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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 43056/2021

1. REPORTABLE: NO

2. OF INTEREST TO OTHER JUDGES: NO

3. NOT REVISED

30 July 2024

In the matter between:

ABSA BANK LIMITED

APPLICANT (PLAINTIFF)

and

MOREBA TOUR & TRANSFERS

FIRST RESPONDENT

(Registration Number: 2005/104259/23)

(DEFENDANT)

ALFRED MOREBA MOCHEKO

SECOND RESPONDENT

(Identity Number: 7[...])

(DEFENDANT)

HEARD 15 APRIL 2024

DELIVERED 30 JULY 2024

JUDGMENT

VAN DER MERWE, AJ

INTRODUCTION

1. This is an application for a preservation order, pending the finalization of an action wherein the Plaintiff seeks *inter alia* cancellation of the agreement between the parties and repossession of the motor vehicle under an instalment sale agreement.
2. The pleadings have closed in the action and according to Caselines the Applicant applied for a trial date herein in September 2022. At the date of the hearing of the matter, a trial date was not allocated yet.

APPLICANT'S CASE

3. On or about 25 July 2019 the Applicant and the First Respondent concluded a written instalment sale agreement in terms of which the First Respondent purchased the bus, on the terms and conditions as contained in the instalment sale agreement. It was specifically agreed that ownership of the bus would remain vested in the Applicant, until all amounts due to the Applicant by the First Respondent has been paid in full.
4. On or about 9 October 2020, the Second Respondent bound himself as surety and co-principal debtor.
5. In breach of the agreement the First Respondent has failed to make due and punctual monthly payments to the Applicant and was in arrears, at the time of the issue of summons in the amount of R302 663.13.
6. Despite due demand the First Respondent has failed to make payment of the arrears and the Applicant has elected to cancel the agreement, take possession of the vehicle and claim the difference between the balance outstanding and the amount realized from the sale of the bus.
7. The motor vehicle ("bus") is the Applicant's only form of security. By its very nature the bus depreciates daily and is subject to various other risks, such as, *inter alia* theft and damage.

8. The Applicant remains the lawful owner of the bus whilst in possession of the Respondents. The Applicant is unable to protect the value of the bus, which will ultimately increase the financial exposure of the First Respondent, in the event of the market value being less than the value which the vehicle can either be resold or released.

9. The Respondents cannot regain the right of possession of the bus as the agreement has been cancelled.

10. For an interim interdict to be granted the Applicant must prove (a) that they enjoy a *prima facie* right, (b) that an injury suffered or reasonable apprehended, (c) that the balance of convenience favours granting the interim interdict, and (d) the absence of similar protection by another ordinary remedy.

11. The bus is used as a tour bus and is used to generate an income for the Respondent.

THE RESPONDENTS' CASE

12. The Respondents seek condonation for the late delivery of the answering affidavit.

13. The main action is defended by the Respondents and they have prospects of success at trial. If the bus is returned to the Applicant, the Respondents would be severely prejudiced. The prejudice could paralyze the business of the Respondents. The asset is insured and maintained and the Respondents are unable to dispose or remove the asset.

14. The Applicant holds security over the asset.

15. The Applicant has failed to convince that there is imminent danger and/or prejudice, and as such, the application ought to be dismissed with costs.

16. The Applicant has failed to cancel the agreement and cancellation is part of the main relief sought by the Applicant in the action. The Applicant is only entitled to return of the motor vehicle if the agreement has been cancelled, which is denied in the main action.

17. The ownership of the vehicle was not placed in dispute.

18. The Applicant has not met the requirements of interim relief to be granted.

19. The Respondents averred that they made payment in respect of the arrears and they dispute the arrear amount owing.

20. The Respondents averred that the bus is comprehensively insured and being maintained and that the Applicant fails to show exceptional circumstances for the return of the asset.

21. The Respondents also aver that the Applicant has failed to show anything other than normal wear and tear of the asset.

THE APPLICANT'S CASE IN REPLY

22. The Applicant raises two points *in limine*.

First point *in limine*

23. During argument, the Applicant abandoned its first point *in limine*.

Second point *in limine*: *Locus standi*

24. The Applicant raises the fact that the deponent to the affidavit has no authorization to depose to the affidavit on behalf of the First Respondent.

25. The First Respondent is a close corporation and can only be represented once a proper resolution was adopted to such effect.

