

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 10249/2008 & 9559/2008 & 8115/2008

DATE: 14 NOVEMBER 2008

5 In the matter between:

S A TAXI SECURITISATION (PTY) LIMITED Applicant

and

H W YUONG Respondent

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JUDGMENT

GAUNTLETT, AJ

15 By agreement, this judgment and the orders I shall make apply
mutatis mutandis to case numbers 8115/08, 10249/98, and
9554/08. I have been invited to address these matters on the
bases of the facts in 8115/08 only.

20 The applicant is a registered credit provider under the National
Credit Act, 34 of 2005 ("The NCA"), and the lessor of the taxi
vehicle to the respondent. The respondent is a taxi operator, who

operates two other taxis which evidently do not fall within the ambit of this application.

The applicant is purported to cancel the credit transaction/lease agreement by virtue of what it says are breaches by the respondent. The respondent denies the validity of the cancellation. The issue raised by this application is whether the applicant is entitled to an interim interdict directing the respondent to deliver to it the vehicle which is the subject of the agreement, for its preservation *pendente* the trial action relating to the cancellation. The parties accept that the determination of the latter may take a considerable period; it is suggested that this may be as long as two years, which may perhaps be overstating it somewhat but clearly they are correct in the general approach that a determination, even a first instance, of a trial action of this kind, may endure for many months.

To succeed in this application for interim relief the applicant is required to establish a *prima facie* right, a reasonable apprehension of irreparable harm if it is not granted, a balance of convenience in its favour, and no alternative remedy adequate in the circumstances.

In oral argument, counsel for the respondent ultimately acknowledged that on the papers the applicant has established that it is the owner of the vehicle and the party with which the respondent contracted in terms of the admitted agreement. Respondent however contends that the applicant has not established a *prima facie* right in respect of cancellation, and therefore the return of the vehicle. Respondent also argues that the other *essentialia* for an interim interdict are not present.

10 The NCA contains no provision like section 17(2) of the Credit Agreements Act, 75 of 1980, which gave a court specific statutory authority, pending the outcome of an action, to make an order regarding the interim custody of the goods in issue. Section 129(3) (b) and 129(4) (a) in contrast make express reference to an interim attachment order. It was not argued for the respondent, and in my view correctly so, that absent express statutory authority under the NCA, the court lacks the power to regulate interim custody of disputed goods sold under a credit transaction. The power of the court arises at common law

20 (Setlogelo v Setlogelo 1914 AD 221), is now constitutionally-rooted in the power of the courts to prevent illegalities and to preserve rights, and is inherently flexible in nature (see for instance Knox D'Arcy v Jamieson 1996(4) SA 348(A); Hix

Technologies CC v System Publishers Limited (Pty) Ltd 1997(1) SA 397(A); and most recently Metlika Trading Ltd v Commissioner, SARS 2005(3) SA 1 (SCA)).

5 I accordingly conclude that this court has the power at common law to grant, in appropriate cases, an order to secure the interim custody of disputed goods in a credit transaction under the NCA. The question however relates as to what those "appropriate circumstances" are. I say this because it was indicated in the

10 course of argument that what may be said in this ruling may have a wider application, but I in turn would stress that this ruling is confined to its own facts. It relates to an application for an interim interdict brought on express grounds of the preservation of disputed goods in a NCA transaction, and is not intended to

15 devise a Magna Carta in respect of all matters of this nature.

Does the applicant have a *prima facie* right in substantive law to the cancellation of the agreement, and to the return of the vehicle? The lease itself so provides, predicated upon a valid cancellation. The enquiry then becomes; has the applicant

20 established such a right, *prima facie* even if open to some doubt?

In oral argument, counsel for the applicant traced the documented failure by the respondent to make due payment to the applicant under the lease. He pointed, too, to conflicting and what he said were inherently implausible explanations by the respondent. The net effect, he said, was that the respondent had demonstrably breached the agreement to a degree far beyond the requirements of a mere *prima facie* right by the applicant to cancel and to seek restoration of its property, the vehicle. In contending for the converse, the respondent's counsel essentially advanced two contentions. The first is that, at the instance of the applicant, the respondent ceased to make payment of the monthly lease instalments to the applicant, and instead it paid, and continues to pay, a third party; Rich Rewards (Pty) Limited. It was established on the papers, and was common cause that Rich Rewards was in fact a corporatisation of the Taxi Association of which the respondent is a member.

