REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **38327/2019**

(1) REPORTABLE: NO / YES
(2) OF INTEREST TO OTHER JUDGES: NO / YES
(3) REVISED.

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SIGNATURE **DATE**

In the matter between:

BRIDGE TAXI FINANCE GJ (PTY) LTD (FORMERLY KNOWN AS BRIDGE TAXI FINANCE (PTY) LTD) Applicant

and

TSWABOLE, FUMANE HERMAN Respondent

JUDGMENT

Lapan AJ:

INTRODUCTION

[1] This is the return day of a rule *nisi* issued on 17 December 2019, calling on the respondent to show cause why he should not be ordered to forthwith restore to the applicant possession of a 2018 Auto Brilliance Jinbei H2, with engine number 4RB269895A and chassis number LSYHKAAF6HK046308 (vehicle).

[2] This issue to be decided is whether the rule *nisi* should be confirmed.

[3] Notwithstanding that an interim order was granted in the form of a rule *nisi*, this court must be satisfied, on the return day, that a proper case has been made out for every facet of the relief sought. Put differently, the applicant must show that the requirements for the granting of an interim interdict have been met.[1]

[4] Before considering the requirements for an interim interdict, the background is provided below and, thereafter, consideration is given to the respondent's grounds for opposing this application.

BACKGROUND

[5] On 26 January 2018, at Johannesburg, the applicant and the respondent concluded a developmental credit agreement in terms of which the applicant leased the vehicle to the respondent for use as a taxi (credit agreement).

[6] In terms of clause 2 of the credit agreement, the applicant remains the owner of the vehicle until the respondent pays all amounts owing to the applicant. The respondent is responsible for maintaining the vehicle and bears the risk of loss or damage to the vehicle.

[7] The respondent agreed to make 57 monthly payments to the applicant in an amount of R13 900.11 each, including interest and costs.

[8] Clause 11 of the credit agreement provides for various instances in which a

[1] *Polyoaks (Pty) Ltd v Chemical Workers Industrial Union and Others* (1999) 20 ILJ (LC) at 394.

breach may occur including the failure to pay an amount due in terms of the credit agreement.

[9] In the event of a breach occurring, the applicant is entitled to terminate the credit agreement and, in doing so, the applicant is required to follow the provisions of the National Credit Act, 34 of 2005 (NCA) relating to enforcing and ending credit agreements.

[10] The respondent breached the lease agreement by failing to make payment of the monthly amounts due.

[11] On 19 June 2019, the respondent took the initiative to apply for debt review in terms of section 86(1) of the NCA.

[12] In terms of a letter dated 2 October 2019, the applicant, acting in terms of section 86(10) of the NCA, gave notice to the respondent, the debt counsellor and the National Credit Regulator terminating the respondent's debt review. More than 60 (sixty) business days had elapsed by the time the applicant gave notice in terms of section 86(10) of the NCA.

[13] Based on a statement of account dated 7 October 2019, the respondent's account is in arrears, in an amount of R95 831.98, and the total amount outstanding is R437 813.73.

[14] In late October 2019, the applicant instituted action against the respondent in terms of which it cancelled the credit agreement and claimed payment of the total amount outstanding and the return of the vehicle (action).

[15] The return of service indicates that the summons commencing the action, as well as this application and the rule *nisi* issued herein, were served on the respondent at his residential address on 6 February 2020.

[16] The respondent delivered a notice of intention to defend the action.

[17] Accordingly, the applicant's election to terminate the credit agreement, as set out in the particulars of claim annexed to the summons, was communicated to the respondent upon service of the summons.

RESPONDENT'S OPPOSITION TO THIS APPLICATION

[18] The respondent alleges that the applicant's notice to terminate the debt review, in terms of section 86(10) of the NCA, did not come to his attention nor did the applicant attach a track and trace report to prove delivery of the notice. Therefore, so the respondent contends, the debt review process was not terminated and the applicant is precluded from terminating the agreement.

