

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4045/12

In the matter between:-

ABSA BANK LIMITED
Registration number: 86/04794/06

Plaintiff

and

M.S. NTEMA
Identity Number:

Defendant

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 6 JUNE 2013

- [1] Defendant seeks leave to appeal against summary judgment granted in favour of the plaintiff ordering delivery of a certain motor vehicle to plaintiff and costs.
- [2] The parties were requested to file heads of argument so that the matter can be disposed of in chambers and invited to object to the procedure if they disagree with that. Both parties filed heads of argument and did not object to the procedure.
- [3] It is argued that the court erred in finding that the plaintiff's claim is based on the *rei vindicatio* and not on the basis of a claim for payment of money, which claim has become prescribed. It is argued that the claim for the return of the vehicle is consequential to the claim based on the liability to

pay the outstanding amount in terms of the agreement and, since that claim has become prescribed, the return of the vehicle cannot be ordered since, by prescription of the claim for payment in terms of the agreement, the claim as to ownership also became prescribed and ownership passed to the present applicant, defendant.

[4] It is clear from the particulars of claim that the plaintiff relied on an instalment sale agreement for its claim for return of the vehicle, alleging that it retained ownership until payment was made in terms of the agreement. The actual relief claimed was delivery of the vehicle and permission to approach the court later for damages. The question is whether there are reasonable prospects that a court of appeal might come to another conclusion. In this regard the same arguments are advanced in favour of the defendant, which has been dealt with in the judgment granting summary judgment.

[5] I am convinced that the arguments on behalf of the defendant are fallacious and show a lack of differentiation between a personal right and a real right based on ownership of the vehicle. The ownership of the vehicle did not vest in the plaintiff because of the agreement, but plaintiff was the owner before the agreement was concluded and remained the owner until payment has been made. Extinctive prescription only leads to the result that the plaintiff cannot recover the purchase price, but that does not mean that the purchase price has been paid, which is the condition on which ownership would have been transferred to the defendant. The argument seems to engage the principles of

fictitious fulfilling of a condition and equates that with the extinction of a claim by a prescription. It is clearly wrong and totally fallacious.

[6] I am convinced that there are no prospects of success on appeal.

[7] In the result leave to appeal is refused and the application dismissed with costs.

A.F. JORDAAN, J

On behalf of plaintiff:

Adv P.J. Heymans
Instructed by:
E G Cooper Majiedt Attorneys
BLOEMFONTEIN

On behalf of defendant:

Mr M.J. Ponoane
Instructed by:
Ponoane Attorneys
BLOEMFONTEIN

/spieterse