Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: **D10858/2023**

In the matter between:

BABCOCK FINANCIAL SERVICES (PTY) LTD **APPLICANT**

and

D AND H FREIGHT CC **RESPONDENT**

Coram: Mossop J
Heard: 9 May 2024
Delivered: 9 May 2024

ORDER

The following order is granted:

1. The respondent is directed to return the motor vehicle described as a 2022 DAF XF 480 FTT 6x4 DD SR AIR SP Smart Truck Tractor with engine number […] and chassis number […] (the vehicle) forthwith to the possession of the applicant by delivering same (together with all keys thereto) to a representative of the applicant to be nominated by the applicant in writing.

2. If the respondent fails, refuses, or neglects to comply with the order contained in paragraph 1 above, the sheriff of this court is hereby authorised and directed to forthwith attach the vehicle, where ever it may be found, and to deliver possession thereof to the applicant.

3. The respondent is directed to pay the costs of this application on the attorney and own client scale, including those costs reserved on 13 October 2023.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] This application was initially launched as an urgent application on 13 October 2023 when it first served before Vahed J. No order was granted on that date and the application was adjourned sine die and the costs were reserved.

[3] When the matter was called this morning, Mr Aldworth appeared for the applicant and Mr Bond appeared for the respondent. Both counsel are thanked for their assistance.

[4] The purpose behind this application is to secure the return of a motor vehicle to the applicant. The respondent is presently in possession of that motor vehicle, which is more fully described as a 2022 DAF XF 480 FTT 6x4 DD SR AIR Smart Truck Tractor (the vehicle). There is no dispute that the vehicle belongs to the applicant. The possession of the vehicle was acquired as a consequence of a lease agreement (the agreement) being concluded between the parties.[1] The applicant alleges that the respondent has breached the agreement and has therefore cancelled it and now seeks the return of the vehicle.

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[1] The Master Finance Lease Agreement recorded the respondent's client number as being 001785 and the Schedule attached to it had the further identifying number of 00178501.

[5] The respondent has raised a number of defences. Some are gossamer thin, while others are slightly more substantial. The first is that there is no nexus between the deponent to the founding affidavit, a Ms Mieke Immelman (Ms Immelman), and the applicant. The next is that the application lacks any true urgency. The third defence is that the respondent denies that it breached the agreement, and the final defence is a denial that the applicant has cancelled the agreement.

[6] Before considering these defences, I consider first the applicant's allegations. The applicant states that the agreement was concluded on 31 October 2022.[2] Several of its terms are directly relevant to this application.

[7] Because the respondent was to take possession of the vehicle and would put it to use hauling trailers, the agreement provided that the respondent was obligated to insure it. The insurance of the vehicle has a significant part to play in the determination of this matter and it will be prudent to state the actual provision of the agreement that deals with it:

'9. You must at all times keep the Goods insured with a registered insurer approved by the Lessor against all insurable risks, loss and damage to a value not being less than the market value of the Goods. Please note the following:

9.1 the policy must either be taken out in the joint names of yourself and the Lessor or you must ensure that the Lessor's interest is noted by the insurance company on the policy and you hereby cede your rights in and (sic) the policy and the proceeds thereof to the Lessor.

9.2 you must give the Lessor immediate proof of insurance upon request by the Lessor together with proof of payment of the premiums. If you do not give proof of payment to the Lessor then you hereby authorise the Lessor to insure the Goods on your behalf and to add the premium to the principal debt. The Lessor shall however not be obliged to insure the Goods on your behalf.'

The reference in this extract (and in other extracts referred to hereafter) to 'the Goods', is defined in the agreement as being a reference to the vehicle.

[8] As regards rental payment, the agreement provided that the respondent was required to pay a deposit of R243 572.01 upon signature of the agreement (the

[2] In fact, the agreement was signed by the respondent on 31 October 2022 but was only signed by the applicant on 15 November 2022.

deposit). The agreement went on to deal with the further payments required as follows:

'8.1 You must make all payments on the dates set out in the Schedule[3] by way of debit order unless the Lessor agrees otherwise and all such amounts shall be made to the Lessor's stipulated address.

8.2 You must ensure that the Lessor receives the full amount of each payment as set out in the First Schedule and no deductions may be made from such payment.

