IN THE GAUTENG DIVISION, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 69092/13

DATE: 20 FEBRUARY

In the matter between:

THE STANDARD BANK OF SA LIMITED **1ST APPLICANT**

And

CHIWAKA AND MOORE TRANSPORT CC **1ST RESPONDENT**

JAN DANIEL MOORE **2ND RESPONDENT**

SIMON CHIWAKA **3RD RESPONDENT**

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The applicant in this application seeks an order:

> "1. That the First Respondent is ordered to forthwith return to the Applicant the following asset:
>
> CAT SKIDSTEER IT14, SERIAL NUMBER FWL00938 **("the asset")**
>
> Failing such return the sheriff of the Court is duly authorised to attach the asset and to hand same to the Applicant;

2. The Applicant shall within a reasonable period of time attend to:

2.1. Independently value the asset **("the valuation");**

2.2. Sell same by way of private treaty or public auction for equal or better than the valuation **("the sale");**

2.3. Credit the First Respondent's account with the Applicant with account number 3[...] with the proceeds of the sale less all costs reasonably incurred and incidental to the attachment, transport, valuation, storage and sale.

IN ALTERNATIVE to paragraphs 1 to 2 above, pending the outcome of the Applicant's action before this Honourable Court under case no 12145/2013:

3. That the First Respondent is ordered to forthwith return to the Applicant the following asset:

CAT SKIDSTEER IT14, SERIAL NUMBER FWL00938 ("the asset")"

4. The Applicant be ordered to store the asset pending finalisation of the main action;

5. The Applicant shall attend to:

5.1. Independently value the asset **("the valuation");**

5.2. Store same at a place of safe keeping **("the storage");**

5.3. Debit the First Respondent's account with the Applicant with account number 3[...] with the costs reasonably incurred and incidental to the attachment, valuation, transport and storage of the asset.

AND

6. Costs of suit on the attorney and client scale;

7. Further and/or alternative relief.

[2] Mr J C Viljoen and Ms T Colyn respectively represented the applicant and the first respondent when the matter was argued.

BRIEF FACTS

[3] The applicant alleges that the first respondent and Barloworld South Africa (Pty) Limited (Barloworld), acting through its Handling Division, concluded a Rental and Maintenance Agreement of a certain CAT Skidsteet IT 14, with serial number FWL00938 (the asset/equipment). This is not in dispute. Further, according to the applicant, Barloworld subsequent to the conclusion of the agreement, ceded all its rights under the Rental and Maintenance Agreement to the applicant in terms of a Master Cession and Sale Agreement (the written cession agreement). There seems to be a dispute regarding this contention. The applicant has brought an action against the first respondent, the second respondent and the third respondent as first defendant, second defendant and third defendant respectively under case number 12145/2013. The applicant, as plaintiff in the matter, seeks judgement against the first defendant for:

> "(a), confirmation of cancellation of the agreement;
>
> (b) Return of the equipment subject to the plaintiff evaluating and selling by way of public auction, the first defendant's account to be credited with the nett proceeds of the sale, the first defendant to be paid the nett credit resulting, if any. Against the first, second and third defendants, jointly and severally the one paying the other to be absolved for:
>
> (c) Payment of R1 399 901.26;
>
> (d) Interest on the aforesaid amount of R1 399 901.26 at the rate of 15.5% per annum a *tempore morae* to date of final payment;
>
> (e) Costs of suit on the attorney and client scale;
>
> (f) Further and/or alternative relief'

The action is defended and the defendants have pleaded. There are amendments in the action. I must point out that the plaintiff brought an application for summary judgment which was not proceeded with. Leave to defend was granted and pleadings were exchanged. The plaintiff, now applicant, brought this application which is opposed by the first respondent. The second and third respondents (defendants in the action) have been cited simply because they are interested parties and no relief is sought against them.

[4] The applicant seeks a final interdict and in the alternative an interim interdict pending finalisation of the main action under case number 12145/2013 for the return of the equipment.

[5] The applicant, in support of its application, used the summons and particulars of claim as amended and the affidavit resisting summary judgment application. The pleadings and letters between the parties' legal representatives form part of and have been referred to in the application. The plaintiff's particulars of claim

have been crafted in such a way that amendments, as pointed out by Ms Colyn, became necessary. She refers to this as a "comedy of errors". I do not deem it necessary to deal with the mistakes alluded to by Ms Colyn, for the first respondent, as I regard the application and the action distinguishable.

THE ISSUES

[6] These are:

6.1. Whether the applicant has *locus standi* to seek the relief covered by the notice of motion and the action instituted by the first respondent.

6.2. Whether the action the first respondent may have against Barloworld has anything to do with the applicant's application and the action against the first respondent.

