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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A137/2019

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

2-12-2021 .....
DATE SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED: VEHICLE & ASSET FINANCE DIVISION **APPELLANT**

AND

JAWIKLANE (PTY) LTD **RESPONDENT**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The appellant brought an application in the Court *a quo* for confirmation of the cancellation of seven instalment sale agreements concluded between the parties and return of the property of the appellant, together with ancillary relief. The application was dismissed and no order as to costs was made.

[2] The issue that needs determination in this appeal is whether the Court *a quo* correctly held that the respondent was not properly placed in mora and that the cancellation of the installment sale agreements concluded between the parties were defective and of no force and effect. It must be noted that the respondent in the Court *a quo* raised the argument that there was a dispute of fact. This argument was dismissed. The respondent also launched an interlocutory application stating that this application must be stayed pending the determination of a damages claim instituted by respondent against the appellant. This application was also dismissed. . As there is no cross appeal before us regarding these issues, we need not concern ourselves with these applications.

[3] The facts relevant to this appeal are largely common cause.[1] The appellant and the respondent concluded seven instalment sale agreements during the period February 2015 to June 2017. In terms thereof the appellant sold certain vehicles and agricultural equipment ('the goods') to the respondent. The relevant terms and the copies of the agreements annexed to the appellant's founding affidavit, are common cause. The relevant terms inter

[1] Judgment, Court *a quo* paras 1 – 6 - Vol 3, pp 280 & 281 (Judgment).

alia include that the appellant remains the owner of the goods, the respondent would only become owner of the goods once all instalments have been paid. In the event of the respondent failing to make payment of any amount due in terms of the agreements, the respondent was obliged to remedy its breach within a period of 7 or 10 business days - depending on the terms of the particular agreement - of being notified by the appellant to do so. In the event of default the appellant was entitled to cancel the agreement and take possession of the goods. Some of the agreements make provision for the appellant to give written notice, requesting the respondent to rectify its default within ten business days of the written notice, the clause state that the appellant "may" give written notice.

[4] The respondent fell in arrears with its payment obligations towards the appellant in terms of the agreements.[2] On 1 October 2018 the appellant granted an indulgence to the respondent until the end of November 2018 to make up the arrears, subject to certain conditions. There was no response forthcoming from the respondent and no compliance with the conditions. It was clearly stated that the extension was an indulgence and not a novation of the appellant's rights. As a result no valid extension until 30 November 2018 existed.

[5] On 1 November 2018 the appellant's attorneys informed the respondent in a letter that it had failed to meet the conditions of an extension granted to them to fulfil its obligations and that the extension was withdrawn. The

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[2] Judgment, para 3.

respondent failed to respond or to make any payment to the appellant by the end of November 2018, or at all.

[6] The appellant served letters of demand, dated 20 November 2018 on the Respondent on 7 December 2018. In terms of the notices ("breach notices") the Appellant notified the respondent to rectify its breach within 10 business days. In the event of failure to make payment the installment sale agreements would be deemed to have been cancelled and the return of the goods which form the subject of the agreement would be claimed. It is not in dispute that the respondent received the breach notice and did not respond to it.

[7] On 31 January 2019 the appellant, through its attorneys, caused a cancellation notice dated 14 January 2019 to be served on the respondent, informing the respondent of the cancellation of the agreements and demanding return of the goods to the appellant. The respondent received the cancellation notice but regarded the cancellation notice as defective and of no force and effect.

[8] The Court *a quo* held that the breach notices lacked firmness and certainty and bordered perilously close to being nugatory.[3] However, it is common cause in terms of the agreements, that if the respondent failed to make payment of any amount due, or breach any term of the agreement, the respondent must remedy its default within 7 or 10 business days of the appellant notifying the respondent to do so, failing which the appellant may

[3] Judgment para 32.

cancel the agreement and take possession of the goods. The breach notices did inform the respondent of the amount in arrears.

[9] The respondent was in default when the breach notices were served on the respondent and there is no indication on the papers that the respondent at any point in time rectified the situation.

