

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 26126/2011

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
26/10/2012	
DATE	SIGNATURE

In the matter between:

SA TAXI SECURITISATION (PTY) LIMITED
(Registration Number: 2005/021852/07)

Applicant

and

SOYA, MABOTHA PAULAS
(Identity Number:)

Respondent

AND

CASE NO: 41194/2011

In the matter between:

SA TAXI FINANCE SOLUTIONS (PTY) LIMITED
(Registration Number: 2003/029687/07)

Applicant

and

MOLAWA, NONYANE SAMUEL
(Identity Number:)

Respondent

AND

CASE NO: 00089/2012

In the matter between:

SA TAXI SECURITISATION (PTY) LIMITED
(Registration Number: 2005/021852/07)

Applicant

and

MOKOTONG, AURLEAN
(Identity Number:)

Respondent

AND

CASE NO: 38354/2001

In the matter between:

SA TAXI FINANCE SOLUTIONS (PTY) LIMITED
(Registration Number: 2003/029687/07)

Applicant

and

MANGEBENGE, JUAWA
(Identity Number:)

Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The above matters are all interlocutory applications for the return and attachment of motor vehicles for safekeeping pending the finalisation of the respective trials.

[2] The applicant in all the matters is claiming largely the same relief against the different respondents. The matters were heard together. It was

agreed that the judgment and the order I make in one matter may apply to all the applications.

THE SOYA MATTER – CASE NO 26126/2011

[3] The applicant is a registered credit provider under the National Credit Act No 34 of 2005 (*“the NCA”*). The applicant is the financier of thousands of taxis throughout South Africa including the motor vehicles in the present applications. In the first matter, Case No 26126/2011 (*“the Soya matter”*), the applicant and the respondent concluded a written lease agreement during July 2008. In terms of the lease agreement, the applicant leased to the respondent a 2008 Toyota Quantum Sesfikile motor vehicle (*“the vehicle”*). The respondent took delivery of the vehicle with which he commenced operating a taxi route between Klerksdorp and Mafikeng.

[4] The first monthly instalment of R7 877,35 in terms of the lease agreement was due on 21 August 2008. The respondent paid a deposit of R4 800,00. Thereafter the respondent made certain payments in reduction of his obligations under the lease agreement. However, the respondent subsequently breached the agreement by failing to pay the full amount of the instalments due. As a consequence, the applicant instituted action against the respondent in July 2011 for, *inter alia*, the return of the vehicle.

[5] The respondent defended the action. The applicant's application for summary judgment was opposed and unsuccessful. The respondent was granted leave to defend.

[6] During August 2009 the respondent invoked the provisions of section 86 of the NCA and applied for debt review. The applicant participated in the debt review process. However, the negotiations between the parties regarding re-arranged instalment payments were unsuccessful. The respondent's application for debt restructuring was set down in the Klerksdorp Magistrate's court for 23 February 2010, but was then postponed *sine die*. On 10 August 2010 the respondent withdrew his application for debt restructuring.

[7] On 23 June 2011 the applicant, as it was entitled to do on its version, notified the respondent, his debt counsellor and the National Credit Regulator, in the prescribed manner, of its election to terminate the debt review in terms of section 86(10) of the NCA. This notice was given after sixty (60) business days had lapsed from the date on which the respondent had applied for debt review and whilst, on the version of the applicant, the respondent was in default in respect of his lease obligations. The respondent terminated the services of his debt counsellor and appointed a new debt counsellor in August 2011. The new counsellor commenced the debt review process afresh. However, by this time, the applicant had already issued summons in July 2011, as stated above. On this basis, the applicant contended that the new debt review process did not apply to the credit agreement between the parties in terms of which the summons had been issued.

[8] On the applicant's calculations, the total payments made by the respondent subsequent to his application for debt review up to 30 January 2012 amounted to approximately R155 819,16. The sum actually due by the respondent in terms of the lease agreement over the period September 2009 to April 2012 was R252 275,20 ($R7\,877,35 \times 32$). The shortfall was R96 256,04 and is increasing each month.

[9] The applicant contended that pending the outcome of the action and in the absence of the interim relief now sought, the applicant has no other method of preventing the respondent from alienating, selling or damaging the vehicle or otherwise disposing of same. The result of such conduct will be that the only security which the applicant has for the respondent's indebtedness will disappear.

