

SOUTH AFRICA / JUDGMENT

Makalela v ABSA Bank Limited (A134/2018) [2020] ZAGPPHC 811 (21 July 2020) [2020] ZAGPPHC 811

COURT

North Gauteng High Court, Pretoria

BEFORE

J W Louw, Tolmay, Hughes

CASE / FILE NUMBER

A134/2018

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IN

THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA
GAUTENG

DIVISION, PRETORIA

CASE NO: A134/2018

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

DATE:

21/7/20

In

the matter between:

JOAN

MATSATSI

MAKALELA Appellant

and

ABSA

BANK

LIMITED Respondent

JUDGMENT

LOUW, J (TOLMAY and HUGHES JJ concurring)

- [1] The appellant and the respondent entered into an instalment sale agreement on 28 October 2013 in terms whereof the respondent sold to the appellant a BMW X6 vehicle. On 31 July 2015, the respondent issued a summons against the appellant in which it alleged that the appellant had breached the agreement by failing to make payment of the agreed instalments and that the respondent had cancelled the agreement. In terms of the agreement, the respondent had reserved ownership of the vehicle until all amounts owing by the appellant had been paid in full. The relief sought by the respondent was an order confirming the cancellation of the agreement, an order for the return of the vehicle and an order that its right to enforce the appellant's remaining obligations after the vehicle had been sold be postponed sine die.
- [2] The appellant entered an appearance to defend the action, whereupon the respondent filed an application for summary

judgment

which was set down to be heard on 22 October 2015. On 21 October 2015, the appellant filed an opposing affidavit. On the day of the hearing, the appellant and the respondent concluded a settlement agreement. In terms of the agreement, the appellant agreed

to pay the amounts stipulated therein on specified dates. Paragraph

- (9) of the agreement provided the following:

"Should the Defendant be in breach of this Settlement Agreement the Plaintiff will be entitled to Summary Judgment on an unopposed basis."

- [3] The settlement agreement was made an order of court. The appellant failed to make the agreed payments, which caused the respondent to re-enrol the summary judgment application for 30 November 2016. On 23 November 2016, the appellant filed a further opposing affidavit. The application for summary judgment was heard by the late A A Louw, J. It is common cause that he granted summary judgment, but there is no judgment or court order available. The record of the proceedings

has, however, been transcribed, from which it appears that the judgment was sent to the judge for revision. The following appears

from the transcribed record:

"ADV FOR APPLICANT:

.....

M'Lord, the settlement agreement makes provision for certain instalments to be made failing which the applicant would be entitled to move for summary Judgment on an unopposed basis.

COURT: Is that what you are asking for today?

ADV FOR APPLICANT: That is correct, M'Lord. COURT: Where is the breach alleged?

ADV FOR APPLICANT: M'Lord, the breach is alleged by the affidavit, M'Lord, would find on page 45 to 47 where they indicate that the defendant had failed to make payment in terms of the settlement agreement. Now I have indicated to your lordship ... [intervenes]

COURT: That seems quite straightforward.

ADV FOR APPLICANT: Yes, M' Lord, that is straightforward. Now subsequent to that opposing affidavit has again been forthcoming. Now, M'Lord, even before I address the content of that opposing affidavit I have already indicated to your lordship that I am in possession of Constitutional Court judgment of Echo v Parsons.

.....

COURT: We can leave that there for a moment.

ADV FOR APPLICANT: Yes, M' Lord.

COURT: Can I hear your opponent? Mister?

.....

MR TSHWAGO: Tshwago . K Hare the initials, M'Lord.

COURT: All right. On what basis can there now be an opposing affidavit after having entered into this settlement agreement?

MR TSHWAGO: There is a, I do not know whether the opposing affidavit is in the court file, M'Lord. The basis of the ... [intervenes]

COURT: But there cannot be an opposing affidavit now. You have the settlement of the summary judgment on page 42 and further so there cannot be an opposing affidavit again.

MR TSHWAGO: M'Lord, it is because of circumstances that have changed that are relevant in this matter that needs to be brought to the attention of the court hence we have the ... [intervenes]

COURT: Well that cannot happen.

MR TSHWAGO: Hence we have the opposing affidavit. MR TSHWAGO: As court pleases.

COURT: Yes. You ask for?

