IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

CASE NUMBER: 5400/2024

DELETE WHICHEVER IS NOT APPLICABLE

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

[redacted]

13-5-2026
DATE

H.F. FOURIE
SIGNATURE

In the application between:

CATERPILLAR FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD **APPLICANT**

and

NTSAKO LETHABO TRADING (PTY) LTD **RESPONDENT**

JUDGMENT

FOURIE AJ

INTRODUCTION:

[1] The matter at hand concerns the return date of a *rule nisi* granted by Vele AJ on 22 October 2024, wherein the return of certain equipment was ordered, and on this, the return date, the Respondents are to show cause why the Order ought not to be made final.

[2] The Applicant's application seeks to secure the return of certain Caterpillar equipment that was financed by the Applicant under an instalment sale agreement concluded with the Respondent.

[3] The Applicant contends that they are entitled to the return of the equipment as the ultimate owners thereof, up until the full purchase price has been repaid. The Respondents oppose the granting of final relief and pray for the dismissal of the application.

RELEVANT BACKGROUND FACTS:

[4] To a large degree, the factual premise of the matter is common cause.

[5] The parties agree that the Applicant and the Respondent, respectively, concluded a Master Instalment Sale Agreement under which the Applicant financed the equipment and the Respondent received delivery of the equipment.

[6] The Applicant is the owner of the CAT equipment, and remains such until final payment in terms of the Master Instalment Sale Agreement.

[7] Since June 2024, the Respondent has fallen into arrears on payments which ought to have been made in terms of the Master instalment Sale Agreement.

[8] The Respondents contend that the equipment in question suffered certain latent defects and persistent operational problems and breakdowns.

[9] The parties are in agreement that the Respondent entered into a customer value agreement, being a maintenance agreement with Barlo World, which was, in essence, an agreement that Barlo World would maintain the CAT equipment.

[10] In terms of the Master Instalment Sale Agreement, the Respondent was obliged to maintain the CAT equipment at the Respondent's costs.

[11] The Respondents have instituted an application under PAIA to obtain certain maintenance records and agreements in respect of the CAT equipment, and the PAIA proceedings are still pending.

[12] When the matter was ultimately presented to the Court, the issues were to a large degree confined to two elements, which the Court believes will lead the matter to ultimate finalisation, being:

[12.1] Whether the Master Instalment Sale Agreement has been cancelled, alternatively, in the absence of cancellation of the agreements, whether return of the CAT equipment to the Applicant is still appropriate; and

[12.2] Whether the *exceptio non adempleti contractus* finds application in the matter, whether the Applicant has performed in terms of the agreement entered into with the Respondent, and in the absence of which the Applicant ought not to be allowed to claim performance or recovery from the Respondent.

[13] The Respondents further state that there has been a material non-disclosure of facts in the *ex parte* application, that the Respondent has substantial

counterclaims that far exceed any amount allegedly owed, and that the defence of set-off ought to be considered by this Court. The last two defences to the application will only find application if the Court is persuaded by the Respondent's argument in respect of the identified issues.

CANCELLATION OF THE MASTER INSTALMENT SALE AGREEMENT

[14] The Respondents contend that, if the Court finds that no valid cancellation of the Master Instalment Sale Agreement did not take place, then the application ought to immediately be disposed of in favour of the Respondents. At the commencement of the evaluation into the matter, it is necessary to highlight a crucial element of the Master Instalment Sale Agreement which both the Applicant and the Respondent seemingly omitted to deal with in their papers. As the contract is, however, before me, and as the same has been incorporated into the evidence, I need to evaluate same, and it is necessary for me to deal with Clause 10(i)(g) which states that:

> *"If an event of default occurs, we (the Applicant) will have the rights and remedies provided by this agreement. We will also have all rights and remedies as a secured party under any Law or otherwise.*
>
> *(i) Among these rights and remedies are to:*
>
> *……..*
>
> *(g) Enter premises, where a unit may be located and take immediate possession thereof and remove (or disable in place) such unit (and any unattached parts) without notice, liability or legal process."*

[15] It is common cause between the parties that non-payment constitutes an event of default.

[16] During the argument, and upon being presented by this Clause, the Respondent could not rebut the notion that the Applicant could have merely proceeded under the auspices of Clause 10(i)(g). The high-water mark for the Respondents is that the Applicant chose not to proceed in terms of Clause 10(i)(g), and as such, should be bound by their election.

[17] On 3 August 2024, a letter was dispatched to the Respondent's legal representatives, Barloworld Equipment and Caterpillar Financial Services South Africa, and the letter is not clear on which portions of the letter are directed to Barloworld Equipment and which portions are directed to Caterpillar Financial Services South Africa. What is, however, clear from the letter is the following:

[17.1] The Respondent complains of persistent operational problems with the equipment.

[17.2] The respondent refers to an administrative error by Barloworld Equipment, leading to servicing problems with the equipment.

[17.3] The Respondent refers to non-adherence with the agreement by Barlo World Equipment.

[18] The Respondent then proceeds with the following crucial statements:

[18.1] *"8.1. Our client hereby gives notice of its intention to cancel the contracts;*

8.2. Our client requires you to make urgent arrangements for the collection and return of your trucks;

8.3 Our client reserves the right to refer all damages suffered to an appropriate forum for adjudication, including loss of income occasioned by the inability to use the trucks as required;

> 8.4. *Since the trucks are currently not operational and generating income, our client will not be in a position to fully honour the instalment agreement concluded with CAT Finance.*
>
> *We hereby invite your office to provide an amicable solution to the issues raised by no later than 8 August 2024, failing which our client will take further steps without further notice to you."*

[19] It is common cause that the issues raised between the parties remain unresolved.

[20] On 22 August 2024, the Applicant informed the Respondent that the equipment would be uplifted from the Respondent on 23 August 2024.

[21] On 30 August 2024, the Respondent's legal representative advanced a letter to the Applicant seeking a payment holiday for the contract for a period of six months pending the resolution of the dispute with Barloworld.

[22] On 5 September 2024, the Applicant's legal representatives addressed an urgent letter to the Respondent's legal representatives wherein the following is necessary to be highlighted:

> *"3. ………your client invited our client to collect our client's equipment. As is evident from the letter attached hereto, our client elected to accept your tender for delivery of the equipment."*
>
> *"4. We further note that you have indicated that your client will not make the monthly payments to your client as it is contractually bound to do"*
>
> *'"5. Having regard to both your letters, we have advised our client that your letters dated 3 and 30 August 2024, constitute a repudiation*

of the agreement. Our instructions are ex abundante, therefore to cancel the agreement with immediate effect, as we herby do."

"6. Our client is the owner of the equipment and the entity that financed the sale thereof. Our client cannot address the operational issues that your client contends to have, as this is an issue that your client has to resolve with Barloworld directly. Our client gave no assurances in respect of the equipment save for what is contained in the now terminated agreement."

[23] At the very least, the following issues can summarise the position as per the correspondence exchanged:

[23.1] On 3 August 2024, the Respondent indicated their intention to cancel the agreement and tendered back the Applicant's equipment. The Respondent states that they will not be making any further payments in respect of the agreement.

[23.2] It is evident that by 8 August 2024, the issues between the parties were not yet resolved. As such, it could reasonably be expected, as per the letter of 3 August 2024, that the Applicant intended to persist with their intentions as foreshadowed in the letter.

[23.3] By 5 September 2024, the Respondent made no further payments in respect of the agreement, and by that time the Respondent was in default of their obligations towards the Applicant in the amount of R 791 354.98.

[23.4] Both the Applicant and the Respondent referred me to the matter of ***Data Color International (Pty) Ltd*** **[1],** where the Supreme Court of Appeal held:

"Conceivably, it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that this conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party's state of mind, on what he suggestively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional, responsible person would conclude that proper performance, in accordance with a true interpretation of the agreement, will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach."

[24] In the same matter, the Court stated that:

"The repudiation is sometimes set to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, "accepting" and thus completing the breach."

[25] I align myself with what the Court stated in the matter of South African Forestry Co Ltd v York Timbers Ltd **[2]** where the Court stated that:

"It is clear, I think, that in particular circumstances, conduct of a contracting party can constitute a breach of contract in the form of malperformance and a repudiation. A fair example of this is to be found in the present case. York's conduct amounted to a breach in the form of

> *failure to comply with its obligations in terms of Clauses 3.2 and 4.4. However, at the same time it also amounted to a repudiation, and that York conveyed the clear indication to SAFCOL of its intention not to comply with those obligations in the future either. In these circumstances, the contracts were in my view duly terminated when SAFCOL accepted York's repudiation in its letter of 10 November 1998."*

[26] The non-performance by the Respondent is common cause. The tender for the return of the Applicant's equipment is also a common cause. The only reasonable inference that a reasonable Applicant could have made under the circumstances is that the Respondent was no longer of the intention to comply with its contractual obligations towards the Applicant. The fact that the Respondent then further proceeded in the coming months up until the date of the hearing of the matter, is indicative that the actions of the Respondent amounted both to a repudiation of the agreement, and that at the very least and even if the Court does not accept that the contract was cancelled by the Respondent on 3 August 2024, the repudiation was accepted by the Applicant on 5 September 2024, further alternatively the contract was cancelled by the Applicant on 5 September 2024, due to the actions of the Respondent.

[27] The acceptance of the repudiation or the cancellation followed the Respondent's direct actions of non-payment, and the perception was brought into being by the Respondents' letters and intention.

[28] Evaluating the aforesaid against the contractual rights of the Applicant in terms of Clause 10(i)(g) of the Master Instalment Sale Agreement, the cancellation defence of the Respondent holds no merit.

EXCEPTIO NON ADIMPLETI CONTRACTUS:

[29] The principles in respect of the *exceptio* turn on reciprocity, and the principle that in many contracts, the common intention of the parties, expressed or unexpressed, is that there should be an exchange of performances. **[3]**

[30] The principle is, accordingly, that neither party should be entitled to enforce the contract unless they have performed or are ready to perform their own obligations. **[4]**

[31] As expressed by the Court in Thompson v Scholtz **[5]** the defence is a stalemate defence to a claim *ex contracto* and not a remedy for breach of contract.

[32] Simply put, the question this Court needs to answer is whether the Applicant had any contractual obligation towards the Respondent which was not complied with, which would afford the Respondent the right to invoke the *exceptio* and withhold payment from the Applicant.

[33] The Respondent submits that severe latent defects existed in the equipment, rendering the equipment unfit for purpose. The question is, accordingly, *ex contracto*, in what way the Applicant failed to perform.

[34] The high-water mark for the Respondent is its reliance upon Common Law principles of reciprocity, statutory consumer rights, the complied warranty of fitness for purpose, public policy against unfair terms, and constitutional rights to fair contractual dealings. No real particularity to these averments has been given by the Respondent.

[35] It is widely accepted that the Master Instalment Sale Agreement was signed in December 2022, that the contract was kept intact for at least a year and a half, and that the Respondent performed in terms of the agreement.

[36] When the maintenance dispute with Barloworld arose, that dispute effectively flowed over to the Applicant, and the Respondents then withheld further payments to the Applicant. It seems more likely that the Respondents stopped payments to the Applicant because they were unable to perform, rather than because they believed the Applicant was at fault, given the correspondence exchanged.

[37] It is noteworthy from the correspondence exchanged prior to the litigious process that the Respondent did not blame the Applicant for causing the non-performance, and it has always been the case that Barloworld was the cause of the Respondents falling in arrears with the Applicant.

