REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 34066/10

DATE:03/08/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD Applicant

and

ELSJE HAND Respondent

J U D G M E N T

HALGRYN, AJ:

[1] The Applicant is Standard Bank of South Africa Ltd. It is cited as a public company and credit provider duly registered and incorporated with limited liability in accordance with the laws of the Republic of South Africa and

in terms of the National Credit Act 34 of 2005 trading, *inter alia*, as bankers and financiers in terms of the provisions of Act 94 of 1990 (as amended).

[2] The Respondent is one Elsje Hand, evidently a client of the Applicant, who contracted with the Applicant in terms of a written *"Vehicle and asset finance FinRent consumer agreement*", which I will deal with hereunder.

[3] The relief which the Applicant seeks herein reads as follows:

1. "*Confirming the cancellation of the agreement entered into between the Applicant and the Respondent and attached to the Applicant's founding affidavit as Annexure "A".*
2. *The Sheriff of the above Honourable Court or his lawful deputy is authorised, directed and empowered to attach, seize and hand over to the Applicant the vehicle, being 2007 Dihatsu Sirion 1.3 litre, engine number 1401402; chassis number JDAM301S001019223 ("the vehicle").*
3. *Costs of suit.*
4. *The Applicant is given leave to approach the above Honourable Court on the same papers duly supplemented for payment on the difference between the balance outstanding and the market value of the vehicle in the event of there being a shortfall after the vehicle has been repossessed and sold or released and there being a balance outstanding by the Respondent to the Applicant."*

[4] The Applicant's claim is founded upon the aforesaid written agreement, a copy of which is attached to the founding affidavit marked "A". In paragraph 6 of the founding affidavit the Applicant set out to allege what the material

terms of the agreement are. It did so without at all indicating which clauses of the agreement it is referring to, making for very difficult reading in order to compare the quoted portions with the attached copy of the agreement, which in addition, was illegible to the extent that I was constrained to request a readable copy, *in lieu* of which, I was going to strike the matter from the roll.

[5] It is improper for a litigant in motion proceedings, to simply attach a (lengthy) document to an affidavit and then proceed to quote therefrom without any indication as to which paragraphs are indeed being quoted and to expect of a Judge – in preparation for the matter – to struggle through what is often a quagmire of fine print, to check if the quotes are in fact correct.

[6] It turns out that had I not taken the trouble to do this exercise, I may have granted relief herein, to which the Applicant would not have been entitled.

[7] The particular wording of the attached agreement – so it would appear – is not unique to the Applicant. I have personally witnessed the exact same wording used by another bank in a separate matter. The specific wording which I propose to analyse and pronounce upon has also been the cause of concern for some of the judges of this Division. Mr Aucamp appearing on behalf of the Applicant and Mr Van der Merwe on behalf of the Respondent, assured me that there are many pending applications in this Division, concerning the same wording and requested me to – notwithstanding their initial agreement to postpone the matter – write this Judgment in order to create certainty.

[8] The defences raised herein are many but I deal with one issue only i.e.:

- Did the Applicant prove that it cancelled the agreement?

[9] In paragraph 6.2 of the founding affidavit the Applicant alleges:

> "*Should the Respondent commit any breach of the agreement, then the Applicant would be entitled without prejudice to any other rights it may have against the Respondent to:*
>
> *6.2.2 cancel the agreement, take repossession of the vehicle, retain all payments already made in terms of the agreement by the respondent and claim as liquidated damages, payment of the difference between the balance outstanding and the market value of the vehicle, which amount would be due and payable forthwith;*".

[10] This purports to be a quotation of clause 13.2.2 of the attached agreement, but the Applicant misquoted it - by omitting to allege the words "*… after due demand …*" before the words "*… cancel the agreement …*". This omission is material and impacts on the Applicant's entire cause of action herein. Incidentally the same omission occurred in paragraph 6.2.1, where clause 13.2.1 of the agreement was purportedly quoted. Nothing turns on this for the purposes of this Judgment, save to record that the incorrect quotations are inexcusable.

[11] It is trite that a party wishing to rely on the cancellation of an agreement – because of its breach – must allege and prove:-

11.1. the breach of the agreement;

11.2. that the right to cancellation has accrued because the breach was material or in the event that the agreement contains a cancellation clause, that its provisions have been complied with; and

11.3. that clear and unequivocal notice of rescission was conveyed to the other party, unless the agreement dispenses with such notice.[1]

[1] LTC Harms; *Amler's Precedence on Pleadings*; 7th edition; Lexis Nexis; Durban; at page 115.

[12] The learned author took care to emphasise that:-

> "*The act of cancellation must be clear and unambiguous.*"[2]

[13] The relevant portions of clauses 13.2 and 13.2.2 of the agreement under consideration provide as follows:-

> "*Upon an event of default … Lessor may … after due demand, cancel this agreement, obtain possession of the vehicle …*"

[14] Given its normal grammatical meaning, the intention of the parties in this clause is that upon default the Applicant may cancel the agreement "*… after due demand …*". Simply put, the parties intended a logical flow of things i.e. breach – demand – cancellation – judicial process.