[10] In the answering affidavit, the respondent has raised several defences some of which were also raised in the affidavit resisting summary judgment. In summarised form, the defences raised by the respondent were that the applicant failed to prove that the applicant was a registered credit provider in terms of the NCA; that the deponent to the founding affidavit (Ms Phyllis Lombard) could not have had personal knowledge of the applicant's dealings with him as well as the lease agreement in question; that the applicant has abused the court process by first launching a summary judgment application, which failed and then by bringing the present application based on an interdict for interim vindicatory relief; that the applicant has delayed in bringing the instant application; that at the time of the negotiations leading to the

conclusion of the lease agreement, the applicant omitted to conduct proper enquiries in regard to his financial ability to pay the required monthly instalments under the agreement which resulted in reckless credit granting on the part of the applicant; that the relief sought by the applicant is final in effect which will result in the respondent being unable to earn a living to support his family and to pay legal fees; that the applicant acted in bad faith in the debt review process by rejecting the proposed repayments; that the giving of notice to terminate the debt review was not done lawfully since such notice never came to his attention; that his debt review in the Magistrate's court was to be heard soon; the lease agreement was still extant; that the applicant has not complied with its obligations in terms of the NCA; and that the respondent was currently paying to the applicant an amount in terms of his offer under the NCA which application is subject to section 86 and which the Court has a discretion to reinstate any agreement in terms of section 86(11) of the NCA.

[11] In the replying affidavit, the applicant in addition to attaching the applicant's certificate in terms of the NCA and contending that the respondent had not delivered a Rule 7 notice challenging the authority of Ms Phyllis Lombard, denied all the allegations in the answering papers. There was nothing untoward with the denials, in my view.

THE MOLAWA MATTER – CASE NO 41194/2011

[12] In the second matter against Mr N S Molawa, Case No 41194/2011 (*"the Molawa matter"*), the applicant, SA Taxi Finance Solutions (Pty) Ltd,

seeks an order for the delivery into the possession of the Sheriff of a 2010 Foton Inkunzi 14 seater motor vehicle (*"the vehicle"*) forming the subject matter of a lease agreement. The applicant undertook to keep the vehicle safely at its own expense pending the outcome of the action.

[13] The lease agreement between the applicant and the respondent was entered into in June 2011. In terms of the lease agreement, the applicant leased to the respondent the vehicle. The respondent took possession of the vehicle. The agreed monthly instalment was R8 409,50. The first payment was due on 1 August 2010. The respondent paid the deposit of R2 500,00 and thereafter paid certain other amounts in reduction of his obligations under the lease agreement. However, later the respondent breached the lease agreement by failing to pay the full amount of the instalments due.

[14] As in the case of the previous application, the respondent invoked the provisions of section 86 of the NCA and applied for debt review in July 2011. The applicant in due course received from the debt counsellor a proposal for a reduction of the monthly instalment from R8 409,50 to R4 579,00 per month. The applicant made a counter-proposal, which the respondent did not accept. The respondent did not obtain a Magistrate's court order for the restructuring of the monthly rental. In the end, no agreement was reached. On 10 October 2011, the applicant, as it was entitled to do on its version, notified the respondent, his debt counsellor and the National Credit Regulator, in the prescribed manner, of its election to terminate the debt review in terms of section 86(10) of the NCA. At that point in time, at least 60 (sixty) business

days had passed from the date on which the respondent had applied for debt review, and whilst the respondent was in default in respect of his lease obligations.

[15] Towards the end of October 2011, the applicant instituted an action against the respondent for, *inter alia*, return of the vehicle. The respondent entered appearance to defend. The applicant applied for summary judgment. The respondent filed an opposing affidavit resisting summary judgment. The respondent was granted leave to defend.

[16] In the furtherance of its claim that the respondent has breached the lease agreement, the applicant calculated the rental payments made by the respondent subsequent to his application for debt review in July 2011, to total R25 339,90. The sum actually due by the respondent in terms of the lease agreement for the period July 2011 to April 2012 was R84 095,00 (R8 409,50 x 10). The shortfall was R58 755,10 and is increasing each month.

[17] The respondent admitted to non-payment in his affidavit resisting summary judgment and alleged that he paid according to his proposal before a Magistrate's court order was granted, instead of in accordance with the terms of the lease agreement. The applicant has cancelled the lease agreement in terms of clause 8.2.2 of the lease agreement. It was not in dispute that the respondent is using the vehicle as a taxi.

