REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 26382/2009

In the matter between:

S A TAXI SECURITISATION (PTY) LTD Applicant

and

CHESANE, ANDRIES RABOHADI Respondent

J U D G M E N T

BORUCHOWITZ, J:

[1] This is an interlocutory application for the interim attachment of two motor vehicles for safekeeping pending the finalisation of a trial.

[2] An application claiming the same relief has been instituted by the applicant against a different respondent in respect of another vehicle under Case No. 26389/2009. It has been agreed that this judgment and the order I make shall apply *mutatis mutandis* to that application.

[3] The applicant which is a registered credit provider under the National Credit Act, 34 of 2005 (the NCA) has leased two motor vehicles to the respondent which he uses as taxis in the conduct of his business as a taxi operator. Ownership of the vehicles vests in the applicant. It is common cause that the respondent is substantially in arrear with the payment of instalments under the leases and the applicant has instituted an action against the respondent in which it claims, among other things, cancellation of the lease agreements and return of the vehicles.

[4] The interim relief sought in the present application is for an order directing the respondent to deliver the vehicles into the possession of the applicant who shall, in turn, at is own expense, store the vehicles at secure garaged premises in Johannesburg pending the outcome of the action.

[5] The immediate question is whether and to what extent the applicant's right to obtain the relief sought is affected by the provisions of the NCA.

[6] At common law the interim attachment of goods pending the outcome of vindicatory or *quasi*-vindicatory proceedings is well-established. See *Morrison v African Guarantee and Indemnity Co Ltd*[1]*; Loader v De Beer*[2]*; Van Rhyn v Reef Developments A (Pty) Ltd*[3].

[7] The NCA is silent as to whether a registered credit provider may obtain an order for the interim attachment of goods. Sections 129(3)(b), 129(4)(a) and 130(2)(a)(ii) make express reference to attachment orders but it is unclear whether these include orders for the interim attachment of goods pending the outcome of vindicatory or *quasi* vindicatory proceedings.

[8] The question falls to be resolved by applying general interpretative principles. Where provisions of a statute are of doubtful meaning there is a presumption against an alteration in the common law. A statute must be construed in conformity with the common law rather than against it, except where the statute is clearly intended to alter the common law. See *Stadsraad van Pretoria v Van Wyk*[4].

[9] There is no express indication in the NCA that the common law remedy has been abrogated. In fact, there are textual indications to the contrary. The NCA places emphasis on what is termed "*debt enforcement*". One of the stated purposes of the NCA is to provide for a consistent and harmonised system of debt enforcement in which the consumer's rights are protected (see

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1 1936 (1) Ph M 35 (T).
2 1947 (1) SA 87 (W).
3 1973 (1) SA 488 (W) at 492.
4 1973 (2) SA 779 (A) at 784 and cases there cited.

section 3(i)). The debt enforcement provisions are to be found in Chapter 6. Section 123(2) provides that if a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 '*to enforce and terminate*' that agreement. Sections 129(1) and 130(1)(ii) prescribe the procedures that must be followed before a credit provider may take legal proceedings '*to enforce*' a credit agreement.

[10] The function and purpose of an interim attachment order is to protect the leased goods against deterioration and damage and to keep them in safekeeping until the case between the parties has been finalised. Its purpose is not to enforce remedies or obligations under the credit agreement and the remedy does not form part and parcel of the debt enforcement process envisaged in the NCA. See in this regard J M Otto *The National Credit Act Explained* para 44.4. See also the unreported judgment in *S A Taxi Securitisation (Pty) Ltd v H W Young* Case No. 10249/2008 (CPD). Compare though in a different context *Absa Bank Ltd v De Villiers*[5].

[11] To succeed in this application the applicant is required to establish and satisfy the well-established requirements for the grant of an interim interdict. It is required to show: (a) that the right which it seeks to enforce is clear or, if not clear, is *prima facie* established, though open to some doubt; (c) that, if the right is only *prima facie* established there is a well-grounded apprehension of irreparable harm if the interim relief is not granted; (c) that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other satisfactory remedy.

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5 2009 (5) SA 40 (C) at paras [11]-[14] and [42].

[12] The respondent disputes both the right relied upon by the applicant and that the balance of convenience favours the grant of the interim relief sought.

[13] It is settled law (at least in this Division) that it is a prerequisite for the grant of an interim attachment order that any agreement under which the respondent has the right to possess the vehicles first be cancelled. See *Steyns Foundry (Pty) Ltd v Peacock*[6]; *First Consolidated Leasing and Finance Corporation Ltd v N M Plant Hire (Pty) Ltd*[7]. In the present matter the applicant has purported to cancel the agreements of lease and is accordingly not precluded from claiming interim recovery of the vehicles.

[14] In his answering affidavit the respondent challenges the validity of the applicant's cancellation of the lease agreements. He does so on the basis that when the applicant purported to cancel the lease agreements there was in force a debt review process as envisaged in section 86 of the NCA which precluded the applicant from doing so.

[15] It is common cause or not in dispute that on 19 February 2009 a debt counsellor notified the applicant that the respondent had applied for debt relief in terms of section 86(1) of the NCA. By further notice dated 2 March 2009 the debt counsellor advised the applicant that he had found the respondent to be over-indebted and that his debt obligations were in the process of being restructured. As at least 60 business days had elapsed after the date on

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6 1965 (4) SA 549 (T).
7 1988 (4) SA 924 (W).

which the respondent had applied for the debt review and because the respondent was in default of his obligations in terms of the leases the applicant gave notice to the debt counsellor, the National Credit Regulator and the respondent of its election to terminate the debt-review process in terms of section 86(10) of the NCA. That notice was given on 26 May 2009. On 23 June 2009 the debt counsellor issued a debt-review proposal which was not accepted by the applicant. Following the aforegoing and on or about 26 June 2009 the applicant instituted the action against the respondent for cancellation of the lease agreements and return of the vehicles.

[16] There is a dispute as to whether the applicant's termination of the debt-review process is valid. The respondent contends that on 26 May 2009 when the applicant purported to terminate the process, the Magistrates' Court had not yet decided whether or not to make any of the orders proposed by the debt counsellor. Accordingly, it is submitted that section 86(10) of the NCA could not have been invoked by the applicant.

[17] This contention is disputed by the applicant. It avers that no proposal or recommendation has been presented by the debt counsellor to a Magistrates' Court as contemplated in section 86(7)(c) of the NCA and there is no application pending in terms of which an order is sought either that the credit extended by the applicant to the respondent was reckless or that the respondent is over-indebted and that his debt should be restructured.

[18] In addition, there is no application currently pending before a Magistrates' Court as contemplated in section 89(11) of the NCA for an order

reviving the debt-review process. Accordingly the applicant contends that its cancellation which was conveyed to the respondent in the particulars of claim is valid.

[19] A different approach was adopted on behalf of the respondent when the matter was argued before this Court. Counsel for the respondent sought to invoke the provisions of section 83 of the NCA which permit the court to declare that a credit agreement is reckless and to set aside all or part of the consumer's rights and obligations or suspend the force and effect of the agreement. It was submitted that, if there was a reasonable chance of it being found that the credit extended to the respondent was reckless or that it resulted in the respondent being over-indebted, the *prima facie* right sought to be enforced in the instant application will not have been established. It was submitted that this Court had a discretion on the basis of justice and reasonableness to inappropriate circumstances set aside the respondent's obligations under the credit agreements while permitting the respondent to retain the vehicles.

[20] The respondent's assertion that on 26 May 2009 when the applicant purported to terminate the debt-review process, the Magistrates' Court had not yet decided whether or not to make any of the orders proposed by the debt counsellor is manifestly incorrect. Applicant gave notice of its intention to terminate the debt-review process in terms of section 86(10) on 26 May 2009. At that date the debt counsellor had not yet presented a proposal to the respondent or to the Magistrates' Court as contemplated in section 86(7)(c) of

the Act. A written proposal was only put to the applicant on 23 June 2009 after the applicant had already purported to terminate the debt-review process. The termination by the applicant of the debt-review process on 26 May 2009 was thus lawful as all the jurisdictional requirements of section 86(10)[8] had been met.

