**IN THE HIGH COURT OF SOUTH AFRICA**
**FREE STATE DIVISION, BLOEMFONTEIN**

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|---|---|
| Reportable: | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |

Case no: **361/2016**
Case no: **4079/2016**
Case no: **4116/2016**
Case no: **4117/2016**
Case no: **4771/2016**

In the matter between:

**ABSA BANK LTD** Applicant

and

**DANIEL POCKLINGBERG ERASMUS** Respondent

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**JUDGMENT BY:** AS BOONZAAIER, AJ

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**HEARD ON:** 23 MARCH 2023

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**DELIVERED ON:** 21 APRIL 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 21 APRIL 2023.

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INTRODUCTION:

[1] This is an interlocutory application for the interim attachment of five motor vehicles for the safekeeping, pending the finalisation of the trial.

[2] Applicant has instituted five separate actions against the respondent in the abovementioned independent cases, which were heard jointly as an application for the following relief, *pendente lite*:

2.1 A declaratory order pertaining to ownership of the relevant vehicles;

2.2 An *interim interdict* prohibiting the disposal of the relevant vehicles by the respondent or any other person in possession of the respective vehicles;

2.3 An order authorising the Sheriff, alternatively the applicant to attach the vehicles and preserve same *pendente lite*.

[3] In general these applications seek to preserve the aforesaid vehicles in the ownership of applicant and free of any hinderance, incumbrance or alteration which would serve to diminish their value or prevent or delay their return to the applicant.

FACTUAL BACKGROUND:

[4] The merits of the main actions are not to be adjudicated upon in this application.

[5] The applicant which is a registered credit provider under the **National Credit Act,** [1] (the NCA) has leased five motor vehicles to the respondent which he uses for his own benefit. The applicant and respondent entered into these partially written and partially oral consumer credit agreements. These agreements state, that should the respondent fail to pay the instalments on the due date or fail to satisfy any of his obligations in terms of the agreements, the applicant shall without prejudicing any of its rights in law be justified in cancelling the agreements. In the

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[1] Act 34 of 2005

instance of such cancellation the applicant *inter alia* be entitled to claim return and repossession of the vehicles.

[6] It is not disputed that the respondent is in arrears with the payment of instalments under the leases and the applicant has instituted an action against the respondent in which it claims, among other things, return of the vehicles.

[7] According to applicant, respondent has breached these agreements in that he has failed to pay the instalments in terms of the agreements and has been in default. Hence applicant launched applications for summary judgments in three similar cases against the respondent. These applications were all opposed based on the same factual allegations and opposed on the same grounds.[2]

[8] The applications for summary judgments were refused in all of the abovementioned instances.[3]

[9] This court found *inter alia* in February 2017, in the matter of **Absa Bank v Pocklingberg** supra that the court is:

> "...satisfied that the respondent raised *bona fide* defences which may defeat the claim. Some of the defences raised by the respondent cannot be determined by way of affidavits but at a trial. A trial is the proper forum for resolving factual disputes, because affidavits are not suitable for that purpose..."

[10] The applicant in 2021 launched the present five applications

[11] It is undisputed that one of the vehicles namely the Jeep Wrangler 2.8 vehicle was repossessed in 2019 and thereafter was sold by the applicant.[4]

APPLICANT`S CASE:

[12] The purpose and grounds for the interdict were stated by the applicant as follows:

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[2] Absa Bank v Erasmus Daniel Pocklingberg, 4116/2016
[3] Absa Bank v Pocklingberg 2017 JDR 0399(FB)
[4] Absa Bank v Erasmus Daniel Pocklingberg,4079/2016

12.1 It is the applicant`s case that the only manner in which to ensure that its claim is secured and remains secure, is for an order authorising the attachment and preservation of the vehicle by the applicant, alternatively, the Sheriff of the Court and consequently, for the utilisation and possession of the respondent to be ceased.

12.2The applicant, avers that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted because in the absence of the interim relief now sought, the applicant has no other method of preventing the respondent from alienating, selling or damaging the assets or otherwise disposing of same. The result of such conduct will be that the only security which the applicant has for the Respondent`s indebtedness will disappear.

