**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, JOHANNESBURG**

**CASE NUMBER: 2020/3285**

**DELETE WHICHEVER IS NOT APPLICABLE**

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

**Judge Dippenaar**

In the matter between:

**TRANSSEC 2 (RF) LIMITED** **APPLICANT/PLAINTIFF**

**AND**

**SINEKE SIYABONGA** **RESPONDENT/DEFENDANT**

**JUDGMENT**

**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 14h00 on the 05th of October 2022.

**DIPPENAAR J:**

[1] This is an opposed interlocutory application in which the applicant seeks the return of a motor vehicle currently in possession of the respondent. The respondent obtained possession of the motor vehicle pursuant to a credit agreement concluded between the parties during July 2015. The agreement was to terminate through effluxion of time during August 2021.

[2] The applicant instituted action proceedings against the respondent for confirmation of the termination of the agreement and return of the motor vehicle, served on the respondent on 14 February 2020. The applicant averred that the respondent had breached its obligations in terms of the agreement and was in arrears with his instalments. It terminated the agreement and notified the respondent of its election in its particulars of claim.

[3] The applicant launched summary judgment proceedings during May 2020. Leave to defend was granted during July 2020 on the basis that the outstanding balance could not be calculated as the applicant had not attached its statement to the particulars of claim.

[4] The present application was launched during March 2021. The respondent in argument objected to the applicant's replying affidavit, which was delivered late. The

respondent has not however illustrated that he was prejudiced and I am not persuaded that the affidavit should be excluded.[1]

[5] In considering the applicant's claim for interim relief, the principles in *Webster v Mitchell* [2] apply. The requirements for interim interdictory relief are trite.[3] They are: (1) a *prima facie* right, although open to some doubt on the part of the applicant; (2) an injury actually committed or reasonably apprehended; (3) a favourable balance of convenience; and (4) the absence of any other satisfactory remedy available to the applicant.

[6] The respondent opposed the application on the basis that the applicant has not made out a case for the relief sought. The respondent's version was that he is no longer indebted to the applicant, although he admitted that he has not paid the full instalments. He disputed that he is in breach of the agreement and the arrears relied on by the applicant. On his version, he owes the applicant an amount of R20 314.19 which he tendered to pay in July 2021. He has however not paid the amount. The respondent further disputed an amount of R175 163.76 pertaining to credit insurance referred to in part D of the agreement, which he contended forms the bulk of the amount claimed by the applicant.

[7] It is common cause that the applicant is the owner of the vehicle. Although disputed that the agreement was validly cancelled, the applicant has on a *prima facie* basis established that it cancelled the agreement and that such cancellation was communicated to the respondent[4] by service of the summons. The fact that the validity of the cancellation and the amount owing to the applicant are disputed in the action proceedings does not bar the applicant from seeking interim interdictory relief as such order is aimed at safeguarding the vehicle until finalisation of the parties' dispute and the order is not determinative of the rights of the parties under the agreement.[5]

[1] Pangbourne Properties Ltd v Pulse Moving CC and Another 2013 (3) SA 140 (GSJ)
[2] 1948 (1) SA 1186 (W) 1189 as modified in Gool v Minister of Justice 1955 (2) SA 682 (C) at 688D-E
[3] Setlogelo v Setlogelo 1914 AD 21
[4] SA Securitisation (Pty) Ltd v Chesane ("Chesane") 2010 (6) SA 557 (GSJ) para [13]
[5] Chesane supra para [10];

[8] The respondent's argument pertaining to the credit insurance is misconceived and is not sustained either by the facts or the agreement. Clause 22 of the agreement makes it clear that the applicant is entitled to pay the monthly insurance premiums on behalf of the respondent, which would be included in the monthly premiums payable by the respondent in terms of the agreement. This accords with the statement of account attached to the application, which reflects that the monthly insurance premiums formed part of the monthly instalments payable by the respondent.

[9] The respondent did not meaningfully challenge the statement attached to the applicant's founding papers, which reflects that an amount of R 243 440 was owing and that the last payment was made by the respondent on 7 March 2021. Instead he presented his own calculations, which are based on the capital amount advanced and does not take into account the interest and other finance charges. It is not necessary for present purposes to determine the dispute regarding the amount owing to the applicant. That issue forms part of the pending trial proceedings.

[10] On the facts presented I am persuaded that the applicant has illustrated a prima facie right to relief. Although claiming that he is entitled to acquire transfer of the ownership of the vehicle, the respondent did not dispute that the applicant is at present the owner. Moreover, the respondent did not launch any counter application for such relief, nor was a proper case for such relief made out in his papers.

[11] The applicant is not required to illustrate that it has no other satisfactory remedy at its disposal as it cannot be forced to accept merely the value of the property.[6] The respondent's argument that the main action constitutes a suitable alternative remedy, does not bear scrutiny.

