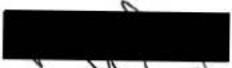




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 2024 – 056924

DELETE WHICHEVER IS NOT APPLICABLE	
1. REPORTABLE : YES/ NO	
2. OF INTEREST TO OTHER JUDGES: YES/NO	
3. REVISED	
30/11/2026	
DATE	SIGNATURE
GAUTENG DIVISION, PRETORIA	

In the matter between:

KOBUS VAN DER WESTHUIZEN NO

VUSUMUZI LUCAS MATIKINCA NO

Applicants

and

NATIONAL EMPOWERMENT FUND

Respondent

JUDGEMENT

Introduction

[1] This application concerns the proper construction and application of ss 83 and 84 of the Insolvency Act 24 of 1936 in circumstances where a creditor, after liquidation, repossessed and sold assets subject to an instalment sale agreement, but retained the proceeds.

[2] The applicants, in their capacities as joint liquidators of Africa People Mover (Pty) Ltd (in liquidation) ("APM"), seek an order compelling the respondent ("the NEF") to pay to the insolvent estate the sum of R20 200 000, being the proceeds realised from the sale of 15 buses previously in APM's possession.

[3] The crisp issue is whether, upon repossession and realisation of assets subject to an instalment sale agreement after liquidation, the proceeds vest in the secured creditor or must be paid into the insolvent estate in terms of s 83(10).

Factual background

[4] The material facts are largely common cause.

[5] The NEF funded APM's acquisition of buses through a structured agreement in terms of which ownership of the buses remained vested in the NEF until full payment, while possession and use were transferred to APM.

[6] That agreement falls squarely within the definition of an instalment agreement as contemplated in s 1 of the National Credit Act 34 of 2005, read with s 84(1) of the Insolvency Act.

[7] APM was placed in liquidation, with the effective date being 25 June 2021.

[8] In November 2021, the NEF obtained possession of 15 buses from the liquidators.

[9] During June 2022, the NEF sold those buses to a third party, Zululand Bus Services CC, for R20 200 000.

[10] The NEF received payment of the full purchase price.

[11] It did not pay the proceeds to the liquidators.

The statutory framework

[12] Section 84(1) provides that where goods are delivered under an instalment agreement, the creditor is deemed, upon insolvency, to hold a secured claim (a hypothec) over the property.

[13] Upon delivery of the property to the creditor, the latter is deemed to hold it as security, and the provisions of s 83 apply.

[14] Section 83 regulates the position of secured creditors who realise their security.

[15] Crucially, s 83(10) provides:

"When a creditor has realised his security as hereinbefore provided, he shall forthwith pay the net proceeds of the realisation to the trustee."

[16] The statutory scheme is thus clear: the creditor realises the asset, but the proceeds are paid into the estate, from which the creditor claims its preference.

Proper interpretation of ss 83 and 84

[17] The interpretation of these provisions must be undertaken in accordance with the now settled approach articulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹: language, context and purpose must be considered holistically.

[18] The Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary*² reaffirmed that interpretation is a unitary exercise directed at ascertaining meaning in context.

[19] Applying that approach, the purpose of ss 83 and 84 is to preserve the concursus creditorum and to ensure orderly distribution of assets through the insolvency machinery.

¹ 2012 (4) SA 593 (SCA)

² 2021 (6) SA 1 (CC)

[20] The SCA in *Commissioner, SARS v Strand Two Nine Nought Wynberg (Pty) Ltd*³ emphasised that once insolvency intervenes, individual enforcement yields to the collective process.

[21] Section 84 does not preserve ownership rights in the creditor in the ordinary sense; rather, it converts the creditor's position into that of a secured creditor with a statutory hypothec.

[22] This accords with the reasoning in *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd*⁴, where the SCA stressed that insolvency law subordinates individual rights to the statutory scheme.

Application to the facts

[23] Once APM was placed in liquidation the NEF's contractual rights were superseded by the statutory regime, its position became that of a secured creditor; and its rights fell to be exercised within ss 83 and 84.

[24] The NEF was entitled to take possession of the buses. That is expressly contemplated by s 84(1).

³ 2005 (5) SA 580 (SCA)

⁴ 2014 (2) SA 518 (SCA)

[25] It was further entitled to realise the buses.

[26] However, upon doing so, s 83(10) imposed a peremptory obligation to pay the proceeds to the liquidators.

[27] The language “shall forthwith pay” admits of no discretion.

[28] The structure of the Act confirms that the creditor’s preference is exercised after payment into the estate, through proof of claim in terms of s 44.

The respondent’s defences

Although the answering affidavit raises several contentions, they may be grouped into three principal defences.

