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

CASE NO. 2022/006207

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

In the matter between:

ABSA BANK LIMITED

Applicant

And

ETERNAL CITY TRADING 612 CC

First Respondent

RODWELL COLLINS GUMPO

Second Respondent

JUDGMENT

THUPAATLASE AJ

Introduction

[1] The applicant instituted a vindicatory application for the return of 11 vehicles. The basis for this application is the first respondent's failure to make monthly payments as per the written sale agreements between the parties, resulting in arrears escalating over a prolonged period.

[2] Respondents are opposing the relief sought and submit that payments have been made to the applicant in the amount of R 850 000.00. The respondents further

contends that the applicant did not take the said amount into account when calculating arrears and as such the amount alleged to be arrear is incorrect.

[3] The respondents also deny receipt of the letters of demand and notices of cancellation allegedly dispatched by the applicant. A further legal argument has been raised regarding the applicant's failure to establish its case in its founding affidavit.

Parties

[4] The applicant is ABSA Bank, public company which is duly registered and incorporated with limited liability in accordance with laws of Republic of South Africa, and registered as a bank in terms of Banks Act, 94 of 1990 as amended and also registered as Credit Service Provider in terms of the National Credit Act 34 of 2005 (NCA).

[5] The first respondent is a Close Corporation (CC) duly incorporated and registered in accordance with Close Corporation Act, 69 of 1984.

[6] The second respondent is Rodwell Collins Gumpo, an adult male and who is surety and co-principal debtor and sole member of first respondent.

Background

[7] The chronology of events as set out on the papers which I consider significant are the following:

7.1. Between July and November 2020, the applicant and first respondent concluded 11 instalments sale agreements. The purpose of which was for purchasing of various assets. These assets were vehicles consisting of tippers and tractors.

7.2. On 17 September 2020, the second respondent signed a suretyship in favour of the applicant for all the debts owing by the first respondent to the applicant.

7.3. First respondent breached the instalment sale agreements by defaulting on its payments. The applicant dispatched several letters of cancellation specifying the arrears and outstanding balances and notifying the first respondent of the cancellation of each of the agreements. The letters were dispatched to the first respondent on 03 June 2022. The date reflected on each of the notices is 04 June 2022. Whilst the respondents are taking issue with the discrepancy between the two dates, the applicant has attributed such discrepancy to a typographical error during preparation of the notices.

[8] Among the salient features of the agreement was to specifically exclude the applicability of the NCA. The reason being that the first respondent is a juristic person, and its annual turnover was above the threshold set by the Minister as per s4(1)(a)(i) of the NCA. The purpose of such agreements was for the applicant to provide the first respondent with loans. The loan amounts were to be used for the acquisition of assets (vehicles).

[9] The assets purchased were to remain the properties of the applicant until first respondent has discharged all its financial obligations towards the applicant.

[10] It was a further a term of the sale agreements that the first respondent is entitled to possession and use of the assets. This was contingent on the first respondent not being in default with its payments. Upon the first respondent's fulfilment of all its financial obligations, the applicant would transfer ownership of the assets to the first respondent.

[11] Apart from the financial obligations; the first respondent was obliged to keep the assets in good working condition, and not permitted to sell, transfer or part with possession or control of the assets to any other person without the applicant's permission.

[12] In order to fulfil its obligations under the agreement, the first respondent undertook to pay the instalments by their due dates. The first respondent as borrower would be considered in default under the agreement if it failed to honour its instalment obligations in full timeously, or failed to comply with any other conditions under the agreement.

[13] In the event of a default, the applicant would be at liberty to cancel the agreement; foreclose the outstanding balance of the loan amount; and repossess the assets or enforce any security provided in terms of the agreement. In the event of termination of the agreement due to the first respondent defaulting, the applicant shall be entitled to take control of the assets and to sell the assets.

[14] The first respondent agreed that notices may be sent by either letter or via email. The first respondent also agreed that a certificate of balance produced and signed by a manager of the applicant will suffice as evidence of the amount owed.

Legal issues to be determined.

[15] The first issue for determination is condonation for the late filling of the replying affidavit. I accept that replying affidavit was quite voluminous and would have required time to prepare.

[16] The applicable legal principles regarding condonation are a well-worn path. A party seeking condonation must provide details that caused the delay with sufficient particularity. The basis being that the said party is essentially seeking an indulgence from the court. The court in considering a condonation application is vested with judicial discretion to determine whether or not to grant same.

[17] The position was articulated as follows in the case of *Uitenhage Local Council v SA Revenue Services* 2004 (1) SA 292 held that: '*Condonation is not to be had merely for the asking. A full detailed and accurate account of the cause of the delay and their effects must be furnished as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related, the date, duration, and extent of any obstacle on which reliance is placed, must be spelt out*'.

[18] In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus)* 2008 (2) SA 472 (CC) the constitutional court at para [22] elaborated further that: '*An application for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And what is more, the explanation given must be reasonable*'.

[19] The interest of a party in the finalization of the matter is another factor to be considered. This consideration was stated as follows in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] All 251 (SCA) that: '*the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and avoidance of unnecessary delay in the administration of justice*'. Both parties submitted the affidavits replying and answering affidavits out of time. It is however evident that the parties to the litigation will be better served by allowing the matter to proceed. I can see no prejudice for any of the parties.

[20] In the present matter I am disabused of the fact that the delay was inordinate on the part of the defendant. The delay was for 14 days. Therefore, I am unpersuaded that the defendant acted in a flagrant and gross manner as it is clear that he made reasonable efforts to comply with the Rules. In the premises condonation is granted.

[21] The first respondent attaches three payment notices showing that between periods 29 June 2022 and 21 September 2022 an amount of R 850 000. 00 was paid

to service its various loan accounts. It is not the first respondent's argument that the said amount represents the total arrears. It agreed that the certificate of balance generated by the manager of the applicant shows a significantly high amount of arrears. It is not denied that the sum of R 850 000. 00 was paid, however the various loan accounts remain in arrears for an amount of R 1 411 146. 44. I am satisfied that the first respondent is still in default with its payment obligations.

[22] In *FIRSTRAND BANK LTD v BECK ESTATES (PTY) LTD* 2009 (3) SA 384 (T) the court dealt with the issue where the amount reflected in the summons and the notice of motion are different as a result of payment which occurred after the proceedings were commenced. In the present case the respondents contend that the arrear amount reflected in the certificate of balance was incorrect as such amount does not take into account the sum of R 850 000.00.

[23] The court in *FIRSTRAND BANK* at para 29 held that: 'the deponent can be criticized for failing to refer to the amount by which the indebtedness has been reduced after issue and service of summons, this would not constitute evidence beyond that required by rule 32. It would have meant that the court was not misled as to the amount outstanding as at date of deposing to the affidavit in support of the summary judgment application'.

[24] At para 30 the court continued: 'I can see no reason why the court cannot itself reduce the amount in respect of which summary judgment is granted where it is apparent from the papers that there has been a reduction in the amount claimed in the summons. There is no prejudice to the respondents. To refuse to grant summary judgment in respect of the balance owing merely because the application failed to reduce the amount claimed in the summons would be, to my mind, to ignore the import of provisions of subrule (6). In a number of authorities our courts have recognised that a plaintiff may be granted less than claimed in the papers because this deviation from that which is claimed in the papers neither adversely affects the defendant's rights nor is it detrimental to him'.

[25] I note that the above remarks were made in the context of summary judgment application. I am of the considered view that the same principle finds application in this matter in so far as it relates to indebted amount being reduced since the issuance of a certificate of balance. Therefore, the discrepancies between the amount reflected in the certificate of balance and the actual amount owed can be corrected by this court. This can be done by simply deducting R850 000.00 from amount as reflected in the certificate of balance, thereby making the balance owing

equal to R 1 411 146. 44. The respondents will not suffer any prejudice, nor will such a correction be detrimental to their case.

[26] Lastly, the question which occupied much of the court's time was regarding the letters of demand and the notices of cancellation of which were purportedly dispatched to the first respondent. The respondent denies receipt of such notices. The question is whether denial of receipt of the letters of cancellation is of any significance to a vindicatory application in the context of each of the sale agreement.

[27] I should add that the answering affidavit of the first respondent does not place many issues in disputes. The first respondent appears to be content with challenging whether there was proper cancellation of the agreement. The respondents do not provide any defence which would be sufficient to defeat the application.

[28] The relationship between the applicant and the respondents is governed by the numerous sale agreements concluded between the parties. It is therefore pivotal that any action contemplated by either party must be within the agreement.

[29] Applicant has launched a *rei vindicatio* application. As I understand the applicant does not rely on the sale agreements. The applicant explains that as an owner of the *merx* it is entitled to recover from whomsoever is in possession or has detention of it. Applicant relies on old maxim *ubi rem inventio ibi*.

[30] The fact that the requirements of *rei vindicatio* have been met is incontrovertible. Applicant is the owner of the property as clearly stipulated in the agreement. The thing is still in existence and clearly identifiable. The respondents have possession or detention of thing at the time of the institution of this application.

[31] The respondents' submission is that the applicant has not acted as prescribed by sale agreements and in particular clause 13 thereof. This clause is common to all 11 sale agreements which were entered into by the applicant and first respondent. Clause 13 under the heading " Default & Consequences" stipulates as follows" 'If you are in default we may: - [My emphasis].

- by notice to you end the Agreement and demand immediate payment of the whole outstanding balance of your loan with continuing interest, fees, and costs.

- re-possess the Asset or;

- enforce any Security provided in terms of this Agreement'.

[32] The Sale Agreement gives the applicant an election whether to send such a notice or not. In this case the applicant dispatched notices to the respondent. The

only issue are the dates of posting and the date reflected as the date on which the notices were written. The anomaly has been explained by the applicant.

[33] The assertion by the respondents that 'the agreement makes specific mention that should the party be in default notice must be provided to the applicant, to either end the agreement and demand immediate payment of the whole outstanding balance of the loan with continuing interest, fees and costs' is not entirely correct. The use of the word 'may' in the Sale Agreement makes it clear that the issuing of a notice is not compulsory. The applicant had a choice whether to serve the notice of cancellation or not.

[34] It is my view that there was substantial compliance with the notice to cancel the agreement. The explanation of the dates is plausible and is accepted by the Court. I am satisfied that the applicant is entitled to the relief sought. I am satisfied that the requirements of rei vindicatio have been proved.

Order

IT IS ORDERED THAT:

1. The First Respondent shall return to the Applicant:
 - 1.1. a 2018 SCANIA G460 6X4 TRUCK TRACTOR with engine number DC13106L[...] and chassis number 9BSG6X400039[...];
 - 1.2. a 2018 SCANIA G460 6X4 TRUCK TRACTOR with engine number DC13106L[...] and chassis number 9BSG6X400039[...];
 - 1.3. a 2018 SCANIA R460 6X4 TRUCK TRACTOR with engine number DC13101[...] and chassis number 9BSR6X400039[...];
 - 1.4. a 2020 CIMC SIDE TIPPER LINK TRAILER with chassis numbers AD SH236WAL1[...] and AD SH236WAL1[...];
 - 1.5. a 2018 SCANIA G460 6X4 TRUCK TRACTOR with engine number DC13106L01[...] and chassis number 9BSG6X400039[...];
 - 1.6. a 2020 CIMC SIDE TIPPER LINK TRAILER with chassis numbers AD SH236WAL1[...] and AD SH236WAL1[...];
 - 1.7. a 2020 CIMC SIDE TIPPER LINK TRAILER with chassis numbers AD SH236WAL1[...] and AD SH236WAL1[...];
 - 1.8. a 2019 SCANIA R460 NGT 6X4 TRUCK TRACTOR with engine number DC13144L01[...] and chassis number 9BSR6X40003[...]; and
 - 1.9. a 2015 VOLVO FH 440 6X4 TRUCK TRACTOR with engine number D1355[...] and chassis number YV2RS02DXF[...],

("the vehicles").

2. If the First Respondent fails and/or refuses to return the vehicles to the Applicant forthwith, then and in that event the Sheriff of the above Honourable Court is hereby authorised and directed to enter upon the First Respondent's premises, or wherever the vehicles are being kept, to attach the vehicles and return same to the Applicant.

3. The Respondents shall pay the costs of this application including the reserved costs of 17 October 2022, jointly and severally the one paying, the other to be absolved, on the scale as between attorney and client.

4. The Applicant is granted leave to apply to this Honourable Court, on the same papers duly supplemented, for payment by the Respondents to the Applicant of any remaining balance due to the Applicant after the inspection, valuation and sale of the vehicles

**THUPAATLASE AJ
HIGH COURT ACTING JUDGE
GAUTENG LOCAL DIVISION**

Date of Hearing: 23 October 2023

Judgment Delivered: 17 January 2024

For the Applicant: Adv C Denichaud

Instructed by: Jay Mothobi Incorporated

For the Respondent: K Howard

Instructed: SN Mazibuko Attorneys