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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION JOHANNESBURG**

CASE NO: 15/12692

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

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DATE

.....

SIGNATURE

In the matter between:

MAN FINANCIAL SERVICES (SA) (PTY) LTD

Applicant

and

FST LOGISTICS (PTY) LTD

First Respondent

VENTER, MICHAEL JOHN

Second Respondent

MATTHYSSEN, FANIE

Third Respondent

FS TRUCKING (PTY) LTD

Fourth Respondent

ROUSSOUW, DORNÉ

Fifth Respondent

JUDGMENT

YACOUB, AJ:

- [1] This is an application for the return of equipment, made up of 15 trucks and 9 trailers, from the first respondent, FST Logistics (Pty) Ltd (“Logistics”) to the applicant (“MAN”).
- [2] The equipment had been the subject of rental agreements between the fourth respondent, FS Trucking (Pty) Ltd (“Trucking”), and MAN, in terms of which MAN purchased the equipment, at the request of Trucking, for the purpose of renting it to Trucking. It was among Trucking’s responsibilities under the rental agreements to maintain and insure the equipment, as well as to pay the rental amount, which was liable to change if the prime rate changed.
- [3] The term of the agreements was from 18 May 2012 to 05 August 2015. The agreements provided that Trucking would be in default if, amongst other things, it failed to comply with a material provision of the agreements, or was placed into business rescue or liquidation.
- [4] MAN describes the arrangement between itself and Trucking as one which “financed the acquisition” of the equipment, despite the fact that the agreements provided for the equipment to be returned to MAN at the end of their term. The agreements are variously referred to as rental agreements and credit agreements. For purposes of this judgment I do not consider their true nature to be material.
- [5] Before the term of the agreements expired, and, in fact, shortly after they were concluded, Trucking defaulted on the agreements by failing to keep up its payments, and by being placed in business rescue on 27 August 2012.
- [6] Oddly, the business rescue practitioner is not cited in these proceedings, nor has consent been obtained for bringing proceedings against Trucking while it is in business rescue. Submissions were made to me to the effect that, while the business rescue proceedings had apparently not been concluded, the omission is of no moment, as no relief is sought against Trucking and the equipment does not form part of Trucking’s assets. For purposes of this application, I shall accept that those submissions are correct.

- [7] Trucking failed to make payments to MAN in terms of its Business Rescue Plan. Logistics then approached MAN, saying that it had contracts that could be carried out by using the equipment, and requested permission to use the equipment. MAN agreed, and Logistics proceeded to use the equipment for the same purposes for which Trucking had used them. The Use Agreement was entered into between Logistics and MAN, but was only signed on 14 July 2014, a year after the arrangement between Logistics and MAN had commenced.
- [8] The Use Agreement allowed Logistics to use the equipment on the terms set out in the “use agreement clauses” of the rental agreements, which are called in the Use Agreement “credit agreements”. Unfortunately the Use Agreement does not identify which clauses those are. However, reading the credit/rental agreements reveals that the only part which deals with the actual use of the equipment is Clause 3, which is entitled “the Goods”. Clause 3, amongst other things, requires Trucking to maintain the equipment.
- [9] The Use Agreement provides that Logistics will make monthly payments to MAN which will be at least equal to the amounts due as “instalments” in the rental/credit agreements, and that Logistics will make payments towards Trucking’s debt (plus interest) to MAN resulting from Trucking’s non-payment. Trucking was, however, not precluded from also making payments towards the debt. Logistics and Trucking were now co-principal debtors.
- [10] The Use Agreement provides that if any payment due is not made punctually, the equipment will be returned to MAN. It does not contain a non-variation clause, nor does it provide that the entirety of its terms are contained in the written document.
- [11] Logistics was unable to pay an amount equal to the monthly instalments or rental, variously identified as R575 000 and R585 000, let alone any extra amounts. It made a few small payments, which in view of the size of the debt (in excess of R20 million) were insignificant.

- [12] MAN issued summons against, *inter alia*, Logistics and Trucking in March 2015, and issued this application on an urgent basis in April 2015. The relief sought in this application mirrors that in one of the prayers contained in the summons. This application was eventually heard in the normal course.
- [13] The summons issued by MAN sought the payment of amounts outstanding in terms of the rental/credit agreements, while in this application MAN seeks only the return of the equipment.
- [14] Logistics claims that the Use Agreement was a common law letting and hiring of property agreement, which, in addition to the terms of the written agreement, imposed the obligation upon MAN to
- 14.1 deliver the equipment to Logistics;
 - 14.2 guarantee Logistics undisturbed enjoyment of the equipment;
 - 14.3 maintain the equipment, and
 - 14.4 guarantee Logistics against defects in the equipment and damages resulting from those defects.
- [15] Logistics claims also that the agreement was continually renegotiated, and the upshot of these renegotiations was that Logistics was to be permitted to pay what it could, when it could. As a result, Logistics's intermittent payments of approximately R55 000 in March 2015, which is less than 10% of the full monthly rental or instalment, would, on Logistics's version, have fulfilled Logistics's obligations under the Use Agreement.
- [16] Logistics claims also that it was not given undisturbed enjoyment of the equipment, that at least some of the equipment was never delivered to it in a condition in which it was fit for purpose, and that MAN failed to maintain the equipment. Logistics was, therefore, in any event not obliged to make payments to MAN.
- [17] Unsurprisingly, MAN denies Logistics's version.

