Republic of South Africa

In the Western Cape High Court of South Africa
(Cape Of Good Hope Provincial Division)

In the matter between:	Case No: 18507/09
ABSA BANK LIMITED	APPLICANT
Versus	
ABLAZE TRADING 216 CC	RESPONDENT

Judgment delivered: 25 February 2011

LOUW J

[1] In this application for final relief the applicant bank seeks the following order against the respondent, Ablaze Trading 216 CC:

That the respondent is ordered to deliver and return the undermentioned assets to the applicant and that the applicant is entitled to repossession thereof:

2. **Claim 1:** 2002 SA Truck Trailer with Chassis Number: AHBDSB2FS2B100221 and Serial Number: AHBDSB2FS (the trailer).

Claim 2: 2007 TATA NOVUS 5542 with Chassis Number: KL4V3TVF16K004424 and Serial Number: DV15TIS601282CB (the truck);

3. Should the respondent fail and/or refuse to deliver the asset to the applicant, the Sheriff of the court is ordered to and empowered to repossess the asset and deliver it to the applicant;

4. The respondent is ordered to pay the taxed costs of this application on an attorney and client scale.

[2] This application arises from two instalment sale agreements concluded between the parties during September and October 2007 (the agreements) in terms whereof the bank sold the truck and trailer to the respondent. The agreements provide in identical terms that the purchase price will be paid in monthly instalments, the final instalments to be paid on 10 October 2012. Further relevant clauses read as follows:

'2. **The Goods**

The purchaser will:

2.1. keep the goods in the Purchaser's possession ...

2.2. normally keep the goods on the premises mentioned in this agreement ...

...

2.4.1. keep the goods free from claims by third parties ...

...

3. **DELIVERY AND ACCEPTANCE**

The purchaser acknowledges that:

3.1. the goods have been purchased from the Supplier at the Purchaser's request and only for the purpose of selling the goods to the Purchaser in terms of this agreement;

3.2. the Seller makes no representations or warranties, whether express or implied to the Purchaser as to the goods or their fitness for any purpose whatsoever except for the common law warranties.

4. **OWNERSHIP**

Notwithstanding delivery, ownership of the goods shall not pass to the Purchaser until all amounts owing under this agreement have been paid in full.

...

6. **RISK**

...

The seller will not be liable to the Purchaser for any loss or damage ... arising from the use of the goods.

...

10. **BREACH**

10.1. The Purchaser will be in breach of this agreement if the Purchaser:

10.1.1. fails to make payment in terms of this agreement.

10.1.2. fails to comply with any other provision of this agreement.

...

10.3. In the event of any breach of this agreement, including 10.1.1, if the Seller elects not to act in accordance with 10.2, the Seller may, in addition to any other remedies that it may have in terms of this agreement or at law:

10.3.1 without notice terminate this agreement and to retain all payments already made; and/or

10.3.2 claim, at the Purchaser's cost, return and possession of the goods, together with all licensing documents in respect of the goods, at the Seller's address or at such other address as the Seller may have notified the Purchaser in writing; and/or

10.3.3 claim damages (which may include immediate payment of all arrear payments plus finance charges thereon).

[3] The respondent is in breach of the agreements in two respects:

1. The respondent has stopped paying the monthly instalments due in terms of the agreements;
2. The respondent has not kept the truck and trailer in its possession and at the premises stipulated in the agreements (71 Cambridge street, Vrijzee, Western Cape) and has allowed it to be removed in terms of a contract the sole member of the

respondent, one Louie Whittaker, concluded on 23 July 2007 with an entity known as Logistic and Freight Solutions (LFS), to be used by other entities in work at Witbank/Middelburg, Mpumalanga. According to Whittaker, who deposed to the answering affidavit on behalf of the respondent, the truck and trailer went, in the custody of another entity, Nicholas Logistics and Trading CC, to Richards Bay. Pursuant thereto, Whittaker states, the trailer was attached by the police in September 2008, 'pending finalisation of the (police) investigation' as an item suspected to have been stolen from an transport company in Uppington.

[4] Mr. Patrick, on behalf of the applicant submitted that save for the allegation that Whittaker concluded the agreement with LFS and that pursuant thereto, the respondent allowed the truck and trailer to be removed for use in Mpumalanga, the allegations as to the further whereabouts of the truck and trailer amount to uncorroborated hearsay.