26. The First Respondent concluded the instalment sale agreement with the Applicant. The Second Respondent concluded a deed of suretyship.

27. There is no resolution authorizing the Second Respondent to defend the application on behalf of the First Respondent or to depose to the answering affidavit on behalf of the First Respondent. With no such resolution the First Respondent is not defending the application. The Second Respondent fails to state that he has the necessary authority to act herein on behalf of the First Respondent.

28. Therefore, the Applicant contends that the Second Respondent has no authority to represent the First Respondent herein nor has he assured any basis upon which he is entitled to oppose the application.

The Applicant's reply on the merits of the Respondents' opposition

29. Prejudice is not a consideration in the granting of an interim interdict.

30. The only security the Applicant holds is the bus and same is being negatively impacted by the continuous use of the bus.

31. The Applicant remains the owner of the bus and as such it has established a *prima facie* right and balance of convenience that favours the Applicant.

32. Since the Second Respondent failed to respond to the allegation that the arrears have been paid, it is to be accepted that the breach was not rectified and as such the agreement was lawfully cancelled by the Applicant.

33. The Applicant attaches a statement of account wherein it is stated that the arrear amount in respect of the First Respondent's account is an amount of R1 156 574.57.

34. The Applicant denies that the Respondents have prospects of success in the main action.

LEGAL PRINCIPLES

Lack of *locus standi*

35. A deponent to an affidavit need not be authorized by the party concerned to depose thereto, but it is the institution of the proceedings and the prosecution thereof that must be authorized.¹ It is correct, as contended by the Respondents' counsel, that a party wishing to challenge someone's authority to act can do so on the basis of rule 7 of the Uniform Rules of Court, which provides as follows:

"Subject to the provisions of subrule (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfy the court that he is authorized so to act, and to enable him to do so the court may postpone the hearing of the action or application".

36. Based on the reading of this rule, a party may on the basis thereof, challenge another person's authority to act on behalf of another as stated in ***North Global Properties (Pty) Ltd v Body Corporate of the Sunrise Beach Scheme case number 12465/2011 – 17 August 2012*** where the court stated that:

"Case law confirms that rule 7 is the prescribed procedure for challenging the authority of the party to act in the unanimous decision of this Division in ANC Umvoti Council the Full Bench observed that the legislature intended the authority of "anyone" who claimed proceedings, and not only attorneys, to be dealt with under rule 7(1)."

37. The Respondents argued that the Applicant failed to challenge the deponent's authority to act on behalf of the Respondents in terms of rule 7. The rule,

¹ See: *Gains v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624G-I

interpreted correctly, should include the authority of anyone, and not only attorneys who claim that they act on behalf of a party in proceedings.

38. I accept that the deponent, Mr Alfred Moreba Mocheko, may be entitled to depose to the affidavit. However, the position is not the same as regards to the institution of proceedings and the prosecution thereof, which the Applicant has also challenged. The Applicant challenged the deponent's authority as there was no resolution authorizing the Second Respondent to act on the First Respondent's behalf, and therefore no proper defence is before the court. The Applicant also raised the issue that the Second Respondent fails to state that he has the necessary authority to act on behalf of the First Respondent.

39. In paragraph 1.2 of the answering affidavit, the Second Respondent states:

"I am duly authorized to depose to this affidavit, I am the First Respondent/Defendant in this matter. I am also the co-owner of the property."

40. What the Second Respondent states in the affidavit is incorrect. The deponent is neither the First Respondent nor the co-owner of the property and although the deponent makes the averment that he is duly authorized to depose to the affidavit, he fails to make the averment that he is duly authorized to defend the application on behalf of the First Respondent, therefore having duly been authorized to proceed with the defence and the prosecution thereof.

41. It is common cause that the Applicant raised this issue in the replying affidavit as the second point *in limine*. It appears from case law that the rule does not lay down any procedure to be followed by the party challenging the authority of a person acting for a party. Such a challenge may be raised for example by notice, with or without supporting evidence (see: **SA Allied Workers Union v De Klerk NO 1990 (3) SA 425 (E) at 437**), in an answering affidavit, a replying affidavit, or orally at the trial provided that prior notice has been given (see: **Ravden v Beeten 1935 CPD 269**).

