

SOUTH AFRICA / JUDGMENT

## Nedbank Limited v Kloppers (A39/2017) [2017] ZAGPPHC 360 (29 June 2017)

[2017] ZAGPPHC 360

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay, T J Raulinga, E M Kubushi

CASE / FILE NUMBER

A39/2017

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### Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

number: A 39/2017

Date:

29/6/2017

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

NEDBANK

LIMITED PLAINTIFF

AND

KLOPPERS,

HERMANUS

PHILIPPUS DEFENDANT

## JUDGMENT

TOLMAY, J:

## INTRODUCTION

[1] The Appellant brought an application seeking an order that 4 (four) vehicles which the Respondent bought from Appellant in terms of written instalment sale agreements be attached and seized by the sheriff, pending the finalisation of certain actions pertaining to these vehicles. The Court a quo upheld the Respondent's point in limine that Appellant is not entitled to the interim relief applied for based upon *lis pendens*. The Appellant appeals the aforesaid ruling of the court a quo.

## BACKGROUND

[2] The appellant financed on behalf of the respondent the purchase of four (4) motor vehicles.

[3] The appellant applied under case number 66933/2015 for interim relief in respect of the attachment and safekeeping of the said 4 (four) motor vehicles, pending the institution and finalisation of two actions being;

3.1 the appellant's action against the respondent that was instituted in the High Court in respect of 3 (three) of the 4 (four) motor vehicles as well as: and

3.2 the finalisation of an action that was instituted by the respondent against the appellant in the Randburg Magistrate's Court in respect of the other motor vehicle (a Nissan, NP200 bakkie).

[4] The first mentioned action that was instituted by the appellant in this Court against the Respondent was instituted under case number 66933/2015 (hereinafter referred to as "the action").

[5] The respondent instituted action against the Appellant and a motor vehicle dealership being Hypercar a division of Eqstra Corporation

(Pty) Ltd, under case number 44273/2013, in the Randburg Magistrate's Court. This action was instituted during or about December

2013. This action relates to the purchase and financing by the respondent of vehicle 3, a Nissan NP 1.6 bakkie. The Appellant is in the process of finalising its plea and counterclaim in the Magistrate's Court action.

[6] The respondent instituted a further action against the Appellant in the High court of South Arica, Gauteng Local Division, Johannesburg

during or about May 2014 under case number 17892/2014. In this action the respondent alleges that the Appellant defamed him after the applicant allegedly caused the respondent's name to be listed with a credit bureau. This action is also defended by the Appellant.

[7] The Appellant previously instituted an action against the respondent under case number 87820/2014, which action the respondent defended. Subsequent to summary judgment being filed, the Appellant withdrew this action and tendered the respondent's costs.

[8] The Appellant also states in the founding affidavit that it would simultaneously with this application institute a fresh action against the respondent in this Court in respect of vehicle 1, 2, and 4.

[9] The following facts are admitted by the respondent and are common cause:

9.1 That the appellant and the respondent concluded four instalment sale agreements in respect of four motor vehicles;

9.2 That the respondent is in possession of the four motor vehicles;

9.3 That the appellant is the common law owner of the aforesaid four motor vehicles;

9.4 That the respondent defaulted in respect of the timeous payment and/or at all of the agreed monthly instalments in terms of the four instalment sale agreements;

9.5 That the last payment received by the appellant from the respondent was made during August 2014;

9.6 That the express terms and conditions of the instalment sale agreements appear from copies of the agreements annexed to the appellant's founding affidavit, which provide, inter alia, that the respondent may not withhold or deduct any amount payable on a monthly basis to the appellant; and

9.7 That the appellant cancelled all four of the instalment sale agreements as it was entitled to do.

[10] The following is also undisputed between the parties:

10.1 That the respondent failed to provide the appellant with written proof of comprehensive short-term insurance cover;

10.2 That the appellant's attorney confirmed during or about 19 May 2015 with the insurance company Outsurance that there is no insurance cover offered under the policy previously held by the respondent in respect of the vehicles;