[5] Mr. du Toit on behalf of the respondent advanced three defences which are founded, he submitted, on the facts disclosed in the papers:

1. Despite knowledge of the breaches, the bank has for more than two years chosen not to cancel the agreements. This justifies the inference that the bank has elected not to cancel. The bank is

consequently not entitled now to cancel the agreements as it purports to do in its launching papers;

2. Not having cancelled the agreements, the bank is not entitled to the return of the truck and trailer, despite the provisions of clause 10.3.2. referred to above. To the extent that the said clause entitles the bank to the return of the truck and trailer while keeping the agreements in force, the provisions are contra bonos mores and not enforceable.

3. The respondent has to the knowledge of the bank not been in possession of the truck and trailer for approximately two years and consequently, in the exercise of its discretion, the court should not order that the respondent deliver possession thereof to the bank.

[6] As to 1 and 2 above, the position is that the obligation to pay the monthly instalments is ongoing and each failure to pay an instalment as it falls due, constitutes a fresh breach which entitles the bank to cancel. The final payment is only due on 10 October 2012. So, while the bank may have elected not to cancel the agreements because the respondent allowed the truck and trailer to pass out of its possession, the bank is entitled to cancel because of the failure to pay an instalment when it falls due. The bank was consequently entitled to cancel the agreements in its launching papers and is entitled to invoke the provisions of clause 10.3. It is therefore not necessary to consider whether clause 10.3.1. entitles the bank to the return of the truck and trailer without first cancelling the agreements.

[7] I turn to the third defence raised. The bank seeks specific performance in terms of a contract. The court has a discretion, to be exercised judicially, whether to order specific performance and the aim is to prevent an injustice. In principle, a party to a contract is generally entitled to specific performance unless the performance is impossible. In Benson v SA Mutual Life Assurance Society 1986 (1) SA 776(A) an order for specific performance relating to the delivery of shares that could readily be obtained on the open market, was confirmed on appeal. In Pretoria East Builders CC and Anor v Basson, 2004(6) SA 15 (SCA), the SCA on appeal set aside an order for specific performance of a contract of the sale of immovable property belonging to a third party who had made it clear that it had no intention of co-operating in its property being delivered to a purchaser who had bought the property from the respondent. At par [10], 21 AD the court held as follows:

> 'In the circumstances of this case, it (the order) cannot be carried out. The rule is set out in *Shakinovsky v Lawson and Smulowitz* as follows:
>
> > 'Now a plaintiff has always the right to claim specific performance of a contract which the defendant has refused to carry out, but it is in the discretion of the Court either to grant such an order or not. It will certainly not decree specific performance where the subject-matter has been disposed of to a *bona fide* purchaser, or where it is impossible for specific

performance to be effected; in such cases it will allow an alternative of damages.'

The owner of the property, Infogold, has made its attitude perfectly clear that it has no intention of performing Pretoria East Builders' contract with the respondent, and that it has no intention of itself selling to the respondent. It advised the respondent of its attitude before the commencement of proceedings, which should have alerted the respondent of the possibility of confining himself to an action for damages, and it repeated its attitude under oath in the opposing papers (through the evidence of Van Schalkwyk). In these circumstances, an order for specific performance against Pretoria East Builders is futile. It should not have been granted.'

[8] In this case it is not clear at all that the performance is impossible. The facts are simply not adequately set out to find that specific performance is in fact impossible, would be futile or would give rise to an injustice. Having cancelled the agreements the bank is in my view entitled to the order sought by it.

[9] Clause 9.2. of the agreements provides for costs on an attorney and own client scale. The bank however, seeks only attorney and client costs.

[10] The following order is consequently made:

1. The applicant is declared to be entitled to repossession of, and the respondent is ordered to deliver and return to the applicant:

   Claim 1: the 2002 SA Truck Trailer with Chassis Number: AHBDSB2FS2B100221 and Serial Number: AHBDSB2FS (the trailer).

   Claim 2: the 2007 TATA NOVUS 5542 with Chassis Number: KL4V3TVF16K004424 and Serial Number: DV15TIS601282CB (the truck);

2. Should the respondent fail and/or refuse to deliver the aforesaid trailer and truck to the applicant, the Sheriff of the court is empowered and ordered to take possession of the assets and to deliver same to the applicant;

3. The respondent is ordered to pay the taxed costs of this application on an attorney and client scale.

W.J. LOUW
Judge of the Western Cape High Court