42. The Supreme Court in the matter of **Unlawful Occupiers, School Site v**

City of Johannesburg 2005 (4) SA 199 SCA dealt with this issue extensively. In this matter the Respondent raised the fact that the Applicant failed to prove that the deponent had the requisite authority to institute the application on behalf of the Applicant. The facts in this matter are distinguishable from the facts in the current matter in that the statements proving authority made in the founding affidavit is different. The Applicant also produced a resolution from the Municipal Council which authorized him to launch the proceedings. Various facts were put before court and the argument regarding the issue of *locus standi*, became quite technical.

43. In paragraph 14 the court held as follows:

“[14] the issue raised had been decided conclusively in the judgment of Flemming JP in Eskom v Soweto City Council 1992 (2) SA 703 (W) which was referred to with approval by this court in Gains and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624I-625A. The import of the judgment in Eskom is that the remedy of a respondent who wishes to change the authority of a person allegedly acting on behalf of the purported applicant is provided for in rule 7(1) of the Uniform Rules of Court. The ratio decidendi appears from the following dicta (at 705D-H):

‘The care displayed in the past about the proof of authority was rational. It was inspired by the fear that a person may deny that he was a party to litigation carried on in his name his signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney...

The developed view, adopted in court rule 7(1), is that the risk is adequately managed on a different level if the attorney is authorized to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether it be a witness or someone who becomes involved especially in the context of authority, should additionally be authorized. It is therefore sufficient to know whether or not the attorney acts with

authority.

As to when and how the attorney's authority should be proved the rule-maker made a policy decision perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See rule (1).' ”

And at **706B-D**:

“If the applicant had qualms about whether the interlocutory application is authorized by the respondent, that authority had to be challenged on the level of whether [the respondent attorney] held empowerment apart from more informal request for enquiries, the applicant's remedy was to use court rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority.

[16] However as Flemming DJP has said, now that the rule 7(1) remedy is available, a party wishes to raise the issue of authority should not adopt the procedure followed by the appellants in the matter, i.e. by way of argument based on no more than a textual analysis of the words used by deponent, in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation which normally leads to the conclusion that the application was indeed authorized. After all, there is rarely any motivation for deliberately launching an unauthorized application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides.

44. I agree with the findings in the Unlawful Occupiers matter *supra*. In this matter the Applicant impugned the Second Respondent's authority to institute the proceedings in the answering affidavit and made it clear that it was disputed. The Applicants failed to file a notice in terms of Rule 7 (1). In my view, the fact that a

notice in terms of Rule 7 (1) was not filed, does not retract from the fact that the issue has been properly and sufficiently been raised to be understood and dealt with by the Respondents. The Respondents furthermore only raised the fact that the Applicants did not follow the process, as prescribed in Rule 7(1), at the hearing of the matter during argument. If the Respondents were of the view that the Applicant failed to challenge the Second Respondent's authority in terms of the Rules, the Respondents should have filed a notice in terms of Rule 30. The challenge to Mr Mocheko's authority to defend the application and to depose to the affidavit is in my view properly done. To say that it should have been brought strictly in terms of rule 7, would amount to elevating form over substance.

45. The issue could have been rectified, if the Respondents had filed the necessary resolutions together with a supplementary affidavit correcting the Second Respondent's misstatement and lack of authority.

46. The Applicant's counsel contended that considering the lack of authority of the Second Respondent to depose to the affidavit on behalf of the First Respondent, that there was no version of the First Respondent before court, and essentially no opposition in the matter.

47. In a case such as this, one clearly needs to prove the deponent's authority, especially where same is challenged.

48. I am therefore of the view that the Respondents have failed to prove that Mr Mocheko is properly authorized to act on the First Respondent's behalf. The defence of these proceedings have therefore been shown not to be authorized by the First Respondent, and as such, on the basis of this finding alone, the application ought to be dismissed.

Preservation order

49. In the matter of ***Pepcor Holdings Ltd v AJVH Holdings (Pty) Ltd and Others 2021 (5) SA 115 (SCA) at 19*** the following was held:

“[19] Res litigiosa is property which is the subject of litigation. A plaintiff may in principle apply to preserve les litigiosa pendente lite. The requirements are those for an ordinary interim interdict as a general principle there are two additional inherent features: The first is that the property which is the subject of the interim interdict is the subject of the action; and the second, that the action and the interim application are between the same parties.”