10.3 That the respondent failed to disclose the whereabouts of the vehicles; and

10.4 That the vehicles are used by the respondent and exposed to risk on a daily basis.

LIS PENDENS

[11] The party wishing to raise lis pendens bears the onus to prove the following:

- a) there must be litigation pending[1] ;
- b) it must be pending between the same parties[2];
- c) it must be based on the same cause of action[3]; and
- d) the pending proceedings must be in respect of the same subject matter. When the subject matter is the same depends on a determination of the issues with reference to the pleadings. [4]

[12] It has been found that the cause of action had to be the same; and that the same relief must be sought in the proceedings[5].

[13] The Supreme Court of Appeal in the Ceasarstone[6] matter referred with approval to the statement of our law in respect of lis pendens in the matter of Smith v Porrit and Others[7] in the following terms:

"The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case by case basis. Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. ..., 'unless carefully circumscribed, [the defence of res judicata] is capable of producing great hardship and even positive injustice to individuals'."

[14] In casu, the Appellant applied for interim relief, which seeks to safeguard the vehicles, pending the finalisation of the actions. The other actions between the parties seek vastly different relief. Case number 44273/2013 relates to the purchase and financing of vehicle

3. Case number 87820/2014 is a claim for defamation and the fresh action to be instituted will deal with confirmation of the cancellation of the instalment sale agreements and damages.

[15] Neither the causes of action nor the relief sought in the different actions are the same. Consequently the Respondent did not succeed in proving the requirements for lis pendens and the Court a quo misdirected itself when the point in limine of lis pendens was upheld.

#### INTERMIN RELIEF

[16] Once the point in limine is determined one must consider whether Appellant met the requirements for an interim interdict.

[17] It is trite that an applicant for such an interdict must establish in applying for interim relief the following:

17.1 a prima facie right, although open to some doubt[8]

17.2 irreparable harm;

17.3 that the balance of convenience favours the applicant; and

17.4 the absence of a satisfactory alternative remedy.

- [18] The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court.[9] The discretion will be exercised having due regard to the requirements referred to as well as the facts of the case.
- [19] The purpose of the interim relief is ultimately to prevent irreparable harm pending the finalisation of the actions between the parties.
- [20] In this instance the Appellant is the common law owner of the vehicles. Furthermore it is common cause that the Respondent failed to pay the required monthly instalments and that the sale agreements were cancelled. Consequently a prima facie right has been established.
- [21] It is common cause that the Respondent uses the vehicles and in the Dorbyl Vehicle Trading[10] matter Hurt, J held, based upon similar facts, where the respondent was using the vehicles for commercial purposes and where they were driven by employees of the respondent, without the respondent being able to exercise direct control over the vehicles, that interim relief should be granted. Respondent did not insure the vehicles, which exposes Appellant to further damages.
- [22] In deciding the question of balance of convenience the court must consider the applicant's prospects of success against the degree of prejudice to either party in the event of interim relief being granted or refused. The stronger the case which the applicant makes out, the less the balance of convenience needs to favour the Appellant for interim relief to be granted.[11] In this instance Respondent has no legal right to possession and use of the vehicles pending the finalisation of the disputes between the parties. The Respondent's contention is that he needs the vehicles in his business, but if one weighs this against all the facts, including the possibility of the uninsured vehicles being damaged and the deterioration of value, there is no question that the balance of convenience favours Appellant.
- [23] Pending the determination of the action there is also no suitable other remedy available to the Appellant. It must be noted that the alternative remedy must be adequate in the circumstances, be ordinary and reasonable and grant similar protection.[12]

[24] As a result I conclude that Appellant made out a case for the relief sought.

