IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 58683/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

Malindi
SIGNATURE

31/08/2021
DATE

In the matter between:

FIRSTRAND BANK LIMITED t/a WESBANK APPLICANT

and

SIYANDA SESIMANI RESPONDENT

JUDGMENT

MALINDI J

INTRODUCTION

[1] This is an application for the interim attachment whereby the applicant seeks the attachment of a motor vehicle which the applicant will keep at a safe place pending the outcome of the action under the above case number.

[2] In the action referred to above the applicant claims, among others, the return of the vehicle from the respondent subsequent to the cancellation of an instalment agreement completed between the parties.

[3] The applicant pleads a breach of the agreement by the respondent by failing to pay the monthly instalments, a breach which entitled the applicant to cancel the agreement.

[4] The respondent pleads a defence and a counterclaim. He pleads that the agreement

> *"is fraudulent, unlawful, null and void, ab initio by virtue of the fact that the plaintiff and the dealer, BMW Melrose Arch … fraudulently misrepresented and inflated the price of the goods … His counterclaim is for the return of his traded-in motor vehicle or its recorded trade-in value."*

BACKGROUND

[5] The relevant background is succinctly set out in the chronology of events as follows:

5.1 17 July 2017: Instalment sale agreement concluded with the respondent;

5.2 17 July 2017: Vehicle delivered to the respondent via a third party;

5.3 October 2017: Last instalment paid;

5.4 July 2019: Arrears on the account: R342 612.28;

5.5 8 August 2019: Summons issued;

5.6 September 2019: Summons served;

5.7 26 September 2019: Notice of intention to defend served;

5.8 31 October 2019: Plea and counterclaim served;

5.9 21 November 2019: Application for summary judgment launched;

5.10 16 January 2020: Affidavit opposing summary judgment served;

5.11 16 January 2020: Leave to defend the action granted;

5.12 30 April 2020: Amended plea served;

5.13 30 April 2020: Amended Counterclaim served;

5.14 21 August 2020: Interim attachment application launched;

5.15 November/December 2020: Third party notice issued and served;

5.16 2 December 2020: Respondent's notice of intention to oppose served;

5.17 2 February 2021: Respondent serves his answering affidavit;

5.18 17 February 2021: Applicant's replying affidavit served.

[6] In addition to the respondent's pleaded defences he states further in his affidavit opposing summary judgment that:

> *"22. I traded in my 2012 BMW 116i 5DR with 108 000km. BMW recorded the total trade in value as R343 884.67 (Three Hundred and Forty-three Thousand Eight Hundred and Eighty-Four Rand and Sixty-Seven Cents). The WESBANK agreement makes no mention of this vehicle and no explanation has been forwarded when I enquired who benefited from the sale of my vehicle. My impression was that this trade in value would be minused from the principal debts."*

> *"29.4 It is imperative to note that I have always wanted to return the vehicle to the plaintiff and never intended using their property without paying for it. From the beginning I had offered to return their vehicle and cancel this "agreement" as it was clear there was no consensus ab initio. For this reason, no rights can flow from such and "agreement". The agreement also does not meet the requirement of lawfulness as it breaches the National Credit Act. It therefore would serve as a grave injustice to me for this vehicle to be returned to the plaintiff, without the plaintiff putting me back in the same position I was in before entering into this "agreement".*

[7] The parties have agreed in their joint practice note that the issues for determination are:

7.1 Whether the application was brought timeously;

7.2 Whether the applicant suffered irreparable harm; and

7.3 Whether the balance of convenience favours the applicant.

[8] Despite the admissions made by the respondent that weigh very much in favour of the applicant in the pending action, taken together with the pleaded defence and counterclaim, the applicant still bears the onus to establish the other requisites for the interim relief that it seeks.

REQUIREMENTS FOR INTERIM RELIEF

Clear right/prima facie right

[9] A clear right has been established and admitted by the respondent.[1]

[1] Answering affidavit ("AA") 003-25 at para 5.26.1. See also *SA Taxi Securitisation (Pty) Ltd v Chesane* 2010 (6) SA 557 (GSJ) ("*Chesane*") at [6].

