

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 6037/2023

In the matter between

**THE STANDARD BANK OF
SOUTH AFRICA LIMITED**

Applicant

and

MARYNA ESTELLE SYMES

First Respondent

SIMON VUSUMUZI

MAHLANGU NO

Second Respondent

(In their capacities as Liquidators of

Tritan Plant Hire (Pty) Ltd [in Liquidation])

Coram: Naidoo J

Heard: 7 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 11h00 on 28 February 2025.

Summary: Ownership of assets – bank terminated instalment agreement prior to liquidation order – bank remains owner of assets which do not form part of insolvent estate – bank entitled to proceeds of sale of assets by liquidators – bank entitled to rentals collected by liquidators for lease of assets.

ORDER

1. The applicant is declared to have been the owner of the following assets, prior to the sale of thereof:

- i. 2017 Hitachi ZX330LC5-G Tracked Excavator with serial/registration number HCM[...]0 and chassis number WDD[...]
- ii. 2020 Hitachi ZX240-5G Tracked Excavator with serial/registration number HCM[...]7;
- iii. 2014 Hitachi ZX240-5G Excavator with serial/registration number RYU[...]5;
- iv. 2014 Hitachi ZX240-5G Excavator with serial/registration number RYU[...]6.

2. The respondents are ordered to pay to the applicant the amount of R1 500 000.00 currently held by the applicant's former attorney, Mr Ruwayne Smith of Symington & De Kok, Bloemfontein, in their trust account, being the proceeds of the sale of one of the assets referred to above, as well as the proceeds still to be paid by the buyers of the assets in respect of the other assets referred to above;

3. The respondents are ordered to pay to the applicant the amount of R1 000 000.00, currently held by the respondent's attorneys, Grundlingh and Associates, alternatively, by the respondents in their trust account, being a settlement in respect of rentals for the assets referred to above, paid by Ryno Prinsloo, Lefras Lourens, Angelique Justine Styles N.O. and Emile Du Plooy N.O. to the liquidated estate of Tritan Plant Hire (Pty) [in liquidation], as well as the balance of the settlement amount, being R2 500 000.00, still to be paid by the aforesaid Ryno Prinsloo, Lefras Louwrens, Angelique Justine Styles N.O. and Emile du Plooy N.O.;

4. The respondents are ordered to provide the applicant with the necessary documentation and proof of their disbursements in relation to the assets and the settlement amount of rentals, with reference to the preservation of the assets, their collection of payments and/or costs relating to the entering into of the settlement agreement, which amounts, if proper proof is provided, are to be repaid by the Applicant to the liquidated estate of Tritan Plant Hire (Pty) Ltd [in liquidation].

5. The respondents are directed to pay the costs of this application.

JUDGMENT

Naidoo J

[1] The applicant, the Standard Bank of South Africa ('Standard Bank' or 'the Bank'), sought a declaratory order declaring that it is the owner of certain movable assets, which were the subject of vehicle finance agreements, together with the payment of R1,5 million, being in respect of the sale of one of those assets. The Bank also sought payment of the proceeds of a rental agreement between the respondents and third parties, in respect of the same assets. The application was opposed by the respondents, who are the liquidators in the insolvent estate of Tritan Plant Hire (Pty) Ltd [in liquidation] (Tritan). They are Maryna Estelle Symes (Ms Symes) and Simon Vusumuzi Mahlangu (Mr Mahlangu), who will be referred to either individually or collectively as 'the liquidators'.

[2] The Bank sought an order in the following terms:

'1. A declaratory order that the Applicant was, prior to the sale of the assets by agreement between the Applicant and the Respondents, at all relevant times the owner of the following assets:

1.1 2017 Hitachi ZX330LC5-G Tracked Excavator with serial/registration number HCM[...]0 and chassis number WDD[...]

1.2 2020 Hitachi ZX240-5G Tracked Excavator with serial/registration number HCM[...]7;

1.3 2014 Hitachi ZX240-5G Excavator with serial/registration number RYU[...]5;

1.4 2014 Hitachi ZX240-5G Excavator with serial/registration number RYU[...]6.