[10] The learned judge in the Court *a quo* wrongly held that in terms of the agreements the appellant was obliged to *"issue"* a notice of demand and that it did so on 20 November 2018, losing sight of the fact that the extension until 30 November was withdrawn and that the demand was in any event only served on 7 December 2018. What is required in terms of the agreements is that the appellant may *notify* the respondent to remedy its default within a specified period. Until the notices came to the knowledge of the respondent it had no legal effect. The fact that the notices bear the date of 20 November 2018, or any other date for that matter, is not relevant.

[11] On a proper interpretation of the agreements and the breach notices, in the context of the legal relationship between the parties, the respondent was notified that it must rectify its default in terms of the agreements within 10 business days of the notices coming to the knowledge of the respondent, which is common cause happened on 7 December 2018.

[12] The agreements do not regard the date of *"issue"* of the breach notice as the date of "notification" but regarded the actual date of notification as the

relevant date. Any other interpretation would be nonsensical, impractical and unbusinesslike and will only serve to undermine the apparent purpose of the relevant provisions of the agreements and of the notices themselves.[4]

[13] The learned judge in the court *a quo* should have found that on the date of service of the breach notices, the respondent was properly notified of its default and to rectify the default within the period stipulated in the notices, whether or not the aforesaid extension until 30 November 2018 was withdrawn or not. The Court *a quo* wrongly held that the applicant *"could only have issued"* the notices after 30 November 2018,[5] firstly the extension was withdrawn and secondly the relevant date is the date of service being 7 December 2018. The learned judge in the Court *a quo* wrongly held that the respondent was not properly placed in *mora* and that the cancellation of the agreements was defective and of no force and effect. The learned judge in the court *a quo* correctly accepted the principle as restated in *Standard Bank of South Africa v A-Team Africa Trading CC*[6] that *mora* only commences from the date of receipt of the letters of demand or breach notices,[7] but continued not to apply this principle. The learned judge in the court *a quo* should have found that on 7 December 2018 the breach notices served on the respondent properly placed the respondent in *mora*, in that the respondent was sufficiently aware of its obligation.[8] As already stated m*ora* commenced from the date of receipt of the

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[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)* paras 18 & 26.
[5] Judgment, paras 35 & 39 – Vol 3, p 289 & 291.
[6] (4417/15) [2015] ZAKZPHC 43 (2 September 2015) para 25 – 26 (D-Team Africa).
[7] Judgment, para 35 – Vol 3, p 289.
[8] *Phone-A-Copy Worldwide (Pty) Ltd v Orkin & Another* 1986(1) SA 729 (A) at 749 I-J; [1986] 2 All SA 12 (A) at p 21.

letters of demand or breach notices *i.e.* 7 December 2018.[9] The respondent was placed on terms and informed what obligation it was required to perform and when it was required to perform.[10] The appellant in the notices warned the respondent that in the event of its failure to remedy its default within the stipulated period, the appellant reserves the right to cancel the agreements.[11] The exact wording of the notices was immaterial where it clearly and unequivocally informed the respondent that its failure to perform timeously may result in the cancellation of the contract.[12] The learned court *a quo*'s conclusion that the breach notices were in any way defective is clearly wrong.

[14] The Court *a quo* also erred when he held that the appellant could not rely on the decision of *Standard Bank SA Ltd v Mbane*[13] because it dealt with a transaction under the National Credit Act 34 of 2005 ('NCA').[14] The reasoning in *Mbane* merely restated and affirmed the principles referred to in *Christie's Law of Contract in South Africa*[15], which will apply whether the agreements under consideration fall within the ambit of the NCA or not. While the learned judge in the court *a quo* apparently accepted as correct that *mora* commenced from date of receipt of the letters of demand or breach notices, he nevertheless incorrectly concluded that the appellant could not rely on *A-Team* and *Mbane* to support the appellant's contention that *mora* commenced on such date.[16]

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[9] *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA); [1995] 1 All SA 486 (A) at para 31.
[10] *Kragga Kamma Estates CC v Flanagan* 1995 2 SA 367 (A) 374D- 375(B); [1995] 1 All SA 486 (A) p 491.
[11] *Nel v Cloete* 1972 2 SA 150 (A) at 159H; [1972] 4 All SA 573 (A) p 584.
[12] *Kragga Kamma Estates* 375 C- F.
[13] (58/2015) [2015] ZAECMHC 53 (23 April 2015) at paras 25 & 26.
[14] Judgment, paras 36 & 37 – Vol 3, p 289.
[15] 5th edition at pp 538 & 539.
[16] Judgment, para 37 – Vol 3, pp 289 - 290.