Irreparable harm

[10] In *Chesane,*[2] the following was stated:

> *"[30] I turn to the balance of convenience.* ***As the applicant's claim is a vindicatory one the element of irreparable harm is presumed.*** *See Stern and Ruskin NO v Appleson12. Having apparently validly cancelled the lease agreements the applicant as owner of the vehicles is entitled to have the vehicles preserved in their present condition pendente lite. See the cases of Morrison, Loader and Van Rhyn supra. It is self-evident that the vehicles are depreciating by use and that the respondent's continued utilisation of the vehicles as taxis over an extended period will have the result that, should the applicant be successful in its action, the vehicles that it recovers may be virtually worthless. It is untenable that the respondent be entitled to utilise the vehicles without effecting payment under the credit agreements. The applicant seeks to have the vehicles stored in a place of safety so that, in the unlikely event that the applicant is directed after the finalisation of the action to return the vehicles to the respondent,* ***they will not have suffered any meaningful reduction in value.*** *The applicant will bear the costs of the storage."* (Emphasis added)

[11] The respondent has submitted that the presumption in irreparable harm being done to the applicant has to be seen in the context of what he has done to mitigate such harm. This he did by subscribing to comprehensive insurance of the vehicle, a service/maintenance plan, warranty Cover Policy in order to cover any mechanical breakdown of the major parts, and a tracking device. When not in use the vehicle is parked in a locked garage and a locked gate to the premises.

[12] This submission is linked to the one that the applicant ought to have acted expeditiously in bringing this application if it had real fears that the value of the vehicle would deteriorate significantly in the hands of the respondent.

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[2] *Chesane supra* n 1 at [30]

[13] In *Chesane* it was said that irreparable harm would be *"any meaningful reduction in value"*. The question arises as to what value remains in this vehicle since it has been in the respondent's possession and use since July 2017.

Balance of convenience

[14] In this regard the respondent pleaded the same circumstances as in *Chesane* and more to be taken into account in balancing the convenience between the parties. These are personal circumstances that impact his ability to work and support himself and his daughter who is still a teenager and who attends school. The possible loss of the vehicle has also caused him anxieties, stress and a deterioration in his well-being, resulting in loss of sleep, nocturnal enuresis (bedwetting at night) and anxiety disorder.

[15] Boruchowitz J in *Chesane* found that despite these personal circumstances where the applicant has established a strong right to cancellation and restoration of the vehicle in the pending action, less weight ought to be placed on the question of balance of convenience. He found that the balance of convenience favoured the applicant.[3]

ANALYSIS

[16] In *Chesane* the cancellation of the agreements was conveyed to the respondent in the particulars of claim, served on or about 26 June 2009 and interim relief to attach the motor vehicles for safekeeping pending the finalisation of the trial was

[3] *Chesane* at [32].

sought in the same year and heard on 23 February 2010. The applicant moved with speed in taking proceedings aimed at minimising any meaningful reduction in value of the vehicles. The respondent in this case pleads that the applicant did not, and therefore has forfeited the right to interim relief.

[17] The respondent relied on the cases of ***Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd***[4] **and *AJVH Holdings (Pty) Ltd & Others v Steinhoff International Holdings NV & Another; AJVH Holdings (Pty) Ltd and Others v Steinhoff International Holdings NV and Others***.[5] In *Juta & Co* the Court held that a delay of some three months from the date of notifying the respondent that it would take legal action for a number of copyright violations by the respondent before launching the application for an interdict pending action was too long in the absence of an explanation for the delay and that the application stood to be dismissed as the applicant had forfeited its right to temporary relief.[6] In *Steinhoff* the Court remarked that the circumstances in *Juta & Co* illustrate that:

> "*the institution of proceedings for interim interdictory relief pendente lite imposes a duty on the litigant initiating them to prosecute them with conscientiousness and expedition, failing which they may justly be regarded, in essence, as an abuse of process.*"[7]

[18] The applicant responded that *Juta & Co* is distinguishable as their action had not been commenced and the applicant was seeking an extension of time to file the interdict pending the filing of an action. The applicant also referred to

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[4] 1969 (4) SA 443 (C).
[5] [2020] ZAWCHC 46 at [17].
[6] *Juta & Co* at 445C-F.
[7] *Steinhoff* at [17].

