

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 18440/2010

In the matter between:

ABSA BANK LIMITED

Applicant

and

ROBERT J MAY

Respondent

CASE NO: 18437/2010

ABSA BANK LIMITED

Applicant

and

ZACPAC WAREHOUSING CC

Respondent

CASE NO: 18438/2010

ABSA BANK LIMITED

Applicant

and

NUET ENGINEERING CC

Respondent

JUDGMENT HANDED DOWN ON 6 SEPTEMBER 2010

1. These three *ex parte* applications to have goods sold to the respondents attached, served before me in motion court on Friday, 27 August 2010. It is appropriate to briefly set out the facts of each application.

ROBERT J MAY

2. On 10 December 2009 the respondent entered into an instalment agreement with the applicant in terms whereof he purchased a 2009 VW Polo. This agreement is subject to the provisions of the National Credit Act, Act No. 34 of 2005. Clause 19.2¹ of the agreement provides for the applicant's rights should the respondent be in default.
3. On 8 March 2010 the parties entered into a further instalment agreement on identical terms to the first agreement. This agreement is in respect of a 2006 Volvo XC90.

¹ "19.2 If the Purchaser is in default, the Bank may –

19.2.1 give the Purchaser written notice of such default and may propose that the Purchaser refer this agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under this agreement or develop and agree on a plan to bring repayments up to date;

19.2.2 commence legal proceedings to enforce this agreement including retaking possession of the goods and recover collection costs and default administration charges from the Purchaser if –

19.2.2.1 it has given the Purchaser notice as referred to in clause 19.2.1 above or it has given notice to terminate any debt review process under section 86 of the National Credit Act which may then be underway in respect of this agreement; and

19.2.2.2 the Purchaser is and has been in default under this agreement for at least twenty business days; and

19.2.2.3 at least ten business days have elapsed since the Bank delivered the notice contemplated in clause 19.2.2.1; and

19.2.2.4 in the case of a notice in terms of clause 19.2.1, the Purchaser –

19.2.2.4.1 has not responded to that notice; or

19.2.2.4.2 has responded to the notice by rejecting the Bank's proposal; or

19.2.2.4.3 the Purchaser has not surrendered the goods to the Bank in accordance with clause 15 or in terms of section 127 of the National Credit Act;

19.2.3 recover collection costs and default administration charges from the Purchaser. "

4. In respect of the first agreement, the respondent is in arrear in an amount of R2 696,01, the monthly instalment being R2 777,02, and in respect of the second agreement the respondent is in arrear in an amount of R6 262,63, the monthly instalment being R6 258,40.
5. Put differently, the respondent is in arrear with approximately the amount of one instalment.
6. On 23 June 2010 a letter was addressed in terms of section 129 of the National Credit Act, wherein the respondent was warned, should he fail to respond, legal action would be instituted against him, *inter alia*, for cancellation of the agreement and return of the goods. A similar letter was dispatched in respect of the second agreement.

ZACPAC WAREHOUSING CC

7. On 19 March 2008 the parties entered into an instalment sale agreement in terms of which the respondent purchased a MAN truck.
8. Clause 10.3 of the instalment sale agreement provides that:

"In the event of any breach of this agreement, [including a failure to make payment in terms of this agreement], if the seller elects not to act in accordance with 10.2 [to increase the finance charge rate to the maximum rate], the seller may, in addition to any other remedies that it may have in terms of this agreement or at law:

10.3.1 without notice terminate this agreement and to retain all payments already made; and/or

10.3.2 *claim, at the purchaser's cost, the return and possession of the goods, together with all licensing documents in respect of the goods, at the seller's address or at such other address as the seller may have notified the purchaser of in writing; and/or*

10.3.3 *claim damages (which may include immediate payment of all arrear payments plus finance charges thereon)."*

9. On 21 February 2007 the parties concluded an instalment sale agreement in terms of which the respondent purchased a MAN truck. The terms and conditions of the second agreement are identical to the first.
10. On 24 August 2007 the parties concluded an instalment sale agreement in terms of which the respondent purchased a trailer. The terms and conditions of this agreement are also identical to the agreements referred to above.
11. On 31 August 2007 the parties entered into an agreement for the purchase of a trailer, the terms and conditions again being identical to the other agreements.
12. The respondent appears to be in arrears with between four to six instalments in respect of the four agreements with the applicant.
13. The agreements are not governed by the provisions of the National Credit Act.
14. No demand was made *ex facie* the papers.

NUET ENGINEERING CC

15. On 13 September 2006 the parties entered into an instalment sale agreement in terms of which the respondent purchased a "3CX TLB Backhoe Loader". The terms and conditions of this agreement are identical to that of the agreements entered into with Zacpac Warehousing CC.
16. On 30 October 2006 the parties entered into an instalment sale agreement for the purchase of a Toyota Hilux. This agreement is in Afrikaans, but the terms and conditions are again identical to the other agreement entered into between the parties.
17. The respondent appears to be in arrears by approximately nine instalments.

The ex parte nature of the application

18. At the hearing I raised with Mr Knoetze, who appeared for the applicants, my concerns regarding the *ex parte* aspect of the applications. The approach by our Courts to *ex parte* applications have been summarised in Knox D'Arcy Ltd and Others v Jamieson and Others 1994 (3) SA 700 (W) at 707J-708A, where Stegmann J said as follows:

"The making of an order which affects an intended defendant's rights, in secret, in haste, and without the intended defendant having had an opportunity of being heard, is grossly undesirable and contrary to the fundamental principles of justice. It can lead to serious abuses and oppressive orders which may prejudice an intended defendant in various ways, including some ways that may not be foreseeable."

19. On appeal E M Grosskopf JA, in Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) expressed his agreement with Stegmann J's comments, set out above, and said:

"I add that the procedure adopted is even more objectionable if the applicant's case rests largely on untested hearsay" (at 380G-H).

He continued:

"While it is probably not correct to say that an application of this sort should never be heard in camera and without notice to the respondent (Cf. Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another, Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others, 1995 (4) SA 1 (A)), I consider that this should happen only in very clear cases where justice cannot be served otherwise than by depriving the respondent of his right to be heard. In the nature of things such cases would be exceptional."

20. Against this general background, I turn to the applications which served before me. I deal with the allegations in the context of these being *ex parte* applications. They are noteworthy in the following respects.
21. The exact selfsame allegations are levelled against each and every one of the respondents. The salient allegations are to the word the same and are as follows:

"18.1 I have been in the credit control (sic) for many years. During my period of employment with applicant I have been actively involved in the day to day business activities of the applicant and especially in the repossession of goods by the applicant.

I speak from experience and know the signs and consequences of companies (sic) which are in financial trouble. The respondent is one such example. The following facts are relevant to the present application.

22. I pause to point out that the application against mr May was against him in person, and no attempt was made to adjust the rote allegation. The affidavit continues -

"18.2 The respondent is experiencing extreme financial problems. The respondent has been unable to keep to its commitments towards the applicant for some time and is unable to meet deadlines to settle the debt." To which is appended in the applications against the two company respondents "Yet, the Respondent has not volunteered to return the goods to the Applicant."

23. Again there is no factual basis set out for what is little else than a conclusion drawn by the deponent.² As set out above, and in respect of mr May, who appears to have been in arrears for only one instalment, they are simply and patently, at least on the papers before me, incorrect. The allegations continue -

"18.3 As a result of the foregoing the applicant has no alternative but to terminate the situation as a result of the respondent's unacceptable conduct. I know of no communication from the respondent in which it seeks indulgence from the applicant to suspend payment of agreed instalments.

² See for instance Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others 2003 (4) SA 207 (C) as to the requirement to set out 'primary facts' from which 'secondary facts' or conclusions may be drawn. As Van Reenen J pointed at at paragraph [28] *"Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (see Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793C - E) and accordingly do not constitute evidential material capable of supporting a cause of action."*

18.4 *The goods itself is the only security the applicant holds for the said debt.*

18.5 *The applicant runs the risk that the goods might be stolen, lost or damaged, with the result that the applicant might lose its security. The applicant is unable to confirm whether the goods are comprehensively insured at this time. The arrear monthly instalments have run up to a substantial amount, and without knowing whether the goods are insured, or whether the respondent can afford the insurance premiums, or whether the respondent is up to date with its insurance premiums, the applicant is exposed to huge losses.*

24. The risk the applicant is running is a risk it has contractually accepted all along. It does not, by itself, constitute grounds on which to grant the relief now sought. The question of insurance, or the feared lack thereof, is again a contractual issue.

“18.6 On the other hand the respondent is using the goods to generate an income, and on the other hand the respondent is not paying the applicant the instalments. The applicant cannot tolerate the situation where the respondent is causing the goods to be used and to deteriorate in value whilst the respondent is not paying for it.

25. The goods, in respect of Mr May, are first, a 2006 Volvo XC19 2.5 T5C – presumably a luxury motor vehicle – and a 2009 Volkswagen Polo. Again there is nothing to indicate that it is being used to generate an income.

“18.7 The goods are wasting assets. The applicant must repossess the goods to limit its damages. Once the goods are in the possession of the applicant, the applicant will be in a position to service the goods, and sell it at the best possible price,

which amount will be credited to the respondent's account, which would also be in the respondent's favour.

26. The goods have all along been wasting assets and, again, this does not afford a basis upon which the applicant can seek repossession of the goods.
27. For good measure, the following is also added in terms of justification for the application under the heading "ex parte".

"18.16 Should the respondent receive any form of notice that the applicant is of intention to remove the goods from its possession with a court order, and know that it will have no other option but to hand the goods over, pending the outcome of the main action, there is no doubt that it will frustrate the sheriff's attempts to attach the goods and remove same from his premises. The applicant has on numerous occasions asked the respondent to return the goods but the respondent has failed to do so."

28. In this regard I point out that the only evidence of any demand included in the papers, and then only in the application against Mr May, was a notice in terms of section 129 of the National Credit Act, Act 34 of 2005, which was dispatched to the respondent on 23 June 2010 by registered post. Therein the respondent was forewarned that should the respondent fail to respond to the letter *"legal action will be instituted against you for: 1) cancellation of the agreement; 2) return of the goods which is subject to the agreement; 3) payment of the full outstanding balance and/or damages; and 4) legal costs.*

29. There are no other allegations made in any of the applications which would sustain the contention that the respondents would remove the goods. Nor is there any evidence of the numerous demands made. Ironically one would have expected, if the applicant's beliefs are well grounded, that the respondents would by now have absconded with the goods.
30. In addition, the certificate of compliance in terms of section 129(1) of the Act, reflects that Mr May had been in default for more than 20 days.

"18.17 The respondent has been unco-operative all along and has not voluntarily returned the goods, subsequent to breach of contract. This application comes as a last resort for the applicant to protect its rights and security in the goods. Prior to this application being launched, the respondent would have received a telephone call inviting him to either pay or co-operate or negotiate, and thereafter would have received a personal visit from a risk mitigation officer. The fact of this application is proof that the respondent failed to co-operate.

31. There is no evidence of any such telephone call being made or a visit from the "risk mitigation officer", having taken place. The deponent to the affidavit merely asserts that that is what would have happened, without stating, that, as a fact that was what had taken place.

18.18 The applicant's recent experience with debtors has been that they drive vehicles or remove goods across the border to neighbouring countries, each time they receive notice of an application of this kind.

32. The allegation does not fit in with the *ex parte* nature of the relief sought. No notice is to be given in an "*application of this kind*". The applicant itself has already given notice, in the application against Mr May, of its intention when it gave the section 129 notice. That, ironically, would have triggered the very apprehension which the applicant now states it has. So too would the numerous demands that have been directed to the respondents.
33. The applicant seeks cancellation of the agreement(s) it has with the various respondents contending
- (a) As against Mr May that: "*The applicant has duly cancelled the agreements as stated in the aforementioned section 129 letter, alternatively notice of cancellation is hereby given to the respondent*".
 - (b) The section 129 letter states as follows: "*The purpose of this letter is to kindly request payment from you thereof (the arrears amount)*". The letter continues, as stated above, that: "*Should you fail to respond to this letter ... legal action will be instituted against you for 1) cancellation of the agreement*".
 - (c) The section 129 letter did not serve to cancel the agreement. In terms of the letter, cancellation would still be sought in terms of an application to court.
 - (d) As against the other respondents that "*(i)n the circumstances the Applicant has no alternative but to cancel the agreement between the*

parties. This application and affidavit serves as notice of cancellation to the Respondent."

34. In Swart v Vosloo 1965 (1) SA 100 (A) at 105G Holmes JA said :

"to sum up so far, it must be taken as settled that, in the absence of agreement to the contrary, a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party; and cancellation does not take place until that happens."

35. The agreements with Mr May are governed by the National Credit Act and provide extensively with the remedies available to the applicant in the event of default by Mr May – the remedy of cancellation is not a stipulated remedy.³ Implicit in the demand made in terms of the section 129 notice, namely that the applicant may institute legal action for cancellation of the agreement, is that notice of such action would be given and that a Court should order the cancellation. It would seem that the cancellation is at the very least ineffective until the cancellation has been communicated to Mr May.
36. In respect of the other respondents, their agreements do provide for termination without notice, but only provide for a claim to be made for the return of the goods.⁴

³ See the provisions of clause 19.2 set out above

⁴ Clause 10.3.1 of the respective agreements

37. Though cancellation may not be a pre-requisite to the grant of the relief (on the supposition that otherwise a proper case has been made out), the respondents may well contend that they do not accept the cancellation as a valid cancellation, and either maintain that they are contractually entitled to the possession of the goods, alternatively that the return of the goods must be sought by way of a claim to be made.
38. It is the cornerstone of our legal system that a party be afforded the opportunity to be heard. The *ex parte* nature of the procedure envisaged by the applicant cuts through this basic principle.
39. I am of the view that the applicant has not made out a proper case for the relief sought. In addition to what I have already set out above, I add the following -
- (a) The allegations I set out above levelled against all the respondents, are levelled mechanically and on identical terms. These are mostly conclusions and they lack the underlying facts underpinning such conclusions.
 - (b) I pause to point out that, presumably, and in respect of each respondent, each would have received a credit clearance from the applicant. Presumably their credit records were clean, or at least such as would permit the applicant to make available to them the finances for the purchase of the goods from the suppliers.

(c) The application is predicated upon the allegation that *"the applicant's recent experience with debtors has been that they drive vehicles or remove goods across the border to neighbouring countries, each time they received notice of an application of this kind"*.

(d) I am not prepared, in each of the cases that served before me, to assume such conduct on the part of the respondents without further proof by way of primary facts which support the apprehension under which the applicant labours.

40. I have already herein above set out the principles underlying *ex parte* applications. In my view the applicant has not made out a case to bring each of these applications within the ambit of the requirements of *ex parte* applications.

41. When I raised my preliminary views with Mr Knoetze, who appeared on behalf of the applicant, he requested that I merely issue an order that the sheriff *"attach"* the goods without removing them. This would then serve as a notification to the respondent of the *"attachment"* and would allow the sheriff to *"write the goods up"*.

42. Again, it would seem to me that the weight of an order of court is little other than a threat to the respondents. Of course, the route suggested by Mr Knoetze would no afford the applicant of the protection it seeks against the conduct set out in paragraph 18.19.

"18.19 The applicant requests the court to authorise immediate removal of the goods should it be found by the sheriff, since the applicant has a reasonable fear that the respondent will jeopardise the applicant's relief once the goods are attached by the sheriff. The applicant has dedicated storage and service facilities, whereas the sheriff not always has secure facilities. The applicant can also store goods much easier than (sic) the sheriff can do so. The benefit of such storage and service facilities will go to the respondent.

43. It seems to me that the order proposed by Mr Knoetze will either have the effect of depriving the respondents of some of their rights, without notice, in which event I am not prepared to grant the order, or it will be of no effect, in which event I should not grant the order.

44. In the premises the applications are dismissed with costs.

S Olivier

