

SOUTH AFRICA / JUDGMENT

ABSA Bank v Farrar (94759/2015) [2023] ZAGPPHC 1123 (30 August 2023)

[2023] ZAGPPHC 1123

COURT

North Gauteng High Court, Pretoria

BEFORE

N P Mngqibisa-Thusi

CASE / FILE NUMBER

94759/2015

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Policy

**REPUBLIC OF SOUTH
AFRICA**

**IN THE HIGH COURT OF
SOUTH AFRICA**

**GAUTENG DIVISION,
PRETORIA**

CASE NO.:

94759/2015

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

DATE:

30/08/23

SIGNATURE

In the matter between: ABSA
 BANK
 Applicant
 and
 RYNETTE
 FARRAR
 Respondent

JUDGMENT

MNGQIBISA-THUSI J:

[1] On 12 April 2022 I granted an order on the following terms:

“1. The respondent is directed to deliver the 2008 Toyota Prado VX 4.0 V6 A/T, with engine number 1[...] and Chassis Number J[...] 2[...] (“the vehicle”) to number [...] T[...] Road, Boksburg after making arrangements with the applicant’s attorney’s offices.

2. In the event of the respondent failing to comply with the order in paragraph 1 above within five days of the service of this order on the respondents attorneys, the sheriff is authorised and directed to take the vehicle into his position from where ever he may find the vehicle and from whoever is in possession of it and return it to the

applicant as aforesaid.

3. Upon receipt of the vehicle, the applicant is ordered to forthwith commence marketing the vehicle in the open public market and dispose and/or alienate and/or send it to the person making the highest offer their own.

4. The proceeds of the sale of the vehicle, less all costs incurred by the applicant from the date of receipt of the vehicle including but not limited to marketing and maintenance of it, add to be credited to the respondents account bearing number 8[...] so as to reduce the outstanding indebtedness owed to the applicant there on.

5. The respondent’s counter application is dismissed with costs.

6. The costs of this application to because in the main action under the above case number.”

[2]

Reasons

for the order were to follow on request.

[3] The applicant sought condonation of the late filing of its answering affidavit in the counter application. The reasons proffered for the late filing of the answering affidavit were that due to the issues raised by the respondent in its notice to the counter

application and her affidavit in the main action, it became necessary for an investigation to be conducted with regard to the issues raised and an audit of the documents filed to be done.

Secondly, that the applicant's counsel had to consider, in particular, the issue of prescription raised by the respondent. In view of the fact that the respondent filed her replying affidavit in the counter application, I am of the view that no prejudice has been suffered by the respondent by the late filing of the applicant's answering affidavit and condonation is granted.

[4] In the application, the applicant sought the an order, pending the final determination of an action institute by the applicant, directing the respondent to return a motor vehicle it had purchased through being financed by the applicant and that such motor vehicle be sold and the proceeds thereof be used to defray the debt owed to the applicant by the respondent.

[5] The respondent also filed a counter application in which she sought an order on the following terms:

"1. Declaring the agreement entered into between the applicant and the respondent on or about the 30th of October 2014, as prescribed in terms of the Prescription Act 68 of 1969.

2. Directing the respondent to hand over the registration papers, including all papers necessary to effect the transfer of ownership to the applicant for the 2008 Toyota Prado VX 4.0 V6 A/T with engine number 1[...] and Chassis number J[...], within 30 days of this court order.

3. Dismissing the application on the basis that the claim has prescribed.

4. That the respondent be ordered to pay the applicant's costs of this application.

5. Further and/or alternative relief."

[6] On or about 30 October 2014, the applicant, ABSA Bank Limited, and the respondent, Mrs Rynette Farrar, concluded a written instalment sale agreement in terms of which the applicant financed the respondent's purchase of a motor vehicle, a 2008 Toyota Prado VX 4.0 V6 A/T.

[7] The agreement provided, inter alia, the following terms, which are not in dispute:

7.1 The agreed instalment would be R4 037.70;

7.2 Should to the respondent default in terms of the instalment sale agreement, the plaintiff would be justified in cancelling the agreement and claiming:

7.2.1 the return and possession of the vehicle;

7.2.2 payment of the difference between the amount outstanding at date of cancellation of the agreement less a rebate on finance charges

calculated from date of termination of the agreement and the amount at which the vehicle was sold for; and

7.3 interest on the amount of referred to, calculated at the rate of 15.5% per year, alternatively, at the current interest rate linked to the fluctuation on the interest rate calculated from the date of termination of the agreement to date of payment.