- [18] Mr Theron, for the first, second and fourth respondents, relies heavily on the principle established in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), to the effect that application proceedings in which final relief is sought must be determined on the respondent's version, unless the respondent's version is "so far-fetched or clearly untenable that the Court is justified in rejecting [it] merely on the papers".¹
- [19] Mr Theron submitted also that Logistics did not bear the *onus* of proving the agreement that it alleged, but that because MAN relies on breach of an unvaried agreement, MAN bore the *onus* of disproving the varied agreement. In support of this submission, Mr Theron relied on the judgments of the then Appellate Division in *Kriegler v Minitzer* 1949 (4) SA 821 (A) ("*Kriegler*"); *Topaz Kitchens (Pty) Limited v Naboom Spar (Edms) Beperk* 1976 (3) SA 470 (A) (*Topaz Kitchens*) and *Stocks & Stocks (Pty) Limited v T J Daly & Sons (Pty) Limited* 1979 (3) SA 754 (A) ("*Stocks & Stocks*"), all of which hold that it is part of a plaintiff's *onus* of proving the terms of the agreements on which it relies to prove also that the agreements do not include the terms alleged by the defendants.
- [20] I have considered these submissions carefully and have come to the conclusion that this case is distinguishable from the cases of *Kriegler*; *Topaz Kitchens*, and *Stocks & Stocks*. In each of those cases, the defendant had admitted the terms of the agreements alleged by the plaintiff, but alleged an additional term. The courts held that the plaintiff's *onus* was to prove its complete agreement, that is, that there were no other terms of the agreement.
- [21] In this case, however, the Logistics does not simply admit the terms of the agreement alleged by MAN, and allege further terms. This might have been the case, for example, had Logistics pleaded that the terms of the Use Agreement were as set out in the written document, with the addition of the

¹ At 635C

terms of a common law letting and hiring of property agreement. However, Logistics went further than that.

- [22] Logistics has alleged what is, in essence, a completely different agreement. Although the written Use Agreement refers to and relies on the rental/credit agreements, Logistics alleges that the actual Use Agreement requires delivery afresh to Logistics, of equipment in a better condition than Logistics alleges the equipment was in when it obtained permission to use the equipment instead of Trucking, or when the Use Agreement was entered into. Logistics alleges also that the actual Use Agreement contains terms regarding maintenance very different to those in the rental/credit agreements.
- [23] While it is arguable that these allegations may be subsumed under the category of terms additional to the written agreement on which MAN relies, Logistics alleges that the terms of the actual Use Agreement regarding payment to MAN are fundamentally different from those contained in the written Use Agreement.
- [24] The written Use Agreement states that Logistics is to pay to MAN every month a minimum amount which is equal to the instalment (or rental) due in terms of the credit (or rental) agreements, which on Logistics's version, was an amount of R585 000 per month. Logistics contends that the actual Use Agreement has been amended so that Logistics will, essentially, pay what it can, when it can. This is clearly a fundamental amendment to the terms of the Use Agreement. Logistics is therefore not simply alleging an additional term to an admitted, otherwise common cause, agreement, but is disputing the terms of the agreement alleged by MAN, and alleging different terms. The *onus* to prove those different terms is therefore on Logistics.
- [25] However, it appears to me that in application proceedings the *onus* is irrelevant. This is because, whether the *onus* lies with the applicant or the

respondent, the evidence on which an application is decided (that is, the probabilities) is determined in accordance with the rule in *Plascon-Evans*.²

- [26] I must therefore decide the matter on the Logistics's version, unless that version contains allegations which are untenable or far-fetched.
- [27] Logistics's contention that MAN had an obligation to deliver the equipment to Logistics, in a condition that was apparently better than the condition the equipment actually was in, and to guarantee Logistics undisturbed enjoyment must be weighed against Logistics's own allegation that the use of the equipment was simply "taken over" by Logistics from Trucking, and that the written Use Agreement was entered into in order for Logistics "to retain usage of the trucks and trailers". The two sets of allegations are so inconsistent with one another that they cannot both be true.
- [28] Logistics clearly already had use of the equipment, which it took over from Trucking, before the Use Agreement was entered into, and could not expect any fresh delivery other than the delivery it obtained by way of MAN's agreement that it could take over from Trucking, nor could Logistics expect delivery of the equipment in any condition other than the condition the equipment was in when Logistics took it over from Trucking.
- [29] It is common cause that the rental/credit agreements placed the obligation of maintenance on Trucking. Having found that the "use agreement clause" of those agreements must be clause 3, in which the maintenance obligation is contained, I am inclined to reject Logistics's contention that, in terms of the actual Use Agreement, MAN was now obliged to maintain the equipment.
- [30] This inclination is supported by an examination of the probabilities of the essence of Logistics's version. The essence of Logistics's version is that, in exchange for intermittent and uncertain payments of a fraction of the monthly