(a) Ownership-based defence

[29] The NEF contends that, as owner of the buses, it was entitled to sell them for its own account and retain the proceeds.

[30] This contention cannot be sustained.

[31] Section 84 expressly intervenes upon insolvency and replaces the creditor's ownership-based rights with a statutory security right.

[32] The effect is that ownership becomes irrelevant to entitlement to proceeds.

[33] In *Venter NO v Avfin (Pty) Ltd*⁵, the Appellate Division recognised that insolvency legislation may alter proprietary consequences in favour of the collective process.

[34] Similarly, in *Firststrand Bank Ltd v PMG Motors Alberton (Pty) Ltd*⁶, the court held that instalment sale creditors are subject to the insolvency regime despite retention of ownership.

[35] The respondent's reliance on ownership is thus misplaced.

(b) Non-compliance with s 83 formalities

[36] The NEF appears to contend that, because the realisation did not strictly comply with s 83(8) procedures (such as public auction), the obligation under s 83(10) does not arise. This argument is untenable.

⁵ 1996 (1) SA 826 (A)

⁶ 2013 (4) SA 77 (GSJ)

[37] The phrase “as hereinbefore provided” in s 83(10) does not create a condition precedent but describes the type of realisation. To hold otherwise would permit a secured creditor to escape statutory obligations by failing to comply with them. That would undermine the *concursum creditorum* and incentivise non-compliance.

[38] The Supreme Court of Appeal has consistently rejected interpretations that defeat statutory purpose.⁷ The obligation to pay over proceeds arises upon realisation, not upon perfect compliance.

(c) Reciprocity or set-off

[39] The respondent suggests that its obligation to pay proceeds is reciprocal to the liquidators’ obligation to recognise its secured claim. This too is incorrect.

[40] The statutory scheme separates the obligation to pay proceeds (s 83(10)); and the proof and ranking of claims (s 44 read with s 83). These are sequential, not reciprocal.

⁷ See *Capitec Bank Holdings Ltd v Coral Lagoon Investments* 2022 (1) SA 100 (SCA).

[41] In *Standard Bank v Townsend*⁸, it was emphasised that secured creditors must submit to the insolvency process for distribution. The NEF's remedy lies in proving its claim, not in withholding proceeds.

Constitutional considerations and the relief sought by the applicants

[42] The interpretation advanced by the applicants is also consonant with constitutional values of legality and equality among creditors.

[43] In *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC)⁹, the Constitutional Court stressed that statutory schemes must be applied as enacted, particularly where they regulate economic relationships.

[44] Allowing the NEF to retain proceeds outside the estate would subvert the statutory distribution scheme and prejudice other creditors.

[45] The NEF realised assets subject to an instalment sale agreement after liquidation. In doing so, it acted within the framework of ss 83 and 84. Those provisions required it to pay the net proceeds to the liquidators. Its failure to do so is unlawful.

⁸ 1997 (3) SA 41 (W)

⁹ 2014 (4) SA 474 (CC)

[46] Consequently, I have no difficulty in finding that the applicants have established a case for the relief sought.

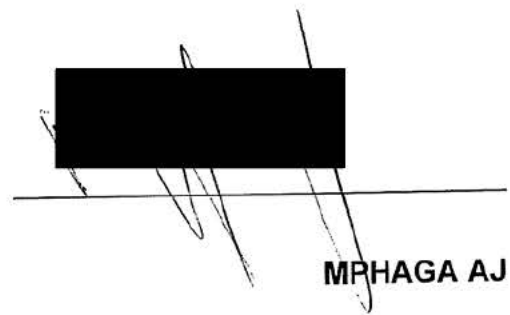
COSTS

[47] The Applicants have been substantially successful and is entitled to its costs. There is no reason to depart from the general rule that costs follow the result. I am not persuaded that punitive costs are appropriate in circumstances where the matter dealt with the interpretation of legislation and where it is apparent that the application was opposed on *bona fide* grounds.

Order

[48] The following order is made:

1. The respondent is directed, in terms of s 83(10) of the Insolvency Act 24 of 1936, to pay the amount of R20 200 000.00 to the insolvent estate of Africa People Mover (Pty) Ltd (in liquidation) within seven (7) days of this order.
2. The respondent is ordered to pay the costs of the application on a party and party scale B.



MPHAGA AJ

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

COUNSEL FOR APPLICANTS

ADV M LOUW

ADV W G TSHABALALA

ATTORNEYS FOR APPLICANTS

MATHYS KROG ATTORNEYS

COUNSEL FOR RESPONDENT

GD WICKINS SC

ATTORNEYS FOR RESPONDENT

CLIFFE DEKKER HOFMEYER INCORPORATED