Harnischfeger Corporation & Another v Appleton & Another[8] where Flemming DJP observed that *Juta & Co* and other cases *"dealt with delay only as a factor in a wider context"*. His Lordship, Flemming DJP, went further to state, with reference to *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & Another*[9] that:

> *"In striking the balance (Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another 1973 (3) SA 685 (A) at 691D-G), the prospects of being successful are in the scale together with the prospect of each party suffering harm as a result of the Court either interfering or, alternatively, not granting interim relief, the seriousness and irreparability of the harm, the difficulties of proving the extent of any harm, and the risk of not recovering the amount thereof."*[10]

[19] I am of the view that the wider context in this matter does require closer consideration. I agree with the respondent that this application ought to have been launched at the time that the applicant apprehended the harm (shortly after November 2017) pending action or together with the summons (which itself was some 22 months after apprehending the harm). Having taken steps to retrieve the vehicle by issuing summary judgment proceedings unsuccessfully the applicant took some seven months to bring this application. In *National Council of Societies for the Prevention of Cruelty to Animals v Peter Openshaw*[11] the Supreme Court of Appeal quoted *Juta & Co*. with approval as follows:

> *"If one bears in mind the long delays for which no explanation has been given, that as far back as December the applicant had numerous clear cases of copying in its possession, according to the letter written by the applicant, and that up to now no action has been instituted, it seems that the applicant has erred in selecting this method, namely, an application for an interdict pendente lite, but even if it was the*

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[8] 1993 (4) SA 479 (W) at 490G-I.
[9] 1973 (3) SA 685 (A).
[10] *Harnischfeger supra* n 8 at 491D.
[11] 2008 (5) SA 339 (SCA) at [16].

appropriate procedure at the time the applicant has, by reason of the facts stated above, forfeited its rights to this temporary relief. Had it issued summons at the time when the notice of motion proceedings were instituted, the trial could already have taken place.

There is such a thing as the tyranny of litigation, and a Court of law should not allow a party to drag out proceedings unduly. In this case we are considering an application for an interdict pendente lite, which, from its very nature, requires the maximum expedition on the part of an applicant."

[20] A long delay in the circumstances of this case is a significant factor to be taken into account. The respondent was unable to pay the instalments immediately from November 2017 when the R10 800.00 that he alleges should have been made available to him by QSG Consult Middle East Limited, a company allegedly based in Dubai, and introduced to him by the applicant, was not forthcoming. Action was only instituted on 8 August 2019, some 22 months later and summary judgment seven months later after the respondent was granted leave to defend.

[21] The quickest that the applicant acted in order to obtain expeditious relief against the respondent was when it brought an application for summary judgment. The application was refused on 16 January 2020.

[22] After having taken an exception to the plea and the respondent amending his plea accordingly in April 2020, the applicant took another four months to launch the current application for interim relief pending the finalisation of the trial in August 2020.

[23] The applicant has not dealt with the delay in bringing the application for the attachment and safekeeping of the vehicle although this point was alluded to in

the answering affidavit. It contended itself with reliance on its legal strategies adopted after the plea, that is, the summary judgment application and the exception to the plea after failure of summary judgment. No attempt is made at explaining the delays between the cancellation of the agreement in the summons issued on 8 August 2019 and the summary judgment application on 21 November 2019; the dismissal of the summary judgment application on 16 January 2020 and the launching of this application on 21 August 2020, seven months after.

[24] In the time that the applicant had not asserted its rights[12] the respondent took steps to mitigate the meaningful deterioration in value of the vehicle by continuing with the comprehensive insurance thereof and taking other measures referred to in para 11 above. It is, in my view, not easy to assess the degree of harm after the respondent has had the vehicle for some four years.[13]

[25] I therefore find in favour of the respondent in relation of the first issue for determination, that is, that the applicant's delay in bringing the application for interim relief was not brought timeously and therefore that it has forfeited the right to do so. This finding is intertwined with the doubt that the applicant has established that irreparable harm will result if this application is not granted. The presumption that irreparable harm follows where vindication of property is sought has been rebutted by the applicant's conduct and the steps taken by the

[12] *Chesane supra* n 1 at [6].
[13] H*arnischfeger supra* n 8 at 490G-I.

respondent to mitigate same. No meaningful irreparable harm will be suffered by the applicant.

ORDER

[26] I therefore make the following order:

[26.1] The application is dismissed.

[26.2] There is no order as to costs.

G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 August 2021.

APPEARANCES

Counsel for Applicant	: Adv. WG Pretorius
Instructed by	: Roussouws Lesie Inc.
Counsel for Respondent	: Adv J Gregory (Appearing Pro Bono)
Instructed by	: Hansen Attorneys, Notaries and Conveyancer
Date of hearing	: 26 July 2021
Date judgment reserved	: 26 July 2021
Date of judgment	:31 August 2021