REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2018/46468

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

07/03/2022

Judge Dippenaar

In the matter between:

FIRSTRAND BANK LIMITED T/A

CNH CAPITAL INDUSTRIAL (Division of Wesbank) Applicant/Plaintiff

And

JAWIKLANE (PTY) LTD Respondent/ First Defendant

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 07th of March 2022.

DIPPENAAR J:

[1] The applicant seeks an order directing the respondent to return a 2015 New Case Ecolo Tiger 870 18ft Ripper engine number YED074844 ("the ripper") to it for safekeeping pending the outcome of trial proceedings instituted by it against the respondent under case number 46468.2018- in this court.

[2] It is common cause that the applicant is the owner of the ripper. The parties concluded an instalment sale agreement on 30 October 2015 in terms of which the applicant retained ownership of the ripper until payment of all instalments was received and annual instalments were due from 2016 to 2019. Pursuant to that agreement the respondent acquired possession of the ripper. The instalment sale agreement contains a non-variation clause.

[3] The applicant's case is that respondent breached the payment provisions of the agreement and it elected to cancel the agreement, alternatively it cancelled the agreement in its particulars of claim. Action was instituted by the plaintiff during December 2018 and the summons was served on 11 January 2019. The applicant's application for summary judgment was dismissed on 9 June 2020 and the trial action is still pending.

[4] In its plea, the defendant denied that it was in breach or that the instalment sale agreement was validly cancelled. It pleaded an oral agreement in terms of which *inter alia,* the loan period would be extended by a year to 1 October 2020. It pleaded that is was not in default as payments on 1 October 2016 of R267 543.33 and R138 271.66 on 1 October 2017 were made.

[5] The present application was instituted on 16 August 2021. The applicant avers that the current outstanding balance due by the respondent is R1 103 855.46 and the respondent remains in arrears and has failed to rectify its breach of the instalment sale agreement. It contends that no payments were made subsequent to the payment of 1 October 2017. The respondent denied these averments but produced no evidence to refute them.

[6] The applicant's case is that it is not aware if the goods are properly insured and is unaware of the condition of the ripper. It has an obligation to mitigate its damages, which it cannot do whilst the respondent is in unlawful possession of the goods. The ripper is used on a daily basis in the respondent's farming operations and is depreciating and being damaged on a daily basis.

[7] In considering the applicant's claim for interim relief, the principles in *Webster v Mitchell*[1] apply. The requirements for interim interdictory relief are trite[2]. They are: (1) a prima facie right, although open to some doubt on the part of the applicant; (2) an injury actually committed or reasonably apprehended; (3) a favourable balance of convenience; and (4) the absence of any other satisfactory remedy available to the applicant.

[8] Two of the requirements can be dealt with succinctly. The first is applicant's prima facie right to relief. It is common cause that the applicant is the owner of the ripper. Although disputed that the agreement was validly cancelled, the applicant has on a prima facie basis established that it cancelled the agreement and that such cancellation was communicated to the respondent[3], at the latest by service of the summons. The fact that the cancellation is disputed in the action proceedings does not bar the applicant from seeking interim interdictory relief as such order is aimed at safeguarding the ripper until finalisation of the parties' dispute and is not determinative of the rights of the parties under

[1] 1948 (1) SA 1186 (W) 1189 as modified in Gool v Minister of Justice 1955 (2) SA 682 (C) at 688D-E
[2] Setlogelo v Setlogelo 1914 AD 21
[3] SA Securitisation (Pty) Ltd v Chesane ("Chesane") 2010 (6) SA 557 (GSJ) para [13]

the agreement[4]. The respondent moreover did not mount any challenge to compliance with this requirement.

[9] The applicant is further not required to illustrate that it has no other satisfactory remedy as it cannot be forced to accept merely the value of the property[5]. Similarly, the respondent did not challenge that this requirement has been met.

[10] The respondent opposes the application primarily on the basis that the balance of convenience does not favour the granting of relief and the applicant has not illustrated irreparable harm. It further relies on the discretion afforded a court not to grant interim relief, even if the requirements therefor are established and characterises the application as an abuse of process.