2. That the Respondents be ordered to pay to the Applicant the amount of R1,500,000.00 currently held by Applicant's former attorney, Mr Ruwayne Smith of Symington & De Kok, Bloemfontein, on trust, being the proceeds of the assets referred to above, as well as the proceeds still to be paid by the buyers of the assets;

3. That the Respondents be ordered to pay to the Applicant the amount of R1,000,000.00, currently held by the respondent's attorneys, Grundlingh and Associates, alternatively, by the Respondents on trust, being a settlement on rentals for the assets referred to above, paid by Ryno Prinsloo, Lefras Lourens, Angelique Justine Styles N.O. and Emile Du Plooy N.O. to the liquidated estate of Tritan Plant Hire (Pty) [in liquidation], as well as the balance of the settlement amount, being R2.500,000.00, still to be paid by the afore (sic) Ryno Prinsloo, Lefras Louwrens, Angelique Justine Styles N.O. and Emile du Plooy N.O.;

4. That the respondents be ordered to provide the Applicant with the necessary documentation and proof of their disbursements in relation to the assets and settlement amount of rentals, with reference to the preservation of the assets, their collection of payments and/or costs relating to the entering of the settlement agreement, which amounts, if proper proof is provided, to be repaid by the Applicant to the liquidated estate of Tritan Plant Hire (Pty) Ltd [in liquidation] (Tritan)

5. Costs of the application.'

[3] By way of background, the Bank entered into Vehicle and Asset Finance Agreements (VAF Agreements) with Tritan during 2019 and 2020, in respect of the four assets mentioned above. The Bank alleges that it retained ownership of the four assets at all material times. Tritan failed to pay the amounts stipulated in the VAF agreements and on 19 October 2021, the Bank served a written notice on Tritan, terminating the VAF Agreements. It also demanded return of the four assets, but Tritan failed to return the assets. Thereafter, the Bank issued summons against Tritan, and when there was no response from Tritan, the Bank applied for default judgment and an order declaring certain property executable. The Bank also instituted legal proceedings against an entity called Global Group Auctions (Pty) Ltd (GGA) and Rhyno Prinsloo (Mr Prinsloo),

who was the sole director of Tritan as well as GGA, in the same action.

[4] This precipitated a settlement agreement between the Bank, Tritan and GGA, which was signed on 23 May 2022 and 31 May 2022 (the settlement agreement). Tritan, GGA and Mr Prinsloo were ostensibly indebted to the Bank and breached the payment requirements in terms of those agreements, resulting in action being instituted against them. The settlement agreement related to various credit agreements, guarantees and suretyship agreements, numbering ten in total. The four VAF Agreements formed a part of those ten agreements. In order to give effect to certain terms of the settlement agreement, Surrender of Goods forms, dated 23 May 2022 and relating to the four VAF assets, were signed by Mr Prinsloo, who represented Tritan and GGA, and served as attachments to the settlement agreement. I will return to this aspect later. The settlement agreement was made an order of court on 17 June 2022. I note that all parties were legally represented when the settlement agreement was concluded and when it was made an order of court.

[5] Tritan failed to adhere to the terms of the settlement agreement and failed to return the VAF assets to the Bank, which then brought an application, on 20 October 2022, for the liquidation of Tritan. A provisional order of liquidation was granted on 22 December 2022 and a final order for the liquidation of Tritan was granted on 2 February 2023. As indicated, Ms Symes and Mr Mahlangu were appointed liquidators of Tritan's insolvent estate. The Bank asserts that while the VAF assets were not delivered to it by Tritan prior to the date of liquidation, the VAF Agreements were terminated prior to that date.

