IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO. 105/2015

Of interest

In the matter between:

ABSA BANK LIMITED **APPLICANT / PLAINTIFF**

and

MOSULI CONSTRUCTION
AND OTHER SERVICES CC **RESPONDENT / DEFENDANT**

JUDGMENT

Rugunanan J

[1] This is an application for the interim attachment of an Isuzu motor vehicle[1] (the vehicle) pending the outcome of a vindicatory action and a claim for damages (the action). The *causa* in the action is occasioned by an alleged breach of an instalment sale agreement (the agreement), the subject of which is the vehicle. It is alleged that the agreement is not subject to the provisions of the National Credit Act 34 of 2005[2] (the Act). That being the case, the vehicle is not 'property that is the subject of a credit agreement' and accordingly the provisions of s 131 of the Act are inapplicable. The purpose of seeking interim vindicatory relief or quasi-vindicatory relief[3] is to protect the vehicle against the risk of damage and deterioration in value, and for the applicant to preserve it in safekeeping until the action is finalised.

[2] In opposing the application the respondent filed a notice in terms of uniform rule 6(5)*(d)*(iii) contending: *(a)* that the return or repossession of the vehicle is *lis pendens* the action; and *(b)* that the applicant did not give written notice before resorting to legal proceedings. Following delivery of the notice neither of the parties applied to the registrar to allocate a date for the hearing of the matter[4]. In the course of events, beyond prescribed time frames, the respondent filed an opposing affidavit and the applicant filed its replying affidavit. The latter was preceded by a supplementary affidavit confirming the principal relief claimed in the applicant's amended notice of motion and clarifying that orders previously sought in the initial notice of motion, *inter alia* that the vehicle be marketed and sold, will no longer be pursued with. The circumstances occasioning the procedural context in which the matter evolved in this manner and the condonation sought by the respondent for the late filing of its opposing affidavit are not material to the determination of the issues and are not addressed in this judgment.

[3] It is enough to say that the opposing affidavit does not engage with the allegations in applicant's founding affidavit. In effect, the following material facts read

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[1] More fully described in the instalment sale agreement between the parties as a 2012 Isuzu KB300D-TEQ LX E/CAB P/U S/C with engine number 4[…] and chassis number A[…].
[2] See *SA Taxi Securitisation (Pty) Ltd v Chesane* 2010 (6) SA 557 (GSJ) paras 6 to 10 regarding the position under the common law and the National Credit Act pertaining to the interim attachment of goods.
[3] For the distinction between vindicatory and quasi-vindicatory actions see Van Loggerenberg, *Erasmus Superior Court Practice* at D6-21 [Service 15, 2020].
[4] In accordance with rule 6(5)*(f)*(ii) or (iii).

together with the chronology below are common cause, alternatively, they are not seriously and unambiguously disputed: *(a)* the applicant and the respondent entered into an instalment sale agreement regarding the vehicle; *(b)* the applicant is the owner of the vehicle; *(c)* the vehicle was delivered to the respondent and it remains in the respondent's possession; *(d)* the vehicle is a depreciating asset for which the respondent has provided no tangible proof of insurance and it depreciates by use; *(e)* the respondent refused and refuses to return the vehicle; and *(f)* the make and model of the vehicle is identifiable by its engine and chassis numbers. During argument the respondent did not persist with the issues raised in its rule 6(5)*(d)*(iii) notice, adopting instead a discrete approach pinpointed at the timing of the application and the contention that the applicant did not establish a well-grounded apprehension of irreparable harm.[5]

[4] The chronology of events pertinent to the matter are set out somewhat in abbreviated terms as follows:

4.1 12 January 2012 – instalment sale agreement concluded between the parties;

4.2 18 January 2015 – summons issued;

4.3 17 June 2015 – judgment by default entered against the respondent for return of the vehicle and payment of arrears amount;

4.4 18 August 2015 – default judgment order rescinded;

4.5 2 December 2015 – notice of exception to particulars of claim;

4.6 14 January 2016 – delivery of amended particulars of claim;

4.7 9 June 2021 – rule 35(3) notice directing respondent to produce proof of comprehensive insurance cover on vehicle;

4.8 3 December 2021 – respondent's affidavit in response to rule 35(3) notice;

4.9 6 March 2023 – application for interim relief launched by applicant.