[15] The Court *a quo* should have found that the respondent's failure to rectify its default within at least 10 (ten) business days from date of receipt of the breach notices entitled the appellant to cancel the agreements. He furthermore should have found that the appellant placed the respondent properly in *mora* and the agreements were validly cancelled. To support this position, it is in any event trite that in a notice of cancellation can also be inferred from the notice of motion or summons.[17]

[16] The respondent complained about the correctness of the amounts referred to in the certificates of balance, but the appellant's claim against the respondent in the Court *a quo* was not for payment of any amount. The certificates of balance attached to the appellant's founding affidavit, were not a necessary ingredient of the appellant's cause of action and not relevant to the appellant's claim for confirmation of cancellation and return of the goods. A certificate of balance is merely an evidentiary tool provided for in an agreement to facilitate proof of the amount of the debtor's indebtedness and nothing more.[18] The Court *a quo* wrongly held that the certificates of balance *"were used to support the notices of demand,"*[19] the fact of the matter is that irrespective of the amount it was common cause that the respondent was in breach of its obligations. The certificates of balance do not in themselves establish liability or default.[20] They do however constitute *prima facie* proof of the extent of the respondent's default on 12 November 2018 in terms of each agreement. Importantly it was not in dispute that the respondent had been in

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[17] Standard Bank SA Ltd v Mbane (58/2015) [2015] ZAECMHC 53 (23 April 2015) at para 26.
[18] *Thrupp Investment Holdings (Pty) Ltd v Goldrick* 2008 (2) SA 253 (W) at para 6.
[19] Judgment, para 38 – Vol 3, p 290.
[20] *Thrupp Investment Holdings (supra).*

default of its payment obligations when it was notified by the appellant to remedy its default, and that the respondent failed to do so.

[17] It follows that the appeal should succeed and cancellation of the agreement should be confirmed and the goods returned to the appellant.

[18] The following order is made:

18.1 The appeal is upheld.

18.2 The order of the Court *a quo* is set aside and substituted with the following:

18.2.1 The cancellation of the instalment sale agreement concluded between the appellant and the respondent, listed in annexure "A" to the notice of motion dated 26 February 2019 are confirmed;

18.2.2 the respondent is ordered to forthwith hand over to the applicant the vehicles/agricultural implements in its possession, listed in the said annexure "A"

18.2.3 in the event of the respondent failing and/or refusing to hand over to the appellant, the vehicles/agricultural implements listed in the said annexure "A", the sheriff is authorised to seize and attach the said vehicle/agricultural implements, wherever said vehicles/agricultural implements may be found, and

from any other person or persons in whose custody or possession the vehicles/agricultural implements may be found, and to hand them over to the appellant;

18.2.4 the appellant is authorised to dispose of the vehicles/agricultural implements listed in the said annexure "A" by way of public auction and to credit the accounts of the respondent listed om annexure "A" accordingly, with the proceeds of such public auction in respect of each such vehicle/agricultural implements;

18.2.5 the respondent is ordered to pay the costs of the application and appeal, on a scale as between attorney and client.

R G TOLMAY
JUDGE OF THE HIGH COURT

I agree:

A P LEDWABA
DEPUTY JUDGE PRESIDENT

I agree:

M P MOTHA
ACTING JUDE OF THE HIGH COURT

DATE OF HEARING:	24 NOVEMBER 2021
DATE OF JDUGMENT:	2 DECEMBER 2021
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ADVOCATE FOR APPELLANT:	ADV Y COERTZEN
ATTORNEY FOR RESPONDENT:	DE KLERK VERMAAK & PARTNERS
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