

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2024-128008

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
_____	_____
DATE	SIGNATURE

In the matter between:

CATERPILLAR FINANCIAL SERVICES

SOUTH AFRICA (PTY) LTD

Applicant

AND

KHULAKANYE INVESTMENTS

AND PROJECTS (PTY) LTD

Respondent

JUDGMENT

ROBERTSON, AJ

Introduction

1. This is an application arising from a Master Instalment Sale Agreement concluded between the parties, together with schedules concluded under that agreement in respect of Caterpillar's equipment.
2. The applicant obtained an interim *ex parte* order from Wepener J on 12 November 2024. That order authorised repossession of the equipment, pending the determination of Part B. The matter now comes before me after the filing of answering and replying affidavits and heads of argument.
3. The applicant also seeks condonation for the late filing of its replying affidavit. The application for condonation was not seriously opposed. Although the explanation for the delay is not entirely satisfactory, the delay is not excessive, the respondent has dealt fully with the replying affidavit, and no material prejudice has been demonstrated. In the circumstances, condonation is granted.
4. In Part B, the applicant initially sought final relief arising from the repossession order, together with payment of R4 510 423.64, interest and costs. The applicant no longer seeks a monetary judgment at this stage. It presently seeks leave to dispose of the equipment, with the monetary claim to be postponed until after disposal and quantification.
5. For convenience, I refer to the Master Instalment Sale Agreement as "the MISA".

The central issue

6. Although a number of issues were raised in the papers and heads of argument, the central issue for present purposes is whether the applicant validly cancelled the relevant agreements concluded under the MISA. If it did, the applicant's entitlement to the present disposal relief follows, subject to the respondent's complaints about the *ex parte* order and alleged non-disclosure.

Clauses 9 and 10 of the MISA

7. The applicant relies on payment default. The relevant contractual provisions are clauses 9 and 10 of the MISA.
8. Clause 9(a) (p. 27-96) provides that an event of default occurs if the respondent fails to make payment when due, or if payment is not received when due for any reason.
9. Clause 10 (p. 27-96) then provides for the remedies available to the applicant upon an event of default, including declaring the relevant agreement in default and cancelling it.
10. The respondent contends that clause 9(d) applies (p. 27-96). That clause provides for a 10-day period in relation to failure to observe or perform a covenant, agreement or warranty. I do not accept that clause 9(d) governs the present default. Non-payment is dealt with expressly in clause 9(a). Clause 9(d), properly construed, governs other breaches not specifically catered for elsewhere in clause 9. Clause 9(a) does not require 10 days' notice before an event of default arises. The respondent's construction would impermissibly subject the specific non-payment default in clause 9(a) to the separate notice regime in clause 9(d).
11. That conclusion accords with the principle *generalia specialibus non derogant*, as applied by the Supreme Court of Appeal in *Lebashe Financial Services (Pty) Ltd v Prudential Authority*,¹ and *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga*.² The principle applies *mutatis mutandis* to the construction of a contract, where the parties have addressed a specific subject (here, non-payment) in a specific provision (clause 9(a)), the general words of clause 9(d) cannot be used to displace that bargain.
12. It is not seriously disputed on the papers that the respondent was in arrears.

¹ [2022] ZASCA 141; 2023 (2) SA 130 (SCA) para 37

² [2012] ZASCA 77;2012 (5) SA 392 (SCA); [2012] 3 All SA 655 (SCA) para 15

The cancellation issue

13. The respondent disputes the validity of the cancellation and contends that it was premature.
14. The formal cancellation letter was sent on 6 November 2024. It is annexed to the founding affidavit as FA8 (p. 02-77). In paragraph 6 thereof, the applicant stated that it had “elected to, as it hereby does, cancel the agreement with immediate effect”.
15. Paragraph 7 of the same letter then required the respondent, by no later than 7 November 2024, to disclose the whereabouts of the equipment and to make it available for collection by the applicant.
16. In my view, the reference to 7 November 2024 in paragraph 7 related to the disclosure and collection of the equipment after cancellation. It was not an opportunity afforded to the respondent to remedy the payment default before cancellation took effect.
17. The respondent relies heavily on an email dated 5 November 2024 annexed to the answering affidavit as Annexure M (p. 27-165). In that email, the applicant urged the respondent to make payment by 7 November 2024 or to contact the writer to discuss a payment arrangement.
18. I do not read that email as a waiver, suspension, or postponement of the applicant’s accrued contractual right to cancel. Properly construed, it is a payment demand and an attempt to procure payment of arrears. It does not state that the applicant will refrain from cancelling pending 7 November 2024, nor does it amount to an election to suspend accrued cancellation rights. In addition, clause 15 of the MISA (p. 27-98) expressly provides that no delay, latitude, extension of time or other indulgence granted by the applicant shall be construed as a waiver of any rights arising from an event of default.

The notice issue

19. The respondent contends that the letter of cancellation was invalid on several grounds. It submits that the letter was not delivered at the respondent’s

domicilium address, that it was sent to an incorrect email address, and that it was sent to Mr Mthombeni after he had resigned as a director of the respondent.

20. I do not accept those contentions. The agreement distinguishes between contractual notices and service of legal process. The cancellation letter was not legal process. It was a contractual notice.
21. Clause 18(i) of the MISA (p. 27-98) expressly permits notices to be sent by email to the nominated email address recorded in the agreement, or to such other email address as may be furnished in writing. Clause 18(i)(c) further provides that notice by email is deemed received on the first business day following transmission, provided the email is received in legible form.
22. There is no sufficient basis on the papers to conclude that the respondent formally changed the nominated notice address in writing in accordance with clause 18(i). At most, the papers establish that some operational communications were conducted through a different email address. In addition, numerous emails annexed to the answering affidavit continue to reflect use of the original nominated email address.
23. In any event, clause 18 contains a safety-net provision which records that “a written notice or communication actually received by a party shall be an adequate written notice or communication to it, notwithstanding that it was not sent to or delivered at its chosen address”. Mr Mthombeni admits in his answering affidavit (at paras 20.9 and 30, pp. 27-14 and 27-17) that both the 5 November email and the 6 November cancellation letter reached him at the Gmail address.
24. Even if the Gmail address had ceased to be the chosen address (which I have found it had not), the cancellation notice was “actually received” and is therefore an adequate notice. The decision in *Swart v Vosloo*,³ upon which the respondent relied, does not assist. The contract in that case did not contain a deeming or “actual receipt” provision of the kind contained in clause 18 of the MISA.

³ 1965 (1) SA 100 (A)

25. Nor did the agreement require notice to be given to a current director. The nominated email address remained the contractual address for notices.
26. I therefore find that the applicant validly cancelled the relevant agreements concluded under the MISA on 6 November 2024.
27. Once the relevant agreements under the MISA were validly cancelled, the later payments did not revive or reinstate them. Those payments did not cure the breach before cancellation. They were made after cancellation.

The ex parte order

28. The respondent also raises a number of complaints concerning the ex parte order. These include complaints about alleged non-disclosure relating to the use, maintenance and movement of the equipment, the role of Barloworld, the location of the equipment, and the respondent's tender work.
29. I accept that an applicant approaching court *ex parte* must disclose all material facts. But the alleged non-disclosures relied upon by the respondent do not, in my view, warrant reconsideration or discharge of the interim repossession order. The material facts were that the applicant was the owner of the equipment, that payment defaults existed, and that the relevant agreements under the MISA had been cancelled. None of the alleged omissions would, in my view, have altered the granting of the interim repossession relief.
30. So far as the locations of the equipment are concerned, the applicant in fact disclosed those locations, with GPS coordinates, both in paragraphs 2.2 to 2.4 of the notice of motion (pp. 02-3 to 02-4) and in paragraphs 42 to 44 of the founding affidavit (pp. 02-27 to 02-28). As to the maintenance position, the applicant is the financier; the maintenance contract (if any) was with Barloworld Equipment, a separate juristic entity. The applicant cannot be required to disclose, as a fact, that of which it has no knowledge.
31. It is unnecessary for me to determine all disputes concerning the use, maintenance or movement of the equipment. Those disputes are not decisive once cancellation for non-payment is upheld. I therefore make no final findings

on those disputes.

Consequential relief

32. It follows that the applicant is entitled to consequential relief permitting it to dispose of the equipment. The monetary claim cannot sensibly be determined until after disposal and quantification. It should therefore be postponed sine die, with leave to the applicant to supplement its papers after disposal.


Costs

33. As to costs, clause 10(k)(ii) of the MISA contains a contractual costs provision entitling the applicant to recover attorney-and-client costs incurred in enforcing the agreement.
34. In the circumstances, the applicant is entitled to costs on that scale. I do not award those costs as a mark of judicial displeasure or because the respondent's opposition was vexatious. I award them because that is what the parties agreed in the contract.

Order

35. I therefore make the following order:
- 35.1. the applicant's non-compliance with Rule 6(5)(e) of the High Court Rules is condoned;
 - 35.2. the interim order granted by Wepener J on 12 November 2024 under the above case number is made final;
 - 35.3. the applicant is granted leave to dispose of the following CAT equipment by private sale:
 - 35.3.1. Caterpillar Backhoe Loader 426 with Serial Number/VIN EJ406046 under contract number IS/SA-003423;
 - 35.3.2. Caterpillar Medium Excavator 320 with Serial Number/VIN ZBN21947 under contract number IS/SA-003595; and

- 35.3.3. Caterpillar Medium Excavator 320 with Serial Number/VIN ZBN50010 under contract number IS/SA-003654;
- 35.4. the applicant's claim for a monetary judgment against the respondent is postponed *sine die*;
- 35.5. the costs relating to the future determination of the applicant's postponed monetary claim are reserved for determination at the hearing thereof;
- 35.6. the applicant is granted leave to deliver a further supplementary affidavit in support of its claim for a monetary judgment after disposal of the CAT equipment and quantification of its claim;
- 35.7. the respondent is directed to pay the costs occasioned by Part A and the costs of this hearing, both on the attorney-and-client scale.

_____ 
CL ROBERTSON
Acting Judge of the High Court
Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by upload to Caselines. The date for hand-down is deemed to be 2 June 2026.

Date of hearing: 14 May 2026

Date of judgment: 2 June 2026

APPEARANCES

For the Applicant: Adv C van der Merwe

Instructed by: Senekal Simmonds Inc, Bedfordview

For the Respondent: Mr KJ van Huyssteen

Instructed by: Fluxmans Inc, Illovo, Johannesburg