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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: 9953/23P

In the matter between:

CROSSMOOR TRANSPORT (PTY) LTD

APPLICANT

and

ABSA BANK LIMITED

FIRST RESPONDENT

THE SHERIFF OF CAMPERDOWN

SECOND RESPONDENT

THE SHERIFF OF EMPANGENI

THIRD RESPONDENT

THE SHERIFF OF PINETOWN

FOURTH RESPONDENT

THE SHERIFF BENONI

FIFTH RESPONDENT

THE SHERIFF OF JOHANNESBURG SOUTH

SIXTH RESPONDENT

Coram: **Koen J**

Heard: **25 August 2023**

Delivered: **4 September 2023**

ORDER

The application is dismissed with costs.

JUDGMENT

Koen J

Introduction

[1] The applicant, Crossmoor Transport (Pty) Ltd (Crossmoor), seeks an interim interdict against the first respondent, Absa Bank Ltd (ABSA), in the following terms:¹

‘1. Pending the outcome of an action to be instituted by the Applicant against the First Respondent within 30 days:

1.1 The First Respondent is interdicted and restrained from:

1.1.1 Executing upon the Order granted by this Court under case number 8991/19 on 17 December 2021 (“the Court Order”);

1.1.2 Instructing the Second to Sixth Respondent or any other Sheriff, to attach and remove the assets/articles listed in paragraph 3 of the Court Order from any of the Applicant’s premises.

¹ This is per the draft order handed up at the end of the argument. The terms correspond exactly with the relief claimed in the notice of motion, save that the paragraph numbering has been amended.

1.2 The Second to Sixth Respondents are interdicted and restrained from executing the Court Order.

2. Should the Applicant not institute the action within 30 days of the date of this order, the order in 2.1 and 2.2 will lapse and be of no further force and effect.

3. The costs of this application shall be costs in the action.²

[2] The relief claimed is interdictory, akin although not entirely identical to an application for a stay of a court order in terms of this court's inherent jurisdiction or pursuant to the provisions of rule 45A, but nevertheless aimed at staying execution on the entire court order, specifically any attachment and removal of the assets listed in paragraph 3 of the court order from any of Crossmoor's premises. In the context of an application for the stay of execution of a court order the full court in *MEC, Department of Public Works v Ikama Architects*³ remarked:

'Courts enjoy constitutionally supported inherent jurisdiction to control their own processes, taking into account the interests of justice. It appears as if this inherent discretion operates independently of the provisions of Uniform Rule 45A. Execution must generally be allowed. This is so even in cases where a stay is sought pending the determination of proceedings still to be instituted. Courts will generally grant a stay of execution if the applicant demonstrates that real and substantial justice requires this or where an injustice will result if execution proceeds. The court's discretion must be exercised judicially, but cannot otherwise be limited.' (footnotes omitted)

² The application was initially pursued as one of urgency and on 20 July 2023 Mngadi J postponed the application to the date that the matter was heard before me and granted the relief provided in paragraphs 1.1 and 1.2 above pending the outcome of the application on 25 August 2023. Although the application was initially also opposed on the basis that it should not be entertained as an urgent application, the issue of urgency has become largely academic as answering affidavits and replying affidavits have been filed. This judgement accordingly does not deal with the issue of urgency.

³ *MEC, Department of Public Works and Others v Ikama Architects and others* [2022] ZAECHC 13; 2022 (6) SA 275 (ECB); [2022] 3 All SA 760 (ECB) para 82.

[3] The issue in this application is whether Crossmoor has satisfied the requirements for an interim interdict,⁴ specifically whether it has proved a *prima facie* right, even if open to some doubt, to interdict the execution of the court order and to restrain the second to sixth respondents from removing the assets in paragraph 3 of the court order.

Background

[4] The events material to this application are largely common cause, or not seriously disputed. They include the following:

- (a) Over time Crossmoor and ABSA⁵ concluded various credit agreements, in terms of which Crossmoor was to acquire various assets/articles referred to in paragraph 1.1.2 of the relief claimed (the assets);
- (b) Crossmoor conducted itself in relation to those credit agreements in such a way that ABSA became entitled to and did cancel all the credit agreements;
- (c) Crossmoor was thereafter liquidated on 27 September 2021;
- (d) On 18 November 2021 Crossmoor, its liquidators, ABSA, and other creditors of Crossmoor concluded an agreement (the settlement agreement);
- (e) The settlement agreement expressly provided inter alia that:
 - (i) The liquidation order in respect of Crossmoor was discharged by consent (paragraph 1);

⁴ For the requirements see generally *National Treasury and others v Opposition to Urban Tolling Alliance and others* [2012] ZACC 18, 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) paras 41 and 45, and *Webster v Mitchell* 1948 (1) SA 1186 (W).