[5] In mentioning the agreement between the parties, it was an express condition that ownership of the vehicle remains vested with the applicant and will not pass to

[5] As for the other issue, *lis pendens*, this was not at all addressed in argument nor was the court invited to deal therewith in this judgment.

the respondent until such time that the cost of the vehicle, which amounted to R441 148.80, was fully paid up in monthly instalments of R7 352.48 over a term of five years ending 10 February 2017.

[6] At the time of issue of summons the respondent was in arrears with its monthly instalments in the sum of R158 483.81. As at the date of the institution of this application the amount escalated to R341 100.45. In the pending action, and as a defence to non-payment, the respondent disputes the authenticity of the signatures to the agreement, including some of its terms.

[7] Apart from the instalment obligations the agreement obliged the respondent to keep the vehicle licensed and comprehensively insured. In response to the applicant's rule 35(3) notice in the action the respondent (duly represented by its sole member) declared under oath *inter alia* that the vehicle 'was' uninsured, and that proof of insurance and licensing 'was' unavailable. It is indicated in the respondent's heads of argument that the vehicle is comprehensively insured. That, however, does not constitute evidence given under oath.[6] Heads of argument are merely persuasive comment by the parties with regard to questions of fact or law and offer no substitute for affidavits.

[8] According to the particulars of claim the cancellation of the agreement by reason of the respondent's default on its payment obligations was conveyed to the respondent. The cancellation is reiterated in the applicant's founding affidavit. Alternatively, it is asserted that the agreement terminated by effluxion of time on 10 February 2017. It is nowhere gainsaid by the respondent in its opposing papers that the agreement was cancelled or otherwise terminated by effluxion of time but this is obliquely raised in its heads of argument. The issue is moot. Put otherwise, the respondent's contention that there can be no repossession without cancellation is unsustainable.[7]

[6] *Maboho T and Others v Minister of Home Affairs* (833/2007, 1128/2007) [2011] ZALMPHC 4 (28 November 2011) para 13.

[7] The legal position is that once an agreement is cancelled an applicant is not precluded from claiming recovery of goods – see *SA Taxi Securitisation (Pty) Ltd v Chesane ibid* fn 2 para 13.

[9] Allowing for the fact that the agreement is no longer in existence the applicant is not precluded from obtaining an order for the interim attachment of the vehicle provided it establishes the requisites for the grant of an interim attachment, namely: *(a)* a clear right or, if not, a *prima facie* right though open to some doubt; *(b)* a well-grounded apprehension of irreparable harm (only in the event a *prima facie* right is established); *(c)* the balance of convenience favours the granting of interim relief; and *(d)* the applicant has no other satisfactory remedy.[8]

[10] In what follows hereafter the requisites are discussed but not necessarily in the order in which they have been formulated.

[11] It is undisputed that the respondent has defaulted on its instalment obligations and that applicant is the owner of the vehicle and remains as such until the respondent pays the final instalment. The respondent has not shown otherwise. Inherent in the nature of the remedy invoked by the applicant is that possession of the thing should be restored to the owner and it follows that no other person may withhold it from the owner unless they are vested with some right enforceable against the owner (such as a right of retention or a contractual right).[9] I am of the persuasion that the applicant has established a clear right.

[12] In a claim for vindicatory or quasi-vindicatory relief the apprehension of irreparable harm need not be established if the applicant establishes a clear right[10]. The apprehension is presumed until the contrary is shown[11].

[13] In argument the respondent placed significant store on the judgment in *Firstrand Bank Limited v Sesimani*[12] (*'Sesimani'*) regarding the timing of this application and the applicant's apprehension of harm. It argued with reference to the historical chronology set out earlier that the applicant's inordinate delay in launching this application warranted its dismissal. *Sesimani* is distinguishable from the present factual setting. The respondent in that matter adduced evidence in rebuttal of the

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[8] *SA Taxi Securitisation (Pty) Ltd v Chesane supra* para 11.
[9] Silberberg and Schoeman, *The Law of Property*, LexisNexis 5th ed at page 243.
[10] See Van Loggerenberg, *Erasmus Superior Court Practice* Juta at D6-19 [Service 18, 2022] and the cases referred to in footnote 10 thereto.
[11] *Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (W) at 813C.
[12] *Firstrand Bank Limited v Sesimani* 2022 JDR 2010 (GP) para 19.

presumption. The evidence indicated that the respondent took measures to mitigate the deterioration in the value of a BMW motor vehicle by maintaining payments on a comprehensive insurance cover, a service/maintenance plan to cover mechanical breakdowns, and a subscription to a vehicle tracking service. This attracted censure for the applicant's protestation of irreparable harm when weighed against its seven-month delay in launching its application for interim relief and resulted in the dismissal of the application.

