IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

NOT REPORTABLE
CASE NO.2696/2023

In the matter between:

CATERPILLAR FINANCIAL SERVICES SOUTH AFRICA PROPRIETARY LIMITED **Applicant**

and

AMLO TRADING CLOSE CORPORATION **Respondent**

JUDGMENT

WATT AJ:

[1] This is an opposed application in which the Applicant seeks the return of four units from the Respondent, namely a new caterpillar medium excavator 320 with serial number ZBN12471; a new caterpillar medium excavator 320 with serial number DKJ21894; a new caterpillar backhoe loader 426 with serial number EJ402922 and a new caterpillar backhoe loader 426 with serial number EJ402924 ("the Units").

[2] On 14 September 2020 the Applicant and the Respondent entered into a written instalment sale agreement. On 14 September 2020 and 25 November 2020 the Applicant and the Respondent entered into written schedules to the instalment sale agreement, in which the purchase of the Units was financed by the Applicant. The following terms of the instalment sale agreement are relevant:

(a) The Respondent agreed that its payment and performance obligations under the agreement are absolute and unconditional and all payments are to be made by debit order.[1]

(b) The Respondent acknowledged that the Applicant owns and holds title to a unit, until title is transferred to the Respondent upon completion of its obligations to the Applicant. A unit will remain the property of the Applicant until all the amounts owing have been paid in full. Upon completion of all payments pursuant to a schedule, the Applicant will transfer title and ownership of the relevant unit to the Respondent.[2]

(c) An event of default includes the Respondents failure to make payment when due, or if payment is not received by the Applicant when due for any reason.[3]

(d) In an event of default the Applicant may declare the default and cancel the agreement[4] and may shut off and/or de-rate the unit using the unit monitoring system and it is expressly recorded that the Respondent consents to such shutting off and de-rating of a unit.[5]

(e) Any latitude, extension of time or other indulgence given by the Applicant

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[1] Clause 1
[2] Clause 3
[3] Clause 9(a)
[4] Clause 10i(b)
[5] Clause 10 i.(i)

to the Respondent will not be construed as any waiver of any right. Any waiver of a right must be in writing. Neither party shall be bound by any express or implied term, representation, warranty or promise not recorded in the agreement.[6]

[3] The first schedule to the instalment sale agreement, entered into on 14 September 2020, relates to the first unit identified in paragraph 1 above for a total financed sum of R2,208,000.00, to be paid by the Respondent to the Applicant in instalments of R79,376.45 per month, over a period of 36 months. The second schedule to the instalment sale agreement, entered into on 25 November 2020, relates to the other three units, identified in paragraph 1 above, for a total financed sum of R4,651,750.00, to be paid by the Respondent to the Applicant in instalments of R167,228.01 per month, over a period of 36 months.

[4] The instalment sale agreement, together with the two schedules thereto in which the Units are identified, will collectively be referred as the Agreement.

[5] The Applicant alleges that it cancelled the Agreement as the Respondent breached its terms, by failing to make full payment of the instalments when due and, that as at 21 May 2023, the Respondent was in arrears in the sum of R2,546,636.70. The Respondent admits that it breached the Agreement by failing to make payment of the full instalments when due to the Applicant.

[6] From April 2022 various correspondence was exchanged between the parties and the parties took various actions, which I summarise as follows:

(a) On 13 April 2022 the Applicant directed a letter of demand to the Respondent and afforded the Respondent until 19 April 2022 to make payment of the arears, which at that time was the sum of R707,464.49. In this demand the Respondent was informed that if it should fail to make payment, the Applicant would hand over the account to its attorneys, cancel the Agreement and/or

[6] Clause 15

disable the Units. The Respondent did not formally respond to this demand and did not make payment as demanded.

(b) On 9 May 2022 the Applicant directed correspondence to the Respondent in which it stated that the Respondent is in default and demanded payment of the sum of R389,795.31 by 11 May 2022, failing which the Units would be disabled. The Respondent did not respond to this demand and did not make payment as demanded. The Applicant then remotely deactivated the Units, the exact date of which is not apparent from the papers.

(c) On 5 August 2022 the Applicant's attorneys directed a letter of demand to the Respondent which afforded the Respondent an opportunity until 12 August 2022 to make payment of the outstanding arrears which, as at 5 August 2022, was the total sum R1,124,828,02.

(d) On 5 August 2022 the Respondent responded to the letter of demand and provided reasons which it alleged were the basis upon which it could not make payment, including that it had not received payment from various of its clients and that the Applicant had deactivated the Units. The Respondent requested an opportunity to make payment to the Applicant by 7 September 2022.

(e) On 19 August 2022 the Applicant's attorney addressed an email to the Respondent which stated that the Applicant agreed to an extension for payment to be made by 7 September 2022, failing which the Agreement would be terminated and legal action instituted for the recovery of the Units. The Respondent failed to make payment, as undertaken, by 7 September 2022.

(f) On 12 September 2022 the Applicant's attorneys directed correspondence to the Respondent in which the Agreement was cancelled and sought immediate return of the Units.

(g) On 18 September 2022 the Respondent made two payments of R400,000.00 each and addressed correspondence to the Applicant in which it referred to the payments, acknowledged that it was not payment of the full sum owing to the Applicant and requested that the Units be re-activated. The Respondent requested a further indulgence until the end of September 2022 to bring its account up to date.

(h) On 12 October 2022 the Applicant's attorneys addressed correspondence to the Respondent in which it confirmed receipt of the payment of R800,000.00, that payment of the sum of R250,492.19 should be made by 14 October 2022 and the balance of the overdue amount (R825,798.00) should be settled in full by 25 October 2022. This correspondence states that the proposal should not be construed as a waiver of the Applicant's rights or a revival of the cancelled Agreement.

(i) On 18 October 2022 the Respondent addressed correspondence to the Applicant in which it undertook to settle the arrears by the end of November 2022, settle the total outstanding sum by easter 2023 and make payment of at least 50% of the outstanding arrears by the end of October 2022.

(j) On 25 October 2022 the Applicant's attorneys addressed an email to the Respondent in which it stated that payment of the sum of R540,000.00 (50% of the overdue sum) should be paid by 31 October 2022.

(k) On 2 November 2022 the Respondent made payment to the Applicant in the sum of R250,000.00.

(l) On 3 and 25 November 2022 the Applicant's attorneys addressed email correspondence to the Respondent acknowledging receipt of the payment of R250,000.00 and enquired when the outstanding sum would be paid.

(m) On 8 December 2022 the Respondent made payment to the Applicant in the sum of R240,000.00. The Applicant re-activated the Units, although the exact date on which this was done is not apparent from the papers.

(n) On 18 January 2023 the Applicant's attorneys addressed email correspondence to the Respondent which stated the arrear sum to be R1,346,866.08 and that this sum, together with legal fees, should be paid by 27 January 2023 failing which legal action would be taken.

(o) On 6 February 2023 the Respondent made payment to the Applicant in the sum of R250,000.00.

(p) On 15 February 2023 the Applicant's attorneys addressed correspondence to the Respondent which stated that the arrears is in excess of R1,3 million and payment of at least R750,000.00 was required by 25 February 2023, together with the payment of the normal monthly instalment, for the Applicant to consider any further settlement proposals. No payment was made by the Respondent by 25 February 2023.

(q) On 24 February 2023 the Respondent's attorneys addressed correspondence to the Applicant's attorneys in which it stated that the Units had been de-activated for a period of four months and requested an extension of the terms of payment for four months.

(r) On 8 March 2023 the Applicant's attorney addressed email correspondence to the Respondent's attorney which stated that an extension could only be considered if at least R850,000.00 was paid towards the arrears. Despite follow up emails on 16 and 22 March 2023 no response was received from the Respondent or its attorneys.

(s) On 1 May 2023 the Respondent made payment to the Applicant in the sum of R600,000.00.

(t) On 31 May 2023 the Applicant’s attorneys directed correspondence to the Respondent which stated that the Agreement had been cancelled, which cancellation remains effective, and demanded the return of the Units.

(u) On 5 June 2023 the Respondent’s attorneys directed correspondence to the Applicants attorneys in which it stated that payment to the Applicant would be made within 30 days.

(v) On 9 June 2023 the Applicant’s attorneys addressed an email to the Respondent’s attorneys which stated that the arrears is the sum of R2,546,636.70, which included unpaid invoices up until June 2023.

(w) No payment was made by the Respondent, as undertaken in the correspondence of 5 June 2023, and subsequently the application was launched on 7 August 2023.

[7] The Respondent’s opposition to the application is premised on various defences, including:

(a) The Applicant deactivated the Units, which caused the Respondent harm and its contracts were terminated due to the inability to utilize the Units.