[15] This seems simple enough until one is confronted with a "*definition*" of "*due demand*", further on in clause 13.2.2, which reads as follows:-

> "*… 'due demand' shall mean 'immediately on demand' …*"

[16] If I were to read "*immediately on demand*" into "*due demand*" the absurd result is this:-

> "*Upon an event of default … Lessor may … after 'immediately on demand', cancel this agreement …*"

[17] Even if I were wrong by literally reading "*immediately on demand*" into "*due demand*" the result of this interpretation would still be this:-

> "*Upon an event of default … Lessor may … immediately on demand cancel the agreement…"*

[18] This would render the requirement of prior *"due demand"* superfluous. This could not have been what the parties intended. Upon a proper

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[2] *Supra*; at page 115. In doing so Harms refers to the following authorities:- *Swart v Vosloo* [1965] 1 All SA 264 (A), 1965 (1) SA 100 (A); *Miller & Miller v DickInson* [1971] 3 All SA 6O3 (A), 1971 (3) SA 581 (A); *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] 1 All SA 581 (A), 2001 (2) SA 284 (SCA) para.29; *Nedcor Bank Ltd t/a Nedbank v Mooipan Voer & Graanverspreiders CC* [2002] 3 All SA 477 (T).

construction of this clause, the parties - in my view - intended that in the event of the Respondent's default, the Applicant would give "*due demand*" and only thereafter could the Applicant have earned the right to cancel, by giving clear, unequivocal and unambiguous notice thereof to the Respondent.

[19] By expressly requiring "*due demand*" before cancellation, the parties intended that effect be given to it. Christie states:-

> "*… if the contract expressly requires demand or notice, the giving of which then becomes part of the creditor's cause of action.*"[3]

[20] I pause to deal briefly with demand, as it is not defined in the agreement, as far as I could ascertain. In their still authoritative work De Wet and Yates state the following:-

> "*Aanmaning is 'n kennisgewing deur die skuldeiser aan die skuldenaar gerig waarin eersgenoemde laasgenoemde in kennis stel dat hy voor of op 'n bepaalde dag moet voldoen.*"[4]

[21] In other words by expressly providing for "*due demand*" in the agreement, the parties intended:-

21.1. a notice by the Applicant to the Respondent;

21.2. in terms of which the Applicant would notify the Respondent to perform and/or to rectify the breach;

21.3. before or on a specific date.

[22] It is so that demand can be effected by way of summons (*interpellatio iudicialis*) or "*buitegeregtelik*" (*interpellatio extra iudicialis*), i.e. by way of notice other than judicial procedure.[5] If the Applicant intended this application to constitute *interpellatio iudicialis*, it did not allege that and even if it could be

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[3] R H Christie; *The Law of Contract in South Africa*; 5th edition; Lexis Nexis; Butterworths, at page 503. See also *Henriques v Lopez* 1978 (3) SA 356 (W) at 358C.
[4] *Kontrakreg en Handelsreg;* 4th edition, Butterworths, at page 145.
[5] *De Wet and Yates*; *supra*, at page 145.

contended that nothing needed to be stated in this respect, the Applicant could not – on my interpretation of clause 13.2.2 – have:-

22.1. made "*due demand*"; and simultaneously –

22.2. give clear, unequivocal and unambiguous notice of cancellation;

singularly - by way of these judicial proceedings.

[23] The parties clearly intended that due demand and clear, unequivocal and unambiguous notice of cancellation should occur prior to the institution of judicial proceedings; or at the very least, that "*due demand*" ought to have occurred prior to the institution of judicial proceedings and if the Applicant thereafter intended this application to constitute "*clear, unequivocal and unambiguous notice of cancellation*", it ought to have alleged that.

[24] I now turn to deal with the manner in which the Applicant sought to prove the cancellation in its founding affidavit. After misquoting clause 13.2.2 of the agreement – as I have pointed out hereinabove – the Applicant states the following in paragraph 9 of the founding affidavit:

> "*The Applicant in terms of the agreement has elected to cancel the agreement, take repossession of the vehicle and claim damages. The Applicant seeks confirmation of the cancellation of the agreement and the return of the vehicle in the present application.*"

[22] The Applicant goes no further in the remainder of its founding affidavit and the high watermark of what the Applicant states in respect of the cancellation of the agreement is thus that it "*… has elected to cancel the agreement …*". It does not allege that it had – as a fact – 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. The Applicant also does not state that it cancels the agreement by means and

in terms of this application and even if this was its intention, it does not allege that the cancellation was preceded by "*due demand*".

[23] It follows that the Applicant failed to allege and prove that it had earned the right to cancel the agreement and that it had - as a fact - lawfully cancelled the agreement. In the result the application has to fail.

In the premises I make the following order:

1. The application is dismissed with costs.

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L P HALGRYN
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG