

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES:
No

DATE

SIGNATURE

Case No.: 2021/44121

In the matter between:

BIDVEST BANK LIMITED

Applicant

and

KWANE FLEET SERVICES (PTY) LIMITED

First Respondent

RAND WEST CITY LOCAL MUNICIPALITY

Second Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The applicant sold various vehicles and other equipment (“the vehicles”) to the first respondent in terms of an instalment sale agreement (“the agreement”)

pursuant to which it reserved ownership. The first respondent then, with the knowledge of the applicant, on-sold this equipment to the second respondent municipality. It is not disputed that the municipality uses the vehicles in discharging its constitutional objectives of ensuring the provision of services to the communities and in promoting a safe and healthy environment as provided for in sections 152(1)(b) and (d) of the Constitution, such as in making road markings, for waste and effluent removal and on landfill sites.

2. The first respondent defaulted on the monthly payments under agreement, which resulted in the applicant instituting these motion proceedings for the recovery of the full outstanding indebtedness under the agreement, and failing payment thereof, the repossession of the vehicles.
3. The first respondent opposed the matter primarily on the basis that it disputed the outstanding quantum and that this dispute was sufficient to trigger the dispute resolution clause in the agreement, which provided that any dispute arising out of or in connection with the agreement must, if not resolved by the parties' senior executives, be submitted to arbitration.
4. The municipality, which was cited by the applicant as the second respondent, opposed the application and sought its dismissal on the basis that the applicant in seeking to repossess the vehicles would prejudice the municipality in delivering upon its constitutional mandate to the communities that it served.

5. Presumably having realised that it may not have done enough in its answering affidavit for there to be an arbitral dispute sufficient to trigger the arbitration clause, the first respondent shortly before the hearing delivered a supplementary answering affidavit in which it adduced expert evidence by a registered accountant and auditor under oath seeking to demonstrate that there was a basis for disputing the quantum of the applicant's claim. The first respondent in that supplementary affidavit asserts that based upon its expert evidence its indebtedness to the applicant is R39 878 711.09 and that the updated amount as claimed by the applicant is incorrect.¹
6. The first respondent effectively admitted its indebtedness to the applicant in the amount as calculated by its expert, but disputed the balance.
7. The issue that crystallised before me what was to be done with the balance of the claim, which the first respondent disputed. More particular, was this dispute in relation to the balance, to use the language of Gauntlett AJ in *Delfante v Delta Electrical Industries Limited* 1992 (2) SA 221 (C) at 227F-H sufficiently palpable and genuine to constitute a dispute that would trigger the arbitration clause, and so require these proceedings to be stayed pending the outcome of arbitration proceedings?
8. The municipality, who had no contractual relationship with the applicant as it was not a party to the instalment sale agreement between the applicant and

¹ On 18 July 2022 the applicant delivered a supplementary affidavit giving an updated outstanding indebtedness, as at 18 July 2022, of R44, 004, 415.04, together with interest thereon at the prime rate of 2% per annum as from 15 July 2022, having taken into account certain payments that had since been made.

the first respondent and also perhaps realising that it may not have made out a case in its answering affidavit why the relief sought by the applicant should not be granted, at the eleventh hour as the first respondent had done, delivered a supplementary affidavit. In that affidavit the municipality, relying upon the court's powers in terms of section 172(1) of the Constitution to make any order that is just and equitable when deciding a constitutional matter within its power, sought that should the court be inclined to grant a repossession order against the first respondent, the execution of that order be stayed for 180 days to enable the municipality to effectively make alternative arrangements with a new service provider for the provision of vehicles that would be needed to continue to render those services that the municipality was presently rendering to the community using the financed vehicles. As part of this remedy the municipality also indicated that it would make payment to the applicant of the monthly amounts due under the agreement for the duration of that six-month suspension period.

9. During the lunch adjournment, the parties agreed that the dispute relating to the balance of the applicant's claim should be referred to arbitration and that therefore there was no need for the court to decide this dispute on the papers and/or whether it triggered the arbitration clause.
10. The parties were also able to agree upon a formulation of a suspension of execution to address the municipality's concerns in relation to continued service delivery. It therefore also became unnecessary for me to decide to what extent the court was able to and should make the order sought by the municipality as falling within the ambit of section 172 of the Constitution.

