REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: ***46192/2018***

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
09/09/2020

In the **matter between:**

FIRSTRAND BANK LIMITED T/A CNH CAPITAL
A DIVISION OF WESTBANK Applicant

and

JAWIKLANE (PTY) LIMITED Respondent

JUDGMENT

Lapan AJ:

INTRODUCTION

[1] This is an application for an interim interdict for the return of a vehicle to the applicant, for safekeeping, *pendente lite.*

[2] The applicant instituted an action against the respondent for *inter alia* cancellation of the instalment sale agreement concluded between the parties and for the return of the vehicle sold to the respondent, the applicant alleging that it retained ownership of the vehicle in terms of the agreement.

[3] Before considering whether the applicant has met the requirements for the granting of an interim interdict, and the respondent's opposition thereto, the relevant background is set out below.

BACKGROUND

[4] On 26 June 2014, the applicant and the respondent concluded an instalment sale agreement in terms of which the applicant sold a vehicle to the respondent (agreement). The vehicle is described in the agreement as a 2014 new case IH Farmall cab loader tractor (vehicle).

[5] In terms of the agreement, the applicant retained ownership of the vehicle until the respondent had complied with all of its obligations in terms of the agreement.

[6] The respondent is alleged to have breached its obligations by falling into arrears with the payments due in terms of the agreement.

[7] In December 2018, the applicant issued summons against the respondent, claiming cancellation of the agreement, rectification of the description of the vehicle and repossession of the vehicle (action). On 11 January 2019, the combined summons was served on the respondent.

[8] The particulars of claim, with annexures, are attached to the founding affidavit marked **"FA3".** A copy of the agreement is Annexure B of the particulars of claim and a copy of a pre-agreement statement is Annexure D of the particulars of claim.

[9] In December 2019, the applicant brought this application for the return of the vehicle, for safekeeping, pending the outcome of the action.

REQUIREMENTS FOR AN INTERIM INTERDICT

[10] It is settled law that the applicant for an interim interdict is required to establish the following:

(a) a *prima facie* right though open to some doubt;

(b) a well-grounded apprehension of irreparable harm occurring should the interdict not be granted;

(c) the balance of convenience favours the granting of the interdict; and

(d) the applicant has no other satisfactory remedy available to it.

Prima facie right

[11] The applicant alleges that it has a *prima facie* right to the return of the vehicle, having retained ownership thereof in terms of the agreement and based on its cancellation of the agreement in terms of the particulars of claim.

[12] The respondent contends that:

> [12.1] the applicant has failed to establish its right to the return of the vehicle, relying as it does on clause 4 of the agreement. The document relied on, being annexure B of the particulars of claim, is a pre-agreement statement that was superceded by the agreement;
>
> [12.2] the cancellation of the agreement is disputed in the action which precludes determination of this application until the final outcome of the action; and
>
> [12.3] the chassis number of the vehicle is incorrectly described in the agreement and the prayer, in the action, for rectification of the agreement to correct the chassis number requires determination before this application can be decided.

Ownership of the vehicle

[13] The respondent contends that the application ought to be dismissed since the applicant's reliance on clause 4 of the agreement is misplaced, first, because the agreement (that is, annexure "B" of the particulars of claim) does not contain a clause 4, and, second, to the extent that clause 4 in the pre-agreement statement is relied upon (that is, annexure "D" of the particulars of claim), the pre-agreement statement was superceded and replaced by the agreement.

[14] The applicant relies on clause 4 of the agreement, being Annexure B, which provides that the applicant will remain the owner and titleholder of the vehicle until all amounts due by the respondent have been paid in full.

[15] The document which is attached as Annexure B of the particulars of claim is *headed* ***"COST OF CREDIT SCHEDULE INSTALMENT SALE AGREEMENT (outside the NCA)".*** Below this heading, it is stated that the agreement is concluded between the applicant, as the seller, and the respondent, as the buyer, with the parties' full particulars inserted below their names.

[16] Thereafter, Annexure B contains the following provision:

> *"The seller sells the goods described below to you, the Buyer, on the terms and conditions set out in this Schedule and the terms and conditions annexed hereto and forming part hereof."*

[17] Based on the heading and the above-quoted paragraph, the document attached as Annexure B must be the "schedule" referred to in the above paragraph

and the "terms and conditions annexed hereto and forming part hereof' must be a reference to the next document, attached as Annexure D, which contains terms and conditions typically found in an instalment sale agreement. This is borne out by the provisions of Annexure D.

[18] The document marked Annexure D is headed **"RE-AGREEMENT STATEMENT FOR A (sic) INSTALMENT SALE AGREEMENT OUTSIDE THE NCA"** Due to its illegibility, it is not clear whether the heading begins with the word "Pre-agreement" or "Re-agreement". For purposes hereof, the appellation used by the parties will be accepted, namely, *"Pre-agreement statement'.*

[19] Below the aforesaid heading is a paragraph, encased in a block and preceded with the word ***"WARNING".*** The relevance of this paragraph is that it provides that *the agreement is ... "made up of the quotation, the information statement, the pre-agreement statement and these terms and conditions (which are identical to the pre-agreement statement)"* [underlining added].