[11] As the main proceedings are of a vindicatory nature, there is a presumption, which may be rebutted by evidence, that the applicant will suffer irreparable harm[6]. The respondent challenged the cogency of the applicant's case. For the reasons dealt with hereunder, I am not persuaded that the respondent has rebutted the presumption of irreparable harm.

[12] In a well-articulated argument, Mr Swart, for the respondent, argued that the applicant's case was in generic terms which did not sustain its contention for irreparable harm and that on the facts, the balance of convenience favours the respondent as the applicant would not suffer any prejudice if the relief sought was refused, whereas the harm to the respondent would be manifest, were relief to be granted as the ripper is vital to the respondent's farming operations.

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[4] Chesane supra para [10];
[5] Fedsure Life Assurance Co Ltd v Worldwide African Investments Holdings (Pty) Ltd 2003 (3) SA 268 (W) at 278E-F
[6] Chesane 563I-564D; Stern and Ruskin v Appleson 1951 (3) SA 800 (W) at 813

[13] Reliance was placed on *Harnischfeger Corporation and Another v Appleton and Another*[7], wherein Flemming DJP in the context of the balance of fairness phrased as the "balance of injustice", stated the following[8]:

In striking the balance (Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 585(A) at 692 G, the prospects of being successful are in the scale together with the prospect of each party suffering harm as a result of the Court either interfering with, or, alternatively, not granting interim relief, the seriousness and irreparability of the harm, the difficulties of proving the extent of the harm, and the risk of not recovering the amount thereof. Compare also Fourie v Uys 1957 (2) SA 125 (C) at 129; Beecham Group Ltd v B-M Group (Pty) Ltd 1977 (1) SA 50 (T) at 54E".

[14] In considering all the relevant factors, it is also necessary to consider the prospects of success and to apply the test enunciated in *Olympic Passenger Service (Pty) Ltd v Ramlagan*.[9]

[15] Although the respondent challenges that the agreement was validly cancelled it did not meaningfully challenge the applicant's version that no further payment were made to the applicant after 1 October 2017. On the available undisputed facts, it can be concluded that on a prima facie basis, the applicant's claim has prospects of success.

[16] The respondent's case is that the ripper is not being damaged and is properly insured, stored in a locked shed and maintained on a regular basis. In its answering affidavit, proof was provided that the ripper was at that time insured. The ripper has been used in farming operations for the last six years and the applicant did not institute any interdictory proceedings when it launched the action proceedings to protect the ripper against depreciation. The ripper is crucial to the respondent's farming operations and the harvesting of its crops during February and March 2022. As such the respondent would suffer irreparable harm should the ripper be returned to the applicant *pendent lite*. Such

[7] 1994 (3) SA 479 (W) at 491 B-C
[8] 1993 (4) SA at 491 B-C
[9] Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 D

prejudice will continue until the trial is ultimately adjudicated which is estimated to only be towards the end of 2022.

[17] The respondent argued that there was a substantial delay in the institution of these proceedings and that its institution is merely intended as a bargaining chip in the pending trial proceedings now that the matter is trial ready. Whilst there has been a delay in the institution of the present proceedings, that of itself is not a reason to refuse relief, but is merely one of the factors to be taken into consideration. Considering the history of the litigation and the considerable time it would take on the respondent's own version, for the trial proceedings to be finalised, it cannot be concluded that the delay was unreasonable or fatal to the application.

[18] The respondent argued that the applicant's case was speculative. In support of this argument, heavy reliance was placed on *BMW Financial Services (SA) (Pty) Ltd v Rathebe ("Rathebe")*[10], wherein the court contrasted serious harm with an adequate reason to fear the imminence of it actually eventuating with a notional possibility of some risk of such a development.

[19] I am not persuaded that *Rathebe* assists the respondent's cause for various reasons. First, the factual matrix and context differs substantially from the present and it is distinguishable.

[20] Second, insofar as certain of the applicant's averments are in general terms and are predicated upon ignorance of the full factual situation, the respondent's own version lends credibility to the applicant's concerns.