11. The parties prepared and agreed upon a draft order in terms of which *inter alia* the first respondent is ordered to make payment of the admitted portion of the indebtedness, that the dispute in relation to the balance of the indebtedness is to be determined in arbitration as provided for in the agreement and that should the first respondent fail to make payment of the admitted indebtedness, then the vehicles would be repossessed, save that the repossession would not take place for a period of six months provided that the second respondent made payment of monthly instalments in respect of those vehicles for that six-month period.
12. What the parties could not reach agreement on was the issue of costs and the date by which the first respondent had to make payment of the admitted portion of the indebtedness, and so requires the court to determine these two issues.
13. The applicant submits that the first respondent should be ordered to make payment of the admitted indebtedness within ten days of the order. In contrast, the first respondent contends that thirty days is appropriate. The applicant in support of its position stated that ordinarily the order would be executable immediately and therefore a ten-day period was more than reasonable. The applicant also pointed out that in the event that payment only had to be made within thirty days, this would have a knock-on effect on the second respondent's obligation to make payments of the monthly instalments commencing on 1 August 2022 should the first respondent not make payment of the admitted indebtedness.

14. The municipality did not raise any difficulty as to its ability to make payment of the first instalment on 1 August 2022, as provided for in the draft order. In my view, the first respondent should be afforded until 12 August 2022 in which to make payment of the admitted indebtedness. The municipality's obligation to make the first instalment if the first respondent does not pay the admitted indebtedness by 12 August 2022 is adjusted to 15 August 2022, with the succeeding instalments to be paid on the first day of each month, commencing on 1 September 2022. The municipality is not prejudiced in that it effectively has two weeks longer to make payment of the first instalment than otherwise proposed in the draft order.
15. In relation to the issue of costs, the applicant seeks that the first and second respondents be ordered to pay the costs of the applicant jointly and severally. The applicant submits that it has had substantial success, particularly given that the admitted portion of the indebtedness was only admitted shortly before the hearing. The applicant submits that the arbitration proceedings and the costs that will follow thereupon would take care of who should bear the costs in relation to the dispute that remains between the parties, and the referral of that dispute to arbitration should not detract from a favourable costs order in its favour in these proceedings.
16. The municipality during the course of argument adopted the position that it did not seek any costs against any party and that no costs should be granted against it.

17. I agree that the applicant has had substantial success and is entitled to the costs of the application. It was only very late that the first respondent submitted its supplementary affidavit, and which contributed to the agreed proposed order.
18. Insofar as the second respondent is concerned, the second respondent, although not a party to the agreement, opposed the application, delivered an answering affidavit and heads of argument and sought that the application be dismissed in its entirety. Even in its belated supplementary affidavit of 19 July 2022, it still persisted that the application be dismissed in its entirety while simultaneously seeking, incongruently, some form of equitable relief in terms of section 172 of the Constitution. It was only during the course of argument that the municipality relented, appreciating that the crafting of an equitable remedy did not allow for a dismissal of the application in its entirety.
19. Although opposing the application, the municipality raised no legally cognisable defence against the applicant. The municipality could have from the outset sought to rely upon section 172 and to advance an appropriate remedy, but did not do so until the eleventh hour.
20. In my view, the second respondent should be liable for the applicant's costs arising from the opposition, jointly and severally with the first respondent.
21. An adaption that I have made to the draft order other than in relation to the two issues above is to provide for a stay of the application in relation to the dispute that is to be decided in arbitration, thereby enabling the parties to

return to court in these proceedings under this case consequent upon the outcome of the arbitration proceedings, should that become necessary and so avoid the need for proceedings to start afresh to enforce any arbitration award as may be made.

22. Finally, I wish to express my gratitude to the legal representatives of all three parties in the manner in which the hearing was conducted and their co-operation with each other in reaching such agreement as they did upon most of the order to be granted.

23. The following order is granted:

23.1. The Master Agreement in respect of the purchase and sale of vehicles on instalment sale, dated 26 March 2019 (annexed as "FA3" to the founding affidavit) ("the Master Agreement") is rectified by the substitution of "Kwane Capital (Pty) Limited", wherever it appears, with "Kwane Fleet Services (Pty) Limited".