(b) The Agreement was not validly cancelled as it has always been agreed between the parties that the Respondent would make lump sum payments to the Applicant, whenever the Respondent was paid by its clients, and such payment arrangement was accepted by the Applicant.

(c) The Applicant failed to exhaust all other remedies provided for in the provisions of the National Credit Act 34 of 2005 (“the NCA”).

(d) The return of the Units would be prejudicial to the Respondent.

(e) The calculation of the arrears amount has not been disclosed by the Applicant.

(f) The Respondent intends to make payment to the Applicant, upon receipt of payment from its clients.

(g) The Applicant failed to exhaust all remedies in terms of the provisions of the Consumer Protection Act 68 of 2008 ("CPA").

[8] It is common cause that the application is a *rei vindicatio* for the return of the Units to the Applicant, which are in the possession of the Respondent*.*

Postponement

[9] When the matter was called Mr Giwu, who appeared on behalf of the Respondent, indicated that the Respondent intended to apply for a postponement of the application. Mr Louw, who appeared on behalf of the Applicant, indicated that the Applicant would oppose such application. After hearing full argument on the application for a postponement, I dismissed the application and indicated that I would give reasons therefor in this judgment, which I now do.

[10] In support of the application for a postponement Mr Giwu handed up an affidavit, deposed to by himself on the date of hearing, without a notice of motion. The affidavit consists of four paragraphs which states:

> '*1. I write this affidavit seeking postponement of this matter wherein I state that I received a statement of account from the Applicant's attorneys on the 22nd of March 2024 after having the Respondent's Answering Affidavit and on a plethora*

of occasions requesting this statement of account without receiving it from the Applicant.

2. I wish to state that this statement is a true reflection of amounts as per the contract and it is of paramount importance for this Application.

3. I request a period of 14 (fourteen) days to file and this is accordance with Rule 6(5)€ of the uniform Rules of this Honourable Court.

4. Costs be reserved.' (sic)

[11] An applicant for a postponement must show good and strong reasons therefor and must furnish a full and satisfactory explanation of the circumstances that give rise to the application.[7] An application for a postponement must be made timeously, as soon as circumstances would justify the facts which became known to the applicant.[8]

[12] An application must be *bona fide* and not used as a tactical manoeuvre to obtain an advantage.[9] The court must weigh the prejudice which will be caused if the postponement is granted, against the prejudice which would be caused if it is not granted.[10]

[13] The Respondent alleges to have obtained certain documentation from the Applicant on 22 March 2024, which it wishes to place before court in a supplementary affidavit. The Respondent's heads of argument, dated 19 March 2024, also states that the Respondent seeks an indulgence to file a supplementary affidavit to deal with payments included in a statement received from the Applicant. The application for postponement, based on the sole reason that a supplementary affidavit is required to be filed was only made on the date of hearing of the matter, at least nine days after the

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[7] *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 482 (SCA) at paragraphs 28 and 31
[8] *National Police Service Union v Minister of Safety and Security* 2000 (4) SA 11110 (CC) at 1112E
[9] *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315E
[10] *Myburgh Transport supra* at 315G

Respondent was aware, and had made known, that it intended to deliver a supplementary affidavit. The application was not made timeously and did not detail what the statements from the Applicant reflected nor how these statements would either be destructive of the Applicants case or benefit of the Respondents opposition. All the affidavit in support of the postponement disclosed is that additional documentation is now available, without stating the relevance thereof or why it was of "*paramount importance*". A full and satisfactory explanation was not given for the application for a postponement and it was not made timeously.

[14] I am of the view that the application for a postponement is not made *bona fide* and is a strategy to prolong the litigation and for the Respondent to retain possession and use of the Units. If a postponement was granted, a hearing date would only be sourced in approximately seven months. Should the documentation received from the Applicant have been materially relevant and dispositive of the Applicant's case the Respondent could, and should, have deposed to a supplementary affidavit and sought leave to file such a supplementary affidavit on the date of hearing. The Applicant did not do so and accordingly I cannot find that the documentation which is sought to be introduced is relevant or material to the adjudication of the application.

[15] The Applicant will suffer prejudice should a postponement be granted. As the owner of the Units it has a right thereto and has waited for a period of almost seven months for the application to be adjudicated, after having launched the application on 7 August 2023. The Respondent will not suffer prejudice should the postponement be refused in circumstances in which it has, in its answering affidavit, admitted being in breach of the Agreement, and its defences and opposition have been set out therein and will be adjudicated on.

