IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number: 2023/122995

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED: NO

SIGNATURE **DATE:** 9 JANUARY 2022

In the matter between:

BAIC AUTOMOBILE SA (PROPRIETARY) LIMITED Applicant

and

SAMARITAN CAR COVER (PROPRIETARY) LIMITED (IN BUSINESS RESCUE) First Respondent

CHRISTIAAN CERVAAS HERBST N.O Second Respondent

JUDGMENT

PULLINGER AJ

INTRODUCTION

[1] This is an application for the return of certain motor vehicles leased by the applicant to the first respondent pursuant to the cancellation of the lease agreement.

[2] The material facts are not in dispute.

[3] On 14 July 2021, the applicant and the first respondent concluded a written agreement styled "Fixed Term Lease Agreement" ("**the Agreement**").

[4] In terms of the Agreement the applicant would lease a number of motor vehicles to the first respondent for a period of 36 months. The first respondent would, in turn, would lease the vehicles to third parties for use in e-hailing services.

[5] As a *quid pro quo* for the use of the vehicles, the first respondent would pay R4,161.00 per vehicle per month to the applicant.

[6] By late October 2023 the first respondent was in breach of the Agreement having failed to pay rent for the vehicles. As at 27 October 2023 the first respondent owed the applicant some R4.1 million.

[7] Pursuant to discussions between the applicant and the first respondent, and on 30 October 2023, the Agreement was cancelled. Notwithstanding the

cancellation of the Agreement the first respondent failed and refused to return the vehicles to the applicant.

[8] Instead, and on 14 November 2023, the first respondent's board of directors passed a resolution placing the respondent under supervision and in business rescue as contemplated in Chapter 6 of the Companies Act, 2008. The second respondent was appointed as the business rescue practitioner.

[9] At this point, some observations are apposite:

[9.1] first, by the time the respondent was placed in business rescue, the Agreement had been terminated. Accordingly, the vehicles which were the subject of the Agreement were, no longer, lawfully, in the respondent's possession (to the extent that it, as sub-lessor had possession of the vehicles) as contemplated in section 133(1) of the Companies Act, 2008;[1]

[9.2] second, upon termination of the fixed term lease agreement, the lease agreements as between the respondent and its sub-lessees also terminated by operation of law;[2]

[9.3] third, as a matter of law, and unless the agreement between the parties stipulates otherwise, the lessee is bound to restore the let

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[1] **Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron ore (Pty) Ltd** [2021] 3 All SA 843 (SCA) at [26] and [31] and the authorities cited in *fn* 12

[2] **Klaase and another v van der Merwe N.O and Others** 2016 (6) SA 131 (CC) at [86] and the authorities cited in *fn* 90

goods to the lessor immediately upon termination of the lease[3] or, as in this case, procure the return thereof.

[10] In the instant case, the respondent has failed and refused to procure the return of the vehicles to the applicant. This prompted the applicant to approach this Court, by way of urgency, claiming an absence of substantive redress at a hearing in due course.

[11] Given the nature of the sub-lease agreements and the intended use of the vehicles pursuant thereto, I am satisfied that the applicant is entitled to a hearing before the urgent court.[4]

DISCUSSION

[12] The basis of the respondent's opposition to the relief sought is four-fold.

[13] First, the respondent takes a point of non-joinder. The respondent's case is that each of the respondent's sub-lessees ought to have been joined to these proceedings on the basis of an ostensible direct and substantial interest in the outcome of these proceedings.

[13.1] The proposition is flawed.

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[3] *Grotius* 3.9.11; *Voet* 19.2.32; **Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd** 1955 (3) SA 249 (C) at 253 J; **Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another** 2013 (4) SA 607 (GSJ) at [42]

[4] **Chung-Fung (Pty) Ltd and Another v Mayfair Resident's Association and Others** [2023] ZAGPJHC 1162 (13 October 2023) at [24] and [30] – [31]

[13.2] The rights of a sub-lessee are derivative. Thus, a sub-lessee only enjoys rights in and to the leased *res* for so long as the "main" lessee enjoys such rights.

