

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 160/2014

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

2 MAY 2014

FHD VAN OOSTEN

In the matter between

CAPITAL ACCEPTANCES (PTY) LTD

APPLICANT

and

VELAKANCANE TRADING CC

FIRST RESPONDENT

KWENZEKILE MTHETHWA

SECOND RESPONDENT

VELAKANCANE MTHETHWA

THIRD RESPONDENT

Contract – Lease – Practice - Attachment of grader pursuant to cancellation of lease agreement pending proof of damages - two defences raised by lessee - first defence justus error - requirements of - absence of proof of reasonable mistake - defence rejected - second defence - alleged overcharge in respect of VAT - VAT correctly charged on total purchase price although portion thereof subsidised - defence unsustainable - application granted

J U D G M E N T

VAN OOSTEN J:

[1] In this application the applicant seeks an order for the attachment and return of a certain Bell grader pursuant to its cancellation of a written lease agreement entered into between the applicant as lessor and the first respondent as lessee. The second and third respondents duly bound themselves as sureties and co-principal debtors in

favour of the applicant for the due and punctual payment by the first respondent to the applicant of all amounts due under the lease agreement.

[2] The respondents have raised two defences: firstly, that the lease agreement was signed by the third respondent on behalf of the first respondent 'under the reasonable impression and belief that the first respondent was purchasing a New Bell Grader....' and, secondly, that the applicant has 'overcharged' the first respondent with the sum of R140 000-00, being value added tax in respect of a portion of the purchase price of the grader that was financed by the Department of Trade and Industry under a scheme of assistance to BEE businesses. Each of the defences will now be considered separately.

[3] The first defence in essence concerns the nature of the agreement: the written signed lease agreement clearly and beyond any doubt both in its heading (Lease Agreement) and terms (with reference to *inter alia* the lessor, the lessee and rentals payable) refers to and deals with a lease agreement. Ownership of the grader is specifically dealt with in clause 3 of the agreement: it remains with the applicant 'at all times'. As opposed hereto none of its provisions can, in any way, be reconciled with an agreement of purchase and sale. The respondents contend that an agreement of purchase and sale was in fact concluded which was brought to the fore when, after cancellation of the agreement by the applicant, it dawned on them that in terms of the lease agreement the grader had to be surrendered to the applicant upon expiry of the lease. No reliance is placed on rectification of the lease agreement and it has not been alleged that a common mistake had occurred. Nor has it been alleged that the respondents were misled in any way. The defence raised, at best for the respondents, is one of *justus error* (*Christie The Law of Contract in South Africa* 6ed p181). In order to succeed the respondents are required to show that the mistake was reasonable. In signing the lease agreement the third respondent on behalf of the first respondent is presumed, at least *prima facie*, to have been acquainted with the contents of the lease agreement and that he knew what it contained (*Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd and another* 1979 (3) SA 210 (T) 215A-C quoted with approval in *KPMG Chartered Accountants (SA) v Securefin Ltd and another* 2009 (4) SA 399 (SCA) para [28]). The allegations in support of the defence are that it had always been the intention of the respondents to purchase the

grader and that they were under the impression that a purchase and sale agreement had been concluded. The allegations clearly fall short of proof of reasonableness. *Caveat subscriptor* applies and I am not satisfied either that a mistake had occurred or that the mistake, had it occurred, was reasonable. It follows that the first defence must fail.

[4] The VAT defence is short lived: the amount of VAT reflected in the agreement and paid by the applicant, was calculated on the total purchase price paid to the seller in respect of the grader. The fact that a portion of the purchase price (R1m) was financed by the Department of Trade and Industry is of no moment. The liability for payment of VAT is based and calculated on the full purchase price.

[5] In the absence of any sustainable defence the applicant is entitled to the relief sought.

[6] In the result the following order is made:

1. The sheriff of the high court is authorised and directed to attach, seize and hand over to the applicant a Bell model grader, with serial number BMG644893, VIN number 1DW670GXJCC644893 and engine number PE6068H872270, wherever it may be found.
2. The applicant is granted leave to apply on the same papers, duly supplemented, for such damages as it may have suffered following the cancellation of the agreement of lease, to be calculated in terms of clause 12 of that agreement.
3. The respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of this application on the scale as between attorney and client.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANTS
APPLICANT'S ATTORNEYS

ADV DT v R DU PLESSIS SC
DRSM ATTORNEYS

COUNSEL FOR RESPONDENTS

ADV N ALLI

RESPONDENTS' ATTORNEYS

KHUMALO MASONDO

DATE OF HEARING

29 APRIL 2014

DATE OF JUDGMENT

2 MAY 2014