

IN THE REPUBLIC OF SOUTH AFRICA

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

CASE NO: 62969/2013

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| (1) | REPORTABLE: NO/YES |
| (2) | OF INTEREST TO OTHER JUDGES: NO/YES |
| (3) | REVISED. |
| | <div style="display: flex; justify-content: space-between;"> <div> <p>13/02/2018</p> <p>DATE</p> </div> <div> <p><i>[Signature]</i></p> <p>SIGNATURE</p> </div> </div> |

13/2/18

WESBANK A DIVISION OF FIRSTRAND

APPLICANT/PLAINTIFF

And

KGOROSHI SAMUEL MAGALADI

RESPONDENT/DEFENDANT

JUDGMENT

KHUMALO J

Introduction

[1] This is an interlocutory application in which the Applicant seeks an interim attachment of a motor vehicle for its preservation pending the finalisation of an action.

[2] On 19 November 2008, the Applicant, a registered credit provider under the National Credit Act, 34 of 2005 (the NCA), and the Respondent concluded a written instalment sale agreement in terms of which Applicant sold a motor vehicle to the Respondent. The Applicant was furthermore to retain ownership until final payment of the purchase price.

[3] The interim relief the Applicant is seeking in this application is for an order directing the Respondent to deliver the vehicle into the possession of the Sheriff who is to deliver it to the Applicant who shall then, at its own expense, transport and retain the vehicle under security at its premises situated at Plot 50 Zandfontein in Pretoria, pending the outcome of the action.

[4] The common cause facts are that the Respondent is substantially in arrears with the monthly instalments payable under the agreement, having stopped payment when a dispute arose between the parties. The Applicant on 2 October 2013 instituted an action against the Respondent for the breach, claiming, among other things, confirmation of cancellation of the sale agreement and return of the vehicle.

[5] This has been a long and protracted action. A year and a half lapsed after the Respondent had entered an appearance to defend the action and before he served his Plea in May 2015. This Application was launched on 30 November 2016, a year and a half after the Plea, following the postponement of the trial on 6 May 2016. It was set down for hearing on 2 February 2017, postponed several times until I heard the matter on 7 February 2018 a year later.

[6] The function and purpose of an interim attachment order is to protect the leased or partially paid for goods against deterioration and damage and to keep them in safekeeping until the case between the parties has been finalised. Its purpose is not to enforce remedies or obligations under the credit agreement and the remedy does not form part and parcel of the debt enforcement process envisaged in the NCA. See in this regard J M Otto *The National Credit Act Explained* para 44.4. See also the unreported judgment in *S A Taxi Securitisation (Pty) Ltd v H W Young* Case No. 10249/2008 (CPD).

[7] The claim for interim attachment of goods pending the outcome of vindicatory or quasi-vindicatory proceedings is well-established at common law: See *Morrison v African Guarantee and Indemnity Co Ltd* 1936 (1) Ph M 35 (T); *Loader v De Beer* 1947 (1) SA 87 (W); *Van Rhyn v Reef Developments (Pty) Ltd* 1973 (1) SA 488 (W) at 492. In *SA Taxi Securitisation (Pty) Ltd v Chesane* (26382/2009) [2010] ZAGPJHC 30; 2010 (6) SA 557 (GSJ), Boruchowitz J pointed out that the NCA 'does not expressly indicate that the common law remedy has been abrogated but has in fact, textual indications to the contrary.

[8] To succeed in this application the Applicant is required to establish and satisfy the well-established requirements for the grant of an interim interdict. The Applicant is required to show: (a) that the right which it seeks to enforce is clear or, if not clear, is *prima facie* established, though open to some doubt; (b) that, if the right is only *prima facie* established there is a well-grounded apprehension of irreparable harm if the interim relief is not granted; (c) that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other satisfactory remedy.

[9] In the Applicant's founding affidavit its alleged that for the fact that the agreement has been cancelled due to the Respondent's breach, it has a right to be in possession of a vehicle, or at least a *prima facie* right.

[10] Its also alleged that since the Applicant is the owner of the vehicle and seeks vindicatory relief, it is not incumbent upon it to allege or prove well founded apprehension of irreparable harm, the harm being presumed. Notwithstanding, it has a well founded apprehension of irreparable harm in that the vehicle is the only security that the Applicant has for the sums owing to it by the Respondent. The vehicle is being diminished in value on a daily basis and will, in future, not retain sufficient value to discharge the sums owing by the Respondent.

[11] The Applicant has no say to the manner in which the Respondent drives or operates the vehicle on a daily basis and therefore powerless to protect its interest. It is not receiving the agreed monthly instalments payment which is the quid pro quo for the inevitable reduction in the value of the vehicle so that as the vehicle reduces in value, the principal debt owing to the Applicant likewise reduces. Under the circumstances the debt is increasing as no payments are made whilst the value of the vehicle diminishes, which erodes on the Applicant's interest or right of recourse against the Respondent.

[12] On the other hand the Respondent is utilising the vehicle as a taxi and receives an income daily. However Respondent's use of the vehicle severely harms the prospects of Applicant's recovery of the debt as even though he is remunerated for its use he still fails to make any payment towards settlement of the loan advanced to him by the Applicant whilst the vehicle is losing its value. It is argued that the balance of convenience favours the Applicant in the granting of the interim interdict.

[13] It is Applicant's contention that pending the main action and in the absence of the interim relief sought, the Applicant has no method of preventing the Respondent from causing any further depreciation of the value of the vehicle. Further that Applicant has no alternative remedy available to it and unlikely that it will be able to recover its damages at the end of the action, unless able to secure payment of those damages by means of interim possession and protection of the vehicle.