[16] In the circumstances I found that the Respondent had not made out a strong case in support of the application for a postponement and, in my discretion, I ordered that the postponement be refused. After I refused the application for a postponement Mr Giwu indicated he was ready to proceed with argument in the main application.

Legal principles applicable to the *rei vindicatio*

[17] *"The incidence of the burden of proof is a matter of substantive law…and in the present type of case it must be governed, primarily, by the legal concept of ownership. It may be difficult to define dominium comprehensively…but there can be little doubt…that one of its incidents is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. 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…It appears to be immaterial whether, in stating his claim, the owner dubs the defendant's holding "unlawful" or "against his will" or leaves it unqualified…But if he goes beyond alleging merely his ownership and the defendant being in possession (whether unqualified or described as "unlawful" or "against his will"), 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."*[11]

[11] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B-G

[18] Ownership rights are the most comprehensive right a person can have in respect of property.[12] The law jealously protects the right of ownership, and the correlative right of the owner in regard to his property, unless the possessor has some enforceable right against the owner.[13]

Discussion

[19] It is common cause that the Applicant is the owner of the Units, based on the terms of the Agreement. The Respondent accordingly has the onus to establish a right to remain in possession of the Units, in circumstances in which it admits having breached the terms of the Agreement by failing to make payment of the full instalments to the Applicant when due.

[20] I have identified the grounds of the Respondent's defence and opposition to the relief sought above. In argument Mr Giwu primarily pursued and advanced argument relating to the defence that the Agreement has not been validly cancelled because the Respondent had always paid lump sums to the Applicant when able to do so, after receipt of payments from its clients, and that such payment arrangement had been accepted by the Applicant. Although the other defences were not advanced with any vigour in argument, I first turn to deal briefly with these defences.

[21] <u>Deactivation of the Units</u>: I accept that the Applicant deactivated the Units for a period of approximately three to four months, during which period the Respondent was not able to utilise the Units. The Respondent was however, at the time of the deactivation of the Units, already in arrears in the sum of approximately R700,000.00. The deactivation of the Units accordingly did not cause the Respondent to be in arrears with its payments. Clause 10i(i) of the instalment sale agreement provided for the Applicants to deactivate the Units, which it did, and the Respondent did not take any action to have them re-activated at that stage. The fact that the Units were deactivated

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

[13] *Oaklands Nominees (Pty) Ltd v Gelria Mining and Investment Co. (Pty) Ltd* 1976 (1) SA 441 (A) at 452A

by the Applicant can accordingly not be a valid basis and defence for the Respondent to remain in possession of the Units.

[22] Remedies provided for in the NCA: The provisions of the NCA are not applicable to the Agreement between the parties because the Respondent is a juristic person whose asset value or annual turnover exceeded the threshold of R1 million[14] and/or the Agreement is a large agreement with a principal debt of R250,000.00 or more.[15]

[23] The Respondent will suffer prejudice: Although the Respondent does not detail what prejudice it will suffer should the Units be returned to the Applicant, I accept that it will suffer some measure of prejudice as it will no longer be in a position to utilise the Units. Any prejudice the Respondent may suffer is however not a valid defence to the *rei vindicatio* and cannot sustain an opposition to remain in possession of the Units.

[24] Calculation of the arears: The Respondent takes issue that the Applicant has not set out its calculation of the arrears. Apparent from the correspondence referred to earlier in this judgment is that the arrears, at certain times, was set out and was not disputed by the Respondent. In fact the Respondent admits, in the correspondence and in its answering affidavit, that it was in arrears. A detailed calculation of the arrears amount owing to the Applicant by the Respondent is not necessary in the circumstances and is not a defence to a *rei vindicatio*.[16]

[25] Respondent's intention to make payment: The Respondent states its intention to make payment to the Applicant in due course, despite the Applicant having cancelled the Agreement. The Respondent's offer to perform and make payment, after the cancellation of the Agreement, does not defeat the cancellation of the Agreement[17] and can therefore not be a valid defence to the return of the Units.