[18] In the answering papers filed out of time, the respondent raised a number of defences. Some of the defences, although not entirely credible to resist the relief sought, however raised issues of concern in the whole debt review process as discussed later in the judgment. In the main, the respondent contended that the applicant's sales agent misled him into believing that he could meet the financial obligations envisaged by the lease agreement and still make profit by the usage of the vehicle as a taxi. Further that he was not granted the opportunity to secure his own insurance for the vehicle as the applicant's insurance cover now proved unaffordable. When the respondent realised that he could not comply with his financial obligations, and to make ends meet, he resorted to debt restructuring thereby compromising his financial commitments to all his creditors and defaulting in respect of the lease agreement. In spite hereof, the respondent said he refused to surrender the vehicle to the applicant when requested to do so. He contended that he had made a reasonable instalment repayment offer to the applicant, which offer was unfairly rejected.

[19] The respondent further contended that even though the applicant had terminated the debt review process, he made payment to the applicant as proposed by his debt counsellor. The proposed attachment of the vehicle would be drastic and would prevent him from earning a living, including making repayments to the applicant. The lease agreement was still in place. There was no proper and prior analysis of his financial situation. The respondent also contended that by resorting to the relief currently sought, the applicant failed to promote the spirit of the NCA. The respondent has also

applied for condonation for the late filing of his answering affidavit, which was filed and served a day later. There was a reasonable explanation for the delay. Condonation ought to be granted.

[20] In the replying affidavit the applicant disputed the contentions of the respondent. The applicant contended that it was entitled to terminate the debt review process as the respondent had not yet obtained an order in the Magistrate's court for debt restructuring within the period provided for in the NCA. The respondent was given the option upfront to obtain his own insurance or use the insurance company of the applicant's choice. The applicant submitted that it participated in the debt review in good faith. It was in the business of financing taxis countrywide. For this reason the applicant used stringent measures to assess the financial risks when providing finance to taxi operators.

THE MOKOTONG MATTER – CASE NO 00089/2012

[21] I deal with the third matter in which the respondent is Mr A Mokotong, Case No 00089/2012 (*the Mokotong matter*). The applicant seeks similar relief as in the two other matters. The lease agreement was concluded in April 2009. In terms of the lease agreement, the applicant leased to the respondent a 2009 Toyota Quantum Sesfikile (*the vehicle*) to be used as a taxi. The respondent took possession of the vehicle.

[22] The agreed monthly instalment due in terms of the lease was R9 000,61. The respondent paid a deposit of R5 000,00, and thereafter paid certain other amounts in reduction of his lease obligations. However, on the version of the applicant, the respondent breached the agreement by failing to pay the instalments due timeously or at all. On 18 February 2010, the respondent was in arrears in the amount of R33 843,88.

[23] In November 2009 the respondent utilised the provisions of section 86 of the NCA and applied for debt review. The applicant and the respondent could not reach agreement as contemplated in section 86(8)(a) of the NCA in spite of negotiations. On 23 February 2010, the applicant terminated the debt review after giving notice to all parties concerned. The termination was in terms of section 86(10) of the NCA. At such termination, no order had been made by the Magistrate's court granting the debt restructuring application.

[24] On the calculations of the applicant, the payments made by the respondent for the period November 2009 to December 2011 totalled only R92 683,95. The sum actually due by the respondent for the period November 2009 to February 2012 is R144 009,76 (R9 000,61 x 16). The shortfall is R51 325,81 which is increasing each month.

[25] As in the other matters, the applicant cancelled the lease agreement, instituted an action which was defended by the respondent. Similarly, the application for summary judgment was opposed. The respondent was granted leave to defend on 1 February 2012.

[26] In the answering affidavit, the respondent raised largely the same defences as the respondents in the above matters. These included briefly, the discretion of the Court in granting the relief sought; the authority of the deponent to the founding papers and her knowledge of the transaction in question; the procedure followed by the applicant in resorting to interim relief after a failed summary judgment application; that at the time of the agreement the applicant sale's agent failed to properly assess the financial ability of the respondent to sustain payments in respect of the lease agreement; that the applicant participated in the debt review process in bad faith by rejecting respondent's repayment offer; and generally, that the return of the vehicle to the applicant will hamper the respondent's right to earn an income. For the rest, the allegations and counter-allegations on both sides were the same as in the other matters.

THE MANGEBENGE MATTER – CASE NO 38354/2011

[27] Finally, I deal with the fourth application. The matter of SA Taxi Finance Solutions (Pty) Ltd against Mr J Mangebenge, Case No 38354/2011 (*"the Mangebenge matter"*).

[28] The applicant and the respondent concluded a credit lease agreement in May 2010. In terms of the lease agreement the applicant leased to the respondent a Toyota Quantum Sesfikile 15 Seater (*"the vehicle"*). The vehicle was delivered to the respondent after he signed the agreement.

[29] The agreed monthly instalment due in terms of the lease agreement was R10 568,25. The respondent paid the required deposit of R5 500,00. The respondent breached the agreement by failing to pay the instalments due. On 14 September 2011 the respondent was in arrears in the sum of R73 800,73.

[30] In February 2011 the respondent applied for debt review in terms of section 86 of the NCA. There was no agreement between the parties during the debt review process. The debt counsellor had proposed a reduced monthly instalment from R10 568,25 to R4 000,00 per month. The applicant rejected the proposal on the basis that the debt would only be paid off in 2037, which is more than 25 years in the future, and long after the useful life of the vehicle. As a consequence, on 15 September 2011, the applicant, acting in terms of section 86(10) of the NCA, terminated the debt review by giving notice to all the parties concerned. At that stage, there was no order made by a Magistrate's court granting the debt restructuring application.

[31] On the calculations of the applicant, the only payments made by the respondent consequent to his application for debt review, and for the period 8 April 2011 to February 2012, totalled R61 760,22. The sum actually due by the respondent in terms of the lease agreement for the period March 2011 to April 2012 was R147 955,50 ($R10\,568,25 \times 14$). The shortfall is R86 195,28 which is increasing each month.

[32] The applicant has cancelled the lease agreement. The respondent was granted leave to defend under similar circumstances as the other matters when an application for summary judgment was launched.

[33] In the answering affidavit, the respondent raised substantially the same defences raised by the respondents in the other applications under discussion. In particular, the respondent contended that there was no certificate of registration as a credit provider attached to the founding papers. However, this issue was cured in the replying papers when the applicant provided the requisite certificate in terms of the NCA.

[34] The authority of the deponent to the founding papers was equally challenged. The same applied to the procedure followed by the applicant in seeking the present relief. The respondent also contended that the granting of credit to him as envisaged in the lease agreement was reckless on the part of the applicant. The respondent also contended that he was paying a monthly instalment to the applicant as suggested by his debt counsellor. However, a certificate of balance attached to the replying papers, and dated 29 May 2012, showed that at the date of the issuing of summons, the respondent was in arrears with his monthly instalments in the amount of R73 800,73. The current arrears were R150 457,33.

APPLICANT'S INTERIM RELIEF

[35] It is more than plain from the above background that in all the applications in issue, the applicant seeks interim relief in the form of attaching the motor vehicles in question pending the outcome of the respective trials. The relief sought is not a final interdict as contended for on behalf of the respondents. There is indeed a vast difference between the two remedies. In all the applications, it is not in dispute that the applicant is the lawful owner of the motor vehicles.

SOME LEGAL PRINCIPLES

[36] In *LAWSA* Vol XI, 2 ed, para 401, it is said that:

"An interim interdict is a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination. Whether an interdict is final or interim depends on its effect upon the issue and not upon its form."

Reference is made to *Apleni v Minister of Law and Order and Others* 1989 (1) SA 195 (A) at 201A-D. It is settled law that the requirements for the right to claim an interim interdict are, a *prima facie* right; a well-grounded apprehension of irreparable harm if the relief is not granted and the ultimate relief is ultimately granted; that the balance of convenience favours the granting of an interim interdict; and that the applicant has no other satisfactory remedy. See in this regard the well-known case of *Setlogelo v Setlogelo* 1914 (A) 221 at 227. It is also settled law that in exercising its discretion whether or

not to grant an interim interdict, the Court is enjoined to consider the above requirements, not in isolation, but conjunctively. In Prest, *The Law and Practice of Interdicts* (1996) at 39, the learned author states:

“Van der Linde accordingly distinguishes between two differing situations. On the one hand, a clear right; on the other, a right which is doubtful. On the one hand, a matter which can be decided by interdict alone; on the other, a matter which is not a proper one to be decided by interdict alone and requires a more complete judicial proceeding. On the one hand, a final interdict; on the other, an interim interdict. Each situation has its place in the scheme of things and both in the framework of interdicts. On the one hand, the applicant is entitled to final relief where the right asserted by him is clearly established; on the other, where the right asserted by the applicant, though prima facie established, is open to doubt, the applicant is entitled to lesser relief, viz interim relief until such time as he can establish, upon a balance of probabilities his right in a more complete judicial proceeding. This lesser relief is, however, dependent upon the applicant being able to satisfy the requirements relating to irreparable harm.”

LEGAL PRINCIPLES APPLIED TO THE FACTS

[37] Applying the above legal principles to the facts of the instant applications, it is apparent that the defences raised by the respective respondents, although attracting some sympathy, are clearly not a bar to an order for the interim attachment of the various motor vehicles. Ms Stevenson, who appeared for the applicants in all the four matters, referred the Court to numerous other case law emanating from this High Court and other High Courts involving litigation between the applicant and taxi operators. In some of these cases, interim relief was granted, whilst in others it was declined. However, each case must be determined on its own merits.

[38] In one of the cases where interim relief was granted in this High Court, namely *SA Taxi Securitisation (Pty) Ltd v Chesane Andries Rabohadi* (unreported Case No 26382/2009), at para [10] of the judgment, Boruchowitz J said:

“The function and purpose of an interim attachment order is to protect the leased goods against deterioration and damage and to keep them in safekeeping until the case between the parties has been finalised. Its purpose is not to enforce remedies or obligations under the credit agreement and the remedy does not form part and parcel of the debt enforcement process envisaged in the NCA. See in this regard J M Otto the National Credit Act Explained para 44.4. See also unreported judgment in SA Taxi Securitisation (Pty) Ltd v H W Young Case No 10249/2008 (CPD). Also compare Absa Bank Ltd v De Villiers.”

[39] In all the applications in question, the applicant’s unquestionable concerns, which runs like a golden thread throughout, can be summarised as follows. The lease agreements in respect of all the respondents provide that, in the event the applicant cancels the agreement for any reason (as it happened here), and the respondents dispute the cancellation, the respondents would be obliged to continue to pay the agreed instalments while the vehicles remain in their possession. On the facts set out above, it is evident from the respondents’ continued failure to make payments of monthly instalments that they do not intend to comply with these terms of the lease agreement.

[40] In addition, the respondents clearly intend to continue to utilise the applicant’s vehicles in the conduct of their taxi operations. They derive income therefrom, without paying the applicant what had been agreed on. This

results in the vehicles, used as taxis, being exposed on a daily basis to the rigours associated with taxi business, which also entails the extensive mileage that is travelled while the taxis are in operation.

[41] The applicant is equally apprehensive that not only are the taxis known for frequent involvement in accidents and consequential damage thereto, but the diminishing value of the vehicles on a daily basis. This is a situation over which the applicant has no control whatsoever, and therefore entirely powerless to protect its interests or minimise its risks in and to the vehicles.

THE APPLICANT'S SECURITY FOR DEBTS

[42] What is most telling, and well-founded in favour of the applicant is described in the following terms. The only security that the applicant has for the rather substantial sums of monies owed by the respondents collectively is being diminished in value on a continuous basis. These are the motor vehicles in the possession of the respondents. To await the outcome of the pending trials will undoubtedly prejudice the applicant. At that stage the vehicles, if still functional, will most likely have little or no value to discharge the sums owing by the respondents to the applicant. See in this regard the unreported judgment of Kgomo J, Case No 49779/2010 (GSJ), delivered on 13 September 2011, at para [39], comments with which I, respectfully, agree. In *Seaman Bros v Collett* 1928 (EDL) 170, the Court appeared to accept Stroud's Judicial Dictionary (s.e.v.) the definition of "security" as "*speaking generally, anything that makes the money more assured in its payment or*

more readily recoverable". At p 173 of the judgment, the Court (Gane AJ) went on to say:

"I notice that the New English Dictionary gives a somewhat more restricted definition of the word as meaning: 'Property deposited or made over, or bonds, recognizances, or the like entered into by or on behalf of a person in order to secure his fulfilment of an obligation, and forfeitable in the event of non-fulfilment; a pledge, caution.' I will assume, however, for present purposes, that Stroud's definition is correct, so that the word 'security' is in itself explicable. That cannot, however, prevent the word from being construed in the light of its context and the surrounding facts. The agreement was that a car sold and delivered to the purchaser should remain in the purchaser's hands as security until the price should be fully paid."

[43] The *Oxford English Dictionary*, 2nd ed, Vol XIV, defines the word "security" as, *inter alia*:

"The condition of being secure"

and,

"The condition of being protected from or not exposed to danger; safety",

or,

"The safety or safeguarding of (the interests of) a state, organization, person, etc., against danger, esp. from espionage or theft; ..."

Based on the above definition of “security” in the *Seaman Bros* case, the respondents in the instant applications are plainly in the same category of purchasers. On their own versions, the respondents have no meaningful income and they are not possessed of any meaningful assets, as argued on behalf of the applicant. It is therefore more than plain that the security held by the applicant in the form of the motor vehicles presently in possession of the respondents is extremely fragile and precarious. As owner of the motor vehicles, the applicant ought not to be placed in such position without adequate legal remedy.

[44] Mr Lavine, who appeared on behalf of the respondent in the *Soya* matter (he also appeared for the respondents in the two other applications as indicated below), argued that pursuant to the unsuccessful summary judgment application, the respondent was granted leave to defend. Therefore, effectively, the applicant, “*now seeks almost identical relief that was sought in the application for summary judgment, save that the relief sought now is interim in nature*”. In the various defences raised by the respondent in resisting summary judgment in short, it was argued that the granting of the order sought by the applicant in the present application would have the effect that the respondent would be unable to earn a living, unable to make payments on the amount owing to the applicant in terms of the agreement and, “*unable to pay legal fees to conduct the present litigation*”, and that the balance of convenience militates in favour of dismissing the interim application with costs.

[45] In the *Molawa* matter, Mr Hadebe, who appeared on behalf of the respondent, advanced virtually the same argument as Mr Lavine. Additionally, he submitted that the applicant ignored the provisions of the NCA and that the respondent's debt review application was pending in the magistrate's court.

[46] In the *Mokotong* matter as well as the *Mangebenge* matter, Mr Lavine for the respondents presented the same arguments as in the other matter in which he represented the respondent. It is unnecessary, for present purposes, to recite the submissions.

[47] It is trite that in the exercise of its discretion, the Court in granting leave to defend in summary judgment applications and the granting of interim relief (as in the present matter), uses different approaches.

INTERIM RELIEF AS OPPOSED TO SUMMARY JUDGMENT

[48] The requirements for the granting of interim relief have already been set out in para [36] of this judgment. The fact that the respondents were granted leave to defend at the conclusion of the summary judgment applications was rather overplayed. It does not necessarily mean that they can successfully resist a subsequent claim for interim relief. In a summary judgment application the plaintiff is not called upon to enter the merits of the matter, but is confined to what the rule, namely Rule 32 of the Uniform Rules of Court, allows. On the other hand, for a defendant to successfully resist

summary judgment, "*it is sufficient if he discloses fully the nature and grounds of a bona fide defence to the action*". See *Venter v Cassimjee* 1956 (2) SA 242 (N) at 245H. This means that the defendant must raise an arguable defence. See also *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423H.

[49] The standards of proof between interim relief and summary judgment are different. The reliance on the fact that the respondents were granted leave to defend is, in my view, misplaced. The defences will be relevant in the pending trials, not in the present applications. There is also no merit in the assertion that the applicant unduly delayed in launching the present applications.

THE AUTHORITY AND PERSONAL KNOWLEDGE OF MS PHYLLIS LOMBARD

[50] Prior to concluding, I need to deal with one other common defence raised by all the respondents. This was that the deponent to the founding papers in all the summary judgment applications, Ms Phyllis Lombard, had no personal knowledge of the subject matter of the affidavit. In other words, that Ms Lombard could not swear positively to the facts in each of the respective matters. In this regard the respondents placed reliance on the unreported judgment of Coppin J in *SA Taxi Securitisation (Pty) Ltd v Bongani Enoch Dlamini*, Case No 00643/2012 (GSJ). In that matter the learned Judge found that the contents of the founding affidavit deposed to by the selfsame Phyllis

Lombard was “*nothing more than a statement of information and belief that is based purely on inadmissible hearsay evidence*”, and that the plaintiff’s affidavit in support of summary judgment in each of those matters accordingly does not meet the requirements of Rule 32(2).

[51] The contentions of the respondents are untenable for a number of reasons. Briefly stated, the founding affidavits of Ms Phyllis Lombard in the present applications are clearly different to those filed in the summary judgment applications. The latter affidavits were plainly lacking in certain respects regarding the knowledge of the deponent. This is apparently the reason why summary judgment was not granted. However, the founding affidavits in the present applications, properly read, complied in all respects with the requirements of Rule 32(2) of the Uniform Rules. The requirements were further re-emphasised in the replying affidavits. Furthermore, all the respondents had not invoked the provisions of Rule 7 of the Uniform Rules to challenge the authority of Ms Phyllis Lombard as was required. In addition, the present applications clearly concern interim relief and not summary judgment applications.

CONCLUSION

[52] I conclude that the applicant has succeeded more than necessary in establishing all the requirements for the granting of interim relief in all the four matters. On all the facts, it is highly improbable that the applicant would have

lent money to the respondents without proper assessments and investigations as claimed by the respondents. The applications must succeed with costs.

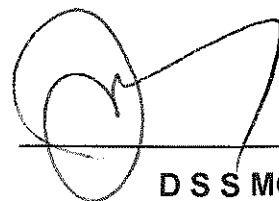
PROCEEDINGS BY WAY OF AN ACTION AND MOTION PROCEEDINGS

[53] *En passant*, I have observed that there are numerous and similar matters on the motion court roll of this High Court involving the applicant and other financial institutions who are chasing debtors, such as the present respondents. The tendency of plaintiffs first proceeding by an action, and later, when summary judgment applications failed, to institute motion proceedings for interim relief in the same matters, is on the increase. The debtors are frequently dragged before the courts based on the same cause of action. The result is that the costs of litigation are inevitably increased in instances where the debtors are already in financial trouble. It may be that in the process their rights to access to courts in terms of section 34 of the Constitution, as argued in the present applications, are curtailed. However, for present purposes, I need not make a conclusive finding in this regard. It may be that instead, the rights of the creditors such as the applicant in the present matters ought to be reviewed. They must, for example, at initial stages of litigation decisively elect the nature of the proceedings to be instituted and be kept thereto. The tendency remains a matter of concern.

ORDER

[54] In the result I make the following order:

1. In the *Soya* matter (Case No 26126/2011) an order is granted in terms of prayers 1 (in particular 1.1, 1.2, 1.2.1 and 1.2.2), 2, 3 and 4) of the notice of motion dated 5 April 2012.
2. In the *Molawa* matter (Case No 41194/2011):
 - 2.1 Condonation is granted for the late filing of the answering papers.
 - 2.2 An order is granted in terms of prayers 1 (in particular 1.1, 1.2, 1.2.1 and 1.2.2), 2, 3 and 4 of the notice of motion dated 5 April 2012.
3. In the *Mokotong* matter (Case No 00089/2012) an order is granted in terms of prayers 1 (in particular 1.1, 1.2, 1.2.1 and 1.2.2), 2, 3 and 4 of the notice of motion dated 12 March 2012.
4. In the *Mangebenge* matter (Case No 38354/2011) an order is granted in terms of prayers 1 (in particular 1.1, 1.2, 1.2.1 and 1.2.2), 2, 3 and 4 of the notice of motion dated 5 April 2012.



D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT

MS R J STEVENSON

INSTRUCTED BY

MARIE-LOU BESTER INC

COUNSEL FOR THE RESPONDENTS
(THE SOYA MATTER, THE
MOKOTONG MATTER AND THE
MANGEBENGE MATTER)

K LAVINE

INSTRUCTED BY

LARRY MARKS ATTORNEYS

COUNSEL FOR THE RESPONDENT
(THE *MOLAWA* MATTER)

ATTORNEY T HADEBE

INSTRUCTED BY

T HADEBE ATTORNEYS

DATE OF HEARING

6 JUNE 2012

DATE OF JUDGMENT

26 OCTOBER 2012

SUMMARY

Credit agreement – consumer credit agreement debt review proceedings – creditor lawfully withdrawing from debt review process – creditor first proceeding by way of action against debtors and later by motion proceedings – pursuant to unsuccessful summary judgment – such conduct on part of creditor having undesirable effect of increasing legal costs when debtors already impecunious – what constitutes “*security*” for the creditor for payment of debt owing in terms of the credit agreement.