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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 4417/15

In the matter between

STANDARD BANK OF SOUTH AFRICA **APPLICANT**

And

A-TEAM AFRICA TRADING CC **RESPONDENT**

JUDGMENT

Delivered: 2 September 2015

Moodley J

[1] This is an application for the return of goods consequent upon the cancellation of the agreements under which the goods were sold by the applicant to the respondent.

[2] During the period from December 2010 until July 2013, the applicant and the respondent concluded 17 similar instalment sale agreements ('the agreements'), in terms of which several vehicles and two brick making plants (referred to collectively as 'the goods') were sold by the applicant to the respondent. It is common cause that the applicant reserved ownership of the goods in terms of each agreement, although

possession thereof was given to the respondent, and that the respondent remains in possession of the goods.

[3] It is also common cause that that the respondent failed to make payment due under each of the agreements, and consequently defaulted in its contractual obligations in terms thereof. The applicant's attorney thereafter sent a letter dated 17 February 2015 to the respondent, referring to the default and giving the respondent notice to remedy that breach.

[4] Clause 9 of each of the agreements provides:

> **'9 Default**
>
> If you fail to make any payment of any amount due or breach any term of this agreement, you must remedy your default within seven business days of us notifying you to do so, unless there are laws that dictates(sic) otherwise. If you fail to do so or if you are declared insolvent, or are provisionally or finally sequestrated or liquidated, die, or allow any judgment against you to remain unsatisfied for more than seven business days, we may exercise any of our remedial rights.'

[5] Clause 10 sets out the applicant's remedies. The portions of the clause pertinent to this applications state:

> **'10 Remedies**
>
> 10.1 Subject to any applicable legislation, on your default, we may do any of the following without prejudicing any of our rights:
> 10.1.1 …….;
> 10.1.2 …….;
> 10.1.3 cancel this agreement, take possession of the goods and claim from you damages as well as the outstanding balance less the market value of the goods as at the date of cancellation. If the goods are not recovered, their value will be deemed to be nil.

[6] The applicant alleges that the requisite notice to remedy its default under clause 9 was given to the respondent in the letter of 17 February 2015 which was sent to the respondent per email and registered mail on 19 February 2015.

[7] The applicant contends that :

(i) the letter containing the default notice was received by the respondent, which is evinced by the letter dated 18 March 2015 from its attorney, which could only have been written on receipt of the letter dated 17 February 2015 from the respondent;

(ii) as the respondent failed to remedy its default within seven business days of receipt of the notice, the applicant had cancelled the agreements as it was entitled to, and claims the return of the goods, which are its property;

(iii) there is no merit in the respondent's dispute as to the validity of the notice of cancellation on the ground that it did not receive the earlier demand: all that is required of a valid notice of cancellation of a contract is that the party in breach should be advised of the election by the other party to cancel the contract, and such notice was effectively given to the respondent prior to the launch of the application.

[8] However, should it be found that any *bona fide* factual dispute exists as to whether the respondent received the default letter, an interim order should nevertheless be granted, pending the finalisation of the dispute.

[9] The respondent resists the application on the grounds that the notice placing it in *mora* :

(i) was not properly served at its *domicilium citandi et executandi* as recorded in each of the agreements;

(ii) did not come its attention; and

(iii) was not clear and unequivocal and therefore invalid in law.

The applicant had therefore not placed the respondent *in mora* and could not rely on the subsequent cancellation of the agreements for the relief sought.

[10] The respondent also contends that the further notice delivered by the applicant was not effective in respect of all the agreements. Relying on its submission that there is a material dispute of fact, namely whether the breach notice relied upon by the applicant was received by the respondent, the respondent seeks an order referring the matter for the hearing of oral evidence, should the application not be dismissed.

[11] The first ground advanced by the respondent viz, that service at the respondent's *domicilum* was a necessary prerequisite, was not persisted in during argument, with Mr Hollis, who appeared for the respondent, acknowledging that the significance of a *domicilium* address lay in the facilitation of service of notices etc for the benefit of the creditor.[1] I am in agreement with the applicant's submission that provided that the notice was actually received, it is irrelevant that it came to the respondent's attention in a manner other than by service at the *domicilium* address.