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[14] Section 4(1)(a)(i) of the NCA
[15] Section 4(1)(b) of the NCA
[16] Cater*pillar Financial Services South Africa (Pty) Ltd v Azania Money Growth (Pty)* Ltd 2023 JDR 3742 (GJ) at paragraph 17
[17] *Moodley v Reddy* 1985 (1) SA 76 (D) at 82F and *Boland Bank Ltd v Pienaar and another* 1988 (3) 618 (A) at 621G-623B

[26] Remedies provided for in the CPA: The provisions of the CPA are not applicable to the Agreement between the parties because the Respondent is a juristic person whose asset value or annual turnover exceeds the threshold of R2 million.[18]

[27] I now turn to the primary argument advanced by the Respondent, that the Agreement has not been validly terminated because of the payment arrangement between the parties, namely that the Respondent would make lump sum payments to the Applicant when payments were received from its clients and the Applicant accepted such payment arrangement. The Agreement was cancelled by the Applicant on 12 September 2022, after the Respondent failed to make payment of the arrears, as undertaken, by 7 September 2022. Thereafter the Applicant was amendable to the Respondent making payment of the arrears but made clear that such payment should not be construed as a revival of the Agreement, which had been cancelled, or a waiver of the Applicant's rights. This is provided for in clause 15 of the instalment sale agreement. The Respondent did not make full payment of the sums demanded by the Applicant, at various times, and also did not make full payment of the sums it undertook to pay, timeously or at all. In those circumstances the Respondent's argument that the payments made by it to the Applicant was an acceptable payment arrangement between the parties and that the Agreement was not validly cancelled cannot be accepted or upheld. The argument is not supported by the correspondence exchanged between the parties, considered together with the payments made by the Respondent. The payments made by the Respondent, after the cancellation of the Agreement, can also not defeat the validity of the cancellation.[19] I am satisfied that the Applicant validly cancelled the Agreement.

[28] Mr Giwu also advanced an argument that the Respondent would be severally prejudiced by the relief being granted in circumstances in which the Respondent only owed the Applicant approximately R800,000.00. This calculation appears to take into

[18] Section 5(2)(b) of the NCA
[19] See *Moodley supra and Boland Bank supra* above

account a payment made by the Respondent in the sum of R1 million on 6 September 2023, which payment is only referenced in the Respondent's heads of argument. I have already held that payment by the Respondent, after the cancellation of the Agreement, does not defeat the validity of the cancellation. Insofar as the Respondent seeks that I exercise a discretion in its favour, a court has no such discretion to refuse relief if the applicant has established the grounds for the *rei vindicatio.*[20]

[29] I also add, as advanced by Mr Louw in argument, that the time period of 36 months contained in the respective schedules to the instalment sale agreement, has lapsed and accordingly the Agreement has terminated by effluxion of time.

[30] I am satisfied that the Respondent has not discharged the onus on it to prove a legal basis upon which it is entitled to remain in possession of the Units and accordingly the Applicant is entitled to the relief sought, namely the return of the Units. There is no reason why the costs should not follow the results, the Agreement makes provision for the Respondent to pay legal costs on an attorney and client scale.[21]

[31] In the circumstances the following order is made:

1. The Respondent is ordered to deliver to the Sheriff of this Court, within 24 (twenty-four) hours of the service of this order on the Respondent at its registered address, the following Units:

1.1 a new caterpillar medium excavator 320 with serial number ZBN12471;

1.2 a new caterpillar medium excavator 320 with serial number DKJ21894;

1.3 a new caterpillar backhoe loader 426 with serial number EJ402922; and

[20] See *Acrewood Property Investments (Pty) Ltd v Pelo Chicken (Pty) Ltd* 2021 JDR 2928 (WCC) at paragraph 30 and *Dey Street Properties (Pty) Ltd v Salentias Travel and Hospitality CC t/a Van Hobbs Dry Cleaners* (25461/2021) [2022] ZAGPPHC 179 (22 March 2022) at paragraph 52

[21] Clause 10ii

1.4 a new caterpillar backhoe loader 426 with serial number EJ402924.

("the Units")

2. In the event of the Respondent failing to comply with paragraph 1 above, the Sheriff of this Court is authorised and directed to take possession of the Units from wherever he/she may find it, and the Sheriff is authorised to retain possession of the Units until delivered to the Applicant or its duly authorised representative.

3. The Respondent shall pay the costs of the application on the attorney and client scale.

KL WATT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant:	Mr PG Louw, instructed by Netteltons Attorneys, Makhanda.
For the Respondent:	Mr N Giwu, instructed by Nceba Giwu Inc., Mthatha.
Date heard:	28 March 2024.
Date delivered:	25 June 2024.