8.3 Whilst this Agreement remains in force you will not be entitled to withhold payment of any rentals for any reason whatsoever.'

[9] The parties agreed as follows in the event of a breach of the agreement occurring on the part of the respondent:

'If you fail to comply with any of the conditions of this Agreement (all of which you agree are material), or fail to pay any amounts due to the Lessor, or commit any act of insolvency, or you have made misleading or inaccurate statements to the Lessor relating to financial affairs or otherwise before or after signing this agreement, or leave the employ or abscond from the company, firm or association that employs you at the date of execution of this agreement, or you allow any judgment that has been taken against you to remain unpaid for more than 7 days, then the Lessor will have the right (without affecting any of its other rights):

17.1 to cancel the agreement and claim from the amount which the Lessor would have been paid had you fulfilled all your obligations. To this end, the Lessor will be entitled to take the goods back, sell the goods, keep all payments you have made and claim the balance (if any) from you as damages; or

17.2 to claim immediate payment of the full amount that the Lessor could claim in terms of the agreement, as if it was then due by you;

provided that pending payment of such arears and/or damages the Lessor shall not be obliged to tender or repay to you any amounts paid under this Agreement or any allowances or credits granted to you.'

[10] Finally, as regards costs, the agreement recorded that the parties agreed to the following clause:

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[3] The schedule provided for the following payments: a single payment of R75 390.09, payable on 7 January 2023; six payments of R103 983.33 each, first payable on 7 February 2023, and all further payments in that amount monthly on the same date of each succeeding month; 40 instalments of R51 032.89 each, first payable on 7 June 2023, and all further payments in that amount monthly on the same date of each succeeding month; and a final payment of the amount of R51 032.89 payable on 7 December 2025.

'You shall be liable for and pay on demand:

21.1 …

21.2 …

All costs arising from your failure to comply with any terms of this Agreement and/or default on your part including but not limited to legal fees on an attorney-and-own-client basis, collection commission on all payments made by you if the matter is referred to an attorney or collection agency, the costs of recovering the Goods and restoring them to a saleable condition, a reasonable handling fee in respect of the Goods if repossessed and any service fee in respect of necessary consultations with you.'

[11] There is no dispute that the applicant made the vehicle available to the respondent, who took possession of it and commenced using it. The breach of the agreement relied upon by the applicant is the alleged non-payment by the respondent of the January 2023 instalment in an amount of R76 804.18.[4] There is also no dispute that this instalment was not paid, as will be seen shortly. Due to the non-payment of this instalment, the applicant ultimately cancelled the agreement and demanded the return of the vehicle. The bringing of this application is indicative of the fact that the vehicle was not returned.

[12] I now turn to deal with the issues raised by the respondent. The first point taken by the respondent is that there is a defect in the application in that the deponent to the founding affidavit, Ms Immelman, does not have any link to the applicant. She therefore has no knowledge of the facts and events to which she testifies.

[13] Ms Immelman describes in the founding affidavit who she is, how she is linked to the applicant, and how she has knowledge of the facts to which she deposes as follows:

'1. I am an adult female managing director employed as such at the (sic) Fast Forward Finance (Pty) Ltd, hereinafter referred to as "FFWD", situated at 431 Kirkness Street, Sunnyside, Pretoria, 0002.

[4] The amount differs from the amount stipulated in the schedule to the agreement. Counsel for the applicant was unsure why this was the case but submitted that it could be as a consequence of an interest rate change. Nothing turns on this.

2. The respondent's file and financial information is administered by FFWD and is under my control.

3. …

4. The facts contained herein are within my personal knowledge and belief unless the contrary is clearly indicated and are both true and correct.'

[14] The respondent submitted in its answering affidavit that this was insufficient to establish a credible nexus between Ms Immelman and the applicant. I am afraid that I cannot agree with that submission. The deponent clearly states that she is the managing director of the company that employs her and that the respondent's financial affairs were administered by that company and that she personally had the documents pertaining to the respondent under her control. A managing director of a company is likely to have personal knowledge of certain events by virtue of the nature of the office that she holds.[5] As was stated in *Conradie v Landro en Van der Hoff (Edms) Bpk:*[6]

'Dit is noodwendig ook die posisie van 'n besturende direkteur van 'n maatskappy. Hy kan immers nie elke transaksie behoorlik behartig nie en tog is hy die persoon wat verantwoordelik is vir die besigheid van die maatskappy. Hy moet noodwendig kennis dra van elke transaksie wat met sy maatskappy aangegaan word. Hy is in alle opsigte die persoon wat namens sy maatskappy optree en as sodanig is hy in dieselfde posisie as die hoof van 'n eenman-saak.'