In my view, this unfortunately offers no answer – certainly it does not rebut the *prima facie* right on the accepted evidential test laid down in Webster v Mitchell 1948(1) SA 1186(W). I say this for several reasons.

In his affidavit in the summary judgment proceedings, which were incorporated by reference in the founding affidavit in the matter before me, the respondent ascribed to the Chairman of his Taxi Association the directive that he (the respondent) should alter his existing bank debit authorisation in favour of the applicant to one in favour of Rich Rewards. In his answering affidavit in this application, however, the respondent ascribed the initiative to the applicant itself. Strikingly (and inconsistently with his identification of the applicant's Ms Faizel Miller for other purposes) he does not identify in his affidavit the applicant's supposed representative in this respect.

His new version – that it was at the instance of the applicant that the diversion of payments took place from the applicant to Rich Rewards – lacks any documentary corroboration. It is strenuously denied by the respondent. It is also in my view inherently improbable that the applicant, with its arduous system of contracting individually with individual owners, should, without evident commercial benefit, wish to substitute an unsecured system of conduit payment through an association of taxi drivers. Even were these ordinary motion proceedings, and the test applicable in interlocutory proceedings did not apply, I would not

hesitate to reject the shifting explanation in this regard as inherently contradictory, inconsistent and beyond credence.

I also do not accept that there is in any event any credence in the
5 assertion by the respondent that he has "religiously" and "diligently" paid first the applicant and thereafter Rich Rewards the monthly rentals. His own bank records reflect the converse. The attempt to explain this by the suggestion that Rich Rewards was paid in cash is not only not what the respondent's affidavit
10 says, but is inconsistent with a number of instances in his bank records when he purported to pay Rich Rewards by cheque. It is also inconsistent with his use of a bank debit order from the outset. The lack of proof of the alleged cash payments thus made "diligently" to Rich Rewards is a further inconsistent fact; his
15 attempt to blame this on a seizure by the police of receipts stumbles on lack of the usual inventory of what the police allegedly took, which might be expected to have been handed to the respondent upon the seizure, and, yet more importantly, any recorded effort to obtain photocopies from the police, and, most of
20 all perhaps, provision by him of proof of receipts from after the time of the police seizure. Finally, and perhaps most unbelievably, there is the respondent's contention that notwithstanding his discovery of what he contends was a fraud on

him by Rich Rewards, he stoutly continued, and evidently continues, to make payment to it under the lease.

In short, I do not accept the contention that the applicant directed
5 the respondent to pay Rich Rewards and not it. I do not accept that the respondent has paid either the applicant or Rich Rewards. I also do not understand the basis of the contention that proof of payment to Rich Rewards would amount in any way to an discharge of the obligation under the lease to the applicant,
10 unless it were apparent on the papers that it could reasonably be believed that Rich Rewards was acting in fact, and not according to some alleged perception of the respondent himself, as a designated payee for the applicant.

15 I accordingly conclude that the applicant has established what is in fact a very strong right to cancellation and restoration of the vehicle in the pending action.

I turn to the issue of harm. It was stressed for the respondent
20 that there is no basis to apprehend that he will dispose of the vehicle, or subject it to neglect or abuse; it is an essential means of his livelihood. This overlooks in my mind two considerations, the first, at the level of principle, is that the claim by the applicant

is quasi-vindictory in nature, in which case it is by clear authority presumed, unless the contrary is shown, that the applicant will suffer irreparable harm if the interdict is not granted. (See Law of South Africa vol 11 (second re-issue) para 318 and authorities collected at footnote 5). The second is that there is important assistance to be found in a line of cases dealing with the situation which arises in relation to the interim custody of vehicles in analogists if not exactly the same circumstances. The *fons et origo* appears for all practical purposes to be the judgment of Greenberg, J (as he then was) in Morrison v African Guarantee and Indemnity Co Ltd 1936(1) PH M), where he stated the following;

"[f I am right in the conclusion that the respondent's claim and his right as to a delivery of the motor car, then whatever he has to do with the motor car afterwards he is entitled to a delivery, and he is entitled to a delivery in the condition on the day in which he seeks to enforce his claim for delivery; he is entitled to have the article kept in the same condition in which it is on that day, and a refusal to grant him relief which would ensure this condition would cause

irreparable injury. It is therefore unnecessary to decide whether this is a vindicatory right or not."