⁵ The names of the parties are used rather than referring to them as applicant and first respondent, as the papers and annexures often refer to them incorrectly, or as they were cited in previous applications. It is further disappointing, having regard to the amount of money involved in the dispute, to note the lack of attention with which some of the documents annexed as annexures to the founding papers, such as the court order, had been prepared.

- (ii) On discharge of the liquidation order, a consent order attached to the settlement agreement (the consent order prayed) 'would be made an order of court to replace the final liquidation order' (paragraph 2);
- (iii) The consent order prayed would 'be made an order of court by an application brought by ABSA' exactly in accordance with its terms (clause 4), because of the practice in the High Court, KwaZulu-Natal Division regarding making settlement agreements an order of court (paragraph 5);⁶
- (iv) The terms of the recordal in the consent order prayed were 'explicitly agreed upon and the terms and conditions of the recordal were verbatim enforceable as an agreement between the parties', to be granted by the court, 'and enforceable between ABSA and Crossmoor, as if specifically incorporated into the settlement agreement' (paragraph 8);
- (v) ABSA and Crossmoor specifically agreed that the consent order prayed would be an agreement by ABSA to enter into the consent order prayed as a 'payment arrangement of the debt in paragraph 2' of the consent order prayed, 'without novating the cancellation' of the credit agreements, 'which would remain cancelled' (paragraph 9.1);
- (vi) ABSA's ownership in the assets remains vested in those assets as is set out in the consent order prayed for the return of the assets (paragraph 9.2);
- (vii) The liquidation order would be replaced between Crossmoor and ABSA by the consent order prayed as a court order 'for the return of the assets and a repayment arrangement of the debt' (paragraph 9.3);

⁶ This refers to the practice in this division not to make settlement agreements wholesale orders of court, but simply the parts thereof sought to be enforced.

- (viii) Apart from the terms in the settlement agreement and consent order prayed, 'the terms and conditions of the individual instalment sale [or credit] agreements between ABSA and Crossmoor would remain of full force and effect' (paragraph 9.4);
- (ix) The settlement agreement provides, as set out in the consent order prayed, that the terms of the instalment sale agreements would only be amended and varied as set out in the consent order prayed. And further where there is 'any discrepancy between the individual instalment sale agreements and the consent order prayed, the terms of the consent order would prevail' (paragraph 11);
- (x) Paragraph 12 of the settlement agreement provides that:

'The settlement agreement would constitute the whole of the agreement between the parties relating to the liquidation and consent order prayed, save to the extent provided therein, and no extension, amendment, leniency or any relaxation granted by any party in terms of the settlement agreement would be binding on any party, unless same was reduced to writing and signed by the parties involved and if necessary';
- (xi) The settlement agreement further states that no 'addition, variation, deletion or agreed cancellation of all or any clauses or provisions' would have 'any force or effect unless in writing and signed by the parties' (paragraph 13);
- (xii) No waiver of any of the terms and conditions of the settlement agreement would be binding or effectual for any purpose unless in writing and signed by the parties. Any such waiver would be effective only in the specific instance and for the purpose given. Failure or delay on the part of any party in exercising any right, power or privilege would not constitute or be

deemed a waiver thereof, nor would any whole or partial exercise of any right, power or privilege preclude any other or further exercise of any right, power or privilege (paragraph 14).

- (f) The consent order prayed attached to the settlement agreement:
- (i) Repeated that the 'final liquidation order against [Crossmoor] was discharged and set aside' (paragraph 1);
 - (ii) Recorded that Crossmoor was ordered forthwith to deliver to ABSA the assets described in the second to fourth columns of paragraph 2 thereof (paragraph 2);
 - (iii) Recorded that Crossmoor agreed to make payment to ABSA in the amount of R134 544 725 together with interest on the accounts set out in paragraph 2, that is the various individual credit agreements, in the amounts as set out in paragraphs 3.1 to 3.29 (paragraph 3);
 - (iv) Recorded that the execution of the order in paragraph 2, that is for the forthwith delivery of the assets forming the subject matter of the individual credit agreements, was suspended pending compliance by Crossmoor (or as long as Crossmoor complied) with its payment obligations in clause 3 of the consent order prayed (paragraph 4);
 - (v) Further, should Crossmoor 'fail to make any payment in terms of paragraph 3 within 5 days of notice to remedy such breach, the suspension of paragraph 2 [that is for the return of the assets] shall *ipso facto* lapse and the Sheriff be authorised to attach and deliver all assets in paragraph 2' to ABSA (paragraphs 4.1 and as also mirrored in paragraph 5);

