



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1344/2020

In the matter between:

ABSA BANK LIMITED

Plaintiff/Applicant

(Registration number 1986/004794/06)

and

E'TSHO CIVILS (PTY) LTD

1ST Defendant/Respondent

(Registration number: 2015/084173/07)

TLALE DAVID MOKGADI

2nd Defendant/Respondent

(Identity number: [...])

HEARD ON: 27 AUGUST 2020

CORAM: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by

email and release to SAFLII on 1 DECEMBER 2020. The date and time for hand-down is deemed to be 1 DECEMBER 2020 at 11:00

Introduction

- [1] This is an application for summary judgement. The plaintiff is a registered bank and credit provider which conducts business including financing *inter alia* acquisition of capital and movable assets. The first defendant is a company registered in accordance with the laws of the Republic. The second defendant is sued in his capacity as a surety and co-principal debtor for the principal debtor (first defendant). On 18 February 2020 the plaintiff instituted action against both defendants jointly and severally, claiming confirmation of the cancellation of the agreements and return of two (2) motor vehicles. The defendants filed a notice of intention to defend. The plaintiff applied for summary judgement which is opposed by both defendants.

Material Facts

- [2] On 10 July 2017 and 12 March 2018 the plaintiff provided credit to the defendants for the purpose of acquiring a 2017 new Toyota Corolla 1.6 Prestige LO6 and used 2016 Toyota Hilux 2.8 GD 6 RB Raider P/U motor vehicles respectively. On both deals the parties concluded a separate written instalment sale agreement. It is common cause that the defendants defaulted on making regular payments as stipulated in the agreement. On 19 September 2019 the plaintiff (plaintiff) issued summons under case number 4376/2020 claiming *inter alia* cancellation of the written agreement,

return of the motor vehicles and ancillary relief. The status of this matter will become clearer in the succeeding paragraphs.

- [3] Prior to issuing summons in this matter, the defendants had fallen again in arrears and the plaintiff dispatched notices dated 6 February 2020 in terms of the provisions of the National Credit Act 34 of 2005 (the “Act”). In terms of the notices the defendants were granted twenty (20) days to remedy the breach. With no positive response from the defendants forthcoming, the plaintiff cancelled the agreements in a letter dated 6 March 2020. All communication was sent to the plaintiffs per registered post to their chosen *domicilium et executandi*. The next step is that the plaintiff commenced proceedings in the current matter, claiming cancellation of the written agreement. The defendants on their part, after the cancellation letters settled the arrears and in their plea raised numerous defences.

Issue to be determined

- [4] The pertinent question is whether an instalment sale agreement can be reinstated after it was cancelled. Approached from another angle, whether it can be revived by law after cancellation. This is the crux of the case for the plaintiff. On the other hand, the defendants hold a different viewpoint. The issue is whether there could be a reinstatement of the agreement if late payment is made.

Submissions

- [5] Mr Heymans on behalf of the plaintiff argued that the agreement was cancelled entitling the plaintiff to the relief claimed. In amplification of his argument he relied extensively on the judgment of the Constitutional Court in **Nkata v Firststrand Bank**¹. In that matter the court held that an agreement that is cancelled cannot be unilaterally reinstated. Turning to the Act he submitted that it was mainly designed to balance the rights of the parties and harmonise the credit system. It was never the intention of the Legislature to create a debtor's paradise and allow the debtor to do as he pleases. Responding to the submission on behalf of the defendants that the Act was not applicable in this matter, he pointed out that was not raised as a defence that cancellation cannot be done in terms of the Act. Its provisions provided more remedies than the common law and no court should fault the credit provider applying its provisions.
- [6] Turning to the defendants, Mr Lubbe submitted that the reliance of the plaintiff on the **Nkata** decision is misplaced. Moreso that there is still a similar case pending before court which has not been withdrawn. If the plaintiff was no longer proceeding with it, filing a notice of withdrawal and tendering costs is an appropriate step to embark on. In *casu* the amount alleged in the application for summary judgement does not correspond with the allegations pleaded in the particulars of claim. Therefore, to argue that the other action has become moot is a misnomer. He pointed out that the Rule 32 of the Uniform Rules of Court stipulate that the deponent to an affidavit must swear positively to the facts and the amount along with the cause of action. In this matter the facts are not confirmed. The other point raised is that although the plaintiff relies on

¹ 2016 (6) BCLR 794 (CC)

cancellation of the agreement, the application still seeks confirmation of the cancellation of the agreement. Lastly, he submitted that the plaintiff has taken an irregular step in that no further evidence could be produced in an application of this nature. He argued that such further information should be disregarded. In the whole, the launching of the application was vexatious and that it should be dismissed with costs.