7.4 costs to be taxed

- [8] It was also agreed that the applicant is the owner and would retain ownership of the vehicle until the last instalment is paid.
- [9] When the respondent defaulted on her instalments, on 19 October 2015 and 25 November 2015 the applicant sent the respondent a letter of demand in the form of a notice in terms of s 129(1)(a) of the National Credit Act 34 of 2005, which reads in part that:

“Should you fail to exercise your rights as aforesaid within 10 business days from date hereof, the agreement with the credit provider will be automatically cancelled and legal action will be instituted against you without further notice for a court order for:

- (1) payment of the full outstanding balance;
- (2) cancellation of the agreement;
- (3) Return of the goods;
- (4) Damages: and
- (5) Legal costs.

Your failure to comply with this notice, will result in judgement being obtained against you for the cancellation of the agreement and repossession of the goods, where after the goods will be valued as sold. Any shortfall would be recovered from you.”

- [10] On 1 December 2015 the applicant caused to be served on the respondent summons. In the summons the applicant sought, inter alia, confirmation of the termination of the instalment agreement; return of the motor vehicle and other ancillary relief. Further in its particulars of claim the applicant pleaded that:

“[12] Due to the Defendant’s breach of the agreement the Plaintiff terminated the agreement, alternatively, the agreement is terminated forthwith.”

- [11] The respondent filed a notice of intention to defend. Consequent thereto the plaintiff filed an application for summary judgement

against the respondent. On 28 September 2016, the court granted an order which reads as follows:

“1. The defendant undertakes to pay the full outstanding amount owing to the plaintiff under the instalment sale agreement by not later than 30 October 2016.

2. In the event that the defendant fails to honour the undertaking in 1 supra, plaintiff would be entitled to proceed in obtaining judgement in terms of prayers 1- 4 at the application for summary judgement unopposed basis.
 3. The application is postponed to 17 January 2017.
 4. The defendant is to pay the wasted costs.”
- [12] The respondent failed to pay the full outstanding amount by 30 October 2016 and it was only on 11 January 2017 did the respondent pay the outstanding arrears and legal costs.
- [13] It is the respondent’s contention that by paying the full arrear amount at the time, the instalment sale agreement was reinstated and that when she again defaulted, it was incumbent on the applicant to re-issue the summons and the section 129(1) (a) notice before proceeding with further proceedings relating to the instalment sale agreement. The applicant did re-issue summons but later withdrew the action based on the new summons. The explanation given for the withdrawal is that it was issued by error as a result as some miscommunication between the employees in the office of the applicant’s attorneys.
- [14] Pending the final determination of the main application, the applicant seeks an order on the following terms:
- “1. Directing the respondent to deliver into the possession of the Sheriff the 2008 Toyota Prado VX 4.0 V6 A/T, with engine number 1[...] and Chassis Number J[...] 2[...] (“the vehicle”) who shall deliver the vehicle to the applicant who shall, in turn, at its own expense;*
- 1.1 Transport the vehicle to its garage premises situated at [...] T[...] Road, Boksburg;
 - 1.2 Retain the vehicle at such garaged premises under security pending the outcome of the action.
2. The applicant shall not use the vehicle or permit that it be used.
 3. In the event of the respondent failing to comply with the contents of paragraph 1 above within five days of the service of this order on the respondent’s attorneys, the Sheriff is authorised and directed to take the vehicle into his possession from wherever he may find the vehicle and return the vehicle to the applicant as aforesaid.
- 3A In the alternative to paragraphs 1 to 3 above, the respondent is ordered to return the vehicle to the applicant and the latter is ordered to forthwith commence marketing the vehicle in the open public market and dispose and/or alienate and/or sell it to the person making the highest offer their own.

3B The proceeds of the sale of the vehicle, less all costs incurred by the applicant from the date of receipt of the vehicle including but not limited to marketing and maintenance of it are to be credited to the respondent's account bearing number 8[...] so as to reduce the outstanding indebtedness owed thereon, alternatively be placed in an interest-bearing trust account administered by the firm Strauss Daly Inc.

4. Costs of the application to be costs in the main action.

[15] In her defence against the relief sought and in her counter application, the respondent contends that the applicant's claim in relation to the motor vehicle has prescribed and the relief sought cannot be granted. It is the respondent's contention that due to the fact that the applicant, despite having issued new summons after the instalment sale agreement was reinstated, prescription began to run in 2017 and at the time this application was launched, the three year period of prescription had lapsed and she had acquired ownership of the motor vehicle.

