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

CASE NO: 57252/2021

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**
(4) DATE: 8 SEPTEMBER 2023
(5) SIGNATURE: **ML SENYATSI**

In the matter between:

CATERPILLAR FIANCIAL SERVICES SOUTH AFRICA (PTY)LTD **Applicant**

(Registration number: 2017/486709/07)

And

ZERO AZANIA (PTY) LTD **First Respondent**

(Registration number: 2012/033424/07)

JUDGMENT

SENYATSI J

- [1] This is an opposed application in terms of which the applicant seeks return of two Caterpillar units, consisting of two motor graders, a Large Caterpillar Excavator 336 with vin number: J[...] and a Large Caterpillar Excavator 366 with vin number: J[...]9 (“the Units”). The respondent is in possession of the units. The units were all funded in terms of a master instalment sale agreement (“the agreement”) concluded by the parties on 20 July 2020 at Kempton Park. The units were sold to the respondent for R 7 245 000.00.

[2] Clause 3 of the agreement provided as follows:

"Notwithstanding the existence of a security interest, you acknowledge that we own and hold title to a unit unless and until title is transferred to you upon completion of your obligations to us. A unit is and will remain our property regardless of its use or manner of attachment to immovable property and we reserve right comment add an interest in end to the units until all amounts of into us have been irrevocably paid in full. Upon the completion of all payments pursuant to a schedule, we will transfer title and ownership of the relevant unit to you via a bill of sale. In addition and to further secure the payment and performance of your obligations to us under this Agreement and to secure all other obligations of every kind and nature that you may owe to us or any of our affiliates now or in the future, you grant us the continuing fence ranking security interest in the unit set out in the schedule(together , the 'Security'). You will, at your expense, do an act and execute, Acknowledge, deliver, file, register and record any documents that we may deem desirable to protect our Security interest in any unit and our rights and benefits under this Agreement. You will pay any cost associated with any security interest and preparation of any document related to this agreement. We have the right (but not obligation) to inspect a unit and its maintenance records and observe its use and determine its hours of usage. You at your expense, will maintain each unit in good operating order, repair end condition and perform maintenance at least as frequently as stated in an applicable operator's guide, service manual or lubrication and maintenance guide. You will only use the original equipment manufacturer parts on the unit.

You must not alter a unit or a fix any accessory or equipment to a unit if doing so will impair its originally intended function or reduce the units value."

The event of default would in terms of clause 9(a) of the agreement occur *inter alia* if the respondent fails to make payment when due. If an event of default occurs, the applicant will have rights and remedies provided by the agreement and all rights and remedies as secured party in terms of clause

10(i) under any law or otherwise including the right to cancel the agreement; declare all amounts due in terms of the agreement and demand the return of the units to it.

[3] The respondent was required to fulfil its monthly repayment obligations to the applicant. The units were delivered to the respondent as agreed. The applicant avers that the respondent failed to fulfil its monthly repayment obligations and as at 25 October 2021 it was in arrears in the amount of R1,176,937,36. The letters of demand in respect of the arrear amounts were sent to the respondent and the respondent was afforded until the 4th of October 2021 to make payment of the arrears amounting to R 793 134.76 to applicant. On 3 November 2021, the applicant informed the respondent that it would accept payment of the arrear amount in instalments. The applicant required the first respondent to pay the arrears by the 5 November 2021. The respondent failed to make payment in terms of the payment proposal suggested by the applicant and the matter was handed to its attorneys of record for further steps.

[4] Pursuant failure to make repayments in accordance with the payment proposal suggested by the applicant, the applicant sent a termination notice through its attorneys of record. The termination notice was served on the respondent by e-mail on 12 November 2021 in terms of which the respondent was advised that it was in breach of the agreement and despite the demand of payment of the arrear amount of R793 134.76, the respondent failed to make payment and consequently the agreement was cancelled. It is the applicant's case that the respondent failed to return the units and consequently requires the judicial intervention to vindicate its rights. The provisions of the National Credit Act 34 of 2005 are not applicable since the amount involved is over the R1 million threshold as determined by the Minister and the respondent is a juristic person.