This decision was followed and applied by Millin, J in Loader v De Beer 1947(1) SA 87 (W), where the stated (at 89):

"In the present case it is quite clear under what arrangement the respondent has possession of this truck: It is under a hire purchase agreement, and he can only be deprived of that possession if it is proved that he committed a default entitling the applicant to reclaim it.

Therefore, in this case, there is no reason why at the present stage the applicant should be put in possession of this truck. But as I say, he is entitled to be protected against the respondents alienating it, and he is also entitled to be protected in accordance with a case I shall refer to in a moment [a reference to *Morrison supra*]. He is entitled to be protected against a further deterioration of the truck by use of it on the part of the respondent."

Somewhat more recently there is the full bench decision in Santambank Beperk v Dempers 1987(4) SA 639 (O), where reference was made (at 647E-J) to this earlier line of authority and to the fact that a commercial vehicle “verminder feitlik daaglik in waarde, veral wanneer dit gebruik word”.

As against these decisions my attention was also drawn to the reported decision in BMW Financial Services (SA) (Pty) Ltd v Rathebe 2002(2) SA 368 (W), where Flemming, DJP dealt with a problem regarding a claim for the restitution of a vehicle *pendente lite* an action, arising under the Credit Agreements Act, 75 of 1980. In that matter the learned judge was unpersuaded that there should be an interim order granted in favour of the applicant (on appeal), concluding as follows (at 374);

“Counsel relied on applicant’s prospects of success. Assuming them to be good, it does not force (sic) the judicial discretion. The judicial discretion must also ask what difference four weeks will make. In the present case it is not fancible to expect that by the time applicant has located the vehicle, the *dies induciae* will

have expired and the applicant will have obtained cancellation of the lease. That would with finality determine that the lessee, the respondent, has no right to use or even to possess the vehicle. Is the risk of collision of theft in a week or two so serious and of such imminence that there can be a real "apprehension of injury" in those respects?

I think not. Will an additional few hundred kilometres harm anything more than insubstantial decrease in value? That is improbable."

The last decision is an unreported decision in Mercedes Benz Finance (Pty) Limited v Motlhako (Case number A3015/2000/WLD), where Jordaan AJ, Flemming, DJP concurring) was also disinclined to grant an interim order on the facts of that matter. Significantly without referring to, and therefore discussing, the earlier decisions to which I have drawn reference, the court concluded (at page 5) as follows;

"It is neither necessary nor desirable for me to attempt what such "damage" or "depreciation" must entail in order to qualify for the exercise of the Court's protective powers: Suffice it to say

that the mere fact that the credit receiver is in possession of the property and continues to use it in the manner envisaged in the Credit Agreement in question will not be sufficient; were it otherwise [as] credit grantor, it would be entitled to approach the Court as a matter of right on each occasion that it institutes proceedings for the return of the goods."

10 With this last proposition in my view there can be little quarrel. As I suggested earlier, there can be no basis for contending that there is an automatic right to secure custody of affected goods pending the trial action. As I have endeavoured to stress, what must be considered on the facts of each matter is the application 15 of the trite principles relating to interdicts. What is to my mind important about the present matter is that the application is not instituted on the basis of a mere entitlement, by virtue of ownership, to interim custody of the vehicle. The case is founded upon contentions regarding relative harm, convenience and of course the strength of the right in issue. More narrowly, the basis 20 of the case, as I understand it, is that the length of time which may be anticipated to elapse before the principal action is heard

is of such a nature that there is a pressing need for interim protective relief related to the preservation of the vehicle.