50. In general, these applications seek to preserve the motor vehicles in the ownership of commercial banks and free of any hindrance, encumbrance or alteration which would serve to diminish their value or prevent or delay their return to the Applicant.

51. The Applicant, which is a registered credit provider under the National Credit Act (NCA)², has financed the motor vehicle for the First Respondent's own benefit, essentially commercial benefit by using the vehicle as a tour bus. This agreement states that, should the First Respondent fail to pay the instalments on the due date or fail to satisfy any of its obligations in terms of the agreement, the Applicant shall, without prejudicing any of its rights in law, be justified in cancelling the agreement. In the instance of such cancellation the Applicant *inter alia*, will be entitled to claim return and repossession of the vehicle.

52. The Applicant has shown that the First Respondent is in arrears with the payment of its instalment sale agreement and that the Applicant has already instituted an action against the Respondent in which it claims, among other things, return of the motor vehicle.

53. The Applicant avers that there is a well-grounded apprehension of irreparable harm if the interim interdict is not granted, as the Applicant has no other method of preventing the First Respondent from alienating, selling or damaging the asset or otherwise disposing of same. The result of such conduct will be that the only security which the Applicant has for the First Respondent's indebtedness will disappear.

² Act 34 of 2005

54. Motor vehicles commonly deteriorate in value. The same with this bus whilst the First Respondent is having use of it for commercial purposes. The Applicant advanced funds for the First Respondent to purchase this motor vehicle.

55. The First Respondent breached the agreement, and although making some payments towards the arrears, has failed to remedy the breach. The Applicant must utilize further recourses to pursue the First Respondent who is currently in default. I have perused the proof of payments that have been uploaded onto Caselines.³

56. From the supplementary affidavit filed by the Applicant, and deposed to on the 3rd of April 2024, it is however clear that the account remains in arrears in the amount of R1,058,628.22 and the arrears had not been expunged by the First Respondent.

57. It is untenable that the First Respondent be entitled to utilize the motor vehicle without affecting payment under the credit agreement. The Applicant seeks to have the motor vehicle stored in a place of safety so that, in the event that the Applicant is directed after the finalization of the action, to return the vehicle to the First Respondent the vehicle will not have suffered any meaningful reduction in value.

58. During the hearing of the matter, it was clear that the Applicant has applied for a trial date herein, but that the registrar had not allocated a trial date in the matter yet. It would seem from Caselines that a trial date has now been allocated for 16 May 2028, which is still some time in the future. It is unfortunate that the parties will only be able to determine their dispute 4 years from now.

59. In the matter of **Absa Bank v De Villiers and another 2009 (5) SA 40 (C)** it was held at paragraph [42] that:

“In my opinion the common law principle (as embodied in the instalment sale agreement), requiring the cancellation of the instalment sale agreement prior

³ CL004-5

to the attachment and repossession of the first respondent's vehicle, is a necessary requirement for a consistent and harmonised system of debt enforcement and for the protection of the consumer's rights".

60. I agree with this principle, but considering the facts before me, the Applicant is seeking interim relief, and not final attachment and repossession of the motor vehicle.

61. At common law, the interim attachment of goods pending the outcome on vindicatory quasi-vindicatory proceedings is well-established.⁴

62. The function and purpose of an interim attachment order is to protect the goods financed under an instalment sale agreement against deterioration and damage and to keep them in safe keeping until the case between the parties has been finalized. Its purpose is not to enforce remedies or obligations under the credit agreement, and the remedy does not form part and parcel of the debt enforcement process as envisaged in the NCA.⁵

63. To succeed in this application, the Applicant is required to establish and satisfy the well-established requirement for the granting of an interim interdict. It is required to show (a) that the right which it seeks to enforce is clear, or, if not clear, 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 relief is not granted; (c) that the balance of convenience favours the granting of the interim relief, and (d) that the applicant has no other satisfactory remedy.

64. The Applicant's case is based on an anti-dissipation interdict, which requires it to show that the Respondents are likely to spirit away his property. In ***Knox D'Arcy Ltd and others v Jamieson and others***⁶ Grosskopf JA discussed the nature and effect of the so-called anti-dissipation interdict and found what is required

⁴ SA Taxi Securitization v Chesane 2010 (6) SA 557 at par 6

⁵ SA Taxi Securitization (Pty) Ltd v Young (CPD) (case number 10249/2008)

⁶ 1988 (4) SA 92 (W)

is for the applicant to show a certain state of mind of the respondent, i.e. that the debtor is getting rid of funds or is likely to do so, with the intention of defeating the claims of creditors.