² See, in this regard, *Ngqumba en 'n ander v Staatspresident en andere; Damons NO en andere v Staatspresident en andere; Jooste v Staatspresident en andere* 1988 (4) SA 225 (A) at 259C-263E and the authorities there cited.

payment amount, MAN agreed to let Logistics use the equipment and accepted an additional obligation of maintaining that equipment, which it had not had when it was entitled to monthly payments of the full amount. MAN is therefore said to have relinquished its right to a substantial monthly payment in exchange for shouldering a considerably more onerous obligation, for which it reaps little or no return. This is, in my view, both clearly untenable and so far-fetched that I am entitled to reject this version on the papers alone.

[31] In the circumstances, I find that Logistics's version is not only far-fetched and untenable, but also internally contradictory. I therefore reject Logistics's version, and find, on a balance of probabilities, for MAN.

[32] During argument, Mr Strydom made it clear that MAN sought an order only against Logistics.

[33] For the reasons above, I make the following order:

1. The first respondent is to cause delivery of the following assets to the applicant:

1.1. 2012 MAN TGS 26.440 BLS LX 6X4 T/T C/C
With chassis number: AAM.....
And with engine number: 51.....

1.2. 2012 MAN TGS 26.440 BLS LX 6X4 T/T C/C
With chassis number: AAM78.....
And with engine number: 51.....

1.3. 2012 MAN TGS 26.440 BLS LX 6X4
With chassis number: AAM7.....
And with engine number: 515.....

1.4. 2012 MAN TGS 26.440 BLS LX 6X4

With chassis number: AAM.....
And with engine number: 51.....

1.5. 2012 MAN TGS 26.440 BLS
With chassis number: AAM78.....
And with engine number: 51.....

1.6. 2012 MAN TGS 26.440 BLS LX 6X4
With chassis number: AAM7.....
And with engine number: 515.....

1.7. 2012 MAN TGS 26.440 BLS LX 6X4
With chassis number: AAM78.....
And with engine number: 515.....

1.8. 2012 MAN TGS 26.440 BLS LX 6X4
With chassis number: AAM7.....
And with engine number: 515.....

1.9. 2012 MAN TGS 26.440 BLS LX 6X4
With chassis number: AAM7.....
And with engine number: 515.....

1.10. 2012 MAN TGS 26.440 BLS LX 6X4
With chassis number: AAM7.....
And with engine number: 515.....

1.11. 2012 MAN TGS 26.440 BLS LX 6X4
With chassis number: AAM.....
And with engine number: 515.....

1.12. 2012 MAN TGS 26.440 BLS LX 6X4
With chassis number: AAM7.....
And with engine number: 515.....

- 1.13. 2012 MAN TGS 26.440 BLS LX 6X4
With chassis number: AA.....
And with engine number: 51.....
- 1.14. 2012 MAN TGS 26.440 BLS LX 6X4
with chassis number: AAM.....
and with engine number: 515.....
- 1.15. 2012 MAN TGS 26.440 BLS LX 6X4
with chassis number: AAM.....
and with engine number: 51.....
- 1.16. 2007 AFRIT 6 12 M TANDEM AXLE I
with chassis number: ADV7.....
- 1.17. 2007 AFRIT 6 12 M TANDEM AXLE I
with chassis number: ADV7.....
- 1.18. 2007 AFRIT 6 12 M TANDEM AXLE I
with chassis number: ADV.....
- 1.19. 2007 AFRIT 6 12 M TANDEM AXLE I
with chassis number: AD.....
- 1.20. 2007 AFRIT 6 12 M TANDEM AXLE I
with chassis number: ADV7.....
- 1.21. 2007 AFRIT 6 12 M TANDEM AXLE I
with chassis number: ADV7.....
- 1.22. 2007 AFRIT 6 12 M TANDEM AXLE I
with chassis number: ADV76.....

1.23. 2007 AFRIT 6 12 M TANDEM AXLE I
with chassis number: A.....

1.24. 2007 AFRIT 6 12 M TANDEM AXLE I
with chassis number: ADV7.....

2. If the first respondent refuses to hand back the assets listed in paragraph 1 of this order, the Sheriff is authorised to take into possession the assets described in paragraph 1 of this order, wherever they may be found, and hand them over to a representative of the applicant.
3. The first respondent is ordered to pay the costs of this application.

S YACOOB
Acting Judge of the South Gauteng
High Court, Johannesburg

Date of Hearing: 20 May 2015
Dare of Judgment: 05 October 2015

APPEARANCES

APPLICANT:	R Strydom SC Instructed by Smit Sewgoolam Incorporated
FIRST, SECOND and FOURTH RESPONDENTS:	EL Theron SC CA du Plessis Instructed by Brits & Weideman Inc