[5] The respondent opposes the application on the following grounds:-

that after various discussions and consultations with the applicant and his representatives, a new agreement was reached between the applicant and

the respondent during January 2022. The respondent attaches to its opposing affidavit annexure "FA2" which is an email authored by Anine van der Merwe of Werksmans, the applicant's attorneys to the respondent's Michael, Elsabe and Helmut. The content of the email reads thus :-

"Subject: CATERPILLAR FINANCIAL SERVICES SA// AZANIA MONEY GROWTH

Dear Sirs

I refer to the matter on the roll for 28 April 2022.

Mr Bruni came to see me on 18 January 2022.

During the meeting he made a payment proposal in relation to the arrears. He proposed to settle all the arrears at the end of February 2022. The current arrears amount to R 383 370.85.

My client accepts this payment proposal.

Please can you advise whether your client will be making payment of the instalment due in the beginning of February 2022. If not, I will provide your client with the arrear amount as at the end of February 22 for him to make payment at the end of February 2022 (inclusive of February 2022).

I will await your response.

Regards

Anine van der Merwe"

In the alternative to the first defence, the respondent contends that the applicant has not tendered restitution and a refund of a portion of the purchase price paid; thirdly, the respondent disputes that the applicant has

met the two jurisdictional requirements for vindicatory relief, namely that the applicant is the owner of the units and that the respondent is in possession of the units; fourthly, the personal knowledge of the deponent to the founding affidavit is disputed and fifthly, that the applicant has not proven the respondent's indebtedness.

[6] The respondent furthermore applies for condonation of filing of its opposing affidavit as it was filed out of time. Its basis for the condonation application is that no prejudice will be suffered by the applicant. The application for condonation is opposed by the applicant.

[7] The issues for determination can be summed up as follows:-

- (a) Whether the applicant has proved the jurisdictional facts of *rei vindicatio* to succeed in the relief sought;
- (b) Whether there was a new agreement as alleged by the respondent and whether as averred by the respondent;
- (c) Whether the contention by the respondent that the deponent to the founding affidavit of the applicant has no personal knowledge of the facts can be sustained and
- (d) Whether it is a requirement in *rei vindicatio* to prove an indebtedness to the owner of a thing.

The principles of the requirements for rei vindication.

[8] I will firstly deal with the principles on the requirements for rei vindication. The jurisdictional facts the applicant has to show to succeed in obtaining vindicatory relief are that:-

- (a) the applicant is the owner of the units; and that

(b) the respondent is in possession thereof. In *Chetty v Naidoo*¹ the Court said the following in respect of *rei vindicatio*:-

“ It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner(e.g, a right of retention or a contractual right). The owner, instituting a rei vindication, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res-the onus being on the defendant to allege and establish any right to continue to hold against the owner... But if he goes beyond alleging merely his ownership and the defendant being in possession... other considerations come into play. If he concedes in his particulars of claim that the defendant has an existing right to hold (e.g., by conceding a lease or a higher purchase agreement, without also alleging that it has been terminated...) his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then ex facie the statement of claim he must at least prove the termination, which might, in the case of a contract, also entail proof of terms of the contract.”

[9] The right of ownership is comprehensive and protected but it is not absolute.² The right of ownership is the most comprehensive right a person can have in respect of a thing.³ This right is also entrenched in section 25(1) of the Constitution of the Republic of South Africa Act⁴ which provides that no one may be deprived of property except in terms of the law of general application and no law may permit arbitrary deprivation of property.⁵

[10] The owner of a thing may, under appropriate circumstances, be estopped from exercising his right to a property. In *Oaklands Nominees (Pty) Ltd v*

¹ 1974(3) SA 13 (A) 20B-G

² *Given v Given* 1979(2) SA 1113 at 1120C.

³ *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC).

⁴ Act No: 108 Of 1996.

⁵ *BLC Plant Company (Pty) Ltd v Maluti-A-Phofung Local Municipality* 2018 JDR (FB) at para 4

*Gelria Mining & Investment Co Pty Ltd*⁶ the Court set out the legal principles on estoppel by conduct as follows:-

“Our law jealously protects the right of ownership and the call relative right of the owner into God to his property, unless, of course, the possessor has some enforceable right against the owner. Consistent with this, it has been also authoritatively laid down by this Court that an owner is a stop from a setting his rides to his property only...”

