IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 338/95

In the matter between:

ABDULLAH PARKER

APPELLANT

AND

DORBYL FINANCE (PTY) LTD FIRST RESPONDENT

BUSAF SALES LIMITED SECOND RESPONDENT

BEFORE : HEFER, VIVIER, HOWIE, SCHUTZ and

PLEWMAN JJA

DATE HEARD : 18 NOVEMBER 1996

DATE DELIVERED : 21 NOVEMBER 1996

J U D G M E N T

<u>SCHUTZ JA</u>:

The central question, posed in a stated case, is whether an agreement dated 26 November 1990 is subject to the Credit Agreements Act 75 of 1980, as amended ("the Act"). The agreement was concluded between the appellant ("Parker"-the plaintiff below) and the first respondent here and below, Dorbyl Finance (Pty) Ltd ("Dorbyl"). The second respondent was not a party to the agreement, and the issues raised in the stated case are not relevant to the alternative cause of action

pleaded against him, of which no further mention need be made.

The agreement is styled "Instalment Sale Master Agreement". It is drawn in such a manner that it can be used both for transactions falling under the Act and for those not so falling. The merx was a new motor passenger bus sold by Dorbyl for a price of R572 150-40 inclusive of finance charges and tax. Ownership was to remain vested in the seller until the 48 monthly instalments had been paid. The agreement was accordingly a "credit agreement" as defined in the Act.

Parker claimed a declaration confirming his cancellation of the agreement, the return of the deposit of R30 000 and damages in the sum of R171 154,00. The cancellation was said to be based on and the damage to flow from a series of pleaded accusations: that Dorbyl had

misrepresented the newness and fitness of the bus, or had failed to make disclosure in these regards when it was its duty to do so; and had breached express or implied terms as to newness and absence of latent defects.

If the case is to be decided without reference to the Act then these causes of action will have to surmount the defences provided by clause 5.2 of the agreement, which contains a sweeping exclusion of liability for misrepresentation or breaches of warranty, whether express or implied.

Hence the stated case as to the application or non-application of the Act. The question of law posed is:

> "as set out in paragraph 4.1 of Plaintiffs Particulars of Claim . . ., read with paragraph 4 of Defendant's Plea . . ., read with paragraph 12 of the plea . . .."

Paragraph 4.1 of the Particulars is to the effect that the Act does apply to the agreement, so that the provisions of clause 5.2 "are invalid and null and void by virtue of section 6 of the Act." Para 4 of the Plea denies these averments. Para 12.1 of the Plea sets up clause 11.2 of the agreement. The dispute in this appeal is about its effect. Clause 11 commences:

"11 USE OF THE GOODS

11.1 The Buyer shall at all times keep the Goods in its possession and control and take reasonable care in the use of the Goods, and shall at its own expense repair the goods and maintain them in proper working order and protect them from loss or damage and shall not use the Goods elsewhere than in the Republic of South Africa without the Seller's written consent.

11.2 The Goods shall be operated at the Buyer's cost and only by competent and properly trained, licensed and qualified persons, and shall be used only for the purpose for which they were designed and/or intended and if the Goods are motor vehicle, only in connection with mining ,engineering construction, road building or a manufacturing process (unless otherwise agreed in writing by the Seller); the Buyer shall itself comply and procure compliance with the specifications, instructions and recommendations of the Supplier of the Goods and/or the Authorised Dealer (own emphasis).

11.3 ..."

The stated case, which included an agreed statement of facts, recorded that no written agreement of the kind envisaged by cl 11.2 was obtained, and proceeded:

"But for the provisions of clause 11.2 of the agreement, the proviso of Section 2 (1) of the Act would not have applied to the goods in question."

S 2 (1) of the Act reads:

> "The provisions of this Act shall apply to such credit agreements or categories of credit agreements as the Minister may determine from time to time by notice in the Gazette: Provided that the Minister shall not have any power to apply such provisions to credit agreements in

(1) a person purchases or hires goods for the sole purpose of selling or leasing them or using them in connection with mining,engineering ,construction, road building or a

(2) the State is the credit grantor" (own emphasis).

The remaining terms of the stated case are to the effect that after

the conclusion of the agreement Parker conveyed passengers not solely for the purposes referred to in the proviso to S 2 (1); that the bus would ordinarily fall within category 19 of GN R 401 published in the Gazette of 27 February 1981 (in which the Minister did make a determination such as is envisaged by s 2 (1)); and that the effect of Regulation 4 (1) of GN R 401 does not require adjudication.

The Court a quo (van der Westhuizen AJ) relied upon the minority judgment of Nicholas AJA in Ooshuizen and Another v Standard Credit Corporation Ltd 1993 (3) SA 891 (A) to conclude that if the sole purpose of the purchaser or lessee is specifically stated in the agreement, that must be decisive as to the applicability of the proviso to s 2 (1). The learned Judge was of the opinion that cl 11.2 did expressly state

such a purpose, in a manner such as to bring the agreement within the proviso, so that he concluded in favour of Dorbyl that the Act did not apply. In passing he rejected arguments to the effect that a circumvention of the Act had been intended and that regard could be had to Parker's actual use of the bus after the agreement had been concluded as an indication of his intention at the time of contracting. Thereafter he granted leave to appeal to this Court.

On appeal Parker's essential argument is that for purposes of determining the application of proviso (a) to s 2 (1), the "sole purpose" is his purpose as buyer; and that for a variety of reasons el 11.2 standing alone - and for purposes of the stated case it must stand alone - is not decisive and is insufficient to discharge Dorbyl's onus of proving that his

sole purpose was to use the bus in one of the ways specified in the subsection (which I shall call "the designated ways"). Dorbyl's essential answer is that cl 11.2 clearly, unambiguously and finally defines that purpose as being use in one of the designated ways. These arguments need to be explored.

The Oosthuizen case (above) was concerned with the other part of the proviso, that part which speaks of "the sole purpose of selling or leasing them". Although there was unanimity that the application of the proviso had not been established, there was disagreement as to the reasons for that conclusion. Speaking on behalf of the minority Nicholas AJA (at 900 H - 902 D) was of the view that the purpose there relevant could not be determined from facts unknown to the lessor (read seller in

this case) at the time of the contract, of from the conduct of the parties subsequent thereto. The purpose was to be derived from the contract itself, from tacit terms if there were any, and possibly from other sources of information, but not the two classes already mentioned as excluded.

Kumleben JA with two concurrences, on the other hand, was of the opposite view with regard to these two classes (at 908 E - 910 J). Like Nicholas AJA, he treated the purpose of the purchaser or lessee as being the relevant one, but in determining what evidence could be taken into account he took a less restricted view than had the minority. The party seeking to rely on the proviso bore the onus of proving the purpose for which the lease was concluded (at 909 F - G). In doing so he could rely on subsequent conduct. Its weight, if any, in proving purpose would

depend upon the circumstances. And it was not necessary that the seller or lessor should have knowledge of the purchaser's or lessee's intention. It is the majority view which I must follow.

Returning to the facts in this case, Mr Blommaert, on behalf of Parker, contends that there is significance in the fact that clause 11.2 says merely that the bus must be used "only in connection with" the designated ways (or manner of use). This places Parker under a contractual obligation to use it in those ways. But there is no express statement that Parker's sole purpose is to use it in that way. To this Dorbyl responds, to quote its heads, "that the restriction on the use contained in clause 11.2 has as a necessary corollary, an agreement between the Appellant and the First Respondent that the sole purpose for

which the goods had been acquired would be for the purposes as set out in clause 11.2 . . ." (own emphasis). This submission has the effect of correctly conceding that Dorbyl must establish this necessary corollary: for the stated case makes it clear that there are no other facts on which Dorbyl can rely. Moreover, according to the argument the agreement one is supposed necessarily to infer was reached in a form such as to exclude any evidence tending to suggest that Parker's purpose was in fact otherwise.

The resolution of the dispute depends upon the construction to be placed on cl 11 (2). The initial difficulty facing Dorbyl is the bracketed words "(unless otherwise agreed in writing by the Seller)." Supposing for purposes of argument that the obligation as to use does translate into

purpose to use in the designated ways; that obligation is neither unqualified nor immutable. Dorbyl may at any time consent to any other use. This means that other uses are contemplated, so that the designated uses are not the only or sole uses. Following Dorbyl's own argument it follows that there were (as a necessary corollary) other purposes, so that, again, the designated purposes were not the only ones. It is as if Parker had been restricted to use in connection with mining, engineering, construction, road building, a manufacturing process or any other activity agreed to by the seller.

Mr Robinson, for Dorbyl, seeks to meet this difficulty by submitting that the purpose must be ascertained at the time of contracting (with which I agree) and that provided no relevant consent

has been given by that time the purpose has been established in such a manner that the Act is excluded from operation for the duration of the contract (with which I do not agree). Mr Robinson is, I think, driven to argue in this way, for otherwise one would have to accept the implausible result of the contract falling or not falling under the Act at various times, depending upon whether consent does or does not exist at a given moment. When regard is had to the import of the bracketed words, to my mind there is no room for the construction advanced by Mr Robinson. That construction is akin to saying that despite the fact that the egg has been laid in the blossom, the fruit is unspoiled because there is no spoiling when the fly lays her egg. The simple truth is that the words in question allow unlimited uses beyond the designated ones,

which on Dorbyl's argument means that there is no sole purpose of the kind contended for.

For this reason I consider that the appeal must succeed. There may be others, based upon the construction of this clause into which an inept ouster of the Act is argued to be tucked away in an unlikely comer, but I do not find it necessary to explore them further.

In the result the appeal is allowed, with the costs to stand over for determination at the end of the trial: and the order of the Court a quo is set aside and replaced with an order that the stated case is answered in favour of the Plaintiff, with the consequence that the provisions of the Credit Agreements Act 75 of 1980 do apply to the agreement "Annexure A" to the Plaintiffs particulars of claim, with costs to stand over for

determination at the end of the trial.

WPSCHUTZ JUDGE
OF APPEAL

HEFER JA) VIVIER
JA)
) CONCUR
HOWIE JA) PLEWMAN JA)