The relevant legal principles

[12] The agreements expressly provide that if the respondent breaches the agreements *inter alia* by failing to effect due payment timeously, and having been placed *in mora* by the delivery of a notice giving the respondent a specified period of 7 days to rectify the default, the respondent fails to do so, the applicant is entitled to cancel the contracts.[2] The provision, termed a '*lex commissoria,*' is valid and enforceable strictly according to its terms, and 'the court has no equitable jurisdiction to relieve a debtor from automatic forfeiture resulting from such a clause',[3] when a debtor has failed to remedy his default within the further prescribed time.

[13] The court must be satisfied that the debtor is sufficiently aware of his obligation.[4] Firstly, as *mora* only commences from the date of receipt of the letter of demand or breach notice, the receipt of such demand or notice is significant and the creditor must prove that the debtor received the peremptory notice.[5] Secondly the demand or notice must inform the debtor what obligation he is required to perform

[1] Judson Timber Co (Pty) Ltd v Ronnie Bass & Co (Pty) Ltd and Another 1985 (4) SA 531 (W) at 538 A 'The purpose of choosing a *domicilium citandi*, for the giving of a prescribed notice under a contract, is the same as it is for the service of process, namely to relieve the party giving the notice from the burden of proving receipt.'
[2] viz *mora ex re* : The Law of Contract in South Africa : Christie & Bradfield 6th Ed page 521
[3] Christie & Bradfield page 527
[4] Phone-A-Copy Worldwide (Pty) Ltd v Orkin & Another 1986(1) SA (A) 729 at 749 I-J : the breach clause was peremptory in 2 respects : (1) the delivery of notice to the defaulting purchaser himself – unless the purchaser receives it is ineffectual; (2) the notice must inform the purchaser of his failure to fulfil any obligation under the contract and the time within which he is required to remedy it.
[5] Hano Trading CC v JR 209 Investments (Pty) Ltd and Another 2013 (1) SA 161 (SCA) 168D para 31

and when he is required to perform it[6] and the substance of the notice must be appropriate for the purpose for which the creditor afterwards relies on it.[7]

[14] Therefore a creditor who intends to cancel the contract on the ground of the debtor's *mora* must also warn the debtor that in the event of his failure to rectify his default within the stipulated period, the creditor reserves the right to cancel the contract.[8] The exact wording is immaterial provided it clearly and unequivocally informs the debtor that his failure to perform timeously may result in the cancellation of the contract.[9]

Admissibility of the letter dated 18 March 2015 from the Respondent's Attorney

[15] *In limine,* the respondent seeks an order that any reference to its attorney's letter dated 18 March 2015 should be struck out as inadmissible because the letter is marked 'without prejudice' and is integral to the settlement negotiations between the parties. Mr Hollis sought to persuade me that the entire letter ought to be ruled inadmissible, not just the portions which refer to the settlement proposals, and that consequently, the applicant cannot rely thereon to prove that the default notice was received by the respondent.

[16] Mr Van der Merwe who represented the applicant, submitted that the privilege operates only to exclude the settlement offer made by the respondent and does not cover the acknowledgement of the receipt, and that even if the references to the letter are struck out, the allegation made in the founding affidavit that the default letter was received and the respondent's admission that the letter was received remain.

[17] Both counsel relied on the judgment of **Trollip JA** in **Naidoo v Marine and Trade Insurance Co Ltd,**[10] in which it was held that in accordance with the general 'without prejudice' rule, once a party objects to any correspondence conducted

[6] Kragga Kamma Estates CC v Flanagan 1995 2 SA 367 (A) 374D- 375(B)
[7] Johnstone v Harrison 1946 NPD 239 245
[8] Nel v Cloete 1972 2 SA 150 (A) 159H
[9] Kragga Kamma Estates CC v Flanagan 375C-F
[10] 1978(3) SA 666 AD

'without prejudice' in the *bona fide* efforts of the parties to settle a claim, being adduced in evidence, the correspondence is wholly inadmissible. However any admissions that are quite unconnected with or irrelevant to the settlement negotiations are not covered by the protection of the rule and are admissible in evidence.[11] The presence or absence of such connection or relevance is essentially a question of fact in which the intention of the party making the admission, as objectively manifested, may be of importance.