- (vi) The consent order further recorded that:
- (aa) Crossmoor was indebted to ABSA 'in the amount of R134 544 725.00 plus interest for the financing of certain assets on instalment sale and lease agreements, as set out in paragraph 2' (paragraph 10.1);
 - (bb) Crossmoor had defaulted on the agreements with ABSA and ABSA 'cancelled the agreements prior to institution of the liquidation application' (paragraph 10.2);
 - (cc) ABSA 'agreed to enter into the agreement as a payment arrangement of the judgement debt in paragraph 2, without novating the cancellations of the agreements referred to in paragraph 2 above which remain cancelled' (paragraph 10.3);
 - (dd) ABSA reserved 'ownership of the assets referred to in paragraph 2 above pending payment of the full outstanding balance on each asset' (paragraph 10.4);
 - (ee) Where Crossmoor defaults and fails to remedy one of the liabilities/payments this would constitute a default against all, 'and the suspension of the order for repossession would automatically lapse and [ABSA would] be entitled to enforce the order for repossession of all the assets (paragraph 10.7);
 - (ff) The consent order prayed would be the consent order as agreed upon 'for return of the assets and a repayment arrangement of the debt' (paragraph 10.8);

- (gg) Where any asset is fully paid, ABSA will release ownership of the asset in favour of Crossmoor (paragraph 10.9);
- (hh) ABSA would deliver to Crossmoor 'all such documents required to effect transfer of ownership' of the asset to Crossmoor (paragraph 10.9);
- (ii) Crossmoor 'would be bound by the terms and conditions of every loan/credit agreement entered into with' ABSA (paragraph 10.10);
- (jj) ABSA would be entitled to 'appropriate 50% of any payments made to any of the above liabilities in respect of the assets, the balance of 50% to be allocated to the liabilities of the assets from the least amount owing' (paragraph 10.11.2).

(g) The court order granted pursuant to the settlement agreement and draft order prayed, reflects the date as 17 December 2021 although it bears the registrar's stamp of 22 December 2021 (but it is the one contemplated in the relief claimed). It mirrors the material terms of the settlement agreement and consent order prayed, and provides as follows:

- (h) Crossmoor was directed to deliver to ABSA the assets listed in the table contained in paragraph 3 thereof (paragraph 3);
- (ii) Crossmoor would pay ABSA the amount of R134 544 725, together with interest, as per the accounts detailed in paragraph 3, in accordance with the schedule contained in paragraph 4 thereof (paragraph 4);
- (iii) The execution of the order set out in paragraph 3 would be suspended pending compliance by Crossmoor with its 'payment obligations in paragraph 4'. Should Crossmoor 'fail to make any payment in terms of

paragraph 3 within 5 days of notice to remedy such breach, the suspension in paragraph 3 shall lapse *ipso facto* and the Sheriff be authorised to attach and deliver all assets in paragraph 2' to ABSA (paragraph 5.1);

(iv) In the event that Crossmoor failed 'to make any payment in terms of paragraph 4 on the due date/s, and fails to remedy such breach within 5 days of notice to do so, then in that event, the suspension of paragraph 3 shall ipso facto lapse and the Sheriff be authorised to attach and deliver all assets described in paragraph 3 above' to ABSA, in the event that Crossmoor failed to deliver the assets to ABSA (paragraph 6);

(v) The following was agreed to and recorded that:

(aa) Crossmoor is indebted to ABSA in the amount of R134 544 725 plus interest for the 'financing of certain assets on instalment sale and lease agreements, as set out in paragraph 3' (paragraph 11.1);

(bb) Crossmoor had defaulted on the agreements with ABSA and ABSA 'cancelled the agreements prior to institution of the liquidation application' (paragraph 11.2);

(cc) Further, ABSA 'agreed to enter into the agreement as a payment arrangement of the judgement debt in paragraph 3, without novating the cancellations of the agreements referred to in paragraph 3 above which remained cancelled' (paragraph 11.3);

(dd) Furthermore, ABSA 'reserved ownership of the assets referred to in paragraph 3 pending payment of the full outstanding balance on each item/asset' (paragraph 11.4);

