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

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

Saakno: / Case number:	**1875 / 2011**
Datum verhoor: / Date heard:	**14/09/2012**
Datum gelewer: / Date delivered:	**21/09/2012**

In the matter between:

MAN FINANCIAL SERVICES (SA) (PTY) LTD
(Registration Number: 1997/011686/07) Applicant

and

JURGENS JOHANNES VAN DER WESTHUIZEN
(Identity Number:) Respondent

Coram: Lacock, J

JUDGMENT

LACOCK, J

[1] The applicant hereto is a credit provider as defined in the National Credit Act, No. 34 of 2005 (the NCA). During September 2008 and again in January 2011 the applicant and the respondent entered into two written instalment sale

agreements in terms whereof the applicant sold a 2008 MAN TGA 27.440 BBS L truck and a 2011 MAN TGS 26.480 BLS LX truck to the respondent respectively. These are credit agreements in terms of the NCA.

1.1 In respect of the first agreement, the purchase price and finance charges had to be paid in monthly instalments over a period of 5 years, and in respect of the second agreement the purchase price and finance charges had to be paid over a period of 4 years.

1.2 In terms of the said agreements ownership of the trucks remained vested in the applicant until fulfillment of all its obligations under the agreements by the respondent.

[2] It is common cause that the respondent defaulted under the agreements by falling in arrears with the monthly instalments due in terms thereof.

[3] By reason of the aforesaid, the applicant had the following letter addressed to the respondent on 12 October 2011:

"*1. We address this letter to you on instructions received from our client, MAN Financial Services (SA) (Pty) Ltd. You entered into an agreement with our client in respect of a 08 MAN TGA27.440 BBS-L and a 11 MAN TGS 26.480 BLSLX 6X4 T/T and you have subsequently failed to comply with the terms thereof in that you* *are currently in arrears with payment of the instalments as indicated hereunder:*

1.1 On 7 October 2011, the outstanding indebtedness in account number: 77773636 amounted to R590,716.27. You were in default with payments thereon in the amount of R88,873.68, with interest thereon calculated at the rate of 9,000% per annum, compounded monthly from 7 October 2011 to date of payment.

1.2 On 7 October 2011, the outstanding indebtedness in account number: 80574016 amounted to R1,228,149.82. You were in default with payments thereon in the amount of R120,664.62 with interest thereon calculated at the rate of 12,000% per annum, compounded monthly from 7 October 2011 to date of payment.

2. Kindly note that we herewith draw the default to your attention and propose that you refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent to resolve any dispute under the agreement or develop and agree on a plan to bring the payments in terms of the agreement up to date.

3. Kindly note that if 10 (ten) business days lapse from the date of delivery of this notice and you have not responded to the notice or responded by rejecting the proposals, our client will proceed to institute action against you for recovery of the full outstanding amount of the indebtedness together with an order that the goods be handed back to MAN FS.

4. We herewith demand payment of the arrears as described and if not paid within the above mentioned 10 days MAN FS will cancel the agreement and demand return of the goods financed.

5. We trust that this matter will receive your urgent attention and kindly note that this letter is sent to you in terms of Section 129 of the National Credit Act No. 34 of 2005."

The letter was served on the respondent on 14 October 2011.

[4] The respondent failed to pay the arrear instalments within the 10 day period stipulated in the letter, whereupon the applicant had a second letter addressed to the respondent on 31 October 2011, reading,

> "*1. You are in arrears with payment of your instalments. Man Financial Services (SA) (Pty) Ltd has cancelled the credit agreements.*
>
> *2. We suggest that you urgently arrange with our offices for the removal of the goods to avoid the costs involved in urgent High Court proceedings and the costs if we have to instruct the Sheriff to attach and remove the goods.*"

[5] On 15 November 2011 the applicant filed the present notice of motion, claiming the following final relief:

> "*1. That the Respondent be and is hereby ordered to return and handover to the Applicant the goods listed in paragraphs 1.1 and 1.2. infra, failing which the Sheriff be and is hereby authorized to attach said goods wherever and in whomever's possession same may be found and to return and hand same over to the Applicant:*
>
> *1.1 The 2008 M.A.N. TGA 27.440 BBS L with chassis number HW9-0273 and engine number 51519120191912, along with all relevant documents in respect thereof;*
>
> *1.2 The 2011 M.A.N. TGS 26.480 BLS LX 6X4 T/T C/C with chassis number: AAM78W0002PX23836 and engine number 51524320372449, along with all relevant documents in respect thereof;*
>
> *2. That the Respondent be ordered to pay the costs of this Application on a scale as between Attorney and own client;*
>
> *3. Granting the Applicant such other and/or alternative relief as the honourable Court deems fit.*"

[6] The crisp point for determination in this matter is whether the two instalment sale agreements had been properly cancelled. It is trite that cancellation of the agreements is a prerequisite for entitlement to the relief claimed in paragraph 1 of the notice of motion. In **Absa Bank Ltd v De Villiers**, 2009 (5) SA 40 (CPD), a full bench of that Division had to consider the following issue:

> *"[19] It follows from the aforesaid that in terms of the general principles of our law of contract an order authorizing the attachment of a vehicle that is the subject of an instalment agreement would be granted by the court as a claim ancillary to the cancellation of the instalment agreement. As mentioned before, second respondent held that, absent a claim for the cancellation of the instalment agreement, applicant was not legally entitled to a final order for the attachment of the vehicle. This decision of the second respondent is in accordance with the principles of our common law. What has to be decided is whether the NCA, and in particular Part C of Ch 6, has introduced a procedure at variance with our common law, which entitles applicant to repossess the vehicle in the absence of the cancellation of this instalment agreement."*

In a well reasoned judgment, Fourie J answered this question as follows at 51J to 52A,

> *"[35] In view of the aforegoing I conclude that applicant's reliance on the provisions of s 131 read with s 127(2) – (9) as substantiation for the submission that the legislature has introduced a procedure whereby the credit provider is entitled to the return of the goods, without cancelling the relevant instalment agreement, is without merit."*

and

"I accordingly conclude that upon a proper interpretation of the relevant provisions of the NCA the legislature has not done away with the requirement of a claim for the cancellation of an instalment agreement prior to the granting of an attachment order in terms of s 131 of the NCA." **(at 52H)**

The aforesaid legal exposition applies to the granting of an interim attachment order as well. (See **SA Taxi Securitisation v Chesane**, 2010 (6) SA 557 (GSJ) at 559F).

[7] It will be noted that the applicant did not apply for either an order of cancellation of the agreements or for an order confirming the alleged cancellation of the agreements.

7.1 In its supporting affidavit the applicant *inter alia* alleges that, in terms of the agreements, it is entitled to cancel same in the event of the respondent defaulting in terms thereof. What is therefore relied upon on the papers, is a *lex commissoria* allegedly contained in the written agreements. However no such contractual right of cancellation is embodied in any one of the written agreements. This was conceded by Adv Olivier, appearing for the applicant.

7.2 Neither in its papers nor in argument did the applicant rely on a common law right of cancellation.

[8] Mr Olivier submitted that the provisions of section 123 read with sections 129 and 130 of the NCA afforded the applicant a right of cancellation of the agreements in question. Since the procedural requirements of the said provisions had been met, so Mr. Olivier argued, the applicant was entitled to cancel the agreements as it did in terms of the letters quoted hereinbefore.

8.1 A similar argument was raised before Horwitz AJ in **Absa Bank Limited v Havenga and Similar Cases**, 2010 (5) SA 523 (GNP), the facts of which were on all fours with the facts in this matter. At page 537 A-D the learned judge rejected this argument in the following terms:

"*As regards the latter point, and as I have indicated above, the fact that an agreement does not contain an express cancellation provision is not to say that cancellation is therefore never possible: the common law may well avail the credit provider. But in that instance the appropriate allegations must be made in the founding papers, and not some absurd allegation, based on a template, that the agreement contains an express provision to that effect. As regards this category of cases (where the agreement contains no cancellation clause), it was submitted to me that the allegations in the particulars of claim or founding affidavit, that the credit provider had complied with the provisions of ss 123 and 129 of the National Credit Act were sufficient to found an action for cancellation because, so the submission went, those provisions created, and afforded the credit provider, a right to cancellation. Those provisions of the Act do no such thing. The right to cancel an agreement arises out of an application of the rules of the law of contract. Sections 123 and 129 are procedural in nature. They prescribe the procedure that the credit provider must follow in those instances* *in which the latter enjoys a right of cancellation, no matter how that right arises."*

I agree with this reasoning.

[9] In as much as reliance was placed on the following wording of the relevant contracts, viz,

"*Indien die huurder wanpresteer, kan die Kredietverskaffer-*

19.2.1 …

19.2.2 met geregtelike stappe begin om hierdie ooreenkoms af te dwing, insluitende terugname van besit van die goedere en verhaling van invorderingskoste en wanprestasie – administrasiekoste van die Huurder indien-",

for a right of cancellation thereof, I once again find myself in agreement with Horwitz AJ where he dealt at 538C of his said judgment with a similar submission thus:

"*There is one provision which gives the plaintiff the right to-*

'enforce this agreement including retaking possession of the goods and recover collection costs and default administration charges from the Purchaser…'

That provision could refer to a temporary attachment order, pending compliance by the defendant (the consumer) with his obligations under the agreement. It does not imply a right to cancel the agreement."

[10] By reason of the aforesaid no vested right to cancel the said agreements had been established or relied upon. It therefore follows that the applicant is not entitled to the

repossession or attachment of the goods sold under the agreements.

[11] Since, as mentioned above, the applicant did not rely on a common law right of cancellation, and as explicitly confirmed by Mr Olivier, I do not find it necessary to deal with Mr Janse van Rensburg's alternative submission i.e. that a period of 10 days notice is unreasonably short under the common law, and would in any event not have afforded the applicant a right of cancellation.

[12] **WHEREFORE THE FOLLOWING ORDER IS MADE:**

THE APPLICATION IS DISMISSED WITH COSTS.

HJ LACOCK
JUDGE

For the Applicant:	Adv. D.A. Olivier oio Duncan & Rothman Inc.
For the 1st Respondent:	Adv. Janse van Rensburg oio Elliott, Maris, Wilmans & Hay