[6] It is apparent that a slew of correspondence was exchanged between the parties from which it was clear that the liquidators took the view that the Bank had relinquished ownership of the VAF assets, which now became assets in Tritan's insolvent estate, and fell to be dealt with by the liquidators. The latter also initially took the view that s 84 of the Insolvency Act¹ was applicable in this matter, and that in terms thereof, the Bank was not a secured creditor but a concurrent creditor. This stance subsequently

¹ Insolvency Act 24 of 1936.

changed, and I will mention it later. Following the exchange of correspondence, an employee in Ms Symes' office informed the Bank on 5 September 2023, that they had received an offer for the purchase of the four VAF assets in the amount of R3 950 000.00 and enquired if the Bank would be willing to consider such offer. The Bank was agreeable to the sale of the assets on condition that the proceeds thereof be paid to the Bank. Annexed to the correspondence from Ms Symes' office, were the offer to purchase the assets as well as a settlement agreement between the liquidators and Mr Prinsloo, Lefras Lourens, Angelique Justine Styles N.O. and Emile du Plooy N.O. This settlement agreement related to the collection of rentals in respect of the four VAF assets, over which the Bank claimed ownership, in the amount of R3.5 million. The Bank further asserts that when Tritan failed to adhere to the terms of the settlement agreement between them, the Bank was not informed of the whereabouts of the four assets, but was informed, subsequent to the liquidation order, that the assets were in the possession of the liquidators and were kept in storage.

[7] On 12 September 2023, the Bank's then-attorney, Mr Ruwayne Smith, sent a letter to Ms Symes' office advising that the VAF Agreements had been cancelled prior to Tritan's liquidation and that the assets do not form part of the assets of the company in liquidation. Therefore, the proceeds of the sale of the assets should be paid directly into his firm's trust account. Mr Smith also pointed out that the lease of the assets (to third parties) was irregular, and that any monies due and payable in respect of the use of the Bank's assets should also be paid into his firm's trust account. The liquidators, however, persisted with their view that the assets were the lawful property of the company in liquidation, were under the control of the liquidators and would be dealt with in the course of administering the insolvent estate. Consequently, they also held the view that the rental amounts in respect of the lease of the assets are proceeds which fall within the liquidated estate, and that the Bank was not entitled to such proceeds.

[8] The basis of the liquidators' opposition to the application is their interpretation of the terms of the settlement agreement entered into on 31 May 2022. They contend that the settlement agreement makes no mention of the termination of the VAF Agreements, alternatively that the settlement agreement reinstated and amended the VAF Agreements, alternatively that the VAF Agreements were fully replaced by the

settlement agreement, with new terms and conditions relating to each of the credit agreements, the different accounts, payment terms and assets. They admit that even after the insolvent company made several payments to the Bank, Tritan, GGA and Mr Prinsloo defaulted in payments, in breach of the settlement agreement. The liquidators complain that in spite of the settlement agreement affording the Bank the right to pursue various rights of recourse against Tritan, GGA and Mr Prinsloo, it chose only to enforce its rights in terms of clause 6.1,² read with para 6.4.4.³ It thereafter chose not to enforce any of the alternative options available to it, but opted to apply for the liquidation of Tritan.

[9] The liquidators further allege that in submitting its Proof of Claim against the insolvent estate, the Bank relied only on specified suretyships and guarantees, in a total amount of R25 292 071.64. This amount included the amounts due in terms of the VAF agreements. At no stage did the Bank mention the VAF assets or place any reliance on its right to repossess or sell the assets, which it was legally entitled to do, in terms of the VAF Agreements, in order to settle the indebtedness in respect of the VAF Agreements. The Bank specifically relied solely on the security provided by the suretyships and guarantees to settle its entire claim. In doing so, the Bank clearly indicated that it did not rely on the repossession or sale of the assets themselves as security to settle the outstanding balances due to it. The assets would, therefore, have been paid in full by the specified securities it held, and would have become assets of the insolvent estate. The Bank had clearly abandoned its right to repossess the assets in settlement of Tritan's indebtedness to it and was therefore only a concurrent creditor of the insolvent estate.