- (ee) Where Crossmoor defaults and fails 'to remedy on one of the liabilities/payments' this would constitute a default against all liabilities/payments, and the 'suspension of the order for repossession' would automatically lapse and ABSA be 'entitled to enforce the order for repossession of all the assets' (paragraph 11.7);
 - (ff) The order as prayed 'was agreed upon as a consent order for return of [the] assets and [as] a repayment arrangement of the debt' (paragraph 11.8);
 - (gg) Where an asset is fully paid it would be released by ABSA in favour of ownership to Crossmoor (paragraph 11.9);
 - (hh) ABSA would deliver to Crossmoor 'all such documents required to effect transfer of ownership of the item' to Crossmoor (paragraph 11.9);
 - (ii) Crossmoor would 'be bound by the terms and conditions of every loan/credit agreement entered into with' ABSA (paragraph 11.10);
 - (jj) ABSA would be entitled to appropriate 50% 'of any payments made to any of the above liabilities in respect of the assets, the balance of 50% to be allocated to the liabilities of the assets from the least amount owing' (paragraph 11.11.2).
- (i) Crossmoor defaulted on its obligations as per the repayment arrangement of the debt;

(j) A proper written demand was made on 4 October 2022 for Crossmoor to remedy its default by payment of the arrears then due in the amount of R5 326 723 within 5 days, failing which ABSA would proceed with execution;

(k) Crossmoor did not remedy this default within the 5 days;

(l) On 3 November 2022 ABSA proceeded to have a writ issued for some of the assets listed in paragraph 3 of the court order;⁷

(m) During the period subsequent to Crossmoor's default, the settlement agreement had required it to pay:

(i) R4 million on or before 31 October 2022, but it paid only R3 million on 1 November 2022.

(ii) R4 million on or before 30 November 2022, but it paid only R2 726 602.68 on 31 December 2022:

(iii) R4 million on or before 31 December 2022 but it paid only R1 194 235.39 on 31 January 2023;

(iv) R5 million on or before 31 January 2023, but it paid only R2 732 440,21 on 16 February 2023;

(n) On 3 February 2023 the Sheriff served the writ on Crossmoor but was unable to locate any of the assets.

(o) In respect of the period subsequent to the service of the writ Crossmoor had been required to pay:

⁷ A comparison carried out by me reveals that at least 18 assets reflected in paragraph 3 of the court order were omitted from the assets listed in the writ.

- (i) R5 million on or before 28 February 2023, but it paid only R2.5 million on 28 February 2023;
- (ii) R5 million on or before 31 March 2023, but it paid only R1 857 809,92 on 30 April 2023:
- (iii) R5 million on or before 30 April 2023, but it paid only R444 813,50 on 31 May 2023;
- (iv) R5 million on or before 31 May 2023, but it paid only R1 117 183.08 on 27 June 2023.

On 4 July 2023, after some assets were traced and attached, Crossmoor launched this application as one of urgency.

Discussion

[5] When Crossmoor failed to remedy its default in accordance with the repayment arrangement in response to the demand of 4 October 2022 within the stipulated 5 days, the suspension of the order (in terms of the settlement agreement and consent order and paragraph 5 of the court order) automatically lapsed and Crossmoor was required to forthwith deliver the assets to ABSA. ABSA became *ipso facto* entitled to 'enforce the order for repossession of *all* the assets' (emphasis added), as provided in paragraphs 5.1 and 11.7 of the court order. ABSA was therefore entitled to proceed with the issue of the writ, in respect of all the assets.

[6] I did not understand Crossmoor to dispute that default position.

[7] The writ should probably, or at least, at best for Crossmoor, exclude assets of which ownership had passed to it. At least 18 assets that formed part of the list of

assets in paragraph 3 of the court order had, as remarked above,⁸ been omitted from the writ. But the remaining assets fell to be returned to ABSA.

[8] In support of its argument that ABSA is not entitled to the return of all the assets by executing the court order,⁹ Crossmoor raised three arguments as establishing a prima facie right entitling it to interdict and restrain the execution of the court order and the removal of the assets in paragraph 3 of the court order. These arguments, in no particular order, are that:

(a) ABSA had failed to deliver the documents required to effect transfer of ownership of the assets fully paid, which it was required to release to Crossmoor, and that this was a reciprocal obligation to the payments Crossmoor was required to make, which failure thus excused Crossmoor from making any further payments, presumably that it was therefore not in default, and that the suspension of the order requiring Crossmoor to deliver the assets to ABSA remained in place (the reciprocity argument).

(b) In receiving and retaining the payments made after Crossmoor's default, ABSA had waived the right to proceed with the execution of paragraph 3 of the court order (the waiver argument).

(c) Crossmoor had acquired ownership of certain assets which appear on the writ, because it had made payment in full in respect of those assets. It contends that the payments it has made, have not been correctly allocated by ABSA in accordance with the formula for allocation prescribed in paragraph 11.11.2 of the court order, and that if the payments were correctly allocated, it would have resulted in payment having been made in full in respect of some assets and hence ownership therein passing to Crossmoor (the ownership argument).

These arguments will be dealt with seriatim below.

⁸ Footnote 7.

⁹ The relief claimed should really only be in respect of the balance of the assets reflected in the writ, and should more correctly be a claim to stay the writ rather than the entire court order. That is however not the relief claimed.

Reciprocity

[9] It is trite that for reciprocity to apply ABSA's performance had to precede that of Crossmoor, or they both had to perform at the same time.¹⁰

[10] The facts material to this argument are common cause. The issue is mainly one of interpretation of the settlement agreement and the court order. The preliminary enquiry is to determine whether the obligations referred to are reciprocal to the extent that if ABSA failed to deliver the documents required to pass transfer in respect of assets fully paid, all payments remaining to be paid by Crossmoor would be excused.

[11] Crossmoor's counsel was invited to explain how the failure to deliver documents in respect of assets which it may contend ownership had passed to Crossmoor, as much as it would entitle Crossmoor thereafter to the delivery of documents to pass transfer in respect of those assets, could be reciprocal to any obligation on the part of Crossmoor to make further payments, which remained unpaid, in respect of assets not yet 'paid' and in respect of which ownership would not have passed.

[12] Counsel wisely did not seek to advance further submissions in regard to this argument and simply said that Crossmoor would stand by the argument advanced in its heads of argument, without abandoning the argument.

[13] I have endeavoured to summarise the argument as reflected in Crossmoor's heads of argument, as I understand it, above. Crossmoor's contention is without any merit. Although payments made, correctly apportioned, may result in payment of the debt owing in respect of a particular asset being paid in full, thus entitling Crossmoor to ownership of that asset passing to it, the obligation to deliver the documents to give effect to the passing of ownership relates to the ownership in respect of that specific asset. The factual position is as follows: first, the documents in respect of that asset need only be delivered once payment has been made. Secondly, even if it is accepted

¹⁰ *Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd* [2017] ZASCA 185; 2018 (3) SA 65 (SCA).

in favour of Crossmoor that the obligation to deliver the documents, at best, was to be made *simul ac semel* or *pari passu* with payment, then the delivery of such documents is reciprocal to the payment in respect of that particular asset. There is no basis in law to find that the failure to deliver the documentation in respect of such asset would excuse the withholding of further payments as they fall due, or that payment of payments that had fallen due, would be excused.

[14] The reciprocity argument does not establish any *prima facie* right to interdict the execution of the court order.

Waiver

[15] Waiver is a unilateral act which needs to be manifested by words or conduct to be effective. Once it is effective, the right concerned is lost for good. Waiver has two components, a mental one and a physical one.¹¹

[16] In *Coppermoon Trading 13 (Pty) Ltd v Government Eastern Cape Province*¹² it was said that:

‘[24] Election and waiver are legal acts and their requirements may be stated as follows: Waiver is the intentional and unequivocal renunciation or relinquishment of a known right . . . Election postulates a choice between two inconsistent rights, each of which has different legal consequences . . . Common to both waiver and election is that it is a matter of the intention of the party said to have made the election, or waived the right in question. The intention is determined objectively, that is, it is adjudged by its outward manifestation in the form of words, spoken or written, or in the form of conduct or a combination of words and conduct . . .

[25] If a party does not expressly waive a right, and waiver is to be inferred, the conduct relied upon must be such as is more consistent, on a reasonable view thereof, with an

¹¹ *Absa Bank Ltd v The Master and others* NNO 1998 (4) SA 15 (N) at 28A-C.

¹² *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province and another* 2020 (3) SA 391 (ECB).

intention to waive the right in question. The outward manifestations of intention must accordingly be adjudged from the perspective of a reasonable person in the position of the other party . . .

. . .

[27] The burden of proof is on the party who alleges that an election has been made, or that a right has been waived. By reason of the fact that no one is presumed to waive his rights, clear proof is required of an intention to do so’.

[17] The onus is on Crossmoor to show that ABSA, with full knowledge, decided to abandon its right to enforce the court order for the return of its assets, whether expressly or by conduct plainly inconsistent with an intention to enforce the order in its favour.

[18] Crossmoor did make payments subsequent to its breach in October 2022, and these were received by ABSA. These payments have been set out above.

[19] At the stage those payment were made, the legal position was that the suspension of the part of the court order requiring Crossmoor to deliver the assets to ABSA, had *ipso facto* and automatically fallen away. Crossmoor was required to deliver the outstanding assets. ABSA could proceed with the issue of a writ. ABSA did proceed with the issue of the writ for delivery of assets. The fact that ABSA kept the payments and allocated them as payments to the various credit agreement accounts did not mean that ABSA elected to abandon its remedy to cancel the credit agreements. It sought to give effect to the cancellation by enforcing the court order. Following cancellation, in the ordinary course, the assets must be returned, and valued or otherwise dealt with as the particular credit agreement may prescribe, whereafter the difference between the outstanding balance on the accounts, after taking into account all payments, including subsequent payments made and allocated, less the value of the asset if returned, would be recoverable as damages. The further payments made pursuant to the repayment arrangement will thus not be irrelevant in the context also of enforcing the remedies available upon the cancellation of the credit agreements.

[20] The correspondence exchanged between the parties' attorneys during that time is also consistent only with an intention to secure the return of the assets. The writ was issued on 3 November 2022. It was served on Crossmoor. Attempts were made to trace the physical whereabouts of the assets for removal when these could not be found by the Sheriff. The evidence in this regard is not summarised in this judgment as it stands unchallenged in the affidavits filed. There is simply no substance to the contention that, viewed objectively, ABSA had waived its right to enforce the court order providing for the return of its assets.

[21] Apart from the aforesaid facts being inconsistent with any notion of a waiver of the right to enforce the court order, reliance on a waiver by conduct would, in the circumstances of this application, also not be legally competent. That statement requires a brief examination and identification of the true *vinculum juris* between Crossmoor and ABSA.

[22] The court order is a consent order for the return of the assets. That is what it provides. It gives effect to what was agreed in the settlement agreement read with the consent order prayed annexed to the settlement agreement. The court order must be read and understood in that context and its purpose, the latter being to give effect to the settlement agreement. In *Eke v Parsons* it was said that where a court order records an agreement of settlement:¹³

'The intention of the parties is ascertained from the language used read in its contextual setting'.

¹³ *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) para 30 where the court quoted with approval *Engelbrecht and another v Senwes Ltd* [2006] ZASCA 138; 2007 (3) SA 29 (SCA) para 7.

Similarly, in *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd*¹⁴ it was explained that:

‘The manifest purpose of the judgment is to be determined by also having regard to the relevant background facts which culminated in it being made.’

[23] The court order simply sought to give the imprimatur of an order of court to what was agreed contractually in the settlement agreement read with the consent order prayed annexed thereto. These documents and the court order must all be interpreted together: Crossmoor agreed to be bound to the terms and conditions of every credit agreement (clause 11.10); Crossmoor agreed that it had defaulted on the credit agreements and that ABSA had cancelled the agreements prior to the institution of the liquidation application (clause 11.2); it agreed that ABSA entered into the agreement as a part payment arrangement of the judgment debt in paragraph 3 of the court order, without novating the cancellations of the credit agreements (paragraph 11.3); paragraph 3 of the court order was for the return of assets, which would be remedied following on the cancellation of any credit agreement. Cancellation of the credit agreements was the remedy elected by ABSA following Crossmoor’s various breaches of the various credit agreements, and ABSA would be entitled to pursue whatever remedies are available to it following such cancellation, as it might be entitled to pursue in terms of the terms and conditions of the credit agreements, the terms of which Crossmoor expressly agreed it would continue to be bound to.

[24] All terms of the credit agreements, including non-waiver provisions, would continue to apply. Equally important, the settlement agreement incorporates the aforesaid terms of the consent order prayed ‘as if specifically incorporated into this settlement agreement’. It also expressly provides that no waiver of any of the terms of the settlement agreement and consent order prayed, including that Crossmoor would be

¹⁴ *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* [2022] ZASCA 52; 2022 (5) SA 373 (SCA) para 27.

bound to all the terms of the credit agreements, would be binding unless in writing and signed by the party giving the same.

[25] There is no such written waiver.

[26] To conclude, ABSA was entitled, following Crossmoor's breach in October 2022, to enforce the order for the return of the assets, for the reasons set forth above. It never exhibited an election to the contrary. It never in writing, in a document signed by the parties, elected not to claim the return of the assets. The repayment arrangement remained an indulgence. Even a failure to exercise the power to claim the return of the assets immediately would not constitute or be deemed to amount to a waiver (paragraph 14 of the settlement agreement).

Ownership of assets

[27] Crossmoor has placed reliance on clause 11.8 of the court order and also paragraph 9 of the settlement agreement and paragraphs 10.8 and 10.9 of the consent order prayed, emphasising that what was agreed included not only the 'return of the assets' but also 'a repayment arrangement of the debt.' The issue is what is to be made of the payments made as part of the 'repayment arrangement', after Crossmoor failed to remedy its breach of the repayment arrangement in October 2022, insofar as these might result in an asset being fully paid (as contemplated in paragraph 11.9 of the court order) following the appropriation of payments (as provided for), and an asset fully paid 'shall be released . . . in ownership to [Crossmoor].'