6.3. Whether the asset/equipment forms part of the Master Cession and Sale Agreement. This is linked to 6.1 above.

COMMON CAUSE FACTS

[7] These are that:

1.The first respondent and Barloworld concluded a Rental and Maintenance Agreement. The effective date was 22 January 2012.

2. The agreement was in respect of a CAT Skidsteer IT14 serial number FWL00938 (the asset/equipment).

3. In or about the first week of March 2012 the equipment was delivered to the first respondent at its business site.

4. On 18 September 2012 the applicant informed the respondents of the cession **(See P196 of Index: Bundle 2 paragraph 14.1)**

5. On **4** December 2012 the respondent was furnished with a letter of demand and cancellation of the agreement. **(P196, Index: Bundle 2 paragraph 14.1)**

6. No payment was made by the respondents to the applicant who eventually issued summons under case number 12144/2013 on 26 February 2013.

7. The applicant applied for summary judgment, however, the respondents/defendants were granted

leave to defend the action on 21 May 2013.

8. It, according to the applicant, was not necessary to file a reply which it deemed unwarranted. The applicant did not reply.

9. The first respondent to date has not made any payment to the applicant.

[8] It appeared that the authority of the deponent to the founding affidavit was challenged. This challenge was not proceeded with when the matter was argued.

[9] The respondent, in the main, contends that the applicant does not have the necessary *locus standi* to institute the action or to bring this application. The contention is that the Master Cession and Sale Agreement between Barloworld and the applicant does not reveal that any right tittle or interest in respect of the first respondent was ceded to the applicant.

[10] It will be remembered that the equipment involved in this matter bears serial number FWL00938. The Rental and Maintenance Agreement between the first respondent and Barloworld is Agreement No. FWL00938. Page 25, sixth line from the top of Index Bindle 1 refers specifically to this agreement. Pages 37 and 48 of Applicant's list of authorities and salient extracts from record confirm this. This is referred to as deal 37 by the applicant when it deals with the cession involving Agreement No FWL00938.

[11] The first respondent admits that it was informed of the cession, the subject matter in this application, on 18 September 2012. It further admits demand and cancellation of the agreement. This, notwithstanding, the first respondent, at the time, never contested or disputed the existence of the cession.

[12] With the evidence at the disposal of the court the first respondent cannot be heard to say that no cession came into being in respect of Agreement No FWL00938 nor that the asset/equipment is covered by such cession.

[13] Ms Colyn's submission is that the relevant documents fail to properly deal with the cession. The cession, according to her, fails to mention the first respondent; the agreement that is being ceded; to whom the agreement is being ceded and by whom same is being ceded. In light of what I say in paragraphs 10, 11 and 12 above, the submission cannot be correct.

[14] There can be no doubt that the Master Sale and Cession Agreement was concluded between and by the applicant and Barloworld. This is not denied. Also, there can be no doubt that the asset/equipment is covered by the Master Sale and Cession Agreement. The equipment and agreement have clearly and properly been identified. The Master, Sale and Cession Agreement clearly states that the rights of ownership of the

asset/equipment are also ceded except the right title and interest to receive maintenance payments and VAT.

[15] The serious challenge amounted against the applicants *locus standi* to litigate by way of an application and action, in my view, has no merit.

[16] The first respondent contends that it has a counter claim in this matter. The question which immediately comes to mind is as to whether the counter claim has anything to do with the applicant. The first respondent, here, has no problem. It is evident from the first respondent's evidence that any damages claim it may have can only be against the cedent, Barloworld, and not the applicant. The first respondent verbalises this in its answering affidavit. The respondent's answering affidavit in paragraph 11.3 says:

> "11.3 I have furthermore instructed my attorneys of record to request this Honourable Court to stay any application and/or action that the Applicant has against the Respondents pending the finalisation of the Respondents action against Barloworld Handling and that any amount owing to the Respondents from Barloworld Handling be set off against any claim the Applicant might have against the Respondents".(my emphasis)

[17] Paragraph 11.3 raises the following:

1. that any claim that the first respondent may have is against Barloworld.

2. it is not clear as to whether the first respondent has finally decided to institute the action or launch the application against Barloworld.

3. Is it right and proper to stop the applicant from proceeding with the action under case number 12145/2013 and this application?

4. why should there be set off of any amount Barloworld may owe the respondents against any claim the applicant might have against the respondents?

[18] The doctrine of set-off cannot be applied in this application or the action under case number 12145/2013. The reason is simple and this is that set-off only applies when two parties are mutually indebted to each other, the debts are equal and fully due **(Schirhout v Union Government Minister Of Justice 1926 AD 286 289-290)** Set-off is a method applied when contractual and other debts may be extinguished. Set off simply means that two people are indebted to each other **(Joint Municipal Pension Fund (TVL) v Pretoria Municipal Pension Fund 1969 (2) SA 78 (T); S.W.A. Amalgamated Afslaers (EDMS) Bpk v Louw 1956 (1) SA 346 (A) at 354 and Public Carriers Association and Others v Tolcon Road Concessionaries and Others (Pty) Ltd 1989 (4) SA 574 (N) at 589G-590C.** There is no indebtedness between the first respondent

and the applicant. Yes set offer could be applied if the indebtness related to the first respondent and Barloworld. It would be improper to stay applicant's action and the application until the finalisation of the action between the first respondent and Barloworld. The interest of justice frowns on this.