[19] Section 86(10) does not require the applicant to take all steps necessary to ensure that the notice terminating the debt review is brought to the respondent's attention. The applicant sent the letter to the respondent by registered mail as it was required to do in terms of the credit agreement.

[20] Our courts have held that while the credit provider is required to take certain steps to ensure that the consumer is adequately informed, the credit provider is not non-suited or hamstrung if the consumer unreasonably fails to engage with or make use of the information provided.[2]

[2] *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) in para [31].

[21] Accordingly, the applicant's notice terminating the debt review was appropriately made in terms of section 86(10) of the Act.

[22] The respondent contends further that this application is premature since the applicant failed to address a letter of demand to the respondent in terms of section 129 of the NCA. This contention is not in accordance with our law.

[23] A notice in terms of section 129 of the NCA is redundant where the consumer has already taken steps to re-arrange his debts such as applying for debt review as the respondent did in the present matter.[3]

[24] Section 129(1)(b)(i) of the NCA requires that the credit provider gives notice to the consumer, in order to commence legal proceedings, either in terms of section 129(1)(a) or section 86(10) of the NCA. The former section applies where there has been no debt review and the latter where there has been. Requiring that two notices, serving the same purpose, be sent to the consumer is absurd.[4]

[25] Since the applicant sent a notice in terms of section 86(10) of the NCA, there is no requirement for a notice to be sent in terms of section 129 of the NCA.

[26] The respondent contends further that the outstanding amount has been incorrectly calculated and fails to take account of certain payments made to the debit counsellor.

[27] It appears from the respondent's Capitec bank statement dated 8 June 2020 that he made two payments of R5 000.00 each during January and February 2020. These payments are given a description incorporating the name of the debt

[3] *Firstrand Bank Ltd t/a Honda Finance v Owens* 2013 (2) SA 325 (SCA) in para [10].
[4] *Ibid*

counsellor but without any evidence indicating that they were paid to, and received by, the debt counsellor.

[28] For purposes of this application, the fact that the applicant is in arrears with his payments is sufficient to trigger the breach and cancellation provisions in the agreement including claiming the return of the vehicle *pendente lite*.

[29] The correct amount claimable by the applicant will be determined in the action.

[30] The respondent claims that, to date, the summons has not been served on the respondent. However, the sheriff's return of service states that the summons was served on the respondent at his residential address and the applicant's attorneys confirmed receipt of the respondent's notice of intention to defend the action. Nothing more needs to be said about this ground of opposition.

[31] The respondent contends that the applicant is precluded from enforcing its rights in terms of the credit agreement due to its non-compliance with section 108 of the NCA which provides that credit providers must offer to deliver periodic statements of account to consumers. Since the applicant concluded a development credit agreement with the respondent, section 107(4) of the NCA exempts it from compliance with the provisions of section 108 of the NCA. Accordingly, there is no merit in this ground of opposition.

[32] Finally, the respondent opposes the claim for return of the vehicle on the basis that he is maintaining the vehicle in good working condition. He also contends

that the vehicle could easily be recovered by the applicant, should the applicant be concerned about its whereabouts, due to the tracking device installed in the vehicle which device, he contends, is in working order.

[33] It does not behove the respondent to say that he is entitled to retain the vehicle for as long as he maintains the vehicle in good working condition and for as long as the vehicle is capable of being recovered by the applicant at any time.

[34] Our law is clear that the purpose of returning the vehicle to the applicant *pendent lite* is to protect the vehicle against damage and further deterioration by the continued use of the vehicle. It is also intended to ensure that the applicant retains the vehicle in its possession for safekeeping and to preserve the vehicle in the condition in which it was in at the time when the applicant sought to enforce its right to claim payment and the return of the vehicle.[5]

[35] In view thereof, the applicant is entitled to the return of the vehicle upon satisfying the requirements for the granting of an interim interdict.