While, as I have indicated, it may not be so that the pessimism of the parties regarding the celerity of trial actions in the Cape is fully justified on any test a considerable period will elapse. This at best will be a period of many months, certainly not the matter of three to four weeks which exercised the minds of the court in the BMW decision. The applicant has addressed this aspect squarely in its papers, and demonstrated that the residual value of the vehicle following the elapse of this period of time, will be greatly reduced if the vehicle remains in daily use. It seems to me that there is no basis to contend that it is incumbent upon an applicant in these circumstances to establish a greater use beyond that which is contemplated by the agreement. On the facts of the present case, the use of a private vehicle is not an issue; what is established is that by all probability, the vehicle will be put to great use understandably given its function and that this will operate, regard being had to the anticipated period, materially to the diminution of its value.

I accordingly consider that the requirement of irreparable harm has been sufficiently established.

I turn then to the third consideration: the balance of convenience. As counsel for the applicant pointed out, it is well established that the stronger the prospects of success, the less the need for the balance of convenience to favour the applicant (*Joubert et al op cit* para 4 and authorities cited in footnote 4).

In my view that is the case here. For the reasons I have given, I consider that on the papers before me, the applicant has a very strong prospect of establishing in the trial action that the respondent has materially breached the lease, and that it (the applicant) is accordingly entitled to a declaratory order confirming its cancellation and therefore to restoration of the vehicle. But I have in any event given consideration to the facts indicated in the affidavits pertaining to the balance of convenience in this matter. I am aware that the respondent is a family man, and that his taxi is part of his livelihood. Unfortunately with the inconsistency and at times lack of evident candour which have been a feature of his affidavits he forbore to disclose in the present application what he had indicated in passing in the summary judgment proceedings: that he has another two taxis unaffected by this application. These factors are relevant to the discretion which I have in this matter, and which, taken together with a cumulative effect of the

other circumstances I have indicated already, I exercise in all the circumstances in favour of the applicant.

As regards the balance of convenience and aspects touching upon the applicant, it is of course not implicitly merely to be accepted that because it is a corporate entity which makes money through entering into credit transaction, that inconvenience to it in the proper sense is to be disregarded in the course of weighing up the various factors. As I have indicated, what is in issue in this matter is a taxi, a piece of working machinery to be maximally used. It is a matter of notoriety that great mileages are clocked up and considerable wear and tear endured by such vehicles, more particularly as I have already indicated, when the period at issue is a considerable one.

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A last aspect relates to whether, if the order is to be granted, the interim custody of the taxi should be in the hands of the applicant or a third party. Counsel for the applicant referred in this regard to a passage in Santambank V Dempers supra suggesting that the latter in principle would be desirable. There are two answers to this. The observation may reflect a *desideratum* but it must yield to fact. Here, I was told from the Bar, it had been established that the Sheriff had no facility to take taxis into indefinite custody.

Conversely the applicant was willing to do so, under security and with an undertaking that the taxi would not be used pending the determination of the main proceedings. It seems to me that this regime in the present case will best preserve the vehicle.

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The order I accordingly make is as follows:

Pending the final outcome of the action instituted by the applicant against the respondent:

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1.1 The respondent is directed to deliver the vehicle into the possession of the sheriff, who shall deliver it to the applicant, who shall, in turn, at its own expense

15 (a) Transport it to garaged premises situated at 17

Bompas Avenue, Dunkeld, Johannesburg;

(b) Retain the vehicle at such garaged premises under security pending the outcome of the action instituted by the applicant against the respondent, and who shall not use the vehicle, or permit that it be used during the said period.

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1.2 In the event of the respondent failing to comply with the contents of paragraph 1.1 above within five days of service of this order on his attorneys, authorising and directing the sheriff to take the vehicle into his possession from wherever he may find it and to return the vehicle to the applicant as aforesaid.

2. Directing that the respondent pay the costs of this application, including the costs of two counsel, and including such costs as may have been reserved. This order must be replicated identifying the different vehicles as between the three applications.

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GAUNTLETT, AJ

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