[20] The underlined words appear to be a reference to the terms and conditions appearing below the encased paragraph and which is preceded by a heading that reads **"TERMS AND CONDITIONS FOR THIS INSTALMENT SALE AGREEMENT",** followed by the terms and conditions of an instalment sale agreement.

[21] Based on the aforesaid heading, and the ensuing terms and conditions, it appears that the terms and conditions of the agreement concluded between the parties is contained in the document marked Annexure D. Even if this were not so, the above paragraph encased in the block at the top of Annexure D makes it clear that the terms and conditions in Annexure 0 *"are identical to the pre-agreement statement".* Therefore, whether the document marked Annexure D is the agreement or the pre-agreement statement, it contains the terms and conditions of the agreement concluded between the parties.

[22] Clause 1 of the agreement contains the following definition:

> ***"the/this agreement'*** means *"this instalment sale agreement which comprised (sic) of these terms and conditions and the Schedule attached"* [underlining added]

[23] The above definition bolsters the conclusion that the terms and conditions of the instalment sale agreement are contained in annexure "D" and the Schedule attached thereto. The reference to the schedule must be the schedule which is

Annexure B and which sets out the parties' particulars, a description of the vehicle, the purchase price, the instalments payable and the applicable interest rate. Various provisions of the agreement in Annexure D refer back to the schedule and the items listed therein.

[24] Having regard to the above, the terms and conditions in Annexure D must be read together with the schedule, being Annexure B, both of which comprise the agreement concluded between the parties.

[25] In view thereof, the applicant has correctly relied on clause 4 of Annexure D for its reservation of ownership. In addition, the respondent admits, in the answering affidavit, that the applicant retained ownership of the vehicle.

Cancellation of the agreement

[26] As a prerequisite to the granting of an interim interdict for the return of a vehicle owned by the applicant, the applicant must establish that it cancelled the agreement and that the cancellation was communicated to the respondent.[1]

[27] The applicant cancelled the agreement, in terms of the particulars of claim, which cancellation was communicated to the respondent upon service of the combined summons. In the particulars of claim, the applicant alleges that the cancellation was due to the respondent's breach in failing to maintain the payments due in terms of the agreement which, as at 30 November 2018, amounted to R181 886.04.

[28] Clause *11* of the agreement gives the applicant the right, upon breach, to cancel the agreement, take back the vehicle, sell the vehicle, retain all instalments made and claim the balance owing, if any, as damages.

[1] *SA Taxi Securitisation (Pty) Ltd v Chesane* 2010 (6) SA 557 (GSJ) in para [13].

[29] The fact that the cancellation of the agreement is disputed in the action does not bar the applicant from seeking an interim interdict since the interim order is aimed at safeguarding the vehicle until finalisation of the parties' dispute. The purpose of the attachment order is not to enforce nor determine the rights of the parties under the agreement.[2]

[30] Therefore, the dispute concerning the cancellation of the agreement does not preclude the granting of an interim interdict pending the outcome of the action, provided that all the requirements for an interim interdict are satisfied.

Error in the description of the vehicle

[31] The respondent contends further that there is an error in the vehicle description in the agreement which precludes the granting of an interdict until the agreement is rectified pursuant to the action.

[32] The error consists of one letter in the middle of the 17-digit chassis number which was erroneously recorded as the letter "E" instead of the letter "F". In every other respect, the description of the vehicle in the agreement is not disputed including the name and type of vehicle, its model number, engine number and serial number as well as the remaining digits of the chassis number.

[33] The respondent does not contend that the error in the chassis number means that a totally different vehicle was sold and delivered to the respondent upon conclusion of the agreement and, to date, the respondent has used, and retained possession, of the vehicle delivered to it pursuant to the conclusion of the agreement.

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[2] *Ibid i*n para [10].

[34] In fact, the vehicle description, and the correct chassis number, is reflected in the respondent's contract of insurance relating to the vehicle, a copy of which is attached to the answering affidavit. Furthermore, the applicant amended the notice of motion recently, without objection from the respondent, to reflect the correct chassis number in the description of the vehicle in prayer 1 of the relief sought.

[35] In the circumstances, the misdescription of the chassis number is inconsequential. Substance must prevail over form and the vehicle is sufficiently well described to permit its identification. It would be unfair to penalise the applicant by denying it a remedy in terms of the agreement due to a minor typographical error occurring in the agreement.

[36] For the above reasons, the applicant has established a *prima fade* right to an interim interdict for the return of the vehicle.