(a) where a person who acquired his property did so because, by the culpa off the owner, he was misled in true believe that the person, from whom he acquired it, was the owner or was in travelled to dispose of it;

(b) (possibly) where, despite the absence of culpa, the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept of exceptio doli.”

[11] The contention that the applicant has failed to prove that it is the owner of the units and that the respondent is in possession thereof. This contention is devoid of any merit. This is borne out by clause 3 of the agreement which reserved the ownership of the units to the applicant until the proper fulfilment repayment obligations in respect thereof by the respondent to the applicant. The respondent is in breach of the repayment obligations which led to the cancellation of the agreement. Accordingly, the Court is satisfied that the applicant has met the jurisdictional requirements of the vindicatory relief sought by it. The third defence is therefore rejected.

The alleged new agreement defence.

[12] With respect to the defence of the new agreement, the Court is of the view that the defence has no factual and legal basis. The alleged so-called new agreement related to the communication in respect of the arrears of Azania Money Growth (Pty) Ltd and not the respondent and this is evident from the

⁶ 1976 (1) SA 441 (A) at 452 A-G

subject of the heading of the email referenced by the respondent in its answering affidavit. Accordingly, the defence is rejected out of hand.

The applicant has not tendered the restitution and the refund of the deposit paid for the units

[13] I now deal with the defence in the alternative, that the applicant has not tendered restitution and the refund of the deposit paid for the units and that it would be unjust to order restitution. Clause 10 (ii) of the agreement stipulates how the respondent is to be refunded. It states that once the units are returned to the applicant, the units will be sold by the applicant. The proceeds received from the sale of the units will be applied first to reimburse the applicant for all expenses of collection in terms of and enforcement of the agreement, including legal expenses on the scale as between attorney and own client, and then to the obligations owed under the agreement. Any remaining proceeds will then be applied to any other indebtedness or obligations owed by the respondent to the applicant subject to the right of set-off.

[14] In *South African Forestry Co Ltd v York Timbers Ltd*⁷ the Court held as follows on the enforcement of contractual relationship between the parties:-

“Although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder.”

⁷ 2005 (3) SA 323 SCA at para 27

[15] The proper interpretation of the agreement insofar as it relates to the refund of any amount after all the obligations are fulfilled, clearly accords with what the parties agreed to at the conclusion of the agreement. It follows that the applicant is not in a position to make any offer relating to excess payment for the purposes of the alleged restitution of the deposit paid because the units have not been sold and it is not known how much they will fetch at the sale thereof. This is what the parties agreed to and the Court has no basis under the circumstances to intervene. The alternative defence of restitution is misplaced and premature. Accordingly, the defence is rejected.

The defence that the deponent to the founding affidavit of the applicant has no personal knowledge thereof

[16] I now deal with the final defence that the deponent to the founding affidavit of the applicant has no personal knowledge thereof. The principles on the approach to be adopted by the Courts when considering evidence adduced through an affidavit are settled in our law. In *Rees and Another v Investec Bank Ltd*⁸ the court found that, who was the recoveries officer, had been involved in attempts to collect the debt, had perused the file and had personally corresponded with the attendees representing the defendants in respect of the arrears account. She had also written letters of demand and had received response setting out the sureties' defences. The court held that it was unimportant that the deponent had not been present when the agreement was concluded.

[17] In the instant case, the deponent is a credit and operations manager of the applicant and exercises custody and control over the documents attached to the founding of it of it. She stated that she has a personal knowledge of the status of the relevant account and has access to and was involved in the management of the account. She personally accessed the account and other relevant reports pertaining thereto. Consequently, the court is satisfied with her affidavit. The respondent's defence is rejected because it has no legal merit.

⁸ 2014 (A) SA 220(SCA) at para 14

- [18] I now deal with the defence that the applicant has not proven the respondent's indebtedness. This is not a requirement in the vindicatory relief sought by the applicant and on that ground alone, it cannot be sustained.

The respondent's condonation application for the late filing of the answering affidavit.