[38] The relevant portions of the contract to be highlighted are the following:

> *"1. You, by execution of this agreement agree that your payment and performance obligations under this agreement are absolute and unconditional. Your payment and performance obligations are not subject to cancellation, reduction, or set-off for any reason."*
>
> *"15. …….the agreement constitutes the sole record of the agreement between the parties in regard to the subject matter thereof. No party shall be bound by any express or implied term, representation, warranty, promise or the like, not recorded in the agreement."*
>
> *"19. No person or entity, including, without limitation, the supplier, dealer or manufacturer of any unit, is authorised to act as our agent regarding this agreement."*
>
> *"No waiver, modification, or change in this agreement will bind us unless provided by us in writing. Oral agreements are not binding."*

[39] Other than the Applicant's obligation to provide financing for the ultimate purchase of the equipment, the contract imposes no further contractual obligations on the Applicant.

[40] The Respondent's argument evolved significantly over the course of the matter, and it was ultimately stated that the Respondent relies on ***Van Niekerk v First Rand Bank Limited.*** **[6]**

[41] It is crucial to highlight the fact that the Court in ***Van Niekerk*** *supra* evaluated the matter under the principles of the *actio redhibitoria,* of which it is fundamental that the contracts between the parties be cancelled, and a reciprocal restoration of what was paid and delivered pursuant to the sale be undertaken on the principles of the *restitutio in integrum.* **[7]**

[42] It is noteworthy to distinguish ***Van Niekerk*** from the current matter in that, in ***Van Niekerk,*** the defects complained of were noticed within four days of the delivery of the vehicle, whereas in the current matter, the issues seem to relate to the issues by Barloworld in their continued maintenance of the equipment, and whereas in ***Van Niekerk,*** the defects were common cause as being latent defects, in the current matter the existence of latent defects is at this stage speculation. The existence of non-performance by Barloworld might be common cause, but the existence of latent defects at the time when the agreement was concluded is not.

[43] It is crucial to state that, under the contract, the maintenance of the equipment is an obligation that the parties have agreed lies with the Respondent, not with the Applicant. As such, the reciprocal duty the Respondent wishes to enforce, being the maintenance of the equipment, is one that the contract burdens the Respondent with, not the Applicant.

[44] In this regard, the contract states that:

> *"3. ….. you, at your expense, will maintain each unit in good operation order, repair and condition, and perform maintenance at least as frequently as stated in an applicable operator's guide, service manual or lubrication and maintenance guide."*

[45] Under the circumstances of the current matter, the Court is not convinced that the purported defence by the Respondent in terms of the *exceptio* is a valid defence against the relief the Applicant ultimately seeks. The Applicant does not seek a declaration of rights, nor damages. The Applicant seeks the return of certain equipment solely.

[46] The aforesaid is to be evaluated against the backdrop of the Respondent having tendered the return of the equipment to the Applicant, and the sentiment that the units are non-operational and unsuitable for their intended purpose.

[47] Upon evaluation of the contractual terms between the parties, the defence raised by the Respondent cannot be sustained.

<u>PRACTICAL EFFECT OF THE RETURN OF THE EQUIPMENT:</u>

[48] The practical effect of the return of the equipment to the Applicant would be the following:

[47.1] It would give effect to the Respondent's wishes in terms of their letter of 3 August 2024.

[47.2] The equipment is non-operational, and can in any event not be utilised for its intended purpose by the Respondent.

[47.3] The Respondent is in breach of their contractual duty towards the Applicant, and as such, the Applicant is entitled to take possession of the equipment.

[47.4] If the Respondent is able, at a later stage, to prove that a latent defect existed and that the Applicant is responsible towards the Respondent for damages as a result thereof, the Applicant or any other liable party will at that stage be ordered to compensate the Respondent for damages suffered as a result of their actions.

[47.5] If the Respondent ultimately rely on the matter of ***Van Niekerk,*** *supra,* and they succeed with their claim in holding the Applicant liable, premised on the *actio redhibitoria* if *restitutio in integrum* is applied, the equipment will in any event have to be returned to the Applicant, and damages will be paid by the Applicant to the Respondent.