[10] With regards to the amounts due in respect of the rentals relating to the assets, which were leased to third parties by the liquidators, the latter argued that there is no provision in law entitling the Bank to these rental amounts. They assert that the Bank relies on its 'alleged' ownership of the assets to claim the rentals accrued/accruing in

² Clause 6.1 provides that the full outstanding balance together with interest thereon (as provided for paragraphs 4.1 to 4.10.3) will immediately become due and payable.

³ Which provides that the applicant may proceed with any further legal steps it deems fit to protect its rights and/or to collect the full outstanding balance due to it.

respect of the assets. The liquidators assert that ownership is irrelevant to a claim flowing from a lease such as a claim for arrear rental. Therefore, the liquidators did not need to be owners to rent the assets to third parties and are entitled to the rentals payable in respect thereof.

[11] While the liquidators initially held the view that s 84 of the Insolvency Act applied in this matter, they subsequently changed this stance on the basis that the Bank did not rely on its right to repossess the assets. In any event, section 84 would have been applicable if, at the date of sequestration or liquidation, the assets, which were subject of an instalment agreement, had already been delivered to the insolvent and the agreement was still in force. In that instance, the instalment agreement would create a hypothec in favour of the creditor (the Bank in this instance). The Bank, however, asserts that s 84 does not apply as the instalment agreements were cancelled prior to the date of liquidation.

[12] The issues for determination by this court are whether:

- a. the VAF Agreements were cancelled by the Bank;
- b. the settlement agreement revived or amended the VAF Agreements;
- c. the Bank retained its ownership of the VAF assets;
- d. the Bank is entitled to the proceeds of the sale of the assets; and
- e. the bank is entitled to the rentals received in respect of lease of the assets.

[13] It is common cause that the Bank and Tritan entered into the VAF Agreements, that the Bank retained ownership of the VAF assets, and that ownership would pass to Tritan only when it paid all amounts due, and complied with all its obligations in terms of the agreements. The liquidators admit that Tritan failed to adhere to the terms of the agreements and that the Bank served a notice of termination of the VAF Agreements on Tritan in October 2022. In my view ownership could not, in those circumstances, have passed to Tritan and that the Bank retained ownership of the assets. It is common cause that Tritan did not return the assets to the Bank as it was obliged to do in the event that the agreements were cancelled. It is also not in dispute that the settlement agreement was entered into as indicated earlier, and that Tritan (and GGA) admitted their indebtedness to the Bank under the VAF Agreements. The settlement agreement was, in effect, an acknowledgement of debt, with an agreement to repay that debt in

specified monthly amounts. The liquidators' argument that the settlement agreement revived, amended the VAF Agreements or created a new agreement must be examined in the light of some of the provisions of the settlement agreement.

[14] Clause 14 stipulates that the settlement agreement does not constitute a novation of the original (VAF) agreements and that the Bank may elect to proceed in terms of either the original agreement or the settlement agreement. With regard to the various methods of recourse available to the Bank in the event of the parties breaching the settlement agreement, it is noteworthy that para 6.1 records the consent of Tritan and GGA that, in the event of breach of the settlement agreement, the full outstanding balance together with interest thereon will immediately become due and payable. Further, in paras 6.2, 6.3, 6.4.1, 6.4.2 and 6.4.3 the use of 'and/or' at the end of each of those paragraphs indicates an option to elect any one or more of the options for recourse provided in each of those paragraphs. The complaint of the liquidators that the Bank selectively chose to enforce collection of the full outstanding balance and liquidation of Tritan, as opposed to any of the other remedies available to it, is, therefore, misplaced. Their argument that no mention is made of the VAF assets in the settlement agreement nor any intention to repossess those assets, thus indicating that the Bank relinquished its intention to repossess and, by implication, its ownership, lacks merit.

