motor vehicle to the applicant. However all that is contained in these pleading is a bald allegation that this is so. While this may be sufficient in particulars of claim for trial, it is not sufficient in motion proceedings.

15. In Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464 (D) at 469 C-E, Miller J held:

"where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of a declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound."

Counsel for the Respondent referred the court to Swissborough Diamond Mines v Government of the Republic of South Africa 1999 (2) SA 279 (T) at 343, where Joffe J applied the dictum in Hart, and held further (at 324) that:

"An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof."

16. The applicant's counsel then referred the court to the Master Discounting Agreement. The preamble to the Master Discounting Agreement provides as follows :

"Whereas: It is contemplated that the Bank shall in its sole discretion from time to time:

A – purchase all the right, title and interest of the Trader in instruments of debt, including, but without restricting the generality thereof, negotiable instruments, written contracts or agreements containing the terms and provisions of any transactions of purchase and sale, or letting and hiring, and/or rendering of services, or advancing of money all of which are herein called "instruments";

B – purchase from the Trader vehicles, machinery, plant , equipment or any other goods including all fittings, accessories and parts thereto for the purpose of selling or leasing the goods thus purchased from the Trader to customers of the Bank."

17. Para 1 of Part 1 then provides that the terms and conditions of Part 1 shall apply to each and every transaction as contemplated in para A in the preamble. . Para 2.1 and 2.2 set out how the rights, title and interest are to be sold to the Bank. They provide:

"2.1 In every instance in which the Trader wishes to sell to the Bank its rights, title and interest in any instrument, including if applicable, the ownership in and to the goods, forming the subject matter of such instrument ('the Goods'), the Trader shall deliver to the Bank the relevant instrument and all documents of the nature described in 2.2.3.

2.2 Delivery of the instrument and documents referred to in 2.1 shall constitute an offer by the Trader to the Bank, to sell and cede to the Bank upon and subject to all the terms and conditions contained herein and at such price as may be agreed upon between the Trader and the Bank:

2.2.1 all the Trader's rights, title and interest into and under the instrument;

2.2.2 the ownership of the Goods described therein;

2.2.3 the benefits of and rights to all bills of exchange, promissory notes, guarantees, suretyships, policies, acknowledgments, ancillary agreements or other documents which in any way pertain to or are supplementary or incidental to such instruments which are held by the Trader relating to the instrument."

18. No evidence is put up by the applicant to show that those paragraphs have been complied with.

19. During the hearing, counsel for the Applicant stated that he could take it no further than para 4.2 of the founding affidavit, which simply asserts as follows" the Seller's right, title and interest were ceded to the Applicant on 17 May 2005".

20. However, on the applicant's own version there is considerable doubt that any cession actually took place on that date. Further, there is a discrepancy regarding the date upon which the cession ostensibly occurred. Paragraph 5 of the particulars of claim, bearing the stamp of the Registrar of the Court and the Sheriff, Pretoria East states that the seller's right, title and interest was ceded to the plaintiff (applicant in this matter) on 14 December 2005.

21. The Applicant also relied upon the Instalment Sale Agreement between Atlantis Nissan and the respondent. According to the applicant, the two page annexure that accompanies the agreement provides for cession of ownership to the applicant. However, during argument counsel conceded that these two pages that were included in the record are not signed or initialed by the respondent.

22. Counsel for the Respondent also referred the court to the judgment in Nedcor Bank Ltd v Absa Bank Ltd 1998 (2) SA 830 (W), in which Cloete J held that floor plan agreements between a motor vehicle dealer and a financial institution are no more than a pledge to secure a loan against the security of motor vehicle without financial institution's taking possession, and with ownership of the vehicle not transferring to the financial institution. In the light of this, evidence other than reference to the Master Discounting Agreement and Instalment Sale Agreement becomes necessary. In this case, the relevant pages of the Instalment Sale Agreement are not signed by the Respondent.

23. Based on the discrepancies within the applicant's own case, I find that a prima facie right is not established.

24. With regard to the apprehension of harm, the applicant's case is that the vehicle will depreciate in value as time passes, and there is a risk that the respondent may have a motor vehicle accident that will affect its value. If they were to secure the motor vehicle they could avert this harm. The vehicle was purchased for R185 000.34, excluding finance charges. As at February 2009 the arrear payments stood at R46 792.47. The court was not informed as to any further payments since then. There is no evidence from the respondent as to the prejudice that he will suffer if the interim interdict is granted. Barring, obviously, the fact he will be deprived of the motor vehicle.

25. It is inherent in financial schemes of this nature that the goods at issue may depreciate in value pending the outcome of the trial. It has been over three years since the main action was instituted. I am not persuaded that the balance of convenience favours the Applicant, especially in the light of the questions surrounding the Applicant's right to ownership.

26. In addition, the Applicant is entitled to a remedy by way of damages, an order that is already being sought in the main action.

27. In the circumstances, I make the following order:

    27.1. The application is dismissed.

    27.2. The applicant is directed to pay the costs of this application.

JUDGE HASSIM A