[15] The link between Ms Immelman and the applicant is through the company that employs her. Her company is the administrator of the applicant's financial affairs. I cannot conceive of a description any clearer nor can I imagine what further she should have said to satisfy the respondent of her ability to depose to the founding affidavit. The point taken by the respondent has no merit.

[16] The respondent next raised the issue of urgency. In the answering affidavit this issue had two parts to it. The first related to the fact that despite the application papers being issued by the registrar of this court on 28 September 2023, they were

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[5] *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 516-517, where reference is made not to a managing director but to the manager of a bank.

[6] *Conradie v Landro en Van der Hoff (Edms) Bpk* 1965 (2) SA 304 (GW); *PBD Boeredienste v Visser* [2011] ZANWHC 10 para 9

only served upon the respondent on 4 October 2023. The second part of the respondent's submission was that there were no factual grounds for urgency.

[17] As to the first part, the respondent argues that there cannot conceivably be any urgency if the applicant was content to sit with the issued application papers for almost a week before serving them on the respondent. That, without more, might be a point of some substance. But, unsurprisingly, there is something more: the applicant includes in its papers the sheriff's return of service which records that he served the application papers at the respondent's registered address on 29 September 2023, the day after the papers were issued, and not for the first time on 4 October 2023, as submitted by the respondent. This fact deprives the point of all the considerable vigour with which it was endowed in the papers.

[18] The second part of the submission on urgency related to the factual basis upon which the application was said to be urgent. The basis for urgency relied upon by the applicant was not the non-payment of the January 2023 instalment. It was an issue relating to the insurance of the vehicle. In the founding affidavit, the applicant stated that on 26 September 2023, it received a notification from an entity known as 'Tradesure' (Tradesure) that the insurance that the respondent was obliged to have in place in respect of the vehicle had been cancelled. As would later be ascertained, this was accurate, but it was only part of the story: the insurance policy then in place in respect of the vehicle had, indeed, been cancelled by the respondent.

[19] The only security that the applicant possesses is the vehicle itself and in the event of its damage or destruction, the insurance policy that the respondent was required to keep in place. The proceeds of that policy have been ceded to the applicant by the respondent. Given the purposes for which the vehicle is designed and is employed, to permit it to operate without such insurance being in place would be reckless and would severely prejudice the position of the applicant in the event of the vehicle being destroyed or damaged. The information received from Tradesure set alarm bells ringing and within a day, the application papers were drawn and within two days, they had been served at the respondent's registered address. There was certainly no foot-dragging in this regard by the applicant.

[20] The undeniable fact of the cancellation of the insurance policy then in place, was, however, not the full story, as alluded to above. It was later established, to the applicant's apparent satisfaction, that the vehicle was not uninsured. All that had happened was that the policy of insurance of which the applicant had knowledge had been cancelled but another policy had apparently immediately been put in place by the respondent. The applicant had no knowledge of this new insurance. The danger that motivated the urgency was ex post facto found not to be present. Thus, the respondent argues, the application must be struck from the roll for want of urgency with an order of costs on the attorney and client scale.

[21] Had the vehicle been uninsured, the risk that the applicant was exposed to would have been manifest and would, in my view, have justified the court being moved for the urgent relief claimed in this application. It is plain that the applicant did not have all the facts at its disposal. However, the wording of the agreement establishes that there was a duty on the respondent to involve the applicant in the insuring of the vehicle. It provided that the applicant was required to approve the identity of the insurer. However, nothing was put up by the respondent to demonstrate that it sought that approval or that it even informed the applicant of the substitution of the existing insurance cover. The very least that it could have done was to inform the applicant of the substitution of insurance policies. Through its own neglect to act in accordance with the agreement, the respondent cannot now protest that there is no urgency when the applicant simply acted on the knowledge that it had which was insufficient due to the respondent not complying with its contractual obligations.