[25] The following order is made:

The appeal is upheld and the order is substituted with the following:

25.1 The point in limine is dismissed;

25.2 The following order is granted:

The Respondent is ordered to forthwith surrender to the Applicant the following motor vehicles:

Vehicle 1:

1 x Nissan Pathfinder 4.0 V6 A/T (L11/14), 2009 Model Engine number VQ40580406A

Chassis number: VSKJLWR5120241373

Vehicle 2:

1 x Hyundai Veloster 1.6 GDI Executive OCT, 2013 model Engine number: G7FDDU3151713

Chassis number: KMHCTC61DVDU141199

Vehicle 3:

1 x Nissan NP200 1.6S (dual airbags) P/U S/C, 2012 model Engine number: K7MF71OUG35701

Chassis number: ADNUSN1D5U0040314

Vehicle 4:

1 x Nissan Miera 1.4 Acenta 5 Dr (D63/74), 2010 model Engine number: CR14271758R

Chassis number: SJNFCAK1223198395

25.3 The Sheriff of the Court is authorised and requested to attach, seize and hand over to the Appellant, wherever they may be found, the motor vehicles as described in prayer 25.2 above.

25.4 The attached motor vehicles as described in prayer 25.2 above are to be kept by the Appellant in safe custody as security, pending the finalisation of the following actions:

- a. In respect of Vehicle 3 - the action instituted by the Respondent against the Appellant in the Randburg Magistrate's Court, under case number 44273/13; and
- b. In respect of Vehicles 1, 2 and 4 - an action to be instituted by the Appellant against the Respondent in this Court within 14 days of this order for inter alia the confirmation of cancellation of the three Instalment Sale Agreements and the return of vehicles 1, 2 and 4 financed by the Appellant for the Respondent in terms of the said Instalment Sale Agreements. If the Appellant fails to institute the aforesaid action within 14 days of this order, this order will lapse.

25.5 The Respondent is interdicted and restrained from dealing in any manner with the goods as described in prayer 25.2 above save as provided for in the Court order.

25.6 The Respondent to pay the costs of the application on a scale as between attorney and client.

The Respondent is ordered to pay the costs of the appeal on a party and party scale.

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R G TOLMAY

JUDGE OF THE HIGH COURT

I AGREE:

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T J RAULINGA

JUDGE OF THE HIGH COURT  
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E M KUBUSHI

DATE OF HEARING: 31 MAY 2017

DATE OF JUDGMENT: 29 JUNE 2017

ATTORNEYS FOR APPELLANT: VHI ATTORNEYS

ADVOCATE FOR APPELLANT: J P VAN DEN BERG

ATTORNEY FOR RESPONDENT: STRAUSS DE WAAL

ADVOCATE FOR RESPONDENT: ATTORNEYS J M PRINSLOO

- [1] RSA Faktors Bpk v Bloemfontein Township Developers (Edms) Bpk 1981(2) SA 141 (O); Van As v Appolus 1993(1) SA 606 (C)
- [2] Cook v Muller 1973(2) SA 240 (N)
- [3] Richterveld Community v Alexor Ltd 2000(1) SA 337 (LCC); Nestle (SA) (Pty) Ltd v Mars Inc 2001(4) SA 542 (SCA)
- [4] Marks & Kantor v Van Diggelen 1933 TPD 29
- [5] Ceasarstone SOOT-Yam Limited v World of Marble and Granite 2000 CC and others 2013 (6) SA 499 (SCA) at par 3 and 12 on p 502I – 503B and p 505E
- [6] Supra
- [7] 2008(6) SA 303 (SCA), supra
- [8] Setlogelo v Setlogelo 1914 AD 221 at 227; Ericson Motors Welkom Ltd v Protea Motors Warrenton 1973(3) SA 685 (AD) as well as Johannesburg Municipal Pension Fund v City of Johannesburg 2005(6) SA 273 (W)
- [9] Eriksen Motors Limited v Protea Motors & Another 1973 (3) SA 685 at 691C
- [10] Dorbyl Vehicle Trading and Finance Co (Pty) Ltd v Kloppers supra at 2441 - 245C
- [11] Olympic Passenger Services (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D) at 383C - G
- [12] Minister of Law & Order v Committee of the church Summit 1994(3) SA 89 (B) at 99; Chapmans Peak Hotel v O'Hagans [2001] 4 All SA 415 (C) at 420

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Prepared on 10 October 2026 · Esheria