SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPORTABLE

CASE NO: 49779/2010

DATE:13/09/2011

In the matter between:

S A TAXI SECURITISATION (PTY) LTD Applicant
(Registration Number 2005/021852/07)

and

SIMA, MXOLISA ANDRIES Respondent
(Identity Number ...)

J U D G M E N T

KGOMO, J:

INTRODUCTION

[1] The Applicant herein instituted proceedings in this Court against the Respondent for the confirmation of its cancellation of the agreement entered into between it and the Respondent and a further order that the Sheriff of this

Court or his lawful deputy be authorised, directed and empowered to attach, seize and hand over to it (Applicant) the vehicle which is the subject of the agreement, to wit, a 2009 Toyota Quantum Sesfikile with engine number 2TR8187976 and chassis number JFTSX22P-806059442 (the vehicle). The Applicant further seeks an order that it be given leave to approach this Court on the same papers, duly supplemented, as may be necessary, for payment of any difference between the balance outstanding and the settlement value in the event of there remaining an amount owing by the Respondent to the Applicant after compliance by the Applicant with the provisions of section 127 of the National Credit Act, 34 of 2005 (the Act). The Applicant also applied for any further or alternative relief this Court may deem fit to grant.

[2] The Respondent is opposing the application.

THE PARTIES

[3] The Applicant, S A Taxi Securitisation (Pty) Ltd is a limited liability company duly incorporated in terms of the company laws of the Republic of South Africa, having its principal office at Finance House, 230 Jan Smuts Avenue, Dunkeld, Johannesburg. The Applicant is a registered credit provider as defined in the Act which undertakes credit vetting processes on behalf of applicants for credit finance and also administer credit agreements concluded between it as credit provider and various credit receivers such as the Respondent.

[4] The Respondent, Mxolisi Andries Sima, is an adult male credit receiver whose *domicilium citandi et executandi* is given as 5952 Extension 3, Khutson, 2499. Khutsong is within the area under the town Carletonville.

[5] The Applicant is the credit provider and the Respondent, the credit receiver herein and their relationship is governed by the credit agreement entered between them.

HISTORY AND BACKGROUND

[6] On 13 March 2009 the Applicant and the Respondent entered into an agreement in terms whereof the Applicant was leasing to the Respondent and the Respondent leasing from the Applicant the vehicle as set out hereinbefore. It was an express term of the agreement that despite delivery of the vehicle to the Respondent, ownership thereof remains vested in the Applicant until all terms relating to the lease agreement have been complied with.

[7] In terms of the above-said agreement the Respondent was to pay an initial deposit of R50 000,00 and thereafter 59 monthly rentals of R9 058,48, the first rental instalment being payable on 1 May 2009, on consecutive months, until the principal debt was extinguished.

[8] The agreement provided further that should the Respondent fail to pay any rental on the due date thereof or fail to satisfy any of his other obligations

in terms of the agreement, the Applicant would, without prejudice to any of its rights in law, be entitled to:

- cancel the agreement and in the case of such cancellation:

    - claim return and possession of the vehicle;
    - retain all payments already made by the Respondent;
    - claim payment of the difference between:

        - the amount outstanding at the date of cancellation of the agreement less a rebate on finance charges calculated from the date of termination of the agreement; and
        - the amount at which the vehicle is valued in terms of the agreement or the re-sale value thereof, whichever is the greater;

    - claim interest on the balance remaining at the date of cancellation at the rate of 29,50% per annum, alternatively, at the current interest rate linked to the fluctuation of the interest rate calculated from the date of termination of the agreement to the date of payment;
    - costs on attorney and client scale;
    - claim all expenses incurred in tracing the respondent before or after the institution of legal proceedings,

attaching the vehicle, removing it, valuing it, storing and re-selling it.

[9] The Respondent defaulted on his rental payments and as at 12 November 2010 he was in arrear to the tune of R33 858,12.

[10] On 17 August 2010 the Respondent applied to have himself declared over-indebted as contemplated in section 86(1) of the National Credit Act 34 of 2005, as amended, (NCA).

[11] On 29 September 2010 the Respondent deposed to an affidavit in support of an application for debt re-arrangement. The Respondent proposed and started paying amounts he felt he could afford in the sum of R3 980,9 5 from 16 October 2010 until 14 June 2011, instead of R6 181,18, in terms of the debt re-arrangement proposals he made.

[12] In terms of the lease agreement over the period September 2010 to June 2011 the amount the Respondent was obliged to pay in rental instalments was R90 584,80, i.e. R9 058,48 x 10 months). The shortfall was R54 756,25 at the time and growing each succeeding month.

[13] During the corresponding period, i.e. September 2010 to June 2011 the Respondent ought to have paid a total of R61 811,18. He was in arrear in the amount of R25 982,63.

[14] Pursuant to the above scenario, on 12 November 2010 the Applicant gave notice to the Respondent, his debt counsellor and the National Credit Regulator of its election to terminate the debt review in terms of section 86(10) of the NCA, which notice was sent to the Respondent by prepaid registered post to the chosen *domicilium citandi et executandi*.

[15] As stated above, the arrears as at the above date was R33 858,12 and has been rising by R6 181,18 a month since then to date.

[16] When the Respondent's debt review was purportedly terminated on 12 November 2010 he was in default, not only in terms of the original lease or credit agreement, but also in terms of his own payment restructuring proposal.

[17] In the light of the above state of affairs the Applicant purported to cancel the lease agreement and claim return of the vehicle and also claim damages as set out in the lease agreement.

[18] The Applicant now seeks confirmation of the cancellation of the lease agreement and an order authorising the return of the vehicle.

THE LEGAL POSITION

[19] Point *in limine 1*

- The Respondent raised the first point *in limine*, being that since it was clear to all and to the Applicant that various factual disputes were going to arise, it ought to have used action proceedings instead of Application proceedings. He submitted that on this ground alone this application should be dismissed with costs.

- The Respondent's Answering Affidavit is eerily quiet as to the real or actual grounds upon which this point *in limine* is based.

- Even during arguments in court nothing was said about this point.

- As a result, the Respondent has not proved or substantiated this point *in limine*.

It is thus dismissed.

[20] Point *in limine* 2

- The second point *in limine* raised by the Respondent was that the purported notice of termination of debt review the Applicant avers he sent to him was not dealt with as required by law and that he never received it. Furthermore, the purported section 86(10) notice's mode of remittance, namely, registered mail was

> invalid in that the document attached as proof of sending does not have a signature of the person who sent it (and the other letters sent together with it), does not indicate how many letters were sent at that occasion and does not contain or have the signature of the post office clerk who allegedly put the official post office stamp on it. That being the case, so argues the Respondent, the said notices fall foul of sections 88 and 130 of the NCA, rendering the entire application bad in law and thus necessitating this Court to dismiss it with costs.

[21] The above is all substantiation the Applicant gave in the Answering Affidavit.

[22] In argument in court counsel for the Respondent presented submissions based on the principles set out in a judgment delivered by Halgryn AJ on 15 June 2011 in the South Gauteng High Court of *Standard Bank of South Africa Ltd v Elsje Hand* as well as *S A Taxi Securitisation (Pty) Ltd v Mbatha and 2 Similar Cases* 2011 (1) SA (GSJ).

[23] The hullaballoo surrounding the notices of termination of debt review has their origin in the terms of the agreement relating to breach thereof. This aspect is clause 8 of the lease agreement herein, clause 8.2.2 whereof reads as follows:

> "*8.2.2 after due demand, cancel this agreement, obtain possession of the vehicle and recover from the Lessee as pre-estimated,*

liquidated damages, the total amount of payments not yet paid by the Lessee …

… For purposes of this subclause 'due demand' shall mean immediately on demand unless the Lessee is entitled to notice, in which case 'due demand' shall mean the giving of such notice to which the Lessee is entitled."

[24] Clause 8.2 of the lease agreement explains the above scenario as follows:

"*8.2 Upon an event of default or the loss, damage or destruction of the vehicle … the Lessor may, …, at its election and without prejudice to any remedy which it may have in terms of this agreement or otherwise –*

8.2.1 without notice, claim immediate payment of all instalments, whether then due for payment or not, provided that if the Lessee does not make immediate payment, the Lessor may, notwithstanding the election of claim immediate payment on terms of this sub-clause, claim the relief set out in clause 8.2.2 …"

[25] On the aspect of notices the situation is governed by clause 11 of the agreement which reads as follows:

"*11. <u>Domicilium and Notices</u>*

11.1 *The Lessee chooses its <u>domicilium</u> … for all purposes as its address on the face of this agreement …*

11.2 Any notice delivered by hand or sent by registered post to the Lessee's <u>domicilium</u> shall be deemed to have been received if delivered by hand, on due date of delivery or if sent by registered post, on the third day after posting."