[19] The National Credit Act 34 of 2005 (the NCA) clearly does not apply to the agreement which is not a lease as defined in Section 1 of the NCA. Ownership of the asset/equipment does not pass to the first respondent during or after the agreement. The agreement, in terms of Section 8 of the NCA, is not a Credit agreement. No deferred amount is repayable and the rentals repayable do not depend or change upon payment of any deferred amount and interest thereon, fluctuating during the rental period. No fee, charge or interest is payable in terms of the agreement. The submission that the agreement is a credit agreement is incorrect.

[20] It is not necessary to deal with issues which relate to Barloworld. Whether Barloworld delivered the equipment late or the equipment was defective when it was delivered that has nothing to do with the applicant.

[21] I do not think that the applicant has properly made out a case to be entitled to a final relief. It is true there are many mistakes in the applicants particulars of claim under case number 12145/2013. These, however, do not stand in the applicant's way to obtain an interim relief. No real, genuine and bona fide disputes of fact have been demonstrated which would make it difficult for this court to grant such a relief. **(Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA))**

[22] All the applicant seeks in the alternative is the preservation of the asset/equipment which, if not preserved, may deteriorate in value. Preservation of the asset/equipment pending finalisation of the action under case number 12145/2013 serves dual purposes. First, it is to the benefit of the first respondent should it succeed in the action. Second, it also helps the applicant which, if successful, will have had the equipment properly preserved regard being had to the fact that the first respondent has the equipment and uses it without paying for such use.

[23] Although it is not clear whether the first respondent has by now instituted an action against Barloworld, nothing stopped it from doing that. The first respondent may decide not to institute the action but that does not mean that the applicant should wait for that. Even if the decision is to proceed by way of action the applicant is perfectly within its right to proceed with the action and the application. There is no counter claim applicable in both instances. It is prudent and desirable that the asset/equipment be preserved and the interim relief, in that regard, becomes necessary. **(SA Taxi Securitisation (Pty) Ltd v Chesane 2010 (6) SA 557 (GSJ) SA Taxi Securitisation (Pty) Ltd v Soya 2012 JDR 2062 (GSJ) at [35], [36], [37], [38] and [39]**

[24] Clearly, the defences that the first respondent has raised, in my view, do not amount to a bar to the interim relief that the applicant seeks in the alternative.

[25] The first respondent has admitted that it was informed about the Master Sale and Cession Agreement; It has received the demand; and was informed of the cancelation of the agreement. This notwithstanding, the first respondent admits that it has not paid the applicant while possessing and using the asset/equipment which is very expensive. The first respondent contends that the applicant has never become the owner of the equipment and avers that the applicant, as a result, has no *locus standi*. I have, above, demonstrated that this contention is clearly wrong. For now, it does not look like the first respondent is prepared to pay the rental amounts.

This, because of its wrong perception regarding the applicant's *locus standi* and the ownership of the equipment.

The applicant failed to prove that it is entitled to storage costs.

[26] The applicant, in my view, has successfully made out a good case for the interim relief that it seeks in the alternative.

[27] The applicant failed to demonstrate that it is entitled to costs on the attorney and client scale.

In the result, the following order is made:

Pending the outcome of the applicants action under case no. 12145/2013:

1. The first respondent is ordered to forthwith return to the applicant the asset/equipment being:

CAT SKIDSTEER IT14, SERIAL NUMBER FWL00938

Failing such return the sheriff of the court is duly authorised to attach the equipment and to hand same to the applicant.

2. The applicant is ordered to store the asset/equipment pending finalisation of the main action under case no. 12145/2013.

3. The applicant shall:

3.1. Independently value the asset/equipment, ("the valuation")

3.2. Store the asset/equipment at a place of safe keeping ("the storage")

3.3. Debit the first respondent's account number 332500810001 which the first respondent has with the applicant with the costs reasonably incurred and incidental to the attachment, valuation and transportation of the equipment.

4. Costs of suit.

M.W.MSIMEKI

JUDGE OF THE GAUTENG DIVISION

PRETORIA

COUNSEL FOR THE APPLICANT: AD J C VILJOEN

INSTRUCTED BY: STUPEL & BERMAN

COUNSEL FOR THE RESPONDENT: ADV COLYN

INSTRUCTED BY: VAN DER MERWE & ASSOCIATE

DATE OF HEARING: 18 NOVEMBER 2014

DATE OF JUDGMENT: