Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	**YES**/NO
Circulate to Regional Magistrates:	**YES**/NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 905/2018

Heard on: 14/09/2018

Delivered on: 19/11/2018

In the matter between

GETRUDE LOUW **Appellant**

And

WESBANK a division of FIRSTRAND BANK LTD **Respondent**

JUDGMENT

PAKATI J

[1] The applicant, Ms Gertrude Louw, applies for an order declaring the credit agreements between her and the respondent, Wesbank, a division of FirstRand Bank Limited ("the bank"), valid and enforceable. She also seeks an order prohibiting the respondent from taking possession of two vehicles, a 2016 Volkswagen Golf VII 2.0 TSI R DSG and a 2018 Ford Ranger Bakkie 2.2 TDCI XL, purchased under the credit agreement until the main dispute has been resolved and the respondent has shown cause as to why the credit agreement should be cancelled on the basis of invalidity (the main application).

[2] The bank opposes the main application and seeks a counter-application for the interim attachment of the said motor vehicles for safekeeping pending the finalisation of the action instituted under Case Number 1046/2018 against Ms Louw. The applicant also applies for condonation for the late filing of the opposing affidavit to the counter-application.

CONDONATION

[3] Mr Kammies, on behalf of the applicant, explains that the replying affidavit was out of time due to unforeseen circumstances. He did not receive the opposing affidavit to the counter-application. The replying affidavit was supposed to have been filed on 04 July 2018. The notice to oppose the counter-application and the replying affidavit were only filed on 10 September 2018. However, the opposing affidavit to the counter-application is dated 10 July 2018. Mr Kammies explains further that he was confused and unaware that the respondent's opposing papers to the main application had already been filed. He mentions that Mr Mzuzu, the applicant's attorney of record, had an issue with the Cape Law Society and was therefore unable to file any papers. Mr Kammies was also hospitalised for more than a month. He argues that there is no prejudice to the respondent as the applicant's replying affidavit and the opposing papers to the counter-application have now been filed.

[4] Mr Pretorius, for the respondent, opposes the application for condonation on the basis that page 55 of the paginated papers clearly show that the answering affidavit to the founding affidavit and the affidavit in support of the counter-application were filed on 26 June 2018. Paragraph 38 of the paginated page 70 clearly states: *'I shall now answer the allegations made in the founding affidavit.'*

[5] On 09 May 2018 the bank filed a notice of intention to defend the main application. On 21 June 2018 it filed a notice to the counter-application and on 26 June 2018, an answering affidavit to the founding affidavit and an affidavit in support of the

counter-application. It is therefore not accurate for the applicant to allege confusion as to which papers were filed. Mr Kammies requests the court to grant condonation, which in the interests of justice I granted considering that it was not the applicant's fault that her replying affidavit was filed late.

BACKGROUND FACTS

[6] On 27 December 2017 Ms Louw and her husband, one of the directors of Mawele Construction and mayor of Kakamas, Mr Marius Matthews Louw, approached Thys Auto, a retailer in Upington to ascertain whether they qualified to purchase motor vehicles. Ms Louw states that at the time she was appointed as Administrative Manager of Mawele Construction (Pty) Ltd, a newly formed company. She alleges that the appointment was duly signed by the company directors during a general meeting of shareholders and directors on 08 December 2017. At the time she and her husband approached the retailer, Mawele Construction had not received its registration certificate. She states that there was a problem with the application for the registration certificate which was in the meantime resolved by the issue of a certificate dated 23 January 2018 in terms of section 14 of the Companies Act[1].

[7] According to the applicant before the certificate was issued the company could not open a bank account. The directors agreed that her salary would be paid from her husband's personal account. That was possible because the company received cash payments for two projects that were completed during that period and her husband was in a financial position to pay her salary. From Annexure "W8", Mr Louw's FNB account number [….] from 24 December 2017 until 26 May 2018 (Annexure "W8"), shows two payments of R38 550-00 on 21 December 2017 to Ms Louw. She states that all this information was conveyed to Mr Strydom of Thys Auto when she sought

[1] Act 71 of 2008

financial assistance. After completing the application form Mr Strydom informed them that the completed form, her salary advice as well as her identity document would be forwarded to the bank for consideration and approval. After the bank approved her application for the purchase of the motor vehicles she took them into her possession. She vehemently denies that she and her husband misled Mr Strydom by making any misrepresentation.

[8] Shortly after Ms Louw took possession of the motor vehicles Auto Thys contacted her and informed her that the bank had laid charges of fraud against her. She was requested to return the motor vehicles, which she did without hesitation. She denied committing any fraud when she completed the application form. To her dismay, Mr Strydom later informed her that there was a misunderstanding. The motor vehicles were then returned to her.

[9] During January 2018 the bank addressed two letters to Ms Louw requesting her to return the motor vehicles again stating that the agreements had been cancelled due to the misrepresentation allegedly committed by her when she completed the application forms requesting for credit. The bank immediately refused to deduct the instalments despite the availability of funds in her bank account. She therefore insists that the credit agreement is still valid and refuses to return the motor vehicles to the bank alleging that she purchased them legally. She still has not returned the motor vehicles to the bank despite demand.

THE COUNTER-APPLICATION

[10] On 02 June 2018 the bank filed a counter-application seeking the return of the said motor vehicles into the Sheriff's possession who should deliver them to the bank.[2] **The** bank would in turn and at its own cost, transport the vehicles to garaged

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[2] Fedsure Life Assurance v Worldwide African Investment Holdings 2003 (3) SA 268 at para [27] Cloete J held: 'A vindicatory action has been categorised as one in which the plaintiff claims delivery of specific property as owner or lawful possessor.'

premises and retain them under security pending the outcome of the action against Ms Louw under Case Number 1046/2018 instituted by the bank. Should Ms Louw fail to return the said motor vehicles the sheriff should be authorised to seize them from whomever and wherever he might find them and hand them over to the bank. The purpose of the interim attachment is to protect the vehicles against deterioration and damage. It further requests that Ms Louw be ordered to pay costs of the counter-application on a scale as between attorney and client.

COMMON CAUSE FACTS

[11] The following facts are common cause:

11.1 That the motor vehicles remain the bank's property until the final instalments have been paid in full;

11.2 That Ms Louw purchased the VW Golf from the bank in terms of the instalment sale agreement on 27 December 2017 for a purchase price of R 561 197-00 including finance charges of R 414 010-90; and

11.3 That on 08 January 2018 Ms Louw concluded the second instalment sale agreement with the bank for the purchase of a 2018 Ford Ranger 2.2 for a purchase price of R 436 997-00 including finance charges of R 272 133-85.

[12] The following were relevant and important clauses under the instalment sale agreements between the parties and can be summarised thus:

12.1 The bank would remain the owner of the motor vehicles until all the instalments due under the instalment sale agreements have been paid in full; and

12.2 Should the applicant make misleading statements to the bank before signing the sale agreements, the bank would be entitled to cancel the agreements and take possession of the motor vehicles, retain all payments already made and claim as liquidated damages payment of the difference between the balance outstanding on the accounts and the market value of the motor vehicles?

[13] The bank alleges that it performed its obligations in terms of the agreements and Ms Louw also took delivery of the motor vehicles.

[14] Mr Moemagare Samuel Motlhodi, a fraud risk specialist investigator, the deponent to the answering affidavit and the one in support of the counter-application, states that during January 2018 he received an anonymous telephone call informing him that Ms Louw had supplied false information to the bank when she applied for vehicle finance. According to Mr Motlhodi the investigation revealed that prior to and at the time of the conclusion of the agreements Ms Louw allegedly made material and oral fraudulent misrepresentations to the representatives of the bank as follows:

14.1 That she was employed at Mawele Construction (Pty) Ltd from 01 December 2017 as an administrative manager according to a purported salary advice presented at the time (Annexure "GL4");

14.2 That Mawele Construction conducted business from 1 Hoof Street; Kakamas with landline number (054) 839 4700 with its postal address as Post Box 613, Kakamas, 8870;

14.3 That she was employed by the said company as a department manager whereas the purported salary advice presented to the bank shows her designation as administration manager (Annexures "W51" and "W52") ;

14.4 That she was paid a net salary of R38 550-00 per month by the company according to the purported salary advice she presented to the bank (Annexure "GL4");

14.5 She furnished the bank with a purported 'Dienskontrak (025) (Annexure "GL1") ostensibly signed by Mr Gregory Mathian, the director of the company, who was only appointed as such on 23 January 2018;

14.6 She provided the bank with an interim bank statement from First National Bank with account number 62507211499 showing two deposits of R 38 550-00 on 21 December 2017 with the following narrative: **"FNB OB PMT PAY025"** and **ATM ACC PAYMESALARIS MA"** ; and

14.7 Ms Louw allegedly represented that income tax in the amount of R11 300-00 was deducted from her gross salary as indicated in her purported salary advice (Annexure "GL4").

[15] Mr Matlhodi submits further that when Ms Louw made the alleged representations she intended the bank to rely on the information provided in making its decision to finance her. The said misrepresentation induced the bank and financed her. The representations were, according to him, false and Ms Louw knew that when she gave the information.

[16] The investigation further revealed that four payments of R 33 000-00 on January 2018, 28 February 2018, 03 April 2018 and 02 May 2018 received by Ms Louw had different narratives and reference numbers ("Ref: 035 Mawele Konstruksie") when compared with the payment of R38 550-00 with "Ref 025" that she received in December 2017. These payments originate from Standard Bank Account Number 41728548 opened during January 2018. The account holder's name does not appear but it would be safe to assume that it was the company's account number after it was registered and incorporated on 23 January 2018. The investigation further showed that as at March 2018 the said Standard Bank account received only two credits of R 34 000-00 on 29 January 2018 and R 33 000-00 on 27 February 2018. Notably, each payment was done a day prior to each of the purported salary

payments to Ms Louw. It also transpired that no income tax payment of R11 300-00 per month was deducted from her salary and paid to South African Revenue Services.

[17] The bank alleges that if Ms Louw had not misled it when completing the application it would not have approved finance for her. Her conduct justifies the cancellation of the agreement hence on 26 January 2018 the bank forwarded a written notice informing her that the agreements were void *ab initio* (Annexure "W12.1"). In a letter dated 09 March 2018 the bank's attorneys of record, Rossouws, Lessie Inc, demanded the return of the motor vehicles due to the cancellation of the agreements based on *'serious misrepresentation'* ("W13"). It thereafter issued summons against Ms Louw on 07 May 2018 claiming the return of the said motor vehicles. No response was forthcoming from Ms Louw. She is still in possession of the said motor vehicles.

[18] Ms Louw denies any interaction with the bank during her applications but with the salesperson. She argues that she insured the motor vehicles to prevent damage or permanent loss. She argues further that after the bank refused to accept the instalments she was informed that she should return them again, which she refuses to do. She claims that before the dispute arose she was the lawful possessor and insists that the agreements were not properly cancelled.

[19] Ms Louw states that when the motor vehicles were returned on the first occasion after the alleged fraudulent misrepresentation the allegations were shown to be unfounded when the motor vehicles were returned. She proffers no elaboration on this. The bank on the other hand claims that return of the vehicles is subsequent to the cancellation of the instalment sale agreements as a result of the alleged fraudulent misrepresentation by Ms Louw. She seeks an order enforcing the validity

of the credit agreement and asks the Court to refuse the counter-application pending finalisation of the investigation into the validity of the credit agreement.

[20] Regarding the main application the issue to be determined is whether Ms Louw has made out a case for the declaratory order and whether she has satisfied the requirements of the interim interdict that she seeks. The declaratory order is final in nature and therefore the principle in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD**[3] is applicable. In this case it was held that where in motion proceedings disputes of fact arise on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent justify such an order. At page 635 the learned Judge of Appeal held further:

> 'Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on papers.'

[21] In her founding affidavit Ms Louw does not give a date when she and her husband approached the retailer, she says during December 2017. In her application dated 19 December 2017 she mentioned that she had been employed by the Construction for two months as a department manager. According to her service contract she started work on 01 December 2017. This is clearly a contradiction.

[22] On the same breadth Ms Louw's contract of employment (Annexure "GL1" and her salary advice "GL4") she states that she was employed by Mawele Construction from 01 December 2017 to 22 December 2017 as administrative manager whereas the 'confirmation of customer application details' attached in support of her application (Annexures "W5.1" and "W5.2") record her designation as department manager as alluded to earlier. The salary advice which she attached to her application shows that

[3] 1984 (3) SA 623 (A) at 634H-I

the salary period as at 01 December 2017 with a total salary package of R 49 850-00 with salary number 025 was signed by one of the directors, Mr Gregory Mathian. It is not possible that she was employed by this company either as department manager or administrative manager from 01 December 2017 because the company was non-existent at the time and Mr Mathian was only appointed as director of the company on 23 January 2018. The company was only registered and incorporated on 23 January 2018. This is clear from the registration certificate attached to the founding affidavit as Annexure "GL3".

[23] The investigation reveals through the TransUnion Search (Annexure "W7") that the company's registered address, 1696 Pioneer Street, Langverwacht, Kakamas, is Ms Louw's private residence and no business is conducted from the said address or 1 Hoof Street, Kakamas for that matter. Again, the landline number that she provided has been shown to be non-existent because when Mr Matlhodi dials it an automated voice prompt would say: '*The number you have dialled does not exist*. *Please re-dial carefully or consult directory enquiries*.' Even the postal address she furnished in her application form (Post Box 613, Kakamas, 8870) belongs to a Mr Kosie Human with identity number 541004 5018 088, residing at House 50, Kakamas. Importantly, Mr Human is not a member or a director of the company as shown in Annexure "W7".

[24] According to Mr Matlhodi Ms Louw's husband had during June 2017 and November 2017 sought vehicle finance but was unsuccessful because his credit rating was low and he had two civil judgments granted against him. His salary of R46, 887-70 shown in his bank statements is from the Kai Garib Municipality as a mayor. Ms Louw's salary was clearly not paid from the company as she alleged.

<u>THE MAIN APPLICATION</u>

[25] The requirements for the right to claim a final interdict are: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other remedy.[4]

CLEAR RIGHT

[26] The applicant argues that its right to possess the motor vehicles is derived from the agreements. She claims that she is the lawful possessor of the motor vehicles and therefore has a vested right in them. She disputes that there was proper cancellation of the agreements and that she has no alternative similar protection than to approach the court. She states that she initially intended to solve the issue through alternative dispute resolution which was refused by the bank. This, she states, infringes upon her rights to possess the motor vehicles. According to her there has been no factual dispute raised until the counter-application and the summons were served on her. She disputes that her application is vindicatory in nature. She prays for an order as prayed for in the notice of motion.

IRREPARABLE HARM

[27] The applicant failed to indicate a well-grounded irreparable harm if the relief sought is not granted. She proffers no explanation that the balance of convenience favour the granting of the order in her would favour.

COUNTER-APPLICATION

[28] To succeed in this application the applicant is required to establish and satisfy the well-established requirements for the grant of an interim interdict. It is required to show: (a) that the right which it seeks to enforce is clear, or, is *prima facie* established, though open to some doubt; (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm if the interim

[4] Setlogelo v Setlogelo 1914 AD 221 at 227

relief is not granted; (c) that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other satisfactory remedy.[5] If the claim by an applicant for an interdict *pendete lite* is vindicatory and if in the circumstances he is entitled to an interim interdict restraining the use of the thing by the respondent, there is no reason why a further order should not be granted authorising attachment *pendete lite* to give effect to the restraint against use and to protect the thing from deterioration.[6]

CANCELLATION

[29] It is settled law (at least in this division) that it is a prerequisite for the grant of an interim attachment order, that any agreement under which the respondent has the right to possess the vehicles first be cancelled.[7] In the circumstances it cannot be said that the agreements were valid and enforceable, hence the bank refused to continue with the debit orders from the applicant's account. The cancellation of the agreements cannot be said to be unreasonable in the face of the misrepresentation by Ms Louw. It can safely be perceived that the company was used as a front employer to induce the bank to finance her.

[30] Ms Louw states that after she took possession of the motor vehicles she was contacted by the dealer Thys Auto to return them indicating that the bank had laid fraud charges against her. She says: *'Due to the fact that I do not want to cause any trouble and needed this issue to be sorted out, I decided to cooperate and return the vehicles to the dealer.'* In my view, the situation is no different because if she does

[5] SA Taxi Securitisation (Pty) Ltd v Chesane 2010 (6) SA 557 (GSJ) at para [11]

[6] Van Rhyn v Reef Developments A (Pty) Ltd 1973 (1) SA 488 (W) (Headnote); see also SA Taxi Securitisation *supra* at para [10] where the court held that the function and purpose of an interim attachment order is to protect the leased goods against deterioration and damage and to keep them in safekeeping until the case between the parties has been finalised.

[7] SA Taxi Securitisation (Pty) Ltd at para [13]

'not want to cause trouble and want the issue sorted out she should do what she did earlier by returning them.