[49] Having regard to all the facts of the current matter, the Court can find no justifiable reason for the equipment to remain with the Respondent, even if a cautious approach to future litigation is to be taken.

[50] Having established the Respondent's default, the Applicant is entitled to take possession of the equipment.

[51] Any and all ancillary remedies available to the Respondents lie in damages claims against the parties they ultimately wish to hold accountable.

[52] At this stage, the existence of latent defects in the equipment has not been proven as of the time the agreements with the Applicant were concluded. The only proven deficiencies pertaining to the equipment are the non-performance by Barloworld.

[53] The Court is not persuaded by the attempted argument of the Respondent to regard the Applicant and Barloworld as intertwined to the degree that they ought to be regarded as functioning as the same entity. The fact that the Master Instalment Sale Agreement expressly burdened the Respondent with the maintenance of the equipment, leading to the Respondent entering into a free-standing service agreement with Barloworld, to which the Applicant is not a party, is indicative that an external obligation with an external company other than the Applicant came into existence.

[54] The Court is mindful, however, that the Respondent may wish to pursue a damages claim against the Applicant in respect of latent defects that existed at the time when the Respondent took possession of the equipment. Whether the Respondent is able to prove such latent defects and to lay the cause thereof at the door of the Applicant, is neither for this Court to establish nor evaluate at this time.

[55] The Court believes, however, that the Respondent needs to be provided an opportunity to have its experts evaluate the equipment, and if they so wish, to draw reports in respect of the equipment to establish whether any facts present themselves in respect of the equipment which the Respondent might wish to use at a later stage.

[56] If the Court does not come to the aid of the Respondent in ordering such a right for the Respondent, the possibility exists that the equipment will be sold, repaired or destroyed, which would lead to an impossible situation for the goods to be evaluated at a later stage.

<u>COSTS:</u>

[57] The Applicant prays for a costs order to be granted in their favour on a punitive scale. Similarly, the contentions by the Respondent are that punitive costs ought to be paid by the Applicant. The Court, although persuaded that a cost

order is warranted, does not believe that costs ought to be ordered on a larger scale than Party and Party Scale B.

ORDER:

[58] For all the aforesaid reasons, the following Order is made:

[57.1] The interim order of this Court dated 22 October 2024 is made final, save for order 3 relating to costs.

[57.2] The Respondent is ordered to pay the Applicant's costs on a Party and Party Scale B.

[57.3] The Applicant shall retain the equipment identified in the Interim Order, and shall make same available for inspection by the Respondent and the Respondent's experts for a period of 90 (ninety) days from this Order, should the Respondent's experts wish to inspect the equipment. During this period, the Applicant shall allow the Respondent or his expert reasonable access to the equipment.

[redacted]

H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MIDDELBURG

Counsel for the Applicant:	Adv C Gibson
Instructed by:	Senekal Simmonds Incorporated
Counsel for the Respondent:	Adv S Janse van Rensburg SC
Instructed by:	Lacante Henn Incorporated
Judgment reserved on:	7 May 2026
Date of delivery:	13 May 2026

---

[1] Data Color International (Pty) Ltd v Intamerket (Pty) Ltd 2001 (2) SA 284 (SCA)

[2] South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA)

[3] Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd (1212/2016) [2017] ZASCA 185; 2018 (3) SA 65 (SCA) (6 December 2017)

[4] Euhar Truck & Bus (SA) Pta Ltd v Dorbyl Limited t/a Dorbyl Transport Products & Busaf Case 38/03 (25 March 2004) at paragraph 12

[5] Thompson v Scholtz 1999 (1) SA 232 (SACA)

[6] Van Niekerk v First Rand Bank Limited 2026 (2) SA 516 SCA (10 December 2025)

[7] Van Zyl v Credit Corporation of South Africa Limited 1960 (4) SA 582 (A)