IN THE NORTH WEST HIGH COURT

MAFIKENG

CASE NO.: 1143/12

In the matter between:

OOS VRYSTAAT KAAP BEDRYF BEPERK	**Applicant**
and	
MT NAVAL TRADING 502 CC	**1st Respondent**
JOSEF MARKUS FOURIE	**2nd Respondent**
JAN ABRAHAM VAN ROOYEN	**3rd Respondent**

CIVIL MATTER

KGOELE J

DATE OF HEARING	**:**	**14 March 2013**
DATE OF JUDGMENT	**:**	**16 May 2013**
FOR THE APPLICANT	**:**	**Advocate J.P. De Bruyn**
FOR THE RESPONDENT	**:**	**Advocate J.P. Coetzee (With him Advocate C Van Der Merwe)**

JUDGMENT

KGOELE J:

A. INTRODUCTION

[1] The issue in this application is whether the applicant is entitled to the delivery to it of the farming implements listed in the notice of motion *pendent lite* the final determination of an action instituted by the applicant against the three respondents in case number 1011/12 in this court. The parties will be referred to in this judgment by name for convenience sake as follows:-

Oos Vrystaat Kaap Bedryf Bpk **(OVK)**	-	Applicant
MT Naval Trading CC **(MT Naval)**	-	First Respondent
Josef Markus Fourie **(Fourie)**	-	Second Respondent
Jan Abraham Van Rooyen **(Van Rooyen)**	-	Third Respondent

[2] OVK does not seek relief against Fourie and Van Rooyen. Both these respondents do not oppose the application as they withdrew their opposition.

[3] As against MT Naval, OVK claims interim possession of 21 farming implements pending the outcome of an action. The cause of action is the alleged breach of 21 instalment sale agreements by MT Naval as at 29 February 2011. The instalment sale agreements are similar, but not identical.

[4] In the alternative the applicant (OVK) claims an order authorising and directing the Deputy Sheriff of the district in which the farming implements are found to attach same and hand them to applicant. In prayer 2 of the notice of motion the applicant request the court to authorise it to keep the said implements in its possession pending the

final determination of the action. There are two alternatives to this prayer. Firstly, authorising applicant to sell the implements by public auction and to credit the respondent's account with the nett proceeds thereof, in the second instance, to invest the proceeds in an interest bearing account at the applicant's attorneys at Ficksburg, Messrs Du Toit Louw Botha Inc.

B. **OBJECTIONS**

[5] There were a number of objections that were raised by the respondent (MT Naval) against the papers filed by the applicant that clouded this application. They are the following:-

Hearsay evidence

- *"OVK relies on hearsay evidence of Mr Hechter ("the deponent") in support of the relief sought. Mr Hechter although contending in the founding and replying affidavits that he has the requisite documents at his disposal, does not allege that he familiarised himself with the content thereof. In an attempt to bolster the hearsay evidence in the founding affidavit, OVK annexes confirmatory affidavits of Mr Booyse, Mrs van Wijk and Mr Crause to the replying affidavit. In general this defect in the founding affidavit cannot be cured in reply. None of the recognised exceptions has been shown to be present."*

- *The replying affidavit seeks to downplay the requirement that the deponent must have personal knowledge in application proceedings and fails to address the crux of the hearsay evidence complained of. Reference is made to one example: OVK is required to prove breach of the instalment*

sale agