

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

CASE NO: 22690/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

DATE

SIGNATURE

**THE STANDARD BANK OF SOUTH AFRICA
LIMITED**

Applicant

And

ANIX TRADING 587 CC

First Respondent

RICHARD RICHIE NYATHI

Respondent

Second

JUDGMENT

SENYATSI, J

Introduction

[1] This is an application for the return of four assets financed in terms of credit and the suretyship agreements (“the agreements”) concluded by the applicant and the respondents. There is also an interlocutory application brought by the respondents for the consolidation of this application to other pending matters. The

interlocutory application is opposed on the basis that it is a tactic intended to delay the current application as well as on other grounds that will be dealt with later in this judgment. At the hearing of the applications, counsel for the Standard Bank submitted that the applications could be heard simultaneously whilst counsel for the respondent argued that the main application should be postponed pending the determination of the main application. The Court resolved to hear both applications based on the papers before it.

Background Facts

[2] The main application is for the return of four assets two consisting of construction vehicles and two luxury vehicles, which are financed by way of an instalment sale agreements with the applicant. The original notice of motion was for the return of six assets which were individually financed through six individual instalments sale agreements.

[3] The agreements were concluded on the following dates:-

- (a) The first agreement was for the finance of a **2017 Mercedes-Benz V Class** as identified in the agreement concluded on 17 July 2017 and was to terminate by effluxion of time on 17 July 2023 on the repayment of the final instalment;
- (b) The first agreement was for the finance of a **2018 Cater Pillar 420FZ 4x4 Backhoe Loader** identified in the agreement and concluded on 08 October July 2018 and was to terminate by effluxion of time on 2 November 2023 on the repayment of the final instalment;
- (c) The first agreement was for the finance of a **2019 CAT 426F 4x4 Backhoe Loader** identified in the agreement and concluded on 2 May 2019 and was to terminate by effluxion of time on 2 May 2022 on the repayment of the final instalment;
- (d) The first agreement was for the finance of a **2019 HPVR 1000: 6x4 Combination Truck** identified in the agreement and the agreement was concluded on 21 June 2019 and was to terminate by effluxion of time on 21 June 2023 on the repayment of the final instalment;

(e) The first agreement was for the finance of a **2019 Isuzu NPR 400 Crew** identified in the agreement and the agreement was concluded on 23 September 2019 and was to terminate by effluxion of time on 22 September 2023 on the repayment of the final instalment and

(f) The first agreement was for the finance of a **2017 Range Rover Sport SVR** identified in the agreement and concluded on 15 January 2020 and was to terminate by effluxion of time on 1 February 2026 on the repayment of the final instalment.

[4] The agreements were cancelled by Standard Bank due to non-payment of the arrear instalments on 11 April 2022 in terms of clause 19.3.2 as set out below. After the application was issued, the respondents made payment of R389 700 on 4 August 2022. The payment led to the third instalment sale agreement in respect of 2019 CAT 426F 4x4 Backhoe Loader and the fifth instalment sale agreement in respect of 2019 Isuzu NPR 400 Crew to be paid in full. Standard Bank is not persisting with any relief in respect of the two settled instalment sale agreement. The rest of the four remaining agreements were not settled and despite the various offers and counter- offers made between the parties the arrears remain unsettled as at the date of hearing of the matter.

[5] The second respondent, Mr Richard Richie Nyathi stood as guarantor and surety for the fulfilment of the repayment obligations by the first respondent to Standard Bank. He is cited as the second respondent in these proceedings.

[6] In each of the instalment sale agreements, clauses 19.2 and 19.3 provide as follows:

“19.2. if you are in default of this Agreement, we may give you written notice of such default requesting you to rectify the default; by giving you 10 (ten) Business Days written notice of notice of the default; and/or review the terms and conditions applicable to this Agreement; and/or increase the rate of interest charged; and/or commence legal proceedings as set out hereunder,
19.3 if you fail to respond us or reject our proposals set out in the written notice referred to in the written notice in 19.2, and/or you remain in default for

20 (twenty) Business Days after the date of the written notice referred to in 19.2, we may commence legal proceedings against you to:

19.3.1 claim payment of all repayments and any other amounts, whether due or not; provided, however, that if you do not make immediate payment we may, notwithstanding the election to claim immediate payment in terms of this sub-clause, claim relief set out in clause 19.3.2 below;

19.3.2 cancel this Agreement, obtain possession of the Goods and recover from you as pre-estimated liquidated damages, the total of Repayments not yet paid by you and any other amounts owing, whether due or not, less the value of value of the Goods as at the date on which we obtain possession of the same or the proceeds of any insurance policy paid to you in respect of the Goods, if the value of same will be nil.”

[7] The rest of the four instalment agreements remain cancelled and the amounts due in terms thereof remain unpaid and consequently, *rei vindicatio* relief is sought by Standard Bank in respect of the goods funded in terms of the four agreements.

[8] The respondents opposed the relief sought because they contend firstly that the first respondent has remedied the breaches which they aver constitutes substantial performance in terms of the agreements. Secondly, they state that the first respondent paid an amount of R339 000.00, the applicant states the amount paid to be R389 700.00 and that it would be unfair and unjust for the Court to grant the relief. They also claim that since the institution of the legal proceedings, the arrears have been settled, something that is denied by the applicant. There are no other defences raised by the respondents.