[13.3] The position was explained by the Appellate Division as follows:

> "… it must be obvious that the rights of his sub-lessees are entirely dependent upon [the lessee's]; if - apart from the Dutch rule *huur gaat voor koop*, which is not relevant since it can apply only to cases where the lessor is also owner and not where the lessor's right is temporary – [the lessee's] right expires, [the sub-lessees'] go with it."[5]

[13.4] Accordingly, a sub-tenant is does not have direct and substantial interest in an application for specific performance of an obligation arising under the head lease.[6]

[13.5] A sub-lessee is not in the same position as a joint contractor who *may* have a direct and substantial interest in the outcome of the litigation.

[13.6] The full bench of this court said:

> "The mere feature that a person is a party to a multi-party agreement does not necessarily have the consequence that such a person has a direct and substantial interest of a legal (in contradistinction to a financial) nature in litigation between or among other parties to the agreement. **It depends on an analysis of the rights and obligations created by the multi-party agreement. Where a right sought to be enforced vests in parties jointly, or an obligation sought to be enforced rests on parties jointly, joinder of the**

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5 **Ntai and others v Vereeniging Town Council and Another** 1953 (4) SA 579 (A) at 589 A

6 *Compare* **Toekies Butchery (Edms) Bpk en Andere v Stassen** 1974 (4) SA 771 (T)

> **joint creditors or joint debtors is generally necessary. Such joint contracting parties are in a similar position to joint owners and partners**."[7] (emphasis added)

[14] Second, it was contended, that the business rescue practitioner enjoyed (or enjoys) a right of election in relation to the Agreement in terms of section 136(2) of the Companies Act, 2008.[8]

[14.1] Again proposition is flawed.

[14.2] The right afforded to a business rescue practitioner in section 136(2) of the Companies Act, 2008 requires an extant agreement. In this sense it is analogous to section 133(1) of the Companies Act, 2008 because the moratorium does not apply to cancelled agreements.

[14.3] In **Timasani**,[9] the Supreme Court of Appeal explained the position thus:

> "[30] In my view, properly construed section 133(1) provides that during business rescue proceedings:

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7 **Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd** 2004 (2) SA 353 (W) at [14]

8 Section 136(2) of the Companies Act, 2008 provides:

> "(2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may-
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> (a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that-
>
> (i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
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> (ii) would otherwise become due during those proceedings; or
>
> (b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a)."

9 *supra*

(1) no legal proceedings, including enforcement action, against the company; and

(2) no legal proceedings in relation to property belonging to or in the lawful possession of the company, may be commenced or proceeded with in any forum. Put differently, the words "no legal proceedings" straddle both the circumstances envisaged in (1) and (2). Thus, in *Cloete Murray v FirstRand Bank*, it was stated that the inclusion of the term "enforcement action" under the generic phrase "legal proceedings" seems to indicate that "enforcement action" is a species of "legal proceeding" or meant to have its origin in legal proceedings.

[31] This appeal concerns the moratorium in (2). Afrimat contends that section 133(1) is inapplicable because the deposit does not belong to Timasani and it is in unlawful possession thereof. The plain language of the words "no legal proceedings in relation to any property belonging to the company or lawfully in its possession may be commenced or proceeded with", limits the reach of the moratorium and renders it inapplicable to legal proceedings in relation to property belonging to an entity other than the company in business rescue, or property unlawfully possessed by the company. Property "belonging to the company" in section 133(1), sensibly construed, can only mean property belonging in a legally valid sense, such as property owned by the company, which in section 133(1) is expressly distinguished from property "lawfully in its possession". Common sense dictates that it could never have been intended that the restructuring of the affairs of a company during business rescue should prevent recovery of property not belonging to it or unlawfully in its possession.

[32] This construction is reinforced by the immediate context. Section 134(1)(c) of the Act which deals with the protection of property interests during business rescue of a company is cast in similar terms and provides:

"134 *Protection of property interests* – (1) Subject to subsections (2) and (3), during a company's business rescue proceedings –

.. .

(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing."

[33] Section 134(1)(c) conditionally prohibits the exercise of any right in respect of property "*in the lawful possession of the company*" during business rescue proceedings, regardless of whether that property is owned by the company. It does not prohibit the exercise of a right in relation to proper- ty in the *unlawful* possession of the company.