[26] From the above it is apparent that there is no provision made in the lease agreement herein for separate demands to be remitted in respect of termination of debt review and the cancellation of the lease agreement. In my considered view, on the face thereof, the terms set out in the latter part of clause 8.2.2 of the lease agreement, to wit –

> "*… For purposes of this sub-clause 'due demand' shall mean immediately on demand unless the Lessee is entitled to notice …*"

kick in.

[27] *Standard Bank of SA Ltd v Elsje Hand (supra)* dealt with a situation where the Applicant in a similar case as the one we are dealing with alleged in its founding affidavit, among others that –

> "*6.22 cancel the agreement, take possession of the vehicle …*"

omitting from the above quotation from clause 13.2.2 of the applicable credit agreement the words –

> "*after due demand*"

before the words – "*cancel the agreement …*"

[28] The learned judge Halgryn AJ held in the above case that it is trite law that a party wishing to rely on the cancellation of an agreement because of its breach must allege and prove –

- the breach of the agreement;
- that the right to cancellation has occurred because the breach was material or in the event that the agreement contains a cancellation clause, that its provisions have been complied with; and
- that clear and unequivocal notice of rescission was conveyed to the other party, unless the agreement dispenses with such notice.

[29] The learned judge went on to state that –

> "*Simply put, the parties intended a logical flow of things i.e. breach-demand-cancellation-judicial process* …"

[30] In the light of the latest Supreme Court of Appeal decision on this aspect, namely, *Rossouw & Rossouw v First Rand Bank Ltd t/a FNB Home Loans* under Case No. 640/2009 decided on 30 September 2010, I need not go deeper into the reasoning in the *Standard Bank v Elsje Hand* judgment save to state that the facts of that case are distinguishable from our present case.

[31] In the *Standard Bank* case Halgryn AJ found that the Applicant therein did not go further than mentioning that it has "*elected to cancel the agreement*". He further held that the Applicant did not allege as a fact that it

had cancelled the agreement, let alone how it did so or how the cancellation notice was conveyed to the Respondent in clear, unequivocal and unambiguous terms. He went further to hold that the Applicant did not state that it cancels the agreement by means and in terms of the application before the court and that even if that was what the Applicant intended, it did not allege that the cancellation was preceded by "*due demand*".

[32] As shown above the Applicant in our present application have alleged all those aspects that Halgryn AJ found were not alleged in the *Standard Bank* case.

[33] The Respondent's second point *in limine* also cannot succeed in the light of the aforementioned.

THE MERITS

[34] As stated hereinbefore, the Respondent has been made aware of the impending litigation in the legal way. Actual receipt of the notices to cancel debt review and the agreement is not a requirement.

[35] It is common cause that the Respondent became unable to meet his financial obligations in terms of the lease agreement at some stage. He applied to have himself declared over-indebted as contemplated in section 86(1) of the NCA. His debt counsellor delivered the Respondent's notice contemplated in section 86(4)(b)(i) of the Act on 17 August 2010. On 17

September 2010 the Respondent's debt counsellor filed the latter's proposed re-arrangement of obligations to the Applicant. Unfortunately, the Respondent failed to act in terms of his own debt re-arrangement proposals. In terms of the applicable laws or legal position at the time the Applicant became entitled to cancel the debt review. It did so on 12 November 2010 when it gave notice to the Respondent, the debt counsellor and the National Credit Regulator in the prescribed manner, of its election to terminate the debt review in terms of section 86(10) of the NCA. The above were sent by prepaid registered post to the address chosen by the Respondent as his *domicilium citandi et executandi*. As I have already found above, the "*delivery*" of the said notice was in accordance with the law as it was at the time.

[36] As at the date of the institution of these proceedings, the Respondent was in default in terms of the agreement. He had, as at the time been in default for at least 20 business days and at least 60 business days had elapsed since the date on which the Respondent applied for debt review. Furthermore, 10 business days had elapsed since the Applicant delivered the notice in terms of section 86(10) of the NCA.

[37] I cannot disagree with the Applicant's submission that it participated in the debt review process in good faith and that it also acted *bona fide* when it terminated it.

[38] In the circumstances, of this case, there was no claim pending before a debt counsellor, alternative dispute resolution agent, consumer court or

ombudsman with jurisdiction as envisaged in section 130 of the NCA. There was in short, no matter arising out of or under the credit agreement which was pending before a tribunal, that could result in an order affecting the issues to be decided by this Court.