65. The Respondent's defence in the application is based on the following:

65.1 The Applicant cannot seek similar relief in the form of an interlocutory application where there is a trial pending because the agreement had not been cancelled the Applicant has no right to return of the motor vehicle.

65.2 The asset is comprehensively insured.

65.3 The Applicant has not met the requirements of an interim interdict.

65.4 The Applicant has failed to prove that the motor vehicle is subject to more than normal "wear and tear".

66. The Respondents, in supplementary heads of argument, aver that the arrears have been substantially reduced. Proof of payment in the amount of R625,000.00 was provided. If one has regard to the supplementary affidavit filed the Respondents the arrears have not been expunged, and the account remains in arrears.

67. The Respondent relies on the matter of ***Volvo Financial Services (Southern Africa) (Pty) Ltd v Adamas Tkolose Trading CC*** case number **2023/06790 [Gauteng Local Division, Johannesburg]** at par [15]:

"Ms Vergana did, though, suggest that the wear and tear to which the debtor will be subject while the claim is heard in the ordinary court will prejudice Volvo as the owner of the vehicles. Whether it is the nature of contracts of lease that a thing let out will be worn and torn. That is taken into the bargain when the parties agree on the rent payable which Volvo is entitled to recover in an action on contract. Volvo did not allege that the damage to the tractors goes

beyond fair wear and tear. Even if it does, there was no indication that Volvo's right cannot be fully vindicated by an action for damages at a later stage."

68. The Respondent's reliance on this matter to contend that the Applicant has not proven that the vehicle is being depreciated by more than normal wear and tear, is misplaced. The merits of the above matter were not dealt with and the matter was struck off the roll due to lack of urgency. Moreover, the mere fact that the Respondent concedes that the bus is being used for commercial purposes and is operating as a tour bus, indicates that the motor vehicle is subject to more than normal wear and tear.

69. In any event, despite the Respondent's lack of *locus standi* I have considered the defences raised by the Respondent and I am of the view that none of the defences holds any merit.

70. The question of the balance of convenience must be placed in proper perspective. It is a well-settled principle, that the stronger the case the Applicant makes out, the less balance of convenience in favour of the Applicant there needs to be for interim relief to be granted⁷ as the court needs to be satisfied that the balance of convenience favours the Applicant.

71. This court is not tasked to consider the dispute in the main action. I am of the view that the Applicant has proven the elements of an interim interdict and therefore would be entitled to the order sought.

IN THE PREMISES, I MAKE THE FOLLOWING ORDER:

1. The Applicant's point second point *in limine* is upheld;
2. The First and Second Respondents (Defendants) are directed to deliver into the possession of the sheriff of the High Court the vehicle, being a certain **2019 YUTONG 37-SEATER ENGINE NUMBER 7[...], SERIAL NUMBER K[...],**

⁷ Olympic Passenger Services v Ramlagan, 13 1957 (2) SA 382 (D) at 383C-G

CHASSIS NUMBER L[...] who shall deliver it to the Applicant (Plaintiff) who in turn shall, at its own expense:

2.1 Transport the said vehicle at garage premises at Crosstate Auctioneers, Top Road and Skew Road, OR Tambo, Boksburg;

2.2 Keep the vehicle at the aforementioned premises, under security.

3. The Applicant is directed to refrain from using the vehicle or permit the use of the vehicle whilst so being retained.

4. That the relief as set out in paragraphs 2 and 3 above, operate as an interim interdict, pending the outcome of the action which has already been instituted under the above case number and set down for trial.

5. In the event that the First or Second Respondent fail to restore possession of the vehicle to the Applicant within a period of 48 hours from date of the granting of this order, the sheriff or his deputies are authorized and directed to take possession of the vehicle whereafter same may be found and to deliver it to the Applicant, to be held by the Applicant subject to the supervision of the deputy sheriff.

6. The costs of the application will form part of the costs in the main action.

**VAN DER MERWE AJ ACTING
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

For the Applicant: Adv J Minnaar

Instructed by: Hammond Pole Majola Inc.

For the Respondent: Adv Mureriwa

Instructed by: CSM Attorneys