REQUIREMENTS FOR AN INTERIM INTERDICT

[36] It is settled law that the applicant for an interim interdict is required to establish the following:

(a) a *prima facie* right though open to some doubt;

(b) a well-grounded apprehension of irreparable harm occurring should the

[5] *SA Taxi Securitisation (Pty) Ltd v Chesane* 2010 (6) SA 557 (GSJ) in para [10]; *Loader v De Beer* 1947 (1) SA 87 (W) at 89D *et seq*.

interdict not be granted;

(c) the balance of convenience favours the granting of the interdict; and

(d) the applicant has no other satisfactory remedy available to it.

[37] As a prerequisite to the granting of an interim interdict for the return of vehicle, the applicant must establish that it cancelled the agreement pursuant to which it retained ownership and granted possession of the vehicle to the respondent and that the cancellation was communicated to the respondent.[6]

[38] In the present matter, the applicant cancelled the agreement in the particulars of claim annexed to the summons and the cancellation was communicated when the summons was served on the respondent on 6 February 2020.

[39] The applicant was entitled to commence action against the respondent after giving notice, on or about 2 October 2019, in terms of section 86(10) of the NCA, terminating the debt review initiated by the respondent. The prerequisites having been fulfilled, consideration is given to the requirements for an interim interdict.

A prima facie right

[41] The applicant relies on its rights, in terms of clause 11 of the credit agreement, to cancel the credit agreement and claim return of the vehicle due to the respondent's breach in failing to pay the monthly amounts due. The respondent does not deny being in default of his obligations to make payment. His only contention is that he made a few payments more than those reflected in the

[6] *SA Taxi Securitisation* (supra) in para [13].

statement of account dated 7 October 2019. This amounts to an admission that the respondent is in breach of his obligations in terms of the credit agreement.

[42] In addition, the applicant contends for a clear right based on the fact that the tracking device installed in the vehicle appears to have been disabled thus putting the applicant at risk of not being able to recover the vehicle.

[43] The tracking company apparently advised the applicant that the last time a signal was received from the tracking device was in March 2020. However, there is no admissible evidence to prove this and to gainsay the respondent's averment that the tracking company would have known, and been alerted, if the tracking device had been tampered with.

[44] Notwithstanding the above, the applicant has established at least a *prima facie* right, if not a clear right, to terminate the credit agreement and to take possession of the vehicle pending the final determination of the action. Thus, the first requirement for the granting of an interdict is established.

Well-grounded apprehension of irreparable harm

[45] Since the applicant's claim is vindicatory in nature, it is presumed that irreparable harm will ensue if the vehicle is not returned *pendente lite*.[7]

[46] Furthermore, the applicant contends that, in its experience, taxis are generally subjected to rigorous use, that persons in the position of the respondent who are facing claims for termination of the agreement and return of the vehicle often display an attitude of disdain for the applicant's rights which manifests in an abuse of the

[7] *Stern and Ruskin No v Appelson* 1951 (3) SA 800 (W) at 813.

vehicle and a concomitant lack of care and maintenance. Such conduct may also lead to the user causing the vehicle to be stripped of its component parts in order to deprive the applicant of its property rights.

[47] It has been held that, whether or not the claim is vindicatory in nature, the applicant is entitled to have the vehicle kept in the condition in which it was in when instituting the action and a refusal to grant interim relief to ensure that it remains in that condition, pending the outcome of the action, would cause the applicant to suffer irreparable harm.[8]

[48] In view of the aforesaid, there is a well-grounded apprehension of the applicant suffering irreparable harm if it fails in its endeavours to claim the return of the vehicle with a view to preserving its value and retaining it for safekeeping.

[49] Thus, the second requirement for the granting of an interim interdict is established.

Balance of convenience

[50] The balance of convenience must favour the granting of an interim interdict and this requirement is satisfied if the prejudice that the applicant will suffer, if the interdict is not granted, outweighs the prejudice to the respondent if the interdict is granted. The stronger the applicant's prospects of success in the action, the less the need for the balance of convenience to favour the applicant and *vice versa*.

[51] The applicant contends that the vehicle deteriorates in value due to its continued use as a taxi particularly due to the rigours that the vehicle is put to in the

[8] Per Justice Greenberg in *Morrison v African Guarantee and Indemnity Co Ltd* (1936) (1) PH Sec. M as quoted by Millin J in *Loader v De Beer* (supra) at 90.

course of being operated as a taxi.