[18] The first two paragraphs of the letter dated 18 March 2015, from the respondent's attorneys of record, Naidoo & Company Incorporated, reads :

> '1 We act for A Team Africa CC.
> 2 Your letter of the 17th February 2015 addressed to our client has been handed to us for attention and reply.'

[19] In my view, the statement by the respondent's attorney that the applicant's letter dated 17 February 2015 has been handed to him, merely constitutes part of the formal portion of the letter in which the attorney places himself on record for the respondent, and indicates the point at which he has entered the fray between the parties. The mere reference to the impugned letter cannot be held to be an integral part of the settlement negotiations, although it may have constituted the impetus for the respondent appointing an attorney to represent him.

[20] Consequently, I am satisfied that a reasonable objective approach does not sustain the argument that because the admission of the receipt of the applicant's letter from the respondent by the attorney, is included in a letter marked 'without prejudice' and is followed by certain proposals on behalf of the respondent, the entire letter, including such admission of receipt, is rendered inadmissible. In my view, the argument is ill-conceived and intended only to circumvent the fact that the default notice did indeed reach the respondent, thereby frustrating the applicant's reliance on the attorney's admission to prove that the respondent had received the letter dated 17 February 2015, and was aware that he had been placed in *mora.*[12]

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[11] 680C '…..the admission to be protected must be reasonably incidental to the "without prejudice" settlement negotiations.'
[12] Phone-A-Copy Worldwide (Pty) Ltd v Orkin & Another page 749

[21] I note in passing, from a perusal of the correspondence annexed to the application, that it appears to be a standard practice of the respondent's attorney to include the words "Without Prejudice" on all correspondence, even when arranging for the goods in the possession of the respondent to be inspected by the appraiser appointed by the applicant, which right is reserved in terms of the agreements.

Is the notice placing the respondent in *mora* clear and unequivocal?

[22] The letter dated 17 February 2015 refers to the 17 credit agreements, listed in the table marked 'A', annexed to the letter. The relevant portions of the letter state:

> '3. We have been instructed that you have failed to make payment of and/or are in arrears with your monthly instalments in respect of each of the instalment sale agreements in the amount stated in R927, 490.91 being the sum total of the instalments due in respect of each instalment sale agreement as more fully set out in the attached table.
>
> 4. Accordingly, you are in default of your obligations in terms of each of the said instalment sale agreements.'

[23] Paragraphs 5 and 6 of the letter set out the recourse available to the applicant in terms of the Companies Act No 61 of 1973 read with the Close Corporations Act No 69 of 1984, and give the respondent notice that liquidation proceedings against it are contemplated.

[24] The letter continues :

> '7. Kindly note that this letter ***also*** *(my emphasis)* serves as notice in terms of each of the instalment sale agreements for you to rectify your default within 7 business days, which business days shall run concurrently within the 21 calendar days referred to in paragraph 6 above. In the circumstances, our client reserves its rights in terms of each of the instalment sale agreements to terminate each of the said agreements should the relevant arrears remain unpaid after seven business days of delivery of this letter.'

[25] It was contended by Mr Hollis that Basil Hendricks, the member of the respondent, as a lay person, would not have been able to comprehend the import of the letter or distinguish between the legal effect of the demand in terms of Section 69(1)(a) of the Close Corporations Act which gave him 21 calendar days to effect payment of the arrears, and the notice in terms of the agreements placing him in

mora, which gave him 7 business days to remedy his breach, because both notices were incorporated in a single letter, and the periods for remedy of the defaults were to run concurrently. Therefore the *mora* notice could not be said to be clear and unequivocal.

[26] In determining the merits of this contention, I have taken cogniscence of the fact that Hendricks is not merely a lay person with no experience of commercial transactions or credit agreements, but a businessman. It is common cause that Hendricks as the member of the respondent, signed the seventeen (17) instalment sale agreements, the terms and conditions of which, particularly the clauses relating to breach by the purchaser and the remedies therefor, were essentially the same in all the agreements.

[27] The pertinent and prudent enquiry therefore should not be whether a reasonable layperson would have understood the contents and import of the letter, but whether a reasonable businessman, in the position of the respondent, would have found the notice to be clear and unequivocal and been able to appreciate the import of the letter.