[22] Mr Aldworth indicated in argument that vindicatory applications are naturally endowed with a degree of urgency. That is so. He referred me to the matter of *Jacobs v Mostert*,[7] where the court cited with approval the principle expressed in *Motor Distributors (Pty) Ltd v Rossman & another*[8] that:

'… inherent urgency underlies a claim for the return of property (a vindication claim) is inferred from the importance our law attributes to this remedy. Firstly, in a claim for

[7] *Jacobs v Mostert* [2021] ZAWCHC 213.
[8] *Motor Distributors (Pty) Ltd v Rossman & another* 1980 (3) SA 1164 (D).

vindication our law factually presumes that the owner will suffer harm if an interdict is not granted'

[23] In the circumstances, although the grounds for urgency were imperfect[9] and, indeed, have fallen away in the meantime, I am prepared to find that the matter was urgent and that on the facts known by the applicant at that time, there was a danger that if the matter was not heard urgently, the applicant may not have obtained substantial redress at a hearing in due course.[10]

[24] The next issue raised by the respondent is that it denies that it has breached the agreement. The schedule of payments referred to in footnote 3 is not in issue. It is recorded in writing in the agreement and the parties have put their respective signatures to the agreement. There is thus agreement that following the payment of the deposit, the next payment that the respondent was required to make was due on 7 January 2023. There is no dispute that this instalment was not paid by the respondent, for the respondent states in its answering affidavit that:

'… due to an error on the part of the Applicant, the Respondent's bank account was not debited with the January instalment.'

[25] Putting aside who made the error for a minute, and assuming for the same minute that the respondent had the ability to make the January 2023 instalment, it is apparent from the extract of the answering affidavit narrated above, that the money that the respondent would have allocated for the payment of the January 2023 instalment remained in its bank account and was not paid over to the applicant on the date that it was due. The January 2023 instalment was therefore, factually, not paid.

[26] Why the January 2023 instalment was not paid is mentioned by the respondent in its answering affidavit when it states the following:

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[9] *Building Product Design Ltd v Cordustex Manufacturing (Pty) Ltd and Another* [2012] ZAECPEHC 42 para 19.

[10] *East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others* [2011] ZAGPJHC 196 paras 6 and 7; *Mogalakwena Municipality v Provincial Executive Council, Limpopo and others* 2016 (4) SA 99 (GP) para 64.

‘I annex hereto marked “AA4” a copy of an email sent by the Respondent to the Applicant dated 27 January 2023 bringing to the Applicant’s attention that the wrong account is being debited by the Applicant.’

The email of 27 January 2023 states as follows:

‘Note the reason this amount was not paid was because the wrong account was debited and that was not a fault on our side.’

[27] The fact that the incorrect account was debited by the applicant must mean that there were two, or more, bank accounts in existence at the same time and that the applicant debited the incorrect one. Why there should be more than one account is not explained with any clarity in the email of 27 January 2023, nor is it explained in the answering affidavit. When the one account became inactive and when the new account became active also remains unclear. In my view, this is critical and it ought to have been explained in order to buttress the assertion by the author of the 27 January email that the fault did not lie with the respondent. Nothing further, however, is said on this point.

[28] What the respondent does state is that it notified the applicant that it had changed its bankers and provided it with the new details. That may well be true. But when that notification was sent is also not mentioned in the answering affidavit nor is a copy of the instruction attached as an annexure. I accordingly have no idea when this was allegedly communicated to the applicant. It is thus possible that it was done after 7 January 2023. This is precisely what the applicant alleges. It states that it was only given the new banking details in February 2023.

[29] The applicant states further that having received the new banking details in February 2023, it could not present a retrospective request for a debit order payment for January 2023. A debit order operates when a debtor gives a creditor a mandate to present an amount for payment due to the creditor to the debtor’s bankers and to receive payment of the amount so presented. The debtor is not required to do anything, ‘other than to give the creditor permission to present its claim for payment to the debtor’s bankers’.[11] I do not know whether the explanation that there could not

[11] *Bright Idea Projects 66 (Pty) Ltd t/a All Fuels v Former Way Trade and Invest (Pty) Ltd and others* 2023 (6) SA 214 (KZP) para 22.

be a retrospective or arrear payment by way of a debit order is correct. It may well be, but that will depend on the terms of the debit order mandate, which I have not seen. This explanation was mentioned in reply by the applicant and the respondent has not therefore had an opportunity to address it. But nothing in my view turns on whether it is correct or not, as I shall now explain.

[30] What is clear from the 27 January email is that the respondent's representatives knew, at least from the date of that email, that the 7 January 2023 instalment had not been paid. In terms of the agreement, the responsibility for ensuring that payment was made each month was the respondent's and it was not entitled to withhold any payment due to the applicant.

[31] I accordingly find that by not paying the January 2023 instalment and not taking steps thereafter to effect such payment, the respondent breached the agreement.

[32] The final point taken by the respondent relates to the applicant's alleged cancellation of the agreement. After repeated demands for the payment of the January 2023 instalment,[12] none of which prompted the respondent to make it, the applicant cancelled the agreement. There can be no doubt that this is what it did, as a letter sent by the applicant to the respondent on 6 September 2023 makes this clear:

'We hereby cancel the Master Lease Agreement Number […], with Schedule Numbers: […][13] between us and yourselves and demand that all goods under this Master Lease Agreements (sic) be returned to our offices by no later than Monday 11 September 2023.'

[33] The agreement recorded that a failure to make a payment due would constitute a material breach. The breach was not remedied prior to the cancellation of the agreement occurring. Once the applicant had made demand for the payment but had not received it, it was entitled to cancel the agreement. I find that it did cancel the agreement. The denial by the respondent that the applicant was not entitled to cancel, or that it has not cancelled, is accordingly not sustainable.

[12] These demands were made on 9 May 2023, 18 May 2023, 6 July 2023, 2 August 2023, and the agreement was finally cancelled on 6 September 2023.
[13] The numbers referred to in this extract match the numbers identified in footnote 1 of this judgment.

[34] The respondent further submitted that the debit order continued to operate after January 2023 and that indicates that the agreement was not actually cancelled by the applicant. That the debit order continued to operate is correct, but there can be no doubt that the applicant cancelled the agreement. Because the respondent did not remedy its non-payment of the January 2023 instalment, it always was in default and the applicant remained entitled to cancel. The applicant made numerous attempts at avoiding cancellation and litigation but those entreaties to the respondent fell on deaf ears. That is a monumental pity for this matter cried out for a sensible resolution. As Mr Aldworth pointed out, had the vehicle been returned to the possession of the applicant the respondent may have had a valid point but the vehicle remains with the respondent.

[35] It follows that the applicant is entitled to the order that it seeks. Given the full argument that I have enjoyed, I can see no purpose in granting a rule nisi and counsel agreed that whatever decision is arrived at by the court it should be in the form of a final order.

[36] On the issue of costs, the agreement provides that the respondent would be liable for legal costs on an attorney and own client scale in the event of it not complying with the provisions of the agreement. I have found that it did not comply with the provisions of the agreement. There is accordingly no reason why I should not give effect to the terms of the agreement and I shall therefore grant costs on the agreed scale. As to the costs reserved on 13 October 2023, Mr Bond argued that the respondent should not be liable for them. I have considered that submission, having stood the matter down to prepare this judgment, but have come to the conclusion that having found the matter to be urgent, those costs should also be borne by the respondent.

[37] I accordingly grant the following order:

1. The respondent is directed to return the motor vehicle described as a 2022 DAF XF 480 FTT 6x4 DD SR AIR SP Smart Truck Tractor with engine number […] and chassis number […] (the vehicle) forthwith to the possession of the applicant by

delivering same (together with all keys thereto) to a representative of the applicant to be nominated by the applicant in writing.

2. If the respondent fails, refuses, or neglects to comply with the order contained in paragraph 1 above, the sheriff of this court is hereby authorised and directed to forthwith attach the vehicle, where ever it may be found, and to deliver possession thereof to the applicant.

3. The respondent is directed to pay the costs of this application on the attorney and own client scale, including those costs reserved on 13 October 2023.

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MOSSOP J

APPEARANCES

Counsel for the applicants	:	Mr D W D Aldworth
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