

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/36599

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

**FIRST RAND BANK LIMITED TRADING *INTER ALIA*
AS WESBANK AND WESBANK AVIATION FINANCE**

Applicant

and

SKY HAWKER PARTNERSHIP

First Respondent

SKYEINVEST ADMINISTRATION (PTY) LTD

Second Respondent

J U D G M E N T

WEPENER, J:

[1] The applicant, a bank, seeks confirmation of the cancellation of an agreement entered into between it and the first respondent and seeks return

to it of an aircraft which it owns, but sold to the first respondent pursuant to an instalment sale agreement whilst retaining ownership thereof.

[2] The facts are largely common cause and insofar as there are disputes of fact, the respondent's version is taken into account (*Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)). I omit the facts which do not have a bearing on the issues, the latter which crystallised before me.

[3] The defences contained in the answering affidavit and heads of argument i.e. that this Court has no jurisdiction to hear the matter; the assertion by the first respondent of lien over the aircraft and the defence that the certificate of balance had expired, were not pursued by Mr Bekker who appeared for the respondents and those issues need no further consideration.

[4] During argument the only two defences which crystallised were firstly, that the applicant had waived its right to cancel the agreement and secondly that the applicant is estopped from asserting its rights and in particular from relying on the cancellation of the agreement, which the applicant effected.

[5] The instalment sale agreement provides that the first respondent would pay a cash price of R33 million plus VAT and costs in a total amount of R44 353 302 million by giving a deposit of R6 million and the balance in twelve instalments the first instalment of R4,6 million being due and payable on 28 February 2007, ten instalments payable half-yearly thereafter of

approximately R2 million each and a final instalment of approximately R20 million.

[6] The written agreement provides *inter alia* that:

“14. BREACH

14.1 *If you fail to comply with any of the conditions of this Agreement (all of which you agree are material), or fail to pay any amounts due to the Seller, or commit any act of insolvency, or you have made misleading or inaccurate statements to the Seller relating to financial affairs or otherwise before or after signing this Agreement, or leave the employ or abscond from the company, firm or association that employs you at the date of execution of this Agreement, or you allow any judgment that has been taken against you to remain unpaid for more than seven days, then the Seller will have the right (without affecting any of its other rights):*

14.1.1 *to cancel the Agreement and claim from you the amount which the Seller would have been paid had you fulfilled all your obligations. To this end, the Seller will be entitled to take the Goods back, sell the Goods, keep all payments you have made and claim the balance (if any) from you as damages; or*

14.1.2 *to claim immediate payment of the full amount that the Seller could claim in terms of the Agreement, as if it was then due by you;*

Provided that pending payment of such arrears and/or damages that the Seller shall not be obliged to tender or repay to you any amounts paid under this Agreement or any allowances or credits granted to you.”

and

“16. INDULGENCE

Should the Seller not have insisted that you follow any of the terms and conditions strictly at any previous stage, you may not assume that the terms and conditions have been altered. These terms and conditions will still apply and the Seller will at any time thereafter be entitled to enforce them strictly without notice."

and

"22. VARIANCE

No Agreement at variance with the terms and conditions of this Agreement (the instalment sale agreement) and no waiver by the Seller of any rights shall be of any force or effect unless reduced to writing and signed by the parties hereto."

[7] After the conclusion of the agreement the first respondent failed to pay the deposit punctually but the applicant indulged this late payment. In such event it is clear that the applicant would still be entitled to enforce the terms and conditions of the agreement strictly (as agreed between the parties in clause 16). When the first instalment fell due the first respondent defaulted and it also defaulted with subsequent instalments until 8 June 2009 when the applicant cancelled the agreement, the first respondent then being in arrear with payments in the sum of R9,5 million. During the period 28 February 2007 to 8 June 2009 the parties had various discussions in order to resolve the first respondent's default and the first respondent also made some payments from time to time but nevertheless built up a substantial arrear amount as at 8 June 2009.

[8] Respondent states that the reason why the deposit was paid late was that it was in “*dire financial straits, and it was hopelessly unable to meet its commitments*”. Thereafter it says that, save for some superficial communications between the parties, nothing of any consequence happened for almost three years. The first respondent then states that the applicant’s failure to take steps and its election or not to cancel the agreement because of the breaches led it to reasonably believe that the applicant elected to keep the agreement in force and to rather “*recover the money due to it in terms (of the agreement) on an accelerated basis in due course*”.

[9] The first respondent did not rely on a defence of waiver as it is generally understood by that term i.e. a waiver which in itself is a contract and which requires both parties to assent to such waiver or release from the rights and obligations. This general type of waiver requires communication to the other party and acceptance by both parties thereof. See *Napier v Van Schalkwyk* 2004 (3) SA 425 (W). The first respondent disavowed reliance on waiver in this sense in particular as a result of the provisions of clause 22 of the written instalment sale agreement which precludes it from relying on a waiver.

[10] The first respondent argued that the waiver it relies upon is the applicant’s election not to cancel. It is argued that because the applicant allowed the contract to remain in existence, despite the breaches, it elected to keep it in esse and the applicant is consequently barred from approbating and reprobating by both keeping it in esse and cancelling it.

[11] I cannot agree with this argument. Firstly, the words of clause 22 do not limit the issue of waiver to a waiver in the broad sense and not to a waiver in the sense of an election, which latter waiver is a genus of the concept of waiver. See

[12] Clause 22 does in my view stipulate that the first respondent's reliance on any form of waiver of rights (including the election not to cancel the agreement at a certain stage) is excluded.

[13] If I am wrong in this conclusion, the first respondent has a further hurdle. The applicant's election not to cancel the agreement because of certain breaches cannot be seen as an election not to cancel the agreement as a result of any future breach. To so hold would hamper commercial realities and credit providers would be held to agreements whilst debtors can stop paying with impunity, whilst credit providers attempt to assist debtors. The first respondent's failure to pay the instalment in January 2009 led to the letter of cancellation and the launching of the present application against the first respondent. Secondly each act of non-payment by the first respondent constituted a separate and distinct breach of contract. *Cohen v Sherman and Company* 1941 TPD 134; *Lochrenberg v Sululu* 1960 (2) SA 502 (E). To deny the applicant the right to rely on the non-payment of an instalment in January 2009 because it indulged the first respondent prior to this date would have no basis as clause 16 of the agreement protects the applicant in such a case. It was not argued that the applicant was not entitled to rely on the breach, which occurred in January 2009 but rather that the applicant's

election not to cancel should be gleaned from the fact that it failed to enforce the contract for the previous breaches by the respondent.

[14] The result is that the first respondent's reliance of the applicant's election not to cancel based on breaches when he did not so cancel the agreement, is misplaced both as a result of the clear wording of the agreement and the first respondent wrongly placing reliance on acts which have no bearing on the breach, which occurred in January 2009 and which led to the cancellation of the agreement. There was no argument that the cancellation was not effected within a reasonable time from the date of the breach which occurred in January 2009.

[15] Thirdly there is a strong presumption against waiver. See *Le Roux v Odendaal* 1954 (4) SA 432 (N) and the first respondent is required to show that the applicant with full knowledge of its rights decided to abandon it. Also see *Hepner v Roodepoort-Maraiburg Town Council* 1962 (4) SA 772 (A) at 778C-F. The applicant did not immediately cancel the agreement when the first breaches occurred and although the respondent baldly denies the applicant's version it is quite apparent that the applicant, as a first objective as a financier, attempted to earn profits from the financing of goods and equipment and that it would far rather receive payment of instalments than the return of the aircraft. The deponent on behalf of the applicant stated that a sale of a security asset usually only partly mitigates the damages suffered in the event of a cancellation and that its value never compensates the total cash value of an instalment sale transaction; a decision to cancel the

agreement is therefore taken only as a last resort where substantial loss to all parties to the agreement is involved; that since the instalments payable by the first respondent were only to be effected on a 6-monthly basis it would hardly have been financially and legally prudent to immediately cancel the agreement simply because the respondent had missed initial payments; throughout the period 2006 to 2009 numerous negotiations were conducted with the view of saving the agreement for the benefit of both parties. The applicant cannot be criticised for adopting this attitude and later cancelling the agreement when a fresh breach of the agreement occurred. The delay can therefore not without more, deprive the applicant of its rights. *North Eastern Districts Association (Pty) Ltd v Surkhey Ltd* 1932 WLD 181 at 186.

[16] The second issue raised by the first respondent is that because the applicant cancelled the agreement in 2009 and commenced proceedings for return of the aircraft shortly thereafter but failed to pursue the relief, it is estopped from relying on the cancellation. The first respondent avers that since the commencement of the proceedings it made various additional payments, which the applicant accepted. Negotiations again ensued to attempt to resolve the matter. Proposals were sent backward and forward. There were restructuring proposals and attempts to assist the first respondent. However nothing came of these discussions and the applicant set the matter down for hearing some 30 months later. The first respondent argues that this lapse of time has estopped the applicant from relying on the cancellation, which it effected in June 2009. Firstly, in order to rely on estoppel as a defence it is a requirement that the representation upon which

the party relies was made negligently. The applicant's conduct by negotiating and attempting to keep the contract alive as a commercial reality cannot be categorised as an act of negligence. Indeed the first respondent was well aware that the applicant was attempting to assist it whilst considering, *inter alia*, the possibility of selling the aircraft, all of which conduct cannot be said to have been negligent or could lead the first respondent to believe that the applicant elected to keep the agreement in esse.

[17] I am of the view that the applicant attempted to assist the first respondent to recover from its dire financial straits and that it took a commercial decision whilst negotiating and discussing with the first respondent rather than to lead the first respondent to believe otherwise. The first respondent was well aware why the parties negotiated a possible new deal and could not have believed that the applicant made representations that it would not rely on the cancellation or that it abandoned its rights.

[17] The negotiations and attempts to assist the first respondent to keep it to its bargain cannot be said to constitute negligence on the part of the applicant and the first respondent has not shown that the applicant is estopped from relying on the cancellation of the agreement.

[18] Having come to this conclusion the first respondent has failed to set up a valid defence to the plaintiff's claim for the return of the aircraft. In the circumstances I grant an order in terms of paragraphs A2, A3, A4 and A5 of the Notice of Motion dated 26 August 2009.

W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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