

REPUBLIC OF SOUTH AFRICA



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

CASE NO. 47458/21

(1) REPORTABLE: ~~YES~~ / NO ✓

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO ✓

3 8 2022

DATE

SIGNATURE

In the matter between:

COMPAIR (SA) (PTY) LIMITED

Applicant

and

ANIKA VAN JAARSVELDT N.O.

First Respondent

JOHAN FRANCOIS ENGELBRECHT N.O.

Second Respondent

SIMON JIYANE N.O.

Third Respondent

THE MASTER OF THE HIGH COURT

Fourth Respondent

JUDGMENT

NOCHUMSOHN AJ

1. This is a vindicatory motion in which the Applicant seeks an Order against the First to Third Respondents for the return of the equipment set out in a schedule in annexure "FA2" to the Founding Affidavit.
2. It is common cause that the Applicant had entered into an oral Agreement with a company known as Normellaz, the terms and conditions of which were those set out in the unsigned written agreement constituting annexure "FA2" to the Founding Affidavit.
3. The First to Third Respondents are the joint liquidators of Normellaz, which entity was placed in liquidation prior to the termination of the sixty-month term agreed upon in "FA2".
4. It is common cause that the Agreement meets the requirements contemplated in paragraphs (a), (b) and (c)(i) of the definition of "*instalment agreement*" set out in section 1 of the National Credit Act of 2005. In accordance with section 1 of the National Credit Act an instalment agreement is defined:

"a sale of movable property in terms of which-

- (a) all or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;
- (c) ownership of the property either –



- (i) passes to the consumer only when the agreement is fully complied with; or
 - (ii) passes to the consumer immediately subject to a right of the credit provider to repossess the property if the consumer fails to *satisfy all of the consumer's financial obligations under the agreement*; and
 - (d) interest, fees or other charges are payable to the credit provider in *respect of the agreement or the amount that has been deferred.*
5. The Applicant disputes that the Agreement meets the requirements of (d) above, inasmuch as on its version there was no interest, fees or other charges payable. In contrast to this, the Respondents indicate that from the pure arithmetical calculations reflected in "FA2" there must have been interest, fees or other charges payable with the result that (d) to the definition of an instalment sale would have been applicable.
6. For the relief sought, the Applicant hangs its hat solely upon the non-applicability of paragraph (d) to the said definition of an instalment sale. The thrust of this argument is that if sub-paragraph (d) to the said definition is not applicable, then the agreement would not be an "instalment agreement", with the results that:
- 6.1. the provisions of Section 84(1) of the Insolvency Act would find no application;



- 6.2. the applicant would remain the owner of the equipment; and
- 6.3. as such, the Applicant would be entitled to the vindicatory relief sought in the Notice of Motion.
7. The Respondents correctly argue that the fallacy in the aforementioned argument lies in the fact that section 84(1) of the Insolvency Act does not require fulfilment of (d) to the definition of an instalment agreement, as set out in section 1 of the National Credit Act.
8. From a plain read of Section 84(1) of the Insolvency Act, it is clear that the requirements of an instalment agreement for purposes thereof, are narrower than the requirements of the definition set out in section 1 of the National Credit Act. This is attributable to the definition under the National Credit Act containing sub-sections (c)(ii) and (d), which are not contained under section 84(1) of the Insolvency Act, which reads:

“If any property was delivered to a person (hereinafter referred to as the debtor) under a transaction that is an instalment agreement contemplated in paragraph (a), (b) and (c)(i) of the definition of “instalment agreement” set out in section 1 of the National Credit Act, 2005, such a transaction shall be regarded on the *sequestration of the debtor’s estate as creating in favour of the other party to the transaction (hereinafter referred to as the creditor) a hypothec over that property whereby the amount still due to him under the transaction is secured. The trustee of the debtor’s insolvent estate shall, if required by the creditor, deliver the*



property to him, and thereupon the creditor shall be deemed to be holding that property as security for *his claim and the provisions of section 83 shall apply.*" (emphasis added)

9. It is not necessary for this court to make a finding as to whether or not interest, fees or other charges were payable by Normellaz. There is no need to determine whether (d) to the definition of instalment sale set out in section 1 of the National Credit Act applies. This is so, arising out of the clear applicability, upon the Applicant's own version of (a), (b), and (c) to such definition. Such applicability is all that is required for the invoking of section 84(1) of the Insolvency Act.
10. Looking at the legal position before the promulgation of the NCA, In **Potgieter NO v Daewoo Heavy Industries (Pty) Ltd**, [2003] 1 All SA 135 (SCA), before the advent of the NCA, the Supreme Court of Appeal ("**the SCA**") considered whether section 84(1) of the Insolvency Act applied to a transaction that satisfied the requirements of section 84(1) even though the Credit Agreements Act did not apply to the transaction. The SCA found that it did.

11. In making this finding, the SCA found that:

- 11.1. There is no reason to restrictively interpret section 84(1) such that it only applies to a transaction when the Credit Agreements Act also applies to that transaction;¹

¹ At [9].

11.2. Because section 84(1) only refers to certain elements of the definition of instalment sale agreement under the Credit Agreements Act, that must signify a deliberate intention by the Legislature not to put the respective legislation on equal footing (in other words, they are not interdependent);²

11.3. Indeed, it would have been strange if that were the Legislature's intention because of the fundamental differences between the two pieces of legislation and their apparent purposes;³ and

11.4. If such an interpretation were correct (that of interdependency), it would lead to absurd results.⁴

12. Consequently, until June 2006, the legal position was that section 84(1) of the Insolvency Act applied to certain transactions contemplated in the Credit Agreements Act even if the Credit Agreements Act did not apply to those transactions.

13. On 1 June 2006, the Credit Agreements Act was repealed and replaced by NCA. Under section 172(2) of the NCA, section 84(1) of the Insolvency Act was amended to refer to paragraphs (a), (b), and (c)(i) of the definition of "instalment agreement" set out in section 1 of the NCA.

14. Accordingly, I find that section 84(1) of the Insolvency Act, as read with section 83 thereof finds application in these proceedings, which disentitles the Applicant to the relief sought. In the premises, I make the following Order:

14.1. The Application is dismissed;

14.2. The Applicant is to pay the costs of the First to Third Respondents, on the scale as between party and party.



NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:	Advocate N Lombard (advnicolel@mweb.co.za)
Instructed by:	KWA attorneys (lindi@kw.co.za)
On behalf of the Respondents:	Advocate J Brewer (brewer@advocatesa.co.za)
Instructed by:	Magda Kets Inc (Admin2@magdakets.co.za)
Date of Hearing:	3 August 2022
Date of Judgment:	3 August 2022

This judgment was Authored by Nochumsohn AJ and is handed down electronically by circulation to the parties/their Legal representatives by email and uploading to the

electronic file of this matter on caselines. The date of this Judgment is deemed to be 3 August 2022.