[21] In terms of the insurance policy provided by the respondent it is only effective for the period 1 July 2021 to 1 February 2022. The policy further only became effective on 6 September 2021, a date well after the service of the present application on the respondent

[10] 2002 (2) SA 368 (W)

on 16 August 2021. In its terms, the policy lapsed on 1 February 2022 and there is thus no guarantee that the insurance is presently in force or that it will be maintained on a continuous basis. The respondent did not provide any proof that the ripper was insured throughout the period it has been in its possession.

[22] On the insurance policy, the insured value is reflected as being R1 019 333, an amount less that the amount the applicant contends is owing to it. There is further no indication on the policy that the applicant's interest in the ripper has been noted. Any payment pursuant to an insurance claim will thus be paid to the respondent, rather than to the applicant, with no undertaking on the part of the respondent that any payment received from the insurance company will be paid to the applicant.

[23] Although I agree with the respondent that the ripper has been at risk of deterioration throughout the period it has been in use by the respondent, such risk would have been on the respondent if it had been meeting its obligations to the plaintiff, whereas the risk is presently on the applicant. It is further well established that a seller of equipment is entitled to be protected against the deterioration of the equipment in the condition in which it was when it sought to enforce its right to claim payment and return of the equipment and a refusal to ensure that it remains in such condition would cause it irreparable harm[11].

[24] The respondent has further provided no proof that it could meet any claim for damages suffered by the plaintiff for such deterioration or if the ripper is for some reason lost or damaged[12].

[25] On the respondent's own version, the ripper is being used on an ongoing basis to generate profits for the respondent's farming operations, in circumstances where no controverting evidence has been put up that the respondent has not made any payments

[11] Louder v De Beer 1947 (1) SA 87 (W)
[12] Van Rhyn v Reef Developments A (Pty) Ltd 1973 (1) SA 488 (W) at 493

to the applicant since 1 October 2017 and for a period in excess of 15 months. No justification for this state of affairs has been proffered by the respondent. If the respondent suffers prejudice as a result of this state of affairs, it is the author of its own misfortune.

[26] For these reasons I am not persuaded that the respondent has on the facts rebutted the presumption of irreparable harm.[13]

[27] In balancing the various factors set out above, I further conclude that the balance of convenience favours the applicant and that the prejudice to the applicant outweighs that to the respondent.

[28] It is trite that if the applicant is entitled to an interim interdict restraining the use of an item by the respondent, there is no reason why a further order should not be granted authorizing attachment pendent lite to give effect to the restraint against use and to protect the item from deterioration.[14]

[29] I conclude that the applicant has met the necessary requirements for interim interdictory relief. Considering the facts, I am not persuaded to exercise the discretion afforded[15] in favour of the respondent.

[30] There is no basis to deviate from the normal principle is that costs follow the result. The agreement concluded between the parties provides for costs to be awarded on the scale as between attorney and client.

[31] I grant the following order:

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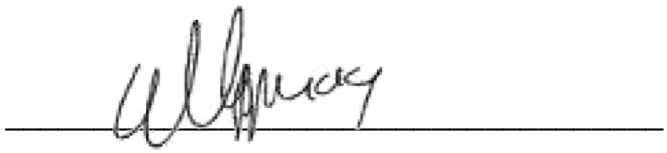
[13] Chesane para [30]
[14] Van Rhyn v Reef Developments A (Pty) Ltd 1973 (1) SA 488 (W) at 492D-E
[15] Ibid at 492\E-Fwholly inconvenient if ripper is not available.

[1] The respondent is directed to forthwith return and deliver a 2015 New Case Ecolo Tiger 870 18ft Ripper bearing serial number YED074844 to the applicant for safekeeping pending the final determination of the action pending between the parties under case number 2018/46468;

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



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 10 February 2022
DATE OF JUDGMENT	: 07 March 2022
APPLICANT'S COUNSEL	: Adv. WG Pretorius
APPLICANT'S ATTORNEYS	: Roussouws Lesie Inc.
RESPONDENT'S COUNSEL	: Adv. DO Swart
RESPONDENT'S ATTORNEYS	: De Klerk, Vermaak & Partners Inc