[34] **Thus, in *Cloete Murray v FirstRand Bank*, the cancellation of an instalment sale agreement by a creditor rendered unlawful the continued possession by a company in business rescue of the goods that formed the subject matter of that agreement. This Court held that although the moratorium in section 133(1) of the Act grants the company breathing space, the Legislature did not intend to interfere with contractual rights and obligations of parties to an agreement. Likewise, in *Kythera Court v Le Rendez-Vous Café CC*, it was held that the moratorium did not preclude vindicatory proceedings or proceedings for the repossession or attachment of property in the unlawful possession of a company in business rescue. The case concerned legal proceedings for ejectment where a lease had been validly cancelled and the company was an unlawful occupier.**

[35] Applied to the present case, the agreement in terms of which the deposit was paid did not materialise. It is trite that when a contract is subject to a suspensive condition which is fulfilled, the obligations under the contract become enforceable. On the other hand, if the condition is not fulfilled then it is as if the contract never came into existence, i.e it is regarded as being void *ab initio*. A party who has made a payment under a contract in anticipation of the fulfilment of a suspensive condition is entitled to the return of the money, unless the contract provides otherwise. Once Timasani and Afrimat did not conclude the draft agreements submitted by Afrimat, there was no right to retain the deposit because it was not money that belonged to the

> company; neither was it property lawfully in its possession. The agreement in regard to the deposit was that it would be held in a specific account and would accrue interest for the benefit of Afrimat. That made it clear that if the anticipated agreement did not materialise the deposit had to be repaid. Timasani was rightly ordered to repay the deposit." (emphasis added; footnotes omitted)

[15] Third, it was contended that the applicant had not satisfied the requirements of the *rei vindicatio* because the first respondent is not in possession of the let vehicles.[10]

[15.1] The proposition fails at its most elementary level – an action (or application) for the return of let property is not axiomatically one in terms of the *rei vindicatio*.

[15.2] In reality, a claim for the redelivery of let property is one of specific performance of a lessee's obligations which may take the form of a *rei vindicatio* when appropriate.

[16] Finally, and pursuant to a proposed mechanism for the return of the vehicles by the respondent to the applicant, presented in the replying affidavit, the respondent complained that an entirely new case had been brought to bear. The complaint is bad. The suggestion made in the replying affidavit amounts to nothing more than a proposal to conveniently arrange for the return of the vehicles.

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[10] The jurisdictions requirements of the *rei vindicatio* are long established and have been stated thus in **Graham v Ridley** 1931 TPD 476 at 478:

> "One of the rights arising out of ownership is the right to possession; indeed Grotius *Introd*. 2.3.4., says that ownership consists in the right to recover lost possession. *Prima facie* therefore proof that the appellant is owner and that the respondent is in possession entitles the appellant to an order giving him possession, i.e. to an order for ejectment."

CONCLUSION

[17] The opposition to this application was dilatory. There is no basis in fact or in law for the first respondent to retain the benefit of the vehicles. In so doing, it is occasioning on-going harm to the applicant both in terms of lost income but also the reduction in value of the vehicles and the loss of opportunity to rent them for a return.

[18] I intend to grant a rule *nisi* calling upon the second respondent to show cause why he should not pay the costs of this application, *de bonis propriis* jointly and severally with the first respondent.

[19] In the result, I make the following order:

1. Mr Christiaan Cervaas Herbst N.O. is joined as the second respondent in this application, in his representative capacity as business rescue practitioner of the first respondent and will henceforth participate in these proceedings as the second respondent.

2. The applicant is, to the extent necessary, granted leave to prosecute this application as contemplated in section 133(1)(c) of the Companies Act, 2008.

3. The respondents are ordered to return or to procure the return of each and every motor vehicle listed in annexure “X” to the applicant’s notice of motion at its nominated address.

4. The second respondent is called upon to show good cause on 25 March 2023 at 10h00 or so soon thereafter as counsel may be heard as to why he should not be ordered to pay the costs of this application, jointly and severally with the first respondent, on the attorney and client scale, *de bonis propriis*.

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A W PULLINGER

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties’ and/or parties’ representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 9 January 2024.

DATE OF HEARING: **7 DECEMBER 2023**

DATE OF JUDGMENT: **9 JANUARY 2024**

APPEARANCES:

COUNSEL FOR THE APPLICANT: **P LOURENS**

ATTORNEY FOR THE APPLICANT: **WERKSMANS**

COUNSEL FOR THE RESPONDENT:	**C GIBSON**
ATTORNEY FOR THE DEFENDANT:	**SMITH QWEMESHA McCARTHY INC.**