[21] Once the debt-review process has terminated in the circumstances referred to, the only remedy available to a consumer such as the respondent is that contemplated in section 86(11) of the NCA which allows for a resumption or revival of the debt-review process by the Magistrates' Court hearing the matter. On the papers before me there appears to be no application currently pending before a Magistrates' Court as contemplated in section 89(11)[9] of the NCA.

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[8] Section 86(10) reads:

> "*(10) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to -*
>
> *(a) the consumer;*
> *(b) the debt counsellor; and*
> (c) *the National Credit Regulator, at any time at least 60 days after the date on which the consumer applied for the debt review.*"

[9] Section 86(11) reads:

> "*(11) If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.*"

[22] As the applicant had complied with the provisions of section 129(1)(b)(i)[10] and section 130(1)[11] of the NCA, the applicant was entitled to enforce its debt as contemplated in Part C of that Act.

[23] It follows from the aforegoing that the applicant's cancellation of the lease agreements which was conveyed to the respondent in the particulars of

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[10] Section 129(1) provides as follows:

> "*(1) If the consumer is in default under a credit agreement, the credit provider –*
>
> *(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and*
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> *(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –*
>
> *(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and*
>
> *(ii) meeting any further requirements set out in section 130.*"

[11] Section 130(1) provides:

> "*(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –*
>
> *(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;*
>
> *(b) in the case of a notice contemplated in section 129(1), the consumer has –*
>
> *(i) not responded to that notice; or*
>
> *(ii) responded to the notice by rejecting the credit provider's proposals; and*
>
> *(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.*"

claim served on or about 26 June 2009, was validly effected. As the agreements of lease appear to have been validly terminated the applicant is not precluded from obtaining an order for the interim attachment of the vehicles.

[24] The aforegoing disposes of the contentions advanced in the respondent's answering affidavit. I accordingly turn to the submission that the court ought to invoke the provisions of section 83 of the NCA.

[25] Section 83 of the NCA provides as follows:

> "***83. Court may suspend reckless credit agreement. –*** *(1) Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, the court may declare that the credit agreement is reckless, as determined in accordance with this Part.*
>
> *(2) If a court declares that a credit agreement is reckless in terms of section 80(1)(a) or 80(1)(b)(i), the court may make an order -*
>
> *(a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or*
>
> *(b) suspending the force and effect of that credit agreement in accordance with subsection (3)(b)(i).*
>
> *(3) If a court declares that a credit agreement is reckless in terms of section 80(1)(b)(ii), the court -*
>
> *(a) must further consider whether the consumer is over-indebted at the time of those court proceedings; and*
>
> *(b) if the court concludes that the consumer is over-indebted, the court may make an order –*
>
> *(i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension; and*

> *(ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.*
>
> *(4) Before making an order in terms of subsection (3), the court must consider -*
>
> *(a) the consumer's current means and ability to pay the consumer's current financial obligations that existed at the time the agreement was made; and*
>
> *(b) the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all required payments in accordance with any proposed order.*"

[26] As appears from the wording thereof, section 83 of the NCA permits a court, in any proceedings in which a credit agreement is being considered, to declare that the credit agreement is reckless as determined in terms of section 80(1). Section 83(2)(a) empowers the court, upon making a finding that a credit agreement is reckless, to make an order setting aside all or part of the consumer's rights and obligations under that agreement as the court determines just and reasonable in the circumstances. The respondent submits that, if there is a reasonable chance of it being found that the credit extended was reckless or that it resulted in the respondent being over-indebted, the *prima facie* right to obtain the interim interdict of the relief sought will not have been established.

[27] The following factors militate against the court exercising its discretion to declare the agreement reckless in accordance with section 83 of the NCA. The respondent initiated the voluntary debt-review process contemplated in section 86 of the NCA. Despite the valid termination of that process in terms

of section 86(10) of the NCA the respondent has taken no steps to revive the process in accordance with the provisions of section 86(11). The respondent remains in default under the credit agreement and has simply left matters in abeyance. Most importantly, the lease agreements appear to have been validly cancelled. There is no provision in the NCA which would entitle a court to reinstate an agreement that has been validly terminated. The only remedy available to the applicant would be to obtain a revival of the debt-review process in relation to whatever amounts may remain outstanding after return of the vehicles to the applicant. It is neither just nor reasonable for the court to set aside, albeit on a temporary basis, the respondent's obligations under the leases while permitting the respondent to retain the vehicles.