- [19] Lastly, I deal with the respondent's condonation application for the late filing of the answering affidavit. The sheriff served the application on 12 January 2022. The notice of intention to oppose the application was served on 21 January 2022. The delivery of the answering affidavit lapsed on 11 February 2022. The answering affidavit and condonation application for the late delivery of the answering affidavit, were served on 20 July 2022.
- [20] The principle relating to an answering affidavit that is being delivered out of time are trite. In the absence of agreement by the opposing side, the condonation must be with the leave of the Court. The Court will favourably consider the condonation once the respondent shows good cause. The respondent must furnish an explanation of its default sufficiently to enable the Court to understand the basis of the delay and the Court will assess the respondent's conduct and motives.⁹ A full and reasonable explanation, which covers the entire period of delay, must be given.¹⁰ If the party seeking condonation fails to discharge the *onus* of showing good cause, the Court may refuse the condonation.
- [21] In the instant case, Van der Merwe sent an email to Van der Walt on 16 February 2022 calling for the delivery of the answering affidavit by no later than 18 February 2022. The respondent failed to provide the answering affidavit by 18 February 2022. The notice of set down of the application was served on Van der Walt on 17 June 2022. The respondent waited until 20

⁹ Silber v Ozen Wholesalers Pty Ltd 1954 (2) SA (A) 353A.

¹⁰ Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) para 22.

July 2022, which was one day before the hearing, to respond to Van der Merwe. The delay in the late filing was attributed to Van der Walt's error.

[22] The explanation proffered as a reason for the delay in delivering the answering affidavit was *inter alia*:-“ ...subsequent to the application being opposed, the matter was removed from roll for 31 January 2022 and settlement negotiations commenced” and in the hope that the matter would be settled, an answering affidavit was not delivered. However, this cannot be so because on 27 January 2022 Van der Walt stated that the proposal was not accepted and that the respondent would proceed to deliver its answering affidavit. Van der Walt failed to explain why he failed to realise that the answering affidavit that he stated would be delivered once the respondent rejected the repayment proposal, was not delivered on time. The condonation requirements on this leg have not been met. Differently put, the reason for the delay is not properly explained.

[23] The applicant seeking for condonation of the late delivery of the answering affidavit must also show that he has a *bona fide* defence in respect of the main application.¹¹ The respondent has failed to show that it has a *bona fide* defence to the main application. This so because given for instance, the so-called new agreement referenced in the answering papers, it fails to state that it has met its repayment obligations in accordance with the alleged new agreement. As a result, it follows that the respondent has failed to meet the second requirement for condonation.

[24] In conclusion, the court is satisfied that the jurisdictional requirements of vindicatory relief have been met by the applicant and that the applicant has succeeded in the relief sought.

ORDER

[25] The order is made in the following terms:-

¹¹ Santa Fe Sectional Title Scheme No.61 /1994 Body Corporate v Bassonia Four Zero Seven CC 2018 (3) SA 451 (GJ) para 13.

25.1. The condonation application is refused with costs;

25.2. The applicant is granted leave to file its supplementary affidavit dated 13 May 2022.

25.3. The respondent is ordered to deliver to the Sheriff of the High Court within 24 (twenty-four) hours of the service of this Order on the respondent at its registered address, the following Units (“the Units”):

25.3.1. a **Caterpillar Large Excavator 336** with serial number **J[...]**;

25.3.2. a **Caterpillar Large Excavator 366** with serial number **J[...]**⁹.

24.4 In the event of the respondent failing to comply with 1 above, the Sheriff of the High Court is authorised and ordered to take possession of the Units from wherever he/she may find it, and the Sheriff is authorised to retain possession of the Units until delivered to the applicant or its duly authorised representative.

25.4. The respondent is ordered to pay the costs of the application on the attorney and client scale, which costs include the costs of opposing the respondent's condonation application and the costs of the applicant's application for leave to supplement.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 08 September 2023.

APPEARANCES

For the Applicants: Adv PG Louw

Instructed by: Werksmans Attorneys

For the Respondent: Adv J Schoeman

Instructed by: Van Der Walt Attorneys

Date of Hearing: 29 May 2023

Date of Judgment: 08 September 2023