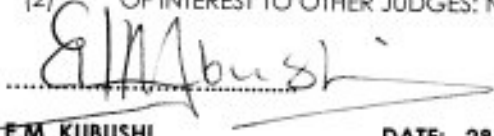




**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case Number: 49347/2018**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
E.M. KUBUSHI	
DATE: 28-05-2021	

In the matter between:

**NALEK SECURITY (PTY) LTD t/a  
NALEK SECURITY (PTY)LTD**  
(REG. NO.: 2014/032142/07)

**FIRST APPLICANT**

**KGASOANE, JOHN KARABO**

**SECOND APPLICANT**

and

**FIRST BANK LTD t/a WESBANK**  
(REG. NO: 1929/001225/06)

**FIRST RESPONDENT**

**THE DEPUTY SHERIFF OF THE HIGH  
COURT JOHANNESBURG SOUTH**

**SECOND RESPONDENT**

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**JUDGMENT**

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**KUBUSHI J**

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 28 May 2021.

## INTRODUCTION

[1] The applicants seek an order that the first respondent be interdicted and restrained from attaching and taking possession of a 2015 MERCEDES-BENZ S 63 AMG COUPE motor vehicle, with engine number 15798560070733 and chassis number WDD2173772A007803; ("the motor vehicle") under an order of this court granted on or about October 2018 under case number 49347/2018, pending the deliberation of an application under the above case number which application will be served on the first respondent.

[2] In addition, the applicants seek an order in terms of which any further execution of an order of this court that was granted on or about October 2018 under case number 49347/2018 is stayed/pended; pending the settlement of correct amount due to the first respondent.

[3] Only the first respondent is opposing the application. The first respondent's defence against the applicants' claim is that the applicants failed to make out a case for interim relief as sought in prayer 1 and that the relief they seek in prayer 2 is *res judicata* and the court is *functus officio* in respect thereof.

[4] The applicants have not filed a replying affidavit and heads of argument as same could not be found on Caselines.

[5] This court has directed that the application be determined on the papers filed on Caselines without oral hearing as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

[6] The defences raised by the first respondent are preliminary in nature and may be dispositive of the issues in this application if decided in the first respondent's favour; and they ought to be dealt with at the outset before the merits of the application are considered.

#### BACKGROUND

[7] It is common cause that due to the first applicant's breach of its payment obligations in terms of the instalment sale agreement ("the agreement") concluded between the first applicant and the first respondent, the first respondent instituted proceedings for the return and repossession of the motor vehicle it financed in terms of the agreement. The applicants defended the summons and the first respondent pursued judgment by way of the summary judgment procedure provided for in Rule 32 of the Uniform Rules of Court.

[8] It is also not in dispute that on 11 October 2018 the court granted judgment against the applicants for cancellation of the agreement and repossession of the motor vehicle. This judgment has not been rescinded and

is still of force and effect. On the basis of that judgment, the Registrar on 7 November 2018 issued a warrant for delivery of the motor vehicle. The first respondent allegedly attempted to execute the warrant for delivery on 14 November 2018 without success.

[9] It is, also, common cause that pursuant to the said judgment granted on 18 October 2018, the applicants, on 28 November 2018, issued an application for an order in the following terms:

9.1 *That ( the first respondent be compelled to apply for the taxation and or other assessment of the legal and/or related costs charged to the applicants' written instalment sale agreement since inception of legal and/or action proceedings against the applicants for determination of reasonableness; That the applicants be granted a period of 3 (three) months within which to appoint an accredited third party auditor in order to determine the actual outstanding balance due and payable by the applicants to the first respondent;*

9.2 *Alternatively, that the execution of an order of this Honourable Court that was granted on or about October 2018 under case*

*number 49347/2018 be stayed pending the settlement of the correct arrear amount due to the first respondent;*

### 9.3 Costs.

[10] The matter was fully opposed and was dismissed with costs on 29 May 2019. The first respondent had undertaken to ensure that the opposed motion papers in this application are filed in the court file but has not done so. These allegations by the first respondent are, in any event, not denied by the applicants.

### PRELIMINARY POINTS

[11] According to the first respondent the applicants' case for an interim interdict is meritless, in that the applicants have failed to make out a case for interim relief and due to the fact that as at date of preparing the opposing affidavit (September 2019 and amended December 2019), no other application for deliberation had been served on the first respondent. The contention, therefore, is that the applicants seek an interim interdict pending the resolution of disputes in another application, which disputes are not yet alive as at date of this application, and which it submits are in any event non-existent.