[6] Fedsure Life Assurance Co Ltd v Worldwide African Investments Holdings (Pty) Ltd 2003 (3) SA 268 (W) at 278E-F

[12] As the main proceedings are of a vindicatory nature, there is a presumption, which may be rebutted by evidence, that the applicant will suffer irreparable harm.[7] I am not persuaded that the respondent has on the facts rebutted such presumption.[8]

[13] The respondent argued that the balance of convenience favoured him as the applicant would not suffer any prejudice if the relief sought was refused, whereas the harm to him would be manifest were relief to be granted. This argument is predicated on the contention that the motor vehicle is vital to his taxi operation. He further argued that the applicant has poor prospects of success in the main proceedings and that there was a substantial delay in the institution of these proceedings which eroded the applicant's case.

[14] Whilst there has been a delay in the institution of the present proceedings, that of itself is not a reason to refuse relief, but is merely one of the factors to be taken into consideration. Considering the history of the litigation and the considerable time it would take for the trial proceedings to be finalised, it cannot be concluded that the delay was unreasonable or fatal to the application.

[15] In considering all the relevant factors, it is necessary to consider the prospects of success and to apply the test enunciated in *Olympic Passenger Service (Pty) Ltd v Ramlagan*.[9]

[16] Although I agree with the respondent that the vehicle has been at risk of deterioration throughout the period it has been in use by the respondent, such risk would have been on the respondent if he had been meeting its obligations to the applicant, whereas the risk is presently on the applicant. It is further well established that a seller of equipment is entitled to be protected against the deterioration of the

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[7] Chesane 563I-564D; Stern and Ruskin v Appleson 1951 (3) SA 800 (W) at 813; SA Taxi Securitisation v Yuong (10249/2008, 9559/2008, 8115/2008 [2008] ZAWCHC 292 (14 November 2008) p9
[8] Chesane para [30]
[9] Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 D; Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 585 (A) at 692 G

equipment in the condition in which it was when it sought to enforce its right to claim payment and return of the equipment and a refusal to ensure that it remains in such condition would cause it irreparable harm.[10]

[17] It is undisputed that the respondent is no longer making any payments under the agreement. As the vehicle is being used on an ongoing basis as a taxi, there is an ongoing risk of harm in relation to the diminution of the value of the vehicle and the risk of loss[11]. The respondent's version, which disavows liability for insurance also disregards that it is the applicant who is presently paying the insurance on the vehicle, whilst he is not making any payments for insurance and is using the motor vehicle for his own benefit. Why this should be the case, is not explained by the respondent.

[18] In balancing the various factors, I conclude that the balance of convenience favours the applicant and that the prejudice to the applicant outweighs that to the respondent.

[19] It is trite that if the applicant is entitled to an interim interdict restraining the use of an item by the respondent, there is no reason why a further order should not be granted authorising attachment *pendent lite* to give effect to the restraint against use and to protect the item from deterioration.[12]

[20] I conclude that the applicant has met the necessary requirements for interim interdictory relief. There is no basis to deviate from the normal principle is that costs follow the result.

[21] I grant the following order:

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[10] Louder v De Beer 1947 (1) SA 87 (W)
[11] Chesane supra para [30], SA Taxi Securitisation (Pty) Ltd v Ndobelan (9162/2010) [2011] ZAGPJHC 14 (15 March 2011) para [27]
[12] Van Rhyn v Reef Developments A (Pty) Ltd 1973 (1) SA 488 (W) at 492D-E

[1] The respondent is directed to deliver into the possession of the Sheriff a 2015 Toyota Quantum Sesfikile 16 seater petrol motor vehicle bearing engine number 2TR8712606 and chassis number AHTSX22P407020773 (“the motor vehicle”);

[2] The Sheriff is directed to deliver the motor vehicle to the applicant for safekeeping pending the final determination of the action pending between the parties under case number 2019/3285;

[3] The applicant shall, at its own expense transport the motor vehicle to a garaged premises situated at 179 15th Road, Randjiespark, Midrand and retain the motor vehicle at such garaged premises under security pending the outcome of the action in [2] above;

[4] The applicant shall not use the motor vehicle or permit that it be used pending the outcome of the action in [2] above;

[5] In the event of the respondent failing to comply with the order in [1] above within 5 days of service of this order on the respondent’s attorneys, the Sheriff is authorised and directed to take the motor vehicle into his possession from wherever he may find it and to return it to the applicant in accordance with this order;

[6] The respondent is directed to pay the costs of the application.

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**EF DIPPENAAR**
**JUDGE OF THE HIGH COURT**
**JOHANNESBURG**

**APPEARANCES**

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| **DATE OF HEARING** | : 03 October 2022 |
| **DATE OF JUDGMENT** | : 05 October 2022 |
| **APPLICANT'S COUNSEL** | : Adv. R. Stevenson |
| **APPLICANT'S ATTORNEYS** | : Marie – Lou Bester Inc. |
| **RESPONDENT'S COUNSEL** | : Adv. Maphutha |
| **RESPONDENT'S ATTORNEYS** | : Ngeno & Mteto Inc. |