[52] In addition, the applicant states that it has observed a recent spike in the stripping of vehicles and the removal of its component parts which jeopardises the applicant's security and its ability to preserve the vehicle *pendente lite*.

[53] In February 2020, the applicant's recovery of stripped vehicles was approximately 16%. This figure escalated to 50% in March, 75% in April, 80% in May and 80% in June 2020. The spike in the recovery of stripped vehicles is alarming but also believable as it occurred at the commencement of, and during the course of, the national lockdown occasioned by COVID-19. The prejudice to the applicant should the interdict not be granted is significant.

[54] The respondent states that he will be prejudiced by the return of the vehicle as he requires the vehicle to continue operating his taxi business. The respondent baldly asserts that the vehicle is well-maintained and in good condition.

[55] The respondent's assertions ring hollow when regard is had to his financial difficulties experienced since May 2019 which led to his application for debt review in June 2019 and, on the respondent's version, this continued when the national lockdown commenced in March 2020. These financial difficulties are also evident from the erratic payments which the applicant has received from the respondent in the past year. The upkeep of the vehicle would serve only to add to the respondent's financial woes and there is no evidence of any maintenance, repairs, or the servicing of the vehicle carried out during the past year.

[56] In view of the above, there is a real risk that the applicant will suffer irreparable harm due to the deterioration in the value of the vehicle occasioned by its

continued use as a taxi and, furthermore, that the applicant will not recover the vehicle in good order and repair. Its prejudice is established.

[57] The respondent indicates that he will be prejudiced as he will not be able to earn an income from the use of the taxi. The argument, in effect, amounts to the respondent requiring the continued use of the vehicle without making payment to the applicant, as he undertook to do in terms of the credit agreement, and notwithstanding the termination of the agreement. This situation is untenable particularly since there is no means of protecting the applicant's property in the absence of a contractual obligation to do so.

[58] The applicant has strong prospects of succeeding in the action to claim all outstanding amounts and the return of the vehicle. Thus, there is a lesser need for the balance of convenience to favour the applicant in the granting of the interdict. I am nevertheless satisfied that the balance of convenience favours the granting of the interdict.

No alternative satisfactory remedy

[59] There is no other remedy available to the applicant other than to permit the applicant to take possession of the vehicle and to assume full responsibility for preserving it pending the outcome of the action.

[60] An interim interdict will provide effective interim protection for the applicant and therefore it ought to be granted.

[61] In any event, given that the action is vindicatory, there is no need for the

applicant to show that it has no other satisfactory remedy.[9]

[62] For the above reasons, the application for an interim interdict succeeds and the rule *nisi* ought to be confirmed.

Other matters arising

[63] The applicant sought condonation for the lateness of its replying affidavit which was delivered 6 days late. There was no opposition to the condonation application, the reasons for the lateness was fully explained and it is in the interests of justice to permit the late filing as the replying affidavit provides pertinent responses to the respondent's opposition to this application. Condonation was granted at the virtual hearing of this matter.

[64] The only remaining issue relates to the costs of this application. There is no reason why the costs should not follow the event such costs to be paid on an attorney and client scale as provided for in the credit agreement.

[65] The following order is made:

1. The rule *nisi* issued by this court on 17 December 2019 is confirmed.

2. The respondent is directed to pay the costs of this application including the costs incurred in obtaining the interim order, on the attorney and client scale.

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[9] *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others* 2003 (3) SA 268 (W) in para [28].

AJ LAPAN

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT:	Mr JG Botha
APPLICANT'S ATTORNEYS:	ODBB Incorporated Attorneys
COUNSEL FOR THE RESPONDENT:	Mr T Ntaka
RESPONDENT'S ATTORNEYS:	Masilo Ramollo Attorneys
DATE OF THE HEARING:	26 August 2020
DATE OF JUDGMENT:	28 August 2020