[39] The vehicle in issue here is the Applicant's only security for the debt owed by the Respondent to the Applicant. The Applicant is the lawful owner of the vehicle. It (Applicant) is unable to protect the value thereof while it is in the Respondent's possession. It is being used as a taxi and the risk of it being damaged or lost entirely cannot be discounted. Protracted refusal by the Respondent to return the vehicle will result in the arrear amount increasing and the Applicant's possible prospects of loss being increased. There is a danger of the market value of the vehicle becoming less than the re-sale value thereof.

[40] The Applicant has tendered refunds of any excess should the value of the vehicle exceed the full balance outstanding and has also undertaken to comply fully with the requirements of section 127 of the NCA.

[41] The notices a Respondent is entitled to receive in terms of the NCA are those in terms of section 129(1)(a) and 86(10). It is also said in certain cases that they are provided in the alternative. What is also a fact is that to the extent that any demand is required, a summons also constitutes a demand.

[42] In *Noble v Laubscher* 1905 TS 125 at 126, Innes CJ put it as follows:

> "*I think if the lessor wished to take advantage of clause 9, it was a condition precedent to his doing so that he should intimate to the lessee his contention that the letter had broken the contract, and that he therefore demanded his goods back … the issue of summons was a formal intimation to the lessee of the lessor's contention that he had broken the contract, that it was cancelled, and that the lessor insisted upon his right to reclaim the goods.*"

[43] In *Alpha Properties (Pty) Ltd v Export Import Union (Pty) Ltd* 1946 WLD at 519-520, Rathouse AJ put it as follows:

> "*The first of these points is that there has been no cancellation of the lease on the part of the plaintiff. It is contended that there was no cancellation prior to the launching of the petition, and that the petition itself did not amount to an intimation to the defendant that the lease was cancelled … I think, therefore, the point fails because I am satisfied that the launching of the petition was a formal notice to the defendant that the lease was cancelled … I might also refer to the case of Jowell v Behr 1940 WLD 144. In that case it was held that the issue of summons claiming damages for breach of contract was, in itself, a binding announcement of an election to repudiate the contract on the grounds of a breach going to the root thereof, and that there was no need for a specific allegation in the declaration that the contract had been broken.*"

[44] In *Thelma Court Flats (Pty) Ltd v Mc Swigin* 1954 (3) SA 457 (C), Watermeyer AJ held among others as follows at 462C-D:

> "*There is ample authority for the proposition that the issue and service of a summons in cases of this nature is a formal intimation to the Lessee of the lessor's contention that the contract has been broken and of the fact that he has elected to treat the lease as cancelled …*"

[45] Similar sentiments were echoed in *Middelburgse Stadsraad v Trans-Natal Steenkoolkorporasie Bpk* 1987 (2) SA 244 (T) at 249 as well as in R H Christie: *The Law of Contract in South Africa*, 5th Edition at p 539.

[46] It is thus my considered view and finding that the Applicant has correctly and procedurally elected to cancel the agreement herein. This application constitutes such an election. It is therefore entitled to take possession of the vehicle and claim damages, if any, from the Respondent.

[47] To the extent that the Applicant seeks confirmation of such cancellation, it is my view and finding that this Court finds such a move justified. The cancellation is therefore confirmed. The return of the vehicle is a natural consequence of the confirmation of the cancellation.

ORDER

[48] The following order is made:

48.1 The cancellation of the agreement entered into between the Applicant and the Respondent on 13 March 2009 is hereby confirmed;

48.2 The Sheriff of this Court or his lawful deputy is authorised, directed and empowered to attach, seize and hand over to the

Applicant the vehicle, namely, 2009 Toyota Qauntum Sesfikile with engine number 2TR8187976 and chassis number JTFSX22P806059442;

48.3 The Respondent is ordered to pay the costs of suit;

48.4 The Applicant is given leave to approach this Court on the same papers, duly supplemented as may be necessary, for payment of any difference between the balance outstanding and the settlement value in the event of there remaining an amount owing by the Respondent to the Applicant after compliance by the Applicant with the provisions of section 127 of the National Credit Act, 34 of 2005.

_____

N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT	ADV A R G MUNDELL SC
INSTRUCTED BY	MARIE-LOU BESTER INC SAXONWOLD, JOHANNESBURG TEL NO: 011 486 0775
COUNSEL FOR THE RESPONDENT	ADV I STRYDOM
INSTRUCTED BY	NAEEMA GABRU ATTORNEYS c/o PAULA DROTSKIE ATTORNEYS TEL NO: 011 447 0640
DATE OF ARGUMENT	29 JULY 2011

DATE OF JUDGMENT 13 SEPTEMBER 2011