Discussion

[7] I wish to touch briefly on the point raised by the defendant namely *lis pendens*. The requirements to sustain the defence were not argued to any significant extent save to state that there has been no withdrawal of case number 4376/2019. The fact of the matter is that pursuant to the summons being issued, the defendants settled the arrears. This simply means that the cause of action was extinguished. It fell away and cannot be relied upon. This matter was rendered moot and there is no merit in the argument for the defendants.

[8] The defendants relied on well-known authorities to oppose the application. The legal position remains the following:-²

“That means that the test remains what it always was: has the defendant disclosed a bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in *Maharaj*¹⁶ and *Breitenbach v Fiat SA*¹⁷ as to what is expected of a defendant seeking to successfully oppose an application for summary judgment therefore remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally

² Tumileng Trading CC v National Security and Fire (Pty) Ltd Case 3670/2019 and 3671/2019 (WCA Unreported) at para 12

cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant."

[9] The main contention is that the facts on which the cause of action and the amount that the claim is based on are not verified. On the other hand, the defendants contend that the arrears amount have been paid. Therefore, the agreement is reinstated. Clearly the defendants are straddling the lines and sitting on two chairs. It is unclear as to exactly what is the basis of their defence opposing the application.

[10] This brings me to what I perceive to be the real issue in this matter. Counsel for the plaintiff placed heavy reliance on the **Nkata** decision *supra*. On paragraph 23 of the judgement the court reiterated that "the contract that has not been cancelled is eligible for reinstatement". The court continued and said the following:³

"At the outset, I observe that sections 129(3) and (4) start with what a consumer may and may not do. It is the consumer who may reinstate a credit agreement. This she may do "any time before the credit provider [cancels] the agreement." So, as long as the agreement is current, she may elect to reinstate it. The clear import is that for purposes of reinstatement the consumer is the protagonist. She may disclose her design to the credit provider but she is not compelled to give notice to or seek the consent or cooperation of the credit giver."

[11] In *casu* the agreement was cancelled before the defendants paid the arrears. As the legal position stand, the defendants cannot unilaterally reinstate it. Reinstatement may occur only before the

³ Nkata *supra* at para 104

credit provider has cancelled the agreement.⁴ This means that the defendants cannot rely on the payment of the arrears because the contract was already cancelled. Clearly the judgement in this application must be granted in favour of the plaintiff. The defendants must pay the costs as stipulated in the agreement.

Order

[12] I make the following order:-

CLAIM 1: 89711180

12.1 Confirmation of cancellation of the agreement;

12.2 The Defendants return the following goods and any registration documents to the Plaintiff:

2017 NEW TOYOTA COROLLA 1.6 PRESTIGE L06

CHASSIS NUMBER: AHTBB0JE200019407

ENGINE NUMBER: 1ZRV505499

12.3 Leave is granted to the Plaintiff to approach the Honourable Court on the same papers, duly amplified where necessary, for damages.

12.4 Costs of suit on an attorney and client scale.

CLAIM 2: 90698058

12.5 Confirmation of cancellation of the agreement;

⁴ Nkata supra at para 110

12.6 The Defendants return the following goods and any registration documents to the Plaintiff:

USED 2016 TOYOTA HILUX 2.8 GD 6 RB RAIDER P/U

CHASSIS NUMBER: AHTGA3DC100871445

ENGINE NUMBER: 1GD0207052

12.7 Leave is granted to the Plaintiff to approach the Honourable Court on the same papers, duly amplified where necessary, for damages.

12.8 Costs of suit on an attorney and client scale.

M. A. MATHEBULA, J

On behalf of plaintiffs:	Adv. P J Heymans
Instructed by:	EG Cooper & Majiedt Inc. BLOEMFONTEIN

On behalf of 2 nd defendant:	Adv. E G Lubbe
Instructed by:	Hill, McHardy & Herbst BLOEMFONTEIN