[16] The main defence raised by the respondent against the relief sought by the applicant is that the applicant's claim to the motor vehicle has prescribed. It is the respondent's contention that after she paid the arrears due on 11 January 2017, the instalment sale agreement was reinstated. In this regard the respondent relies on the provisions of section 129(3) of the National Credit Act which reads as follows:

"(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy the default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default and administration charges and reasonable costs of enforcing the agreement up to the time that default was remedied."

[17] It was submitted on behalf of the respondent that when she defaulted again, it was incumbent on the applicant to issue new summons, which it did, and since it withdrew the action based on the new summons, the period of prescription began to run from January 2017. It was argued that at the time this application was lodged the three-year period of prescription had expired and the respondent had acquired ownership of the motor vehicle through prescription.

[18] On behalf of the applicant it was argued that when it served the respondent with the section 129 notice, it made it clear to the respondent that if she failed to avail herself of the relief as set out in the notice within 10 days of the notice, the instalment sale agreement would automatically be terminated. Further that in its particulars of claim the relief sought included an order confirming the cancellation of the agreement. It was further submitted that the respondent also failed to pay the full outstanding amount as directed by the order of 28 September 2016 and that at the time the respondent paid the outstanding arrears, the instalment sale agreement had already been terminated.

[19] It was further submitted on behalf of the applicant that since the respondent claims acquisition of ownership of the motor vehicle

through prescription, the running of the period of acquisitive prescription was not 3 years as contended for by the respondent, but 30 years. In this regard the court was referred to the Supreme Court of Appeal judgement in *ABSA Bank v Keet* 2015

(4) SA 474 (SCA) where the court held that:

“[25] In the circumstances the view that the vindicatory action is a debt as contemplated by the prescription act, which prescribes after three years is in my opinion contrary to the scheme of the act. It would, if appeal is upheld, undermine the significance of the distinction which the prescription act draws between extinctive prescription on the one hand and acquisitive prescription on the other. In the case of acquisitive prescription one has to deal with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action listed in the creditor, which is a corollary of a debt, becomes extinguished simultaneously with that debt. In other words, what a creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing. To equate the vindicate vindicatory action with a debt has an unintended consequence in that by way of extinctive prescription the debtor acquires ownership of a creditor’s property after three years instead of thirty years that is provided for in section 1 of the prescription Act. This is an absurdity and not a sensible interpretation of the prescription Act.

[26] I am aware that we are different from a view that has been expressed in three judgements of this court, albeit in my view that none of those judgement of those decisions was dependent upon the correctness of that view for the ultimate result. However, to the extent that this view could be seen as the ratio decidendi of those decisions, I would hold that it was incorrect. I am aware of the restrictive basis upon which this court departs from its earlier decisions, but I am of the view that this is one of those rare cases in which it is appropriate to do so. First, the decision (*Barnett*) is of recent origins so that it cannot be said that people have organised their affairs on the basis that it was correct. Second, the author of the decision has indicated that it should be reviewed by this court. Third, the perpetuation of that view gives rise to absurdity in the construction of an important statute and would cause uncertainty in a multitude of relationships.

[27] In the circumstances, the court a quo erred in upholding the special plea on the basis of its finding that a claim for delivery of a tractor was a debt that becomes prescribed after three years by virtue of the provisions of section 10 of the prescription Act.”

[20] It is common cause that in terms of the instalment sale agreement the applicant retained ownership of the motor vehicle until the final instalment was paid. As the respondent failed to avail herself of the remedies as set out in the section 129 notice, the agreement was cancelled and the applicant only sought confirmation of such cancellation in its summary judgement application. Further the applicant is only seeking the preservation of the value of the motor-vehicle as it is a perishable. In this application the applicant on seeks to vindicate the motor vehicle over which it holds a real and not a personal right. In terms of section 1 of the Prescription Act, the prescription period in respect of a real right price is 30 years. Therefore, the respondent could only acquire ownership over the motor-vehicle after the

expiry of 30 years.

[21] I am therefore of the view that the applicant has made out a case for the relief it seeks to be granted in its notice of motion and that the respondent's counterclaim ought to be dismissed as it has not made out a case based on prescription.

[22] In the result the order dated 12 April 2022 was made.

N P MNGQIBISA-THUSI

Judge of the High Court

Date of hearing: 12 April 2022

Date of Judgment: 30 August 2023

Appearances:

For the Plaintiff: Adv A Alli (instructed by Strauss Daly Inc) For the Defendants: Adv C Grant (instructed by Lingwood Attorneys)

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