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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 07550/2019

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

.....
DATE

.....
SIGNATURE

In the matter between:

THE STANDARD BANK OF SA LIMITED

Applicant

and

LANTAU TRADING 365 (PTY) LIMITED
(Registration No: 2011/141489/07)

First Respondent

BLUESTONE TRENCH TECHNOLOGIES CC
(Registration No: 2010/030270/23)

Second Respondent

KUMESHEN PILLAY
(ID No: [...])

Third Respondent

JUDGEMENT

CARSTENSEN AJ:

[1] The applicant seeks an order in terms of the amended notice of motion which was amended without objection and effected on 15 May 2019. The applicant seeks cancellation of agreements entered into between the applicant and the first respondent, return of the assets and costs. The question of damages, being the difference between the balance outstanding on the agreements and the amount for which the asset will be sold and/or the value of the asset, is to be postponed for determination in due course.

[2] Ms Pillay who appeared for the respondents confirmed that she would not advance all the points raised in the answering affidavit, but restrict her argument to three points.

[3] The first is that the applicant did not establish a breach in the agreement in that the certificate of balance relied upon by the applicant did not set out how the amount stated in the certificate was computed.

[3.1] From an analysis of the papers, it appears that the first respondent was in arrears as at January 2019 in respect of one instalment for the first deal, number [...]1, and approximately three instalments in respect of the second deal, number [...]2.

[3.2] In the answering affidavit, the respondents contend that

there is no breach/es as alleged, but do not dispute that payments had not been made or that the respondents are in arrears, notwithstanding the fact that the answering affidavit was only signed on 8 April 2019

[3.3] The respondents concede that clause 23.12, the “certificate of balance” clause contained in the “*standard terms and conditions*,” had been complied with, but suggested that there was no proof that there was any arrears. It was also conceded however that the respondents, although denying the breach, had not provided any evidence to contradict the contents of the certificate of balance. Ms Pillay also could not refer me to any authority to the effect that the applicant was obliged to set out how the amount of the arrears was calculated. The applicant sets out in the founding affidavit that the respondents had breached the finance agreements by failing to make timeous payments of the amounts due.

[3.4] Thus I cannot find that the respondents have, on this basis established a defence to the applicant’s claim.

[4] The second point raised by Ms Pillay on behalf of the respondents, was that there was a reference to a suretyship in the founding affidavit, but in fact the document attached is headed a guarantee, which she contended was different in nature to a suretyship as the

document recorded that the guarantor:

“hereby unconditionally guarantee and undertake as principal and independent obligation (and not merely as ancillary obligation) to and in favour of the Standard Bank of South Africa Limited ...:

___1 the due, punctual and full payment of all debts which Lantau Trading 356 (Pty) Limited ... now owes or may in the future owe to the Bank in terms of or arise in connection with agreements concluded or to be concluded between the Debtor(s) and the Bank; and

___2 to pay the Bank on first written demand from the Bank without delay, any and all amounts which are or may become due and payable in respect of the Debts.”

[4.1] I am satisfied with the argument of Mr Viljoen, who appeared for the applicant that nothing turns on this point. The document is clear in its terms. On a reading of its provisions, it is clear that each of the signatories to the guarantees undertook to make payment on demand of all amounts which are due and payable by the first respondent to the applicant.

[4.2] I also point out that the document meets all the formal requirements necessary of a deed of suretyship.

[4.3] I am of course bound by the decision of Vasco Dry

Cleaners v Twycross¹ where the court found:

“When a court is asked to decide any rights under such agreement, it can only do so by giving effect to what the transaction really is, not to what it in form purports to be.”

[5] The next point raised by Ms Pillay was that the court should set a reserve price in respect of the sale of the assets.

[5.1] However the respondents do not set out what that reserve price should be in the answering affidavit or set out what the fair and reasonable market value of each of the assets are.

[5.2] Ms Pillay suggested that it is contrary to public policy to sell any assets without a reasonable reserve price. To do so would be unfair and repugnant to the values of society. A fair and reasonable market related reserve price must be placed on all goods.

[5.3] Whilst there may be sympathy for this argument and possibly, a ridiculously low price may be contrary to public policy, and/or contrary to the provisions of the Consumer Protection Act, no basis for this conclusion has been set out by the respondents.

¹ 1979 (1) SA 603 (A)

[5.4] However the agreement itself provides protection for the respondents, as the applicant is only entitled to claim the total amount of repayments not yet paid and any amounts owing, less the value of the goods as at the date on which the applicant obtained possession of the goods.

[5.5] In any event, as was pointed out by Mr Viljoen, the second answer to this concern is that the question of damages is to be postponed and the order which the applicant is entitled to in this regard is the difference between the balance outstanding by the respondents and the amount for which the assets were sold and/or the value of the assets, whichever is the greater.

[5.6] I intend to make this clear in the order.

ORDER

[6] In the result, I make the following order:

[6.1] the cancellation of the agreement under deal number [...]1 is confirmed;

[6.2] the sheriff of the court or his lawful deputy is authorised, directed and empowered to attach, seize and hand over to the applicant the asset, wherever it may be found, being:

- Make/model/description:

2016 HPC Steel Pressings Tri-Axle FLA

- Chassis number:

AA9B245MBCWLX2566;

[6.3] the question of damages is postponed *sine die*;

[6.4] in the event that there is a shortfall after the asset has been sold and the balance outstanding by the respondents to the applicant, the applicant is granted leave to approach a court on the same papers, duly supplemented, for payment of the difference between the balance outstanding and the amount for which the asset is sold and/or the fair and reasonable market value of the asset, whichever is the greater;

[6.5] the cancellation of the agreement under deal number [...]2 is confirmed;

[6.6] the sheriff of the court or his lawful deputy is authorised, directed and empowered to attach, seize and hand over to the applicant the asset, wherever it may be found, being:

- Make/model/description:

2012 Top Trailer Interlink Side Tipper

- Serial/registration numbers:

[...]4 NW and [...]9 NW

- Chassis/serial numbers:

ADSM236SAC1ST1207 and ADSM236WAC1ST1206;

- [6.7] the question of damages is postponed *sine die*;
- [6.8] in the event that there is a shortfall after the asset has been sold and the balance outstanding by the respondents to the applicant, the applicant is granted leave to approach a court on the same papers, duly supplemented, for payment of the difference between the balance outstanding and the amount for which the asset is sold and/or the fair and reasonable market value of the asset, whichever is the greater;
- [6.9] the respondents are ordered to pay the applicant's costs of suit, jointly and severally, the one paying, the other to be absolved.

PL CARSTENSEN

[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

DATE OF HEARING: 06/09/2019

DATE OF JUDGEMENT: 08/10/2019

APPEARANCES:

COUNSEL FOR APPELLANT: Adv JC Viljoen

INSTRUCTED BY: Stupel and Berman Inc

COUNSEL FOR RESPONDENT: Adv Pillay

INSTRUCTED BY: Aniraj Bauchoo Attorneys