23.2. The first respondent is to pay the applicant by 12 August 2022:

23.2.1. R39 878 711.09;

23.2.2. interest on the aforesaid amount at the rate of 10.25% (being the current prime rate of 8.25% plus 2%) per annum calculated daily and compounded monthly from 1 July 2022 to date of payment.

23.3. The balance of the applicant's claim, as set out in the notice of motion and affidavits is referred to arbitration in terms of the provisions of the Master Agreement, as rectified.

23.4. To the extent that the first respondent fails to make payment to the applicant as set out in sub-paragraph 2 above, the following vehicles, currently in the possession of the second respondent, are to be attached by the sheriff having jurisdiction or his deputy, wherever they may be found and are to be forthwith delivered into the possession of the applicant:

23.4.1. 2019 CWE330 (E44) 6X4 A/T COMPACTOR C/C

Registration Number: HZ04FH GP

Chassis Number: JPCZXY0D3KS807589

Engine Number: GH8479337

23.4.2. 2019 CWE330 (E44) 6X4 A/T COMPACTOR C/C

Registration Number: HZ04DT GP

Chassis Number: JPCZXY0D1KS807641

Engine Number: GH8479913

23.4.3. D2019 CWE330 (E44) 6X4 A/T COMPACTOR C/C

Registration Number: HZ04DXGP

Chassis Number: JPCZXY0D0JS806897

Engine Number: GH8474099

23.4.4. 2019 CWE330 (E44) 6X4 A/T COMPACTOR C/C

Registration Number: HZ04DH GP

Chassis Number: JPCZXY0D4KS807455

Engine Number: GH8478136

23.4.5. 2019 CWE330 (E44) 6X4 A/T COMPACTOR C/C

Registration Number: HZ04DH GP

Chassis Number: JPCZXY0D9JS806896

Engine Number: GH8474115

23.4.6. Deal number 2197336

2019 CWE330 (E44) 6X4 A/T COMPACTOR C/C

Registration Number: HZ04DN GP

Chassis Number: JPCZXY0D9JS806834

Engine Number: GH8474266

23.4.7. 2019 CWE330 (E44) 6X4 A/T COMPACTOR C/C

Registration Number: HZ04FH GP

Chassis Number: JPCZXY0D3KS807589

Engine Number: GH8479337

23.4.8. 2019 CWE330 (E44) 6X4 A/T COMPACTOR C/C

Registration Number: HZ31FH GP

Chassis Number: JPCZXY0DXKS807640

Engine Number: GH8479931

23.4.9. 2019 CWE330 (E44) 6X4 A/T COMPACTOR C/C

Registration Number: HZ31FZ GP

Chassis Number: JPCZXY0D3KS807642

Engine Number: GH8479889

23.4.10. 2019 CWE330 (E44) 6X4 A/T COMPACTOR C/C

Registration Number: HZ31FN GP

Chassis Number: JPCZXY0D5KS807643

Engine Number: GH8479935

23.4.11. 2019 CWE330 (E44) 6X4 A/T COMPACTOR C/C

Registration Number: HZ31FT GP

Chassis Number: JPCZXY0D7KS807644

Engine Number: GH8479901

23.4.12. 2019 PKE 250 (H37) 4X2 A/T COMPACTOR C/C

Registration Number: JB59ZV GP

Chassis Number: JPCYX22A0JS806796

Engine Number: GH8E473403A1P

23.4.13. 2019 PKE 250 (H37) 4X2 A/T COMPACTOR C/C

Registration Number: JB59ZT GP

Chassis Number: JPCYX22A9JS806795

Engine Number: GH8E462820A1P

23.4.14. 2019 PKE 250 (H37) 4X2 A/T COMPACTOR C/C

Registration Number: JB60BD GP

Chassis Number: JPCYX22A7JS806794

Engine Number: GH8E462819A1P

- 23.4.15. 2019 PKE 250 (H37) 4X2 A/T COMPACTOR C/C
Registration Number: JB60BB GP
Chassis Number: JPCYX22A6JS806804
Engine Number: GH8E473744A1P
- 23.4.16. 2019 CAT 426F2 BACKHOE LOADER 4X4
Registration Number: JC07XT GP
Chassis Number: CAT0426FPEJ401950
Engine Number: CC202183
- 23.4.17. 2019 CAT MD320D2 WHEEL EXCAVATOR
Chassis Number: CATM320DJEN800493
Engine Number: E7A16206
- 23.4.18. 2019 CAT 426FE BACKHOE LOADER 4X4
Chassis Number: CAT0426FEEJ401961
Engine Number: CC202164
- 23.4.19. 2019 N-SERIES NPR 400 CREW CAB AT
Registration Number: JF07PL GP
Chassis Number: ACVNP75PCBN035267
Engine Number: 4HK10AC224
- 23.4.20. 2019 CANTER LIFT FEB-150 AMT DC
Registration Number: JG51KZ GP
Chassis Number: ABJFECX1KKEY00754

Engine Number: 4P10A88333

23.4.21. 2019 CANTER LIFT FEB-150 AMT DC

Registration Number: JG51LJ GP

Chassis Number: ABJFECX1KKEY00753

Engine Number: 4P10A88331

23.4.22. 2019 N-SERIES MNR 250 AMT

Registration Number: JH20BL GP

Chassis Number: ACVNM85HFBN036513

Engine Number: 4JJ14C2712

23.4.23. 2019 N-SERIES MNR 250 AMT

Registration Number: JH20BG GP

Chassis Number: ACVNM85HFBN036514

Engine Number: 4JJ14C2682

23.4.24. 2019 N-SERIES NPR 400 CREW CAB AT

Registration Number: JF07PN GP

Chassis Number: ACVNP75PCBN036401

Engine Number: 4HK10AG480

23.4.25. 2019 N-SERIES NPR 400 CREW CAB AT

Registration Number: JH20BB GP

Chassis Number: ACVNP75PCBN036399

Engine Number: 4HK10AG493

23.4.26. 2019 N-SERIES NPR 400 CREW CAB AT

Registration Number: JF07PV GP

Chassis Number: ACVNP75PCBN035272

Engine Number: 4HK10AC183

23.4.27. 2019 F-SERIES FVZ 1400 CREW CAB AT

Chassis Number: ACV FVZ34R8A034648

Engine Number: 6HK1223149

23.4.28. 2019 UD CWE330 (E42) 6X4 A/T

Registration Number: JD98RM GP

Chassis Number: JCZXY0D4JS805168

Engine Number: GH8463000

23.4.29. 2019 N-SERIES NPR 400 CREW CAB A/T

Registration Number: JH19ZX GP

Chassis Number: ACVNP75PCBN036400

Engine Number: 4HK10AG458

("the vehicles").

23.5. The order in terms of sub-paragraph 4 above is suspended for a period of 6 months, calculated from the date of this order, subject thereto that the second respondent pay an amount equal to the monthly instalment, inclusive of the services, with respect to the vehicles in an amount of R1 914 079.28, commencing on 15 August 2022 and thereafter on or before the 1st day of each subsequent

month commencing 1 September 2022 for the duration of the 6-month suspension period.

- 23.6. In the event that the second respondent fails to make any payment as is set out in the preceding sub-paragraph, the applicant shall be entitled to pursue execution for recovery of any amount due and unpaid and to act pursuant to sub-paragraph 4 above in taking possession of the vehicles.
- 23.7. Any abatement claimed by the first respondent and arising from any payment made by second respondent pursuant to this order shall stand to be determined in the arbitration referred to in sub-paragraph 3 above. Any payments made by second respondent to the applicant which were not accounted for in the first respondent's expert report, shall stand to be determined in those arbitration proceedings.
- 23.8. This application is stayed in relation to the dispute referred to arbitration pending the outcome of the arbitration.
- 23.9. The first respondent is to pay the applicant's costs.
- 23.10. The second respondent is to pay the applicant's costs arising from the opposition in these proceedings, jointly and severally with the first respondent.

Gilbert AJ

Date of hearing: 20 July 2022

Date of judgment: 22 July 2022

Counsel for the applicant: Advocate G Kairinos SC
Instructed by: Du Toit Sanchez-Moodley Inc

Counsel for the first respondent: Advocate N Lewis
Instructed by: Magagula Attorneys

Counsel for the second respondent: Advocate O Mokgotho
Instructed by: De Swardt Myambo Hlahla
Attorneys