Issue for determination

[9] The issue for determination is whether the applicant has made out a case for relief based on the *rei vindicatio*.

The legal principles

[10] To be able to succeed with the claim for repossession (*rei vindicatio*), the owner must satisfy the following jurisdictional requirements, namely:-

- (a) the applicant is the owner of the asset; and
- (b) that the respondent is in possession thereof.

[11] In *Chetty v Naidoo*¹ the Court held the following in respect of *rei vindication*:-

“It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res*- the *onus* being on the defendant to allege and establish any right to continue to hold against the owner ...But if he goes beyond alleging merely his ownership and the defendant being in possession...other considerations come into play. If he concedes in his particulars of claim that the defendant has an existing right to hold (e.g, by conceding a lease or a hire purchase agreement, without also alleging that it has been terminated...) his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then *ex facie* the statement of claim he must at least prove the termination, which might, in the case of a contract, also entail proof of the terms of the contract.”

[12] The right of ownership is comprehensive and protected but it is not absolute.²The right of ownership is the most comprehensive right a person can have in respect of a thing.³ The right is also entrenched in the Constitution of our Republic⁴ which states that no one may be deprived of property except in terms of the law of general application and no law permits arbitrary deprivation of property.⁵

¹ 1974 (3)13 SA(A) 20B-G

² *Gien v Gien* 1979(2) SA 1113(T) at 1120C

³ *Van der Merwe and Another v Taylor NO and Others* 2008(1) SA 1 (CC)

⁴ Section 25(1) of the Constitution Act No: 108 of 1996

⁵ *BLC Plant Company (Pty) Ltd v Maluti-A-Phofung Local Municipality* 2018 JDR (FB) at para 4.

[13] The owner of a *res* may, under appropriate circumstances, be estopped from exercising his right to property. In *Oaklands Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd*⁶ the Court stated the following legal principles on estoppel by conduct:-

“Our law jealously protects the right of ownership and the correlative right of the owner to his property, unless of course, the possessor has some enforceable right against the owner. Consistent with this, it has been also authoritatively laid down by this Court that an owner is estopped from setting his rights to his property only-

- (a) where a person who acquired his property did so because, by the *culpa* of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner or was entitled to dispose of it; or
- (b) (possibly) where, despite the absence of *culpa*, the owner is precluded from asserting his rights by compelling considerations of fairness within the broad concept the broad concept of *exceptio doli*”.

Analysis and reasons

[14] Clause 4 of each agreement states as follows:-

“4 OWNERSHIP OF THE GOODS

4.1 We will be the owner of the Goods for the duration of this Agreement.

4.2 Ownership of the Goods will only pass to you once you have paid all amounts due and complied with all of your obligations in terms of this Agreement”.

[15] In the instant case, it is not the first respondent’s defence that all amounts due have been paid. The first respondents only claims that it settled all arrears since the litigation commenced. It does not allege nor prove that all payments are up to date or that in fact all amounts due in terms of the agreements have been settled in full in respect of the four assets that are the subject of this application. On the contrary, it concedes that all the agreements except one, have come to an end due to the effluxion of time. It is only the agreement in respect of the funding of the Range Rover Sport that has not come to an end.

⁶ 1976(1) SA 441 (A) at 452 A-G

[16] Having regard to the papers before the Court, I am satisfied that the applicant has correctly cancelled the agreements in respect of the four assets because the first respondent was in breach thereof and failed to remedy the breach when called upon to do so.

[17] Furthermore, the ownership relating to the four assets has not passed to the first respondent because the amounts set out in respect of each of them have not been settled in full as agreed to in terms of the agreements. It therefore follows that the jurisdictional requirements of the *rei vindicatio* in respect of the four assets have been met.

[18] The contention by the respondents that granting the relief would be unfair is without factual and legal basis and must therefore fail.

Order

[19] Having considered the papers and the submissions by counsel for the parties, the following order is made:-

- (a) Cancellation of the agreements entered into between the applicant and the first respondent attached to the applicant's founding affidavit marked **FA1; FA 2 ;FA 4 and FA 6** is hereby confirmed;
- (b) The sheriff of this Court or his/her lawful deputy is hereby authorized, directed and empowered to attach, seize and hand over to the applicant:
 - i. a 2017 Mercedes Benz V Class with engine number 6[...] and chasis number W[...];
 - ii. a 2018 Caterpillar 420FZ 4x4 Backhoe Loader with chassis number C[...] and engine number C[...];
 - iii. a 2019 HPVR 1000: 6 x 4 Combination Truck (UD Truck) with engine number G[...] and chassis number J[.]; and
 - iv. a 2017 Land Rover Ranger Rover Sport SVR with engine number 1[....] and chassis number S[...].
- (c) The applicant is given leave to approach this Court on the same papers duly supplemented for payment of the difference between the balance

outstanding and the market value of the aforesaid assets at the date of cancellation together with any damages the applicant may have sustained.

(d) The respondents are ordered to pay the costs on the scale between attorney and client jointly and severally the one paying the other to be excused.

ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 07 June 2024.

Appearances:

For the applicant: Adv M De Oliveira

Instructed by Jason Michael Smith Incorporated Attorneys

For the respondent: Adv M Matera

Instructed by Adonisi Attorneys Incorporated

Date of Hearing: 12 February 2024

Date of Judgment: 07 June 2024