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

Case No: 2023-133096

1. REPORTABLE: YES/NO

2. OF INTEREST TO OTHER JUDGES: YES/NO

3. REVISED YES/NO

In the matter between

EXECUTIVE MOBILITY FINANCIAL SOLUTIONS (PTY) LTD Applicant

And

PHADIMA PHADIMA GROUP HOLDINGS (PTY) LTD

First Respondent

RALEBALA MATOME MAMPEULA

Second Respondent

JUDGMENT

STRYDOM, J

[1] This is a return day of a *rule nisi* obtained *ex-parte*, issued by my brother Twala J on 19 December 2023. In relevant part an order was made for the immediate attachment and removal of a vehicle belonging to the applicant (for purposes of this judgment I will refer to the Mercedes Maybach vehicle, fully described in the papers as "the vehicle").

[2] The vehicle was to be stored pending the return day. The order further provided for costs of the *ex-parte* application to be reserved and that the respondent could anticipate the return date.

[3] The respondents were called upon to show cause, if any, on the return date why an order should not be made to confirm the cancellation of the rental agreement between the applicant and the first respondent in respect of the vehicle and for costs of the *ex-parte* and return date applications.

[4] The matter was set down on this opposed application roll starting on 18 March 2024. As of this date no answering affidavit was filed. When the matter was called on Monday 18 March 2024, I, by that time, received a sick note from the second respondent, explaining that he could not attend the proceedings.

[5] The matter was then stood down to be heard today, Friday 22 March 2024. This morning, I was handed an opposing affidavit and after hearing the second respondent's condonation application for the late filing of the answering affidavit and as no objection on behalf of the applicant was raised, the Court condoned the late filing of this affidavit and accepted the affidavit in evidence.

[6] The relationship between the parties pertaining to the vehicle is strictly a contractual one. To decide whether the applicant has made out a case in its founding affidavit, regard must be had at the contractual terms regulating the relationship between the parties.

[7] In terms of the rental agreement, the applicant rented this luxury vehicle to the first respondent. This was not a lease agreement where the vehicle was leased and at the expiry of the lease period the first respondent would have become the owner of this vehicle.

[8] In terms of clause 8(1) of the Rental Agreement, the renter shall at all times have remained the owner of the vehicle. This rental agreement was entered into on or about 3 March 2023. It was a long-term rental stretching over 43 months and the monthly payment to rent this vehicle was R107 853,44.

[9] The applicant or its representatives were at all reasonable times entitled to inspect the vehicle. The second respondent entered into a deed of suretyship in favour of the applicant for the due payments of the rental.

[10] In this matter it has become common cause that:

10.1. The applicant and the first respondent entered into this rental agreement in relation to this vehicle.

10.2 Applicant was and remains the owner of the vehicle.

10.3 That at the time when the *ex-parte* application was brought, the first respondent was in arrears pertaining to monthly rental in the amount of R326 804,14. Currently the arrears are almost double that amount.

[11] The breach of the rental agreement is accordingly not in a dispute. What is disputed is what remedy is currently available to the applicant. To consider this, the Court will have to consider the breach clause 22 in the rental agreement. The Court will quote two clauses.

11.1 Clause 22(2) reads as follows:

"The renter shall be entitled, without prejudice to any other rights it may have to terminate this agreement forthwith by giving the rentee a written notice of the breach and may thereafter;

22.2.1. Collect and repossess the vehicle without being required to obtain an order of court;

22.2.2. Recover all outstanding rentals due in terms of this agreement, all of which shall become immediately due and payable in full in the event of such breach."

11.2 Clause 22.3 is also relevant and reads:

"Where the rentee fails to pay timeously any amount payable in terms of this agreement, after having been given five days' written notice to remedy such default, the renter shall be entitled to cancel this agreement and without prejudice to any other rights it may have, collect and repossess the vehicle as permitted in 15.1."

[13] Before this Court it was argued that the applicant is not entitled to cancel the rental agreement as the applicant failed to give the first respondent the required five days written notice to remedy the breach as contemplated in clause 22.3.

[14] Attached to the founding affidavit are three letters in terms of which the applicant gave notice to the first respondent to remedy its breaches, i.e. being in arrears with its payment of the monthly rental.

[15] The first notice which was attached to the founding affidavit was dated 21 June 2023, approximately three months after the rental agreement was entered into during March 2023. At this stage notice was given to the first respondent that it was in arrears in the amount of R119 121,13.

[16] Payment was required *in lieu* of which the vehicle had to be returned to the applicant's premises for safekeeping. It should be noted that this letter did not refer to a five-day notice.

[17] The next letter was dated 11 July 2023 and again notice was given of the arrear amounts in somewhat of a higher amount, but in this case, it was stated:
"If full payment is not made five days after this letter, your vehicle must be returned to EMFS premises for safekeeping and if the vehicle is not returned, EMFS will hand your matter over for repossession, where your vehicle will be repossessed."

[18] The third notice was then given more or less a month later, 21 August 2023 where the arrears amount was now again higher and again five days' notice was given to remedy the breach.

[19] Now as alluded to earlier, the amount of arrears escalated by 14 December to the sum of R326 804,14. So it is clear that the first respondent remained in arrears, in fact the amount substantially increased.

[20] In my view, proper notices to remedy the defaults, were provided to the first respondent. These defaults were not remedied and the respondent has not put up a valid defence against the claim of the applicant.

[21] The fact that the second respondent now in Court tendered payment of the arrears in a lump sum is irrelevant. The applicant exercised its rights in terms of the

rental agreement, and it is not for this Court to order the applicant to accept the tender made on behalf of the respondent.

[22] The National Credit Act does not avail the respondent in this matter, as the first respondent is a corporate entity.

[23] As far as costs are concerned, the cost order should follow the result. Before this vehicle was returned to applicant on 15 or 16 January 2024, the applicant was entitled to bring a contempt of court application.

[24] The *rule nisi* was issued on 20 December 2023 and the vehicle was only returned on the date the contempt application was to be heard. The second respondent, and therefore also the first respondent, became aware of the order shortly after it was made on 20 December 2023.

[25] Yet the second respondent decided not to return the vehicle, but to remain on holiday and use the vehicle in the meantime. There is no justification for a party to decide by himself or itself that a court order should stand over until it is convenient for that party to comply with a court order, in this instance, to hand over a vehicle.

[26] The costs of the contempt application should accordingly also be paid by the respondent. The Court has been handed a draft order and the Court intends to make that draft order an order of Court. I will mark that draft order with an X, but for purpose of this judgment I will just read this order into the record.

[27] It is ordered that:

1. The rental agreement between the applicant and the first respondent is hereby terminated,
2. The applicant's Mercedes Maybach GLS600 22 model with VIN number W[...], engine number 1[...] and registration number K[...] be immediately returned to the applicant; and
3. The first and second respondents are liable jointly and severally for:
 - 3.1. The cost of the *ex-parte* application 20 December 2023,

3.2. The contempt application (case number 2024-001504) heard on 16 January 2024; and

3.3. The cost of this application for the final relief, including the cost of counsel.

R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on: 22 March 2024

Delivered on: 22 March 2024

Appearances:

For the Applicant: Adv. C. Shahim

Instructed by: Thomson Wilks Inc

For the Respondents: Mr. R.M. Mampeula

Instructed by: In person