[28] In making this enquiry, I have taken into consideration the following :

(i) The format and content of the letter :

a) paragraphs 3 and 4 refer to the 17 instalment sale agreements and set out clearly the nature of the default, and the arrear amount.

b) The relevant notices are clearly delineated thereafter in separate paragraphs;

c) that more than one action is contemplated by the applicant is apparent from the use ‘also’ in paragraph 7;

d) each notice specifies the period for the remedy of the default, whether in business days or calendar days.

e) clause 7 stipulates that the applicant reserves the right to cancel the agreements, should the respondent fail to remedy the default within 7 business days.

(ii) The language in which the letter is written. A comparison of clauses 9 and 10 in the agreements, (as set out earlier in this judgement) and the notice in paragraph 7 does not disclose a startling difference in language and expression. Paragraph 7 is essentially a paraphrase of the two clauses.

(iii) The respondent does not (and cannot) claim that he is not bound by the agreements because he did not understand the contents thereof. He has admitted that he had fallen into arrears and was in default of his obligations under the agreements. He would therefore have been fully aware of the legal recourse available to the applicant consequent upon his default, and any claim by the respondent that he was not aware of or did not understand the nature of the remedies available to the applicant in the event of his default, would be disingenuous. Nor could he have been under any illusion that the applicant would not exercise its rights as a result of his substantial breach, and the delivery of a notice in terms of the agreements could not have been unexpected.

[29] Therefore in the context of the respondent's default and Hendrik's business experience, there is little reason to accept as a valid complaint the respondent's contention that the contents of the letter, in particular the *mora* notice, were not clear and unequivocal, and it might be claimed that the respondent had not received such notice as was contemplated by clause 9 of the agreements.[13]

[30] I am therefore satisfied that the applicant fulfilled the conditions upon which its right to terminate the agreements with the respondent were dependent and that as a result of the failure of the respondent to comply with the default notice as contained in the letter dated 17 February 2015, the applicant was entitled to terminate the agreements.

[31] In the premises the applicant is entitled to the return of the goods in the possession of the respondent.

[32] There is no reason why costs should not follow the result on a scale as

[13] Phone-A-Copy Worldwide (Pty) Ltd v Orkin & Another page 750 F-I

stipulated in clause 12 of the agreements.

Order:

1. The respondent is directed to place the following assets in the applicant's possession forthwith:

    1.1 A Volvo FM 12 380 6x2 Sleeper with engine number [D1…….] and chassis number [IYV…….]
    1.2 A Volvo FM 12 380 6x2 Sleeper with engine number [D1…….] and chassis number [YV……]
    1.3 A Nissan UD440 with engine / serial number [GE……..] and chassis number [ADDT…….]
    1.4 A Nissan UD440 with engine / serial number [GE……] and chassis number [ADDT1……..]
    1.5 A Bin Side Tipper with engine / serial number [AHBDS…….] and chassis number [AHBD…….]
    1.6 A Nissan UD440 with engine / serial number [GE…….] and chassis number [ADDT……]
    1.7 A SA Truck Bodies Twin Side Tipper with engine / serial number [AHB…….] and chassis number [AHB…….]
    1.8 A Nissan UD440 with engine / serial number [GE……] and chassis number [ADDT…..]
    1.9 A Toyota Hilux 2.5D 4D with engine / serial number [2K……] and chassis number [AH……..]
    1.10 A Toyota Hilux 2.5D 4D with engine / serial number [2KD……] and chassis number [AH…….]
    1.11 A Toyota Hilux 2.5D 4D Raider with engine / serial number [1K……..] and chassis number [AH…….]
    1.12 A Toyota Hilux 3.D 4D Raider with engine / serial number [1…….] and chassis number [AH……]
    1.13 An Automated Brick and Block Plant with engine / serial number [JS…….]
    1.14 An Agram SA33Auto Brick/Block with engine / serial number [2……]

1.15 A SA Truck Bodies Side Tipper with engine / serial number [AH……] and chassis number [AHB……..]

1.16 An Afrit Double Axle Sloper with number [ADV……..]

1.17 An Martin Tri Axle 40 Ton with chassis number[AA……]

2. The respondent is directed to pay the costs of this application on the scale as between attorney and client.

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MOODLEY J

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