ADV FOR APPLICANT: Yes may it please you, M'Lord. I move for an order in terms of the application for summary Judgment. M'Lord would find the application on page one. I will move for an order in terms of prayers one, two three and four."

(4] The appellant thereafter filed an application for leave to appeal against the judgment of A A Louw, J. Leave was granted by Ledwaba DJP to the Full Court.

[5] In the further affidavit, the appellant said that the circumstances had changed since the conclusion of the settlement agreement and sought the court's leave to be heard. She explained that the vehicle had been involved in an accident on 4 July 2015 and had been damaged beyond repair, that the vehicle was comprehensively insured by Absa Direct Limited but that

Absa Direct had rejected her claim on 27 October 2016 without any valid reason, that she thereafter instituted an action

against Absa Direct for payment of the insured amount of R452 800, that in terms of the insurance contract the respondent is nominated

as the loss payee and Absa Direct authorised to settle her obligation to the respondent in terms of the instalment sale agreement.

She therefore contended that the two actions were inter-related, that her claim against Absa Direct would extinguish her obligation to the respondent and that the two actions should be consolidated and heard as one action. She attached a copy of the consolidation application, which had been issued on 15 November 2016, to the affidavit.

[6] What the appellant further disclosed in the second opposing affidavit, is that she had caused her attorney of record to lodge a bond of security with the Registrar in the amount of R452 800 on 15 November 2015, a copy of which was attached to the affidavit .

[7] Rule 32(7) of the Uniform Rules of Court provides that, if a defendant finds security to the satisfaction of the registrar or satisfies the court by affidavit that he has a bona fide defence to the action, the court shall give leave to defend and the action shall proceed as if no application for summary judgment had been made. The giving of security defeats the application whereas an affidavit may or may not. Filing of an affidavit does not preclude the subsequent filing of security.[1]

[8] If the court a quo had given the appellant's attorney the opportunity to be heard and to explain what the changed circumstances were, for which he wanted to rely on the further opposing affidavit, the court would clearly have been obliged to grant the appellant leave to defend the action in light of the security bond which had been furnished. It would therefore not even have been necessary for the court to consider whether the defence put up by the appellant in the affidavit was a bona fide defence to the action or whether it should exercise its discretion against the granting of summary judgment in light thereof. The failure of respondent's counsel to inform the court of the security bond which had been furnished, of which he must have been aware as he indicated to the court that he intended addressing the contents of the appellant's further affidavit, is to be deprecated. It was not even suggested on behalf of the respondent that the registrar was not satisfied with the amount of the security which had been provided.

[9] The court had a discretion to allow the appellant to submit a further affidavit. In Juntgen t/a Paul Juntgen Real Estate v Nott busch[2], the court said the following[3]:

"It follows that, because of the scrutiny of the bona fides of the defendant in respect of the defence to which he lays claim, a defendant may find that his affidavit is inadequate. He may have forgotten to tell his attorney of an important fact or may have missed the significance thereof. Attorneys, like other humans, make errors which are called omissions. The attorney's view of what is adequate may differ from what counsel or the court thinks. A defence may develop subsequent to the signing of the affidavit. It has all the potential to cause injustice if the court's discretion to allow improvement of defective attempts is to be hampered by an application of the dictum in the Joubert case[4] in any literal meaning thereof."

[10] In terms of s 34 of the Constitution, everyone has the right to a fair hearing in a court. By refusing to accept the further affidavit which the court was told was the result of changed circumstances, the appellant was clearly denied the right to a fair hearing.

[11] It follows that the appeal succeeds. I accordingly make the following order:

- (a) The appeal is upheld with costs.
- (b) The order of the court a quo is set aside and replaced with the following order:
 - 1. Leave is granted to the defendant to defend the action.
 - 2. The costs of the application are to be costs in the cause.

J W LOUW

JUDGE OF THE HIGH COURT

Appellant's attorney: Tshwago Inc Attorneys

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Respondent's attorneys: Delport Van den Berg Inc.

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[1] Bank van die OVS Bpk v OVS Kleiwerke (Edms) Bpk 1976 (3) SA 804 (0) at 810G-811D

[2] 1989 (4) SA 490 (W)

[3] At 493C-D

[4] Joubert , Owens, van Niekerk Ing v Breytenbach 1986 (2) SA 357 (T)

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