[15] There is ample evidence that the Bank repeatedly asserted its ownership before and after the liquidation of Tritan. Prior to liquidation, the Surrender of Goods forms signed by Tritan, GGA and Mr Prinsloo, specifically gave notice of cancellation of the VAF Agreements, and consented to the surrender of the assets. It raises the question why they would surrender the goods to the Bank if it was not recognized as the owner of the assets. In the correspondence subsequent to the liquidation similarly, the Bank, through its legal representatives, repeatedly asserted its ownership. The letter by Mr Smith of 12 September 2023 is a clear example of this. That the Bank's permission was sought for the sale of the assets at the purchaser's instance, is a thin argument. Paragraph 5.6.2 stipulates that:

'[t]he Respondents further consent thereto that should any VAF asset be sold before such time as all debt due and payable in terms of this agreement has been settled that such a VAF asset will not be sold without written permission by the Bank and neither below market value'.

Mr Smith's letter made it clear that while the Bank consented to the sale, the proceeds thereof were to be deposited into his firm's bank account, which was done. This demand by Mr Smith was based on the Bank's assertion that it was the owner of the assets.

[16] The further argument by the liquidators that in the Bank's Proof of Claim affidavit, no mention is made of and no reliance was placed on the VAF assets as security for the debt owed to it is an indication of the Bank having relinquished the intention to repossess. I note that the liquidators studiously avoid alleging waiver of ownership by the Bank or that it relinquished its ownership. Even if the bank did not, at the time of submission of its proof of claim, intend to repossess the assets, such lack cannot deprive it of ownership or confer the right on the liquidators to deal with the assets as though it was property belonging to the insolvent estate. Apart from the bald statements made by the liquidators in this regard, they have not substantiated these assertions with either legal precedent or legal prescripts. No mention is made by either of the parties with regard to whether there was equity in the insolvent estate to cover the paper value of the security relied on by the Bank in proving its claim against the insolvent estate. This perhaps answers the question raised by the liquidators who were seemingly left wondering why the Bank now seeks a declaratory order in respect of ownership of the assets, together with the monetary relief which would follow upon an order in its favour.

[17] The Bank's unchallenged evidence was that it was not in possession of and unaware of the whereabouts of the assets at the time that it submitted its Proof of Claim. It also did not receive any proceeds related to the assets, and hence it did not mention it at that stage. The evidence that it was informed only after the liquidation order was granted that the assets were in the possession of the liquidators and in storage was also not challenged. However, it is clear that such information was not correct as the assets were not in storage but rented out by the liquidators to third parties. The question of their entitlement to do so will be dealt with shortly. The Bank

ostensibly became aware of the whereabouts of the assets when the offer to purchase same was sent to it for approval, many months after the liquidation order was granted.

[18] I return to the issue of a waiver or relinquishing of ownership by the Bank. The liquidators seem to conflate possession with ownership, which are distinct concepts. They claim that the Bank waived its ownership of the assets by not including it in its Proof of Claim against the insolvent estate, leaving the liquidators free to deal with the assets as property belonging to the insolvent estate. This is incorrect and not substantiated by the liquidators. They have alleged waiver but have not discharged the onus on them to prove waiver. It is well established in our law that there must be clear evidence of waiver. The Appellate Division in *Borstlap v Spangenberg*⁴ cited with approval the following remarks of the court in *Laws v Rutherford*, 1924 AD 261 at 263:

‘The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances. It is always difficult. . .’

It is also trite that the waiver is complete only when it is accepted by the debtor. The facts in this matter clearly demonstrate that there could not have been a waiver of the Bank’s ownership of the assets or any acceptance thereof either by Tritan or its liquidators. The interpretation given to the terms of the settlement agreement by the liquidators, is unsustainable. The default judgment which the Bank sought, was in respect of the amounts owing to it in terms of the VAF Agreements. The settlement agreement was an acknowledgement of that debt and the undertaking to pay. The settlement agreement is not capable of the interpretation that sustains the assertion that the Bank waived its right of ownership.

[19] An analogous situation which comes to mind is where a debtor purchases a motor vehicle which is subject to an instalment agreement. He defaults in the monthly payment of the purchase price. The Bank issues summons against him for cancellation of the agreement, payment of the amounts due, and the return of the vehicle. A surrender form is sometimes signed by the debtor, which enables the Bank to repossess the vehicle. The

⁴ *Borstlap v Spangenberg* 1974 (3) SA 695 (A).