[28] The remedy ABSA had elected, namely cancellation, was expressly provided not to be novated by the settlement agreement, the consent order prayed, or the court order. The repayment arrangement was an indulgence. It did not constitute a revival or reinstatement of the various credit agreements, or a new 'sale,' because that would be in conflict with the very act of cancellation. It must be remembered that it was recorded that Crossmoor was indebted to ABSA in the amount of R134 544 725, being the total of the account balances, 'plus interest for the financing of certain assets.' Now that

Crossmoor had failed to adhere punctually to the repayment arrangement, there would be questions of interest arising. For the purpose of this judgment it shall be accepted that the indulgence to release assets in ownership to Crossmoor once an asset is 'fully paid' would continue.

[29] The question is whether ownership of the assets reflected in the writ, have been shown to have passed to Crossmoor, thus precluding ABSA from executing on the court order in its totality. The total debt owing by Crossmoor (ignoring further interest) was agreed to in the settlement agreement and court order. The details of the payments made by Crossmoor are known to it. And paragraph 11.11.2 of the court order provided how the payments were to be appropriated.

[30] It would be incumbent on Crossmoor to show that it had 'fully paid' all the assets, such that ownership of all the assets would be required to 'be released' by ABSA to it. In that respect it is common cause that the full indebtedness in respect of the assets has not been paid in full. Alternatively, and at best for Crossmoor, it would have to show that it had fully paid the amount owing in respect of certain assets, and that these specific assets should be excluded from the execution process, although that was not the basis for the relief claimed.

[31] As regards proof, the test is the well-known test which applies in interim interdicts, namely:

'Insofar as the appellant also sought an interim interdict *pendente lite* it was incumbent upon him to establish, as one of the requirements for the relief sought, a prima facie right, even though open to some doubt (*Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189). The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and,

if serious doubt is thrown upon the case of the applicant, he cannot succeed. (*Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688B--F and the numerous cases that have followed it.)¹⁵

[32] ABSA, in its supplementary answering affidavit, contradicted Crossmoor's claim that ownership in certain assets had passed to it. Further, ABSA denied that there are any assets reflected in the writ which are fully paid and in respect of which ownership had passed to Crossmoor at the time, that is prior to the urgent application being issued.¹⁶

[33] Crossmoor has not identified any specific assets which it contends are fully paid. Its argument proceeds on the basis that the allocation of payments which ABSA has made, is not in accordance with the formula, which, had the allocation been done correctly, would have resulted in certain assets being fully paid, and thus would provide it with a prima facie right of ownership of those assets. It could do no more than its counsel from the bar pointing to certain assets at the bottom of the ABSA spread sheets, which it was submitted would have been fully paid if the allocation was done correctly. Crossmoor accordingly seeks to interdict the execution of the entire court order pending an action where it can be investigated which assets had come to be owned by Crossmoor. In the interim, pending the determination of the action, it would however mean that without cogent evidence demonstrating that ownership of specific assets prima facie might have passed to Crossmoor, Crossmoor would effectively also interdict ABSA from the return of assets which Crossmoor is obliged to return and in respect of which Crossmoor has no defence.

¹⁵ *Simon NO v Air Operations of Europe AB and others* 1999 (1) SA 217 (SCA) at 228F-I.

¹⁶ ABSA deals with three assets which were reflected on the writ in respect of which the position has changed subsequent to the issue of the writ and indeed the issue of the application, identified as those in respect of: First, account number 9[...], a 2017 Volvo truck which was written off and the full amount settled by the insurer in September 2022, making it an insurer asset; secondly, account number 9[...], a 2008 Mercedes Benz Axor 3595 which was settled in full after the application was issued; lastly, account number 9[...], a 2008 Mercedes Benz Axor 3535 which similarly was settled in full after the application was issued. These assets should not be executed against as ownership is no longer with ABSA, but this is as a result of payments made after the application was issued on 4 July 2023.

[34] The disputed issue is therefore no longer primarily whether the execution of the court order should be suspended, but rather a confession that following Crossmoor's breach the assets all had to be returned as the terms provided in the court order, but that this consequence is now sought to be avoided on the ground that some assets, yet unidentified, have passed into the ownership of Crossmoor, because they had been paid for in full.

[35] At best Crossmoor would be able to interdict the court order being executed in respect of those assets in respect of which it can show it had acquired ownership. But it cannot interdict the execution of the entire court order altogether simply because the payment allocation might be open to criticism, and ownership of one or more of the assets might or should have passed to Crossmoor. As was said in *Lavelikhwezi Investments (Pty) Ltd v Mzontsundu Trading (Pty) Ltd*:¹⁷

'There is no doubt that a court does have jurisdiction to suspend the execution of any order. However, that discretion must be exercised in such a way that court orders are not undermined by being suspended for speculative reasons in circumstances where the judgment or order is not or cannot be put in dispute. Sound factual and legal basis for the suspension so sought must be clearly established by the applicant to enable the court to carefully exercise its discretion.'

[36] The onus of proving its ownership of specific assets still reflected in the writ, is on Crossmoor – he who alleges must prove. That will involve proving that payment had been made in full in respect of those assets prior to the application being launched. The onus of proving payment is always on the party alleging payment.¹⁸ Where the issue is whether appropriation of a certain payment should have been applied in respect of a particular indebtedness, the onus of proof, by logical extension, is similarly on the party alleging such allocation of payment. That is what *Pillay v Krishna* implicitly requires:

¹⁷ *Lavelikhwezi Investments (Pty) Ltd and others v Mzontsundu Trading (Pty) Ltd and others* [2022] ZAECMHC 6 para 23.

¹⁸ See *Pillay v Krishna* 1946 AD 946.

'If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it.'¹⁹

[37] It was for Crossmoor to establish its ownership of those assets, at least at a prima facie level even if open to some doubt. It should have done so in its founding affidavit. It is not sufficient at the level of seeking to establish a prima facie right of ownership, to simply complain that the allocation of payments made by ABSA was irregular, and to suggest that if done properly in accordance with the terms agreed, ownership of some assets might no longer would vest in ABSA. Crossmoor was required to explain which assets had been fully paid. It could have done so without much difficulty.

[38] The allocation of the payments is not something that falls peculiarly within the knowledge of ABSA only. The balances owing in respect of each credit agreement appears from the consent order prayed and the court order. The payments made thereafter are largely common cause on the affidavits, but would in any event be known to Crossmoor (as it has the onus to prove the payments). The allocation of payments would be a simple arithmetical exercise easily performed in an uncomplicated spreadsheet. Crossmoor has made no attempt to do such exercise, or anything similar, to prove which assets should be excluded from any execution on the basis of its alleged ownership. It has even less so proved that ownership of all the assets would have passed to it, thus justifying an order restraining ABSA from executing upon the court order altogether.

[39] It is not for ABSA to prove which assets remain owned by it. In terms of the court order and settlement agreement, the suspension of the order for delivery of the assets admitted to be owned by it, had ipso facto ceased. It is for Crossmoor who alleges that ownership has passed in respect of all, or some of those assets to prove its entitlement to ownership.

¹⁹ *Pillay v Krishna* at 951.

[40] Crossmoor maintained that it would be sufficient simply to cast doubt on the correctness of ABSA's appropriation, as all that is required is a *prima facie* right though open to some doubt, and that the balance of convenience should sway my decision – the contention being that if the order is executed without qualification it would also involve the removal of assets owned by Crossmoor and leave it without the ability to generate an income. It is true that the assets are substantial. However, I have no direct evidence as to what impact the execution of the court order might have on the business of Crossmoor. ABSA also has an interest in its legal rights being maintained.

[41] Crossmoor only has itself to blame for its present predicament. If it maintained regular payments as it had agreed to make, the *ipso facto* position of it losing the benefit of suspension of the court order for the return of the assets would not have arisen. It has not adduced specific evidence as to which assets if any, over and above those conceded by ABSA to be no longer owed by it, are assets in respect of which ownership had passed to Crossmoor.

[42] This court further, and in any event, has a discretion to refuse to grant an interdict in appropriate circumstances. In circumstances where it was open to Crossmoor to establish, in accordance with the agreed formula, that what it contends is a correct appropriation of its payments would have resulted in ownership of certain assets passing to it, and it failed to do so, then a plea that the execution of the entire court order should be interdicted, cannot be countenanced.

Conclusion

[43] The application accordingly falls to be dismissed, not on its merits, but because Crossmoor has failed to discharge the onus of proof. Crossmoor has been unsuccessful and there is no reason why it should not be ordered to pay the costs of the application.

[44] The application is dismissed with costs.

APPEARANCES

For the applicant:

Mr L Hollander

Instructed by:

Swartz Weil Van der Merwe Inc

c/o Venns Attorneys

Pietermaritzburg

(Ref: N Jooste)

For the first respondent:

Mr D Ramdhani SC

Instructed by:

Tim du Toit Attorneys

c/o Randles Inc

Pietermaritzburg