[31] Again in her heads of argument Ms Louw states that *'information was required and provided to the salesperson whereby the latter completed the application form on his own account and was the applicant later required to sign same.'* She states further that *'all application forms were completed by Mr Strydom and that he only requested us to sign on the dotted line without requesting us to confirm the correctness of the content of such application. I submit that if ever there is an allegation that fraudulent information was contained in my application for financing, the buck has to be passed to the dealer and not to myself.'* Yet in paragraph 9 of the founding affidavit she states: *'I then proceeded to complete the application forms in the presence of Mr Strydom who then submitted the application forms together with annexures to the respondent, subject to their approval.'*

[32] Mr Louw states in his confirmatory affidavit attached to the opposing affidavit to the counter-application dated 20 July 2018 that neither he nor Ms Louw informed Mr Strydom that the main place of their business was 1 Hoof Street, Kakamas. He states that it was due to Mr Strydom's mistake. Strange enough, the form titled 'Customer Application Details' shows the employer business address as 1 Hoof Street, Kakamas. Ms Louw denies that she told Mr Strydom that she was appointed as the department manager as Mawele Construction is not in production but in construction. It is inconceivable where Mr Strydom would have got the information contained in the Customer Application Details from. Mr Strydom would not have sucked it from his thumb.

[33] In **OLYMPIC PASSENGER SERVICE (PTY) LTD v RAMLAGAN**[8] Holmes JA had this to say:

[8] 1957 (2) SA 382 (D) at 383C-G

'It thus appears that where the appellant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range all the way from strong to weak. The expression '*prima facie* established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'

[34] It is common cause that the respondent is the owner of the motor vehicles in terms of the agreements. The bank submits that since it has validly cancelled the agreements it remains the lawful owner of the motor vehicles in terms of the agreements.

[34] The bank alleges that the applicant and her husband are in control of the vehicles and they use them. They are depreciating in value which is prejudicial to the bank. The applicant would suffer no prejudice if the bank preserves them. The bank submits that due to the cancellation of the agreements it owns both motor vehicles and is therefore entitled to preserve them pending the action. In those circumstances the balance cannot be said to favour the applicant as the vehicles would lose value if used.

[35] In her founding affidavit Ms Louw does not mention that she also approached Auto Lexus CC in Upington but only mentions Thys Auto. She also did not mention that her husband could not get finance from the bank for the purchase of a 2016 Chevrolet Spark and a Nissan NP 200 during June 2017. She is clearly economical with the truth. The salary advice, the business address, the amount deposited into her bank account purported to be her salary and the service contract was bogus, in my view.

None of the other directors of the company filed confirmatory affidavits except Mr Mathian. What is clear is that the company was only registered and incorporated on 23 January 2018 as alluded to earlier. From the facts as presented it is doubtful that the bank would have financed the applicant if it had not been induced to do so by the applicant and her husband. The bank states that five case dockets have been laid against the applicant.

[36] Seeing that the claim is a vindicatory one and there is a strong right to cancellation and restoration of the vehicles to the bank less weight should be placed to the element of irreparable harm.[9] In my view, the balance of convenience clearly favours the bank and that other requisites are also present for reasons already advanced. The counter-application has to succeed with costs.

<u>In the circumstances I grant the following order:</u>

1. **The main application is dismissed.**
2. **The applicant, Ms Louw is ordered to forthwith deliver into the possession of the Sheriff of this Division a 2016 Volkswagen Golf VII 2.0 TSI R DSG with engine number WVWZZZAUZGW284785 and a 2018 Ford Ranger 2.2 TDCI XL A/T P/U D/C with engine number QJ2LPHC22366, who shall deliver them to the respondent, Wesbank ,a division of Firstrand Bank Limited, who shall in turn, at its own expense:**

   2.1 Transport the vehicles to garaged premises situate at Day and Knight Towing, 3 Cecil Sussman Street, Kimberley;

   2.2 Retain the vehicles at such garaged premises under security, pending the outcome of the action under Case Number 1046/2018 instituted by the respondent, Wesbank, against the applicant, Ms Louw, in this Court.

[9] Stern and Ruskin 1951 (3) SA 800 (W) at 813

3. **The respondent shall not use the vehicles or permit that they be used.**
4. **In the event that the applicant fails to comply with the order above within five days of service of this order on the applicant's attorneys of record, the Sheriff is authorised and directed to take the vehicles into his possession from whomever and wherever he may find them and return them to the respondent as aforesaid.**
5. **The applicant is ordered to pay the costs of this application on a scale as between party and party.**

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JUDGE BM PAKATI
NORTHERN CAPE DIVISION, KIMBERLEY

For the Applicant:	*ADV KAMMIES*
Instructed by:	*MZUZU ATTORNEYS*
For the Respondent:	*ADV PRETORIUS*
Instructed by:	*DUNCAN & ROTHMAN ATTORNEYS*