Bank in that situation does not lose its ownership of the vehicle, even though the debtor has possession of the vehicle. Orders for cancellation of the agreement and return of the assets/goods are routinely granted by our courts. The facts of this case lean towards the strong indication that the Bank was and remained the owner of the VAF assets. The termination of the agreement by the Bank and by Mr Prinsloo, representing Tritan and GGA, in the Surrender of Goods form, are steps that indicate that the VSAF assets were not the property of the insolvent estate and did not become so because the Bank elected to rely on one of the other options available to it for recovery of the money due to it. In view of what I have said, I find that the Bank remained the owner of the VAF assets.

[20] With regard to the proceeds of the lease of the assets, it follows, from my finding that the Bank remained the owner of the assets, that the liquidators were not authorised by the Bank to lease the assets to third parties. The argument raised by the liquidators that a lessor does not have to be the owner of property to lease it to a third party is correct. Put differently, a lessee cannot raise as a defence the lack of ownership of the property by the lessor, to avoid, for example, payment of arrear rental or eviction from the property. He would be bound by the terms of the lease, even if the lessor has no title to the property. These legal principles regulate the relationship between the lessor and the lessee. The liquidators have failed to show that these principles apply as between the owner of the property and the possessor thereof, where the latter uses or benefits from his possession of the property, without the knowledge or consent of the owner thereof. The liquidators admitted Tritan's receipt of the notice cancelling the VAF Agreements and did not challenge the validity thereof. They liquidators were, therefore, not entitled to deal with the assets as though they were the property of the insolvent estate. It must therefore follow that the Bank would be entitled to the proceeds of the lease of the assets to third parties. It is irrelevant that the Bank was not a party to the settlement agreement between the liquidators and the third party lessees. It is entitled to rental amounts received by the liquidators in terms of that settlement agreement.

[21] In the circumstances, the following order is made:

1. The applicant, The Standard Bank of South Africa Limited, is declared to have been the owner of the following assets, prior to the sale of thereof:

- i. 2017 Hitachi ZX330LC5-G Tracked Excavator with serial/registration number HCM[...]0 and chassis number WDD[...]
- ii. 2020 Hitachi ZX240-5G Tracked Excavator with serial/registration number HCM[...]7;
- iii. 2014 Hitachi ZX240-5G Excavator with serial/registration number RYU[...]5;
- iv. 2014 Hitachi ZX240-5G Excavator with serial/registration number RYU[...]6.

2. The respondents are ordered to pay to the applicant the amount of R1 500 000.00 currently held by Applicant's former attorney, Mr Ruwayne Smith of Symington & De Kok, Bloemfontein, in their trust account, being the proceeds of the sale of one of the assets referred to above, as well as the proceeds still to be paid by the buyers of the assets in respect of the other assets referred to above;

3. The respondents are ordered to pay to the applicant the amount of R1 000 000.00, currently held by the respondent's attorneys, Grundlingh and Associates, alternatively, by the respondents in their trust account, being a settlement in respect of rentals for the assets referred to above, paid by Ryno Prinsloo, Lefras Lourens, Angelique Justine Styles N.O. and Emile Du Plooy N.O. to the liquidated estate of Tritan Plant Hire (Pty) [in liquidation], as well as the balance of the settlement amount, being R2 500 000.00, still to be paid by the aforesaid Ryno Prinsloo, Lefras Louwrens, Angelique Justine Styles N.O. and Emile du Plooy N.O.;

4. The respondents are ordered to provide the applicant with the necessary documentation and proof of their disbursements in relation to the assets and the settlement amount of rentals, with reference to the preservation of the assets, their collection of payments and/or costs relating to the entering into of the settlement agreement, which amounts, if proper proof is provided, are to be

repaid by the Applicant to the liquidated estate of Tritan Plant Hire (Pty) Ltd [in liquidation].

5. The respondents are directed to pay the costs of this application.

NAIDOO J

Appearances

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