Well-grounded apprehension of irreparable harm

[37] Since the applicant's claim is vindicatory in nature, a rebuttable presumption exists that irreparable harm will ensue if the vehicle is not returned *pendente lite*.[3]

[38] The respondent contends that it requires the vehicle to continue conducting a profitable farming business and that the vehicle is essential to the respondent's daily farming operations. Returning the vehicle to the applicant will, so the respondent contends, jeopardise its farming operations until the action is finalised.

[39] The respondent contends further that the vehicle is properly maintained, stored in a locked shed and comprehensively insured against loss or damage and, therefore, there is no risk of harm befalling the applicant if the respondent continues utilising the vehicle in its daily farming operations.

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[3] *Stern and Ruskin No v Appelson* 1951 (3) SA 800 (W) at 813.

[40] It has been held that, whether or not the claim for the return of the vehicle is vindicatory in nature, the applicant is entitled to have the vehicle kept in the condition in which it was in when instituting the action and a refusal to grant interim relief to ensure that it remains in that condition, pending the outcome of the action, would cause the applicant to suffer irreparable harm.[4]

[41] The interim interdict ensures that the applicant retains the vehicle in its possession for safekeeping and allows the applicant to preserve the vehicle in the condition in which it was in at the time when it sought to enforce its right to claim payment and the return of the vehicle.[5] If the vehicle is not preserved in this way, the value of the vehicle will deteriorate with continued use. The respondent does not aver that such deterioration in value is covered by the insurance contract.

[42] The ensuing harm to the respondent's farming operations, should the vehicle be returned to the applicant, would be self-inflicted. The respondent has been in arrears since 30 November 2018 and, despite having had the use of the vehicle for at least the past 21 months to conduct its farming operations, the respondent has made no effort to settle the arrears with a view to negotiating with the applicant for the possible reinstatement of the agreement.

[43] In view of the aforesaid, there is a well-grounded apprehension of the applicant suffering irreparable harm if it fails in its endeavour to re-possess the vehicle for safekeeping and to preserve its value *pendente lite.*

Balance of convenience

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[4] Per Justice Greenberg in *Morrison v African Guarantee and Indemnity Co Ltd* (1936) (1) PH Sec. M as quoted by Millin J in *Loader v De Beer* 1947 (1) SA 87 (W) at 90.
[5] SA Taxi Securitisation 2010 (6) SA 557 (GSJ) in para [10]; Loader v De Beer 1947 (1) SA 87 (W) at 89D et seq.

[44] The balance of convenience must favour the granting of an interim interdict and this requirement is satisfied if the prejudice that the applicant will suffer, if the interdict is not granted, outweighs the prejudice to the respondent if the interdict is granted. The stronger the applicant's prospects of success in the action, the less the need for the balance of convenience to favour the applicant and *vice versa.*

[45] The respondent contends that the balance of convenience favours it as it will suffer irreparable harm should it be unable to continue its farming operations until the action is finalized and that there is no risk of harm to the applicant as the risk of loss or damage to the vehicle is covered in the insurance contract.

[46] The applicant is not protected against the deterioration in the value of the vehicle as a result of its continued use by the respondent. The respondent is under no obligation to preserve the vehicle nor does it intend to do so because of its stated intention to continue conducting its farming operations.

[47] The longer the vehicle remains in use, the less the applicant's chances of recovering a high value for the vehicle sufficient to recoup the debt owed to it by the respondent. Permitting the applicant to take possession of the vehicle will allow it to store the vehicle and preserve its resale value. Thus, the balance of convenience favours the granting of the interdict.

[48] Furthermore, the applicant has good prospects of success in the action, given that the respondent's defence consists mainly of bald denials and its challenge to the cancellation of the agreement is based on an alleged non-compliance with section 129 of the National Credit Act, 34 of 2005 (NCA). Yet, the agreement states clearly that it fails outside the ambit of the NCA.

[49] The strong prospects of success in the action, and given that the balance of convenience favours the applicant, the third requirement for the granting of an interim interdict is satisfied.

No alternative satisfactory remedy

[50] There is no other remedy available to the applicant other than to take possession of the vehicle and assume full responsibility for preserving it pending the outcome of the action. An interim interdict will provide effective interim protection for the applicant until finalisation of the action.

[51] Since the application is vindicatory in nature, there is no need for the applicant to show that it has no other satisfactory remedy.[6]

[52] In view of the aforesaid, the application succeeds with costs, on the attorney and client scale as provided for in the agreement.

[53] The following order is made:

1. The respondent is directed to return to the applicant, within 10 (ten) days from the date of this order, the vehicle more fully described as:

1 x 2014 new case IH Farmall 100 cab loader tractor
Chassis no.:AE9JXI00FAECY1015
Engine No.: [....]
Serial No.: HFJ120557

[6] 6 *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others* 2003 *(3) SA 268 (W) in para [28].*

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

AJ LAPAN
ACTING JUDGE OF THE COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF THE HEARING:	24 August 2020
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