12.3 The applicant thus contended that it is being prejudiced. The vehicles are deteriorating in value, whilst the respondent is having use of it. Applicant advanced its funds to respondent to purchase several vehicles. Respondent breached the agreement, without making any means to remedy the breach. Applicant has to utilize further recourses in order to pursue respondent, who is in default.

12.4 It is self-evident that the vehicles are depreciating by continued use and that the respondent's continued utilisation of the vehicles over an extended period will have the result that, should the applicant be successful in its action, the vehicles that it recovers may be virtually worthless. It is untenable that the respondent be entitled to utilise the vehicles without effecting payment under the credit agreements. The applicant seeks to have the vehicles stored in a place of safety so that, in the unlikely event that the applicant is directed after the finalisation of the action to return the vehicles to the respondent, they will not have suffered any meaningful reduction in value.

12.5 It is clear from the pleadings that the respondent disputes the correctness of the outstanding amounts but he does not dispute the fact that he has not paid the various vehicles in full.

12.6 The applicant has no alternative remedy to approach the court for the interim relief sought.

RESPONDENT`S CASE:

[13] The respondent based his resistance to the preservation application on several grounds being the following:

13.1 The Jeep Wrangler 2.8 vehicle was unlawfully repossessed in 2019 and thereafter being sold by the applicant, notwithstanding the still pending and defended action instituted under case number 4079/2016.

13.2 The applicant is seeking an order interdicting the respondent and any person found in possession of the particular vehicle, from disposing of such vehicle although no third party is cited in the present application notwithstanding relief being claimed against unknown third parties herein.

13.3 All five main actions instituted by the applicant as plaintiff against the respondent as defendant, were instituted almost seven years ago and although the respondent has filed a Plea in each action in 2017 already, closing the pleadings none of the main actions have been brought to trial.

13.4 The allegations with regards to fear of the disposing of the vehicles are without any factual substantiation because the allegations made are generally made without any proof or confirmation of any kind.

13.5 The very same agreement on which the Applicant`s claim is based entitles the respondent to:

a) *inter alia,* per clause 17 of the agreement, possession and use of the vehicles;

b) claim and take transfer of the vehicles. Clause 12 of the Agreement stipulates that when the respondent has settled his obligations in full under the agreements, the respondent will be entitled to ownership of the vehicles. (Which implies that the applicant at present is still the owner of the vehicles;

c) keep the vehicles insured, which he did. The applicant never avers that the respondent has failed to do so;

13.6 This court has already ruled that a trial is the proper forum to resolve this matter. The application *in casu* for *pendente lite* relief is hence unnecessary;

13.7 The relief sought in respect of prayers 1 and 2, are not final relief sought on motion proceedings but based on general remarks to substantiate the possibility of certain future events possibly taking place;

13.8 The relief sought in prayer 1 is academic of nature. Respondent is also unaware to whom the Jeep Wrangler was sold and what the agreement entails with regards to the ownership thereof.? The question arises if the applicant *in casu* can be declared owner with a declaratory order (which is a final order).

13.9 It is trite that it is not permissible to seek an interdict against future actions which have not yet materialized;

13.10 As to prayer 3, it is clear, given the facts relating to the already repossessed and thereafter sold Jeep Wrangler, notwithstanding the pending and defended litigation to proceed with this application.

13.11 Counsel for respondent submitted that the applicant has an alternative remedy being, to proceed with the trial in the main actions. There is no reason to delay the trial. The matter was already declared trial ready in October 2021.

13.12 Counsel for respondent further submitted that in terms of the agreements the applicant needs to terminate the agreements due to the alleged breach of the contracts by the respondent.

13.13 In the reported judgment of Tsatsi AJ, **Absa Bank v Pocklingberg, 2017 supra** it was stated as follows:

"There are factual disputes in this matter. The applicant was of the view that it was entitled to terminate the agreement between it and the respondent. The respondent is of a different view. I agree with the respondent. Section 127 of the Act entitles the consumer in this case the respondent to terminate the agreement by first giving notice to the credit provider to terminate the agreement and sell the goods which are the subject of litigation if such are in the possession of the credit provider. It is my considered view that section 227 does not apply in this case as the respondent has not sent notice to the applicant to terminate the agreement. Even if there was a clause in the agreement between the parties that entitles the applicant to cancel the agreement, the Court still has a discretion to grant or refuse summary judgment."

13.14 The court went further to refuse summary judgment per Tsatsi, AJ in case 4116/2016; 4117/2016 and 4079/2016.The Respondent contends that nothing has changed since February 2017 when this judgment was handed down.

13.15 The applicant moves for relief *in casu*, being well aware of the issues raised by Tsatsi, AJ in the above-mentioned judgment.

13.16 Respondent argues that a party needs to cancel and terminate an agreement before one will be able to repossess and relied on the case of **Absa Bank v De Villiers and Another 2009(5) SA 40 C,** where it was held at par. [42] that:

"In my opinion the common-law principle (as embodied in the instant instalment agreement), requiring the cancellation of the instalment agreement prior to the attachment and repossession of first respondent `s vehicle, is a necessary requirement for a consistent and harmonised system of debt enforcement and for the protection of the consumer`s rights."

THE LAW:

[14] At common law the interim attachment of goods pending the outcome of vindicatory Quasi vindicatory proceedings is well established.[5]

[15] The **NCA per section 123(2)** provides that if a consumer is in default under a credit agreement, the credit provider may take steps "to enforce and terminate" that agreement. **Section 129(1)** and **130(1)** prescribe the procedure s that must

[5] SA Taxi Securitisation v Chesane 2010(6) SA 557 at par 6.

be followed before a credit provider may take legal steps "to enforce" a credit agreement;

Section 123 (1 & 2) provides:

(1) A credit provider may terminate a credit agreement before the time provided.

(2) If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce and terminate that agreement.

Section 130(1) provides:

"(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

1. at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;

2. in the case of a notice contemplated in section 129(1), the consumer has –

   i. not responded to that notice; or

   ii. responded to the notice by rejecting the credit provider's proposals; and

   (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127."

[16] The function and purpose of an interim attachment order is to protect the leased 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.[6]

[17] In **Administrator, Cape and Another v Ntshwaqela** [i7]the court said of this essential consideration:

" It is trite that a court will not engage in the futile exercise of making an order which cannot be carried out. So, an order for specific performance of a contract will be refused where performance is impossible; and an

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[6] SA Taxi Securitisation (Pty) Ltd v Young (CPD case nu.10249/2008)

[7] 1951 (3) SA 800 (W) at 813.

order *ad factum praestandum* will similarly be refused in such circumstance (e.g., an order for maintenance where the defendant is destitute).

[18] In a credit agreement the agreement must be cancelled before the credit provider proceeds with steps against the consumer. In the case of **SR v DR and Another (2980/2007) [2022] ZAGPJHC 172 (22 March 2022)** it was confirmed that:

> "It is settled law (at least in this Division) that it is a prerequisite for the grant of an interim attachment order that any agreement under which the respondent has the right to possess the vehicles first be cancelled "

DISCUSSION OF THE LAW:

19] To succeed in this application the applicant is required to establish and satisfy the well-established requirements for the grant of an interim interdict. It 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; (c) 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.

[20] The respondent disputes both the right relied upon by the applicant and that the balance of convenience favours the granting of the interim relief sought.

[21] The applicant's case is based on an anti-dissipation interdict, which would require it to show that the respondent is likely to spirit away his property. In **Knox D'Arcy Ltd and Others v Jamieson and Others**[8]Groskoppf JA discussed the

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[8] 1988 (4) SA 924 (W).

nature and effect of the so-called anti- dissipation interdict and found that what is required is for the applicant to show a certain state of mind of the respondent, i.e., that the debtor is getting rid of funds, (vehicle) or is likely to do so, with the intention of defeating the claims of creditors. [own insertion]

[22] The question of the balance of convenience must be placed in its proper perspective. It is a well-settled principle that the stronger the case which the applicant makes out, the less balance of convenience in favour of the applicant there needs to be for interim relief to be granted. [9]. As the applicant has not established a strong right to the preservation of the vehicles in the pending action, more weight ought to be placed on the question of balance of convenience. The court needs to be satisfied that the balance favours the applicant.

[23] Where in an application for an interdict *pendente lite*, an applicant cannot obtain an interdict unless it provides in addition to a *prima facie* case an actual or a well-grounded apprehension of irreparable loss. **In Stern v Ruskin NO v Appelson**[10] it was pointed out that:

> "It is not sufficient to say that the applicant himself *bona fide* fears such a loss."

CONCLUSION:

[24] In this matter I am similarly of the view that it is unnecessary to enter upon the academic terrain to declare the applicant owner of the vehicles, where it is clear and undisputed; it remains the owner until the respondent pays the last instalment.

[25] In **Eke v Parsons**[11].the Constitutional Court affirmed the essential characteristics

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[9] Olympic Passenger Service (Pty) Ltd v Ramlagan, 13 1957 (2) SA 382 (D) at 383C-G

[10] 1951(3)SA 800(W)

[11] [2015] ZACC 30; 2016 (3) SA 37 (CC) para 12

of a court order. It is accepted that a court order must be effective, enforceable and immediately capable of execution.

[26] I am similarly also of the view that where an order cannot be carried into effect it cannot, competently, be granted. Whether the order can be carried into effect is a question of fact to be determined by the court asked to grant an order.

[27] The same principle must apply where the question is one not of obeying the law but of complying with an order of court an order should not be granted because it cannot be complied with, it must be shown that compliance is impossible on the facts.'

[28] In my view, the Applicant has not established that it has a *prima facie* case and that it is entitled to the order sought. The applicant has another satisfactory remedy against the respondent.

[29] There appears to be no logic to the applicant`s reasoning, especially if regard is had to the fact that there is a court order in place which obliges him to proceed with the trial.

[30] There are disputes regarding the facts of the matter. Without an order to preserve the vehicles the applicant will still be left with the tangible options to proceed with the trial to protect its rights and interests. The balance of convenience therefore does not favour the Applicant.

[31] The applicant did not provide a well-grounded apprehension of irreparable harm.

[32] According to our law of contract, restitution (repossession of the vehicle in the instant case) is the normal result following from the cancellation of a contract.

[33] Absent a claim for the cancellation of the instalment agreement, a credit provider is not entitled to for a final order for the attachment of goods under section **131 of the NCA.**

COSTS:

[34] Respondent seeks a punitive cost order. This court has already ruled that a trial is the proper forum to resolve this matter. The application *in casu* for *pendente lite* relief is hence unnecessary and burdens the respondent with unnecessary costs.

[35] The general rule is that the costs should follow the event and this rule should be departed from only when there are good grounds for doing so.

[36] The basic principle to be applied in deciding on what scale costs should be awarded is that the court has a discretion, to be exercised judicially upon consideration of facts of each case, and that in essence it is a matter of fairness to both sides.[12]

[37] Awards of attorney client costs are used by the court to mark its disapproval of some conduct which should be frowned upon.[13]

[38] In **Multi- Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd.** [14] the judge remarked:

> " in my view an overall balanced view of the whole of the proceedings and the relevant facts ought to be taken .If a court is then left with that indefinable feeling, which feeling must, however be based on rational analysis of the facts and legal principles, that something is `amiss`, if one can put it that way, it may justify that feeling by deciding that the opposing party ought not to be out of pocket as a result of the application having been launched."

ORDER:

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[12] 'The Law of Costs "by AC Cilliers, third edition updated April 2022 par 2.27.
[13] The Law of Costs supra par 4.04.
[14] [2013] 4 All SA (GNP) par 38.

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

1. The Applications for preservation of the vehicles are dismissed.
2. Applicant to pay the costs on an attorney client scale.

[redacted]

BOONZAAIER, AJ

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