[14] The Respondent opposes the granting of the interim relief on the grounds that he is employed by Cottonfields Shopping Centre as well as Wingrin Centre by organising the taxi rank and cleaning services associated with the taxi rank and uses the vehicle to render his employment services. He uses the vehicle to transport the employee to and from their respective centres which averages on 80 km a day and receives a small remuneration from his employer.

[15] He reckons that the Applicant will suffer no prejudice whilst he remains in possession of the vehicle as:

[15.1] the vehicle is currently insured and will be repaired if it is damaged.

[15.2] The vehicle will depreciate whether in his possession or in the possession of the Applicant.

[15.3] The Applicant has claimed for damages in its particulars of claim and will be compensated for any that are proven at trial, therefore suffering no prejudice.

[16] He alleges he will conversely, be highly prejudiced if the vehicle is taken away from him as he will not be able to render his employment services and therefore needs the vehicle in order to comply with the terms of his employment.

[17] It is trite that for the grant of an interim attachment order it is a prerequisite that any agreement under which the respondent has the right to possess the vehicles first be cancelled. See *Steyns Foundry (Pty) Ltd v Peacock* 1965 (4) SA 549 (T). ; *First Consolidated Leasing and Finance Corporation Ltd v N M Plant Hire (Pty) Ltd* 1988 (4) SA 924 (W).

[18] In the present matter the Applicant has purported to have cancelled the instalment sale agreement due to Respondent's breach of the agreement by failing to pay the monthly instalments due. It is common cause the Respondent has persisted in his default even after the institution of the claim, alleging that proper calculation of the debt should be made. The Applicant is accordingly qualified to claim interim recovery of the vehicle.

[19] The Respondent wants to retain possession of the vehicle so that he can continue earning an income at his employment, whilst the vehicle deteriorates, when he is not paying the monthly instalments that are the *quid pro quo* of the benefit he derives from such possession and the depreciation of the vehicle. He has effectively suspended his obligations that flow from the agreement resulting in the escalation of the debt, however insisting on retaining and using the vehicle. As a result of his actions the Applicant is not only deprived of the monthly instalments but its security is deteriorating, therefore Applicant is highly exposed. The prejudice the Applicant will suffer is glaringly evident. To deprive the Applicant preservation of its security under such circumstances would be unjustifiable.

[20] Levenberg AJ recognising the tragedy of this situation in *SA Taxi Securitisation (Pty) Ltd v Mbatha & 2 Similar cases* 2011 (1) SA 310 (GSJ) on [36] noted that "the credit provider's prospects of recovering from the consumer are often effectively limited to the recovery of the creditor's security. if lenders are unable to recover the deteriorating security, such as motor cars, promptly, the consequences would be economically disastrous for asset-based lenders, especially those lending to the less affluent."

[21] Moreover, the courts have to ensure that the interests of both parties are balanced taking all the relevant factors into consideration. Which is what was intended by the legislature in the enactment of the NCA. The Respondent alleges to have suspended payment due to the litigation, all things being fair, all the elements of the agreement will have to be suspended including Respondent's possession of the vehicle. The court cannot sanction the retention and use of the vehicle by the Respondent, for profit as a taxi, in a manner that will result in its deterioration at the time when it has suspended the fulfilment of its obligations under the agreement. The Respondent's continued possession of the vehicle is causing irreparable harm to the Applicant.

[22] I am satisfied that the applicant has established a clear right to cancellation and restoration of the vehicle in the pending action. Although Applicant has likewise established

irreparable loss it will suffer if preservation is not ordered, generally, irreparable harm is presumed since the Plaintiff's claim is a vindicatory one; see *Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (W) at 813.

[23] The balance of convenience are also in favour of the granting of the interim relief. The Respondent has indicated his intention to continue using the vehicle for earning an income without paying his instalment. The vehicle will certainly continue to deteriorate if Respondent retains its possession, diminishing in value, whereas in Applicant's possession there is certainty of its preservation until the dispute is resolved; *Mathews v Mathews* 1935 TPD 124 at 128.

[24] Generally speaking the fourth requirement, lack of any other ordinary remedy, follows as a natural corollary on proof of irreparable loss; see *Ncongwane v Molorane* 1941 OPD 125 at 130. The Applicant therefore need not show that he has no other satisfactory remedy. A person who is entitled to vindicate property in the hands of another cannot be forced by the actions of that person to accept merely the value of the property; see *Cowen & Hammond v Campbell* 1906 TH 191 and *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd*.

[25] Under the circumstances, the following order is granted:

Pending the final outcome of the action instituted by the applicant against the respondent:

1. The Respondent is directed to deliver into the possession of the sheriff the 2008 VOLKSWAGEN CRAFTTER 50 P/V HR 80, with ENGINE NUMBER: BJK046953 and CHASSIS NUMBER WV1ZZZ2EZ060138 ("the vehicle") who shall deliver the vehicle to the Applicant who shall, in turn, at its own expense:
 - 1.1 transport the vehicle to its garaged premise situate at Zandfontein, plot 50, Beverley Road, Zandfontein, Pretoria;
 - 1.2. retain the vehicle at such garaged premises under security.
2. The Applicant shall not use the vehicle or permit that it be used.
3. In the event the Respondent fails to comply with the contents of paragraph 1 above within five (5) days of the service of this order on the Respondent's attorneys, the sheriff is authorised and directed to take the vehicle into his possession from wherever he may find the vehicle and return the vehicle to the Applicant.
4. Costs to be costs in the main action



N V KHUMALO J

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

**On behalf of Applicant:
Instructed by**

**ADV A P ELLIS
STRAUSS DALY INCORPORATED
Tel: 010 201 8600
Ref: J BOTHA /WES 207/1585**

**On behalf of Respondent:
Instructed by :**

**MONGWEKA
J W WESSELLS & PARTNERS INC
Ref: J ERASMUS/BS/LM146**