[28] Even should the respondent be successful at the trial in demonstrating that the credit grant to him was reckless, then and in that event the probabilities are that the court hearing the matter will, in terms of section 83(2)(a) of the NCA, set aside all or part of the respondent's rights and obligations in terms of the credit agreements in which event the vehicles will be returned to the applicant and any remaining indebtedness of the respondent to the applicant will be the subject-matter of the court's discretionary re-organisation. It is highly improbable that the trial court will allow the respondent to retain possession of both vehicles, operate them for profit as taxis and not make any payment therefor to the applicant.

[29] I accordingly conclude that the applicant has established a clear right to cancellation and restoration of the vehicles in the pending action.

[30] I turn to the balance of convenience. As the applicant's claim is a vindicatory one the element of irreparable harm is presumed. See *Stern and Ruskin NO v Appleson*[12]. Having apparently validly cancelled the lease agreements the applicant as owner of the vehicles is entitled to have the vehicles preserved in their present condition *pendente lite*. See the cases of *Morrison, Loader and Van Rhyn supra*. It is self-evident that the vehicles are depreciating by use and that the respondent's continued utilisation of the vehicles as taxis over an extended period will have the result that, should the applicant be successful in its action, the vehicles that it recovers may be virtually worthless. It is untenable that the respondent be entitled to utilise the vehicles without effecting payment under the credit agreements. The applicant seeks to have the vehicles stored in a place of safety so that, in the unlikely event that the applicant is directed after the finalisation of the action to return the vehicles to the respondent, they will not have suffered any meaningful reduction in value. The applicant will bear the costs of the storage.

[31] As against the aforegoing the respondent contends that he will suffer substantial prejudice if he is deprived of the vehicles. This prejudice includes the loss of his full income together with the assertion that, with such loss, he will be unable to support his family.

[32] The question of the balance of convenience must be placed in its proper perspective. It is a well-settled principle that the stronger the case which the applicant makes out, the less balance of convenience in favour of

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12 1951 (3) SA 800 (W) at 813.

the applicant there needs to be for interim relief to be granted. See *Olympic Passenger Service (Pty) Ltd v Ramlagan* [13]. As the applicant has established a strong right to cancellation and restoration of the vehicles in the pending action, less weight ought to be placed on the question of balance of convenience. I am nevertheless satisfied that the balance of convenience for the reasons stated favours the applicant.

[33] For these reasons, the applicant has established the requirements for the grant of the interim interdict sought.

[34] The following order is granted:

Pending the final outcome of the action instituted by the applicant against the respondent:

CLAIM A:

1. The respondent is directed to deliver into the possession of the Sheriff a 2008 CAM INYATHI Xgs 2.2i HIGH ROOF vehicle with engine number SF491QE071262556A and chassis number LPBMBDDE47H120705 who shall deliver it to the applicant who shall, in turn, at its own expense:

    1.1 transport the vehicle to garaged premises situated at 17 Bompas Avenue, Dunkeld, Johannesburg:

[13] 1957 (2) SA 382 (D) at 383C-G

1.2 retain the vehicle at such garaged premises under security pending the outcome of the action;

2. The applicant shall not use the vehicle or permit that it be used.

CLAIM B

3. The respondent is directed to deliver into the possession of the Sheriff a 2007 CAM INYATHI 15 SEATER vehicle with engine number SF491QE0709568051A and chassis number LPBMBDDE17H112982 who shall deliver it to the applicant who shall, in turn, at its own expense:

3.1 transport the vehicle to garaged premises situated at Park Village Auctioneers, 4 Wemmer Jubilee, Johannesburg;

3.2 retain the vehicle at such garaged premises under security pending the outcome of the action;

4. The applicant shall not use the vehicle or permit that it be used.

5. In the event of the respondent failing to comply with the contents of paragraphs 1 and 3 above within five days of service of this order on respondent's attorneys, the Sheriff is authorised and

directed to take the vehicles into his possession from wherever he may find them and return the vehicles to the applicant as aforesaid;

6. The respondent is ordered to pay the costs of the application.

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P BORUCHOWITZ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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