[14] *Sesimani* is of no assistance to the respondent in contending for dismissal of the application due to delay where the respondent's indifference in mitigating harm or damage to the vehicle in its possession is blatant on the papers.

[15] In the context of interlocutory interdicts, Van Loggerenberg[13] adopts the view that the requisite that there be no other remedy is closely linked with that of irreparable harm. The rationale is that if the harm envisaged will be irreparable if allowed to continue, an interdict will be the only remedy.[14] Establishing a clear right, as the applicant has done in this instance, does not require proof of irreparable harm or loss if the interdict is not granted. Nor, as does the learned author point out, need the applicant show that he has no other satisfactory remedy.[15] To my mind these sentiments read persuasively.

[16] Turning to the balance of convenience. It is settled that the stronger the case which the applicant makes out, the less need for such balance to favour the applicant; and the weaker the prospects, the greater the need for the balance to favour the applicant. Factored in this assessment is the question of prejudice to the respective parties.[16] The facts are clearly supportive of the applicant's case. Whether due to cancellation or passage of time, the agreement does not subsist. The respondent, notwithstanding, avails itself of the possession and use of the applicant's vehicle without making payment. Flowing from the amount in arrears at

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[13] Van Loggerenberg *ibid* fn 10 at D6-21 [Service 15, 2020].
[14] Van Loggerenberg *ibid* fn 10 at D6-21 [Service 15, 2020].
[15] Van Loggerenberg *ibid* fn 10 at D6-21 [Service 15, 2020]; see also *SA Taxi Securitisation (Pty) Ltd v Chesane* ibid fn 2 and cf. *Absa Bank Ltd v Erasmus* 2023 JDR 1228 (FB).
[16] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E-F.

the date of the institution of this application is the deduction that the respondent's default persisted for a protracted period.

[17] The substantial prejudice to the applicant is manifest when weighed against the circumstance that the respondent does not contend for prejudice (and indeed, on the undisputed facts, it cannot) while it uses the vehicle without reciprocity of payment. At the launching of this application the vehicle was of eleven-year vintage and by the time the matter was argued this figure had advanced by another two years. Self-evidently, the vehicle depreciates and its continued utilisation over a prolonged period will have the result that, should the applicant be successful in the action, the vehicle may be of little or no worth by the time it is recovered. The risk associated with the deterioration of the vehicle is ongoing and is occasioned by the respondent's non-disclosure or failure to provide proof of comprehensive insurance cover and its failure to reciprocate in payment. For the reasons stated, I am satisfied that the balance of convenience favours the applicant.

[18] I therefore make the following order:

1. The late delivery of the respondent's opposing affidavit is condoned.
2. The respondent shall pay its own costs in the application for condonation.
3. The respondent is ordered to return a 2012 Isuzu KB300D-TEQ with engine number 4[....] and chassis number A[....] (the vehicle) to the applicant on an interim basis pending the outcome of the main action between the parties.
4. In the alternative to the above paragraph, the respondent is ordered to deliver the vehicle into the possession of the sheriff who shall deliver the vehicle to the applicant.
5. Upon receipt of the vehicle the applicant shall at its own expense:
   - 5.1 transport the vehicle to its garaged premises at […] T[…] Road, Boksburg;
   - 5.2 retain the vehicle at such premises under security pending the outcome of the action; and
   - 5.3 not use the vehicle or permit that it be used.

6. In the event that the respondent or any other third party in whose possession the vehicle may be found fails to comply with the contents of paragraphs 3 and 4 above within 5 (five) days of service of this order upon the respondent, the sheriff be and is hereby authorised and directed to take the vehicle into his/her possession from wherever he/she may find it and return the vehicle to the applicant who shall thereafter act in accordance with paragraph 5 above.
7. The costs of the application shall be costs in the main action.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: *C Cordell*, Instructed by Hack Stupel & Ross c/o Wheeldon Rushmere & Cole Inc., Makhanda (Ref: SA/Farenchia; Te; 046-622 7005).

For the Respondent: *H Zilwa*, Zilwa Attorneys, Makhanda (Ref: H Zilwa; Tel: 047 531 0356).

Date heard: 15 May 2025.

Date delivered: 29 July 2025.