[12] The first respondent submits, further that, the relief sought in prayer 2 is exactly the same as the relief that was sought in terms of prayer 3 of a previously opposed motion which was instituted by the applicants against the first respondent. The first respondent contends that the applicants having previously approached the court for relief in the same terms,<sup>1</sup> which relief was dismissed, absent any new evidence, the relief in prayer 2 of this application is *res judicata* and the court is *functus officio* in respect thereof. Accordingly, the first respondent argues that prayer 2 should, therefore, be dismissed outright.

#### DISCUSSION

[13] What all these amounts to is that the applicants have not been able to make out a case prayed for in their notice of motion, as will appear more fully hereunder.

#### Re: Prayer 1

[14] In terms of prayer 1, the applicants are in essence seeking an interim interdict the effect of which is to restrain the first respondent from enforcing the summary judgment order for repossession of the motor vehicle. The interim order is based on a pending application which was supposed to have been served on the first respondent. As correctly argued by the first respondent, the

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<sup>1</sup> See paragraph 9.2 of this judgment.

applicants seek an interim interdict pending the resolution of disputes in another application, which disputes are not yet alive as the said application has not yet been served on the first respondent. It is common cause that as at the date of the hearing of this application, the envisaged application had not been served on the first respondent. Under the circumstances, it would, thus, be safe to infer that such failure to serve the application means that the disputes are non-existent. It follows that without any pending application, and/or existing disputes between the applicants and the first respondent, the applicants have failed to establish a case for interim relief.

Re: Prayer 2

[15] From the evidence presented by the first respondent in its papers, which evidence has not been challenged by the applicants, it is evident that the facts raised in these papers by the applicants are the same as those raised in the previous application by the applicants. Therefore, in terms of prayer 2, the applicants having not denied the fact that the order granted against them on 29 May 2019 exists and has not been rescinded, renders prayer 2 of the applicants' notice of motion, *res judicata* and this court is *functus officio*, in respect thereof.

[16] Of great importance in this matter is that the applicants have admitted the facts relating to the action that was instituted by the first respondent against them for repossession of the motor vehicle. The effect is that the first applicant having acted in breach of the agreement resulted in the agreement being cancelled when judgment was granted in favour of the first respondent on 11 October 2018. In terms of the agreement, the first respondent was to remain the owner of the motor vehicle until the first applicant had paid all the amounts due under the agreement. Thus, the order of 11 October 2018 entitled the first respondent to enforce its ownership rights in relation to the motor vehicle against the applicants. The applicants' willingness to act in any manner in terms of the instalment sale agreement, at this stage, is irrelevant because it is after the fact, and the cancelled agreement cannot be resuscitated and/or reinstated by the applicants' payment of arrear instalments.

[17] The first applicant's lack of funds occasioned by the circumstances set out in the applicants' founding papers, is really unfortunate but, is in actual fact, irrelevant for purposes of this application. The fact remains that the first applicant acted in breach of the agreement, which in terms of the order granted on 11 October 2018 (which order has not been rescinded and remains of force and effect), entitled the first respondent to the cancellation of the agreement



and further entitles the first respondent to take control of the motor vehicle to recover the debt due to the it.

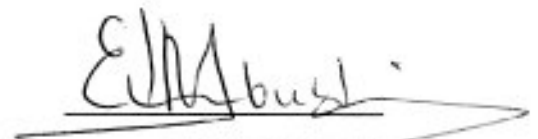
#### COSTS

[18] The first respondent prays for the application to be dismissed with costs on an attorney and client scale. The contention is that this application is unjustified, and an ill-motivated, and perseveres in delaying the repossession of the first respondent's motor vehicle. For this reason, the first respondent argues that a cost order against the applicants on a punitive attorney and client scale, is warranted. I agree.

#### ORDER

[19] Therefore, I make the following order

1. The application is dismissed.
2. The applicants are ordered to pay the first respondent's costs of the opposed application jointly and severally, on an attorney and client scale.

A handwritten signature in black ink, appearing to read 'E.M. Kubushi', is written over a horizontal line.

**E.M. KUBUSHI**

**JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

Appearance:

Applicant's Counsel : UNKNOWN

Applicant's Attorneys : John Karabo Kgasoane Attorneys

Respondent's Counsel : Adv I OSCHMAN

Respondent's Attorneys : Bezuidenhout Van Zyl & Associates

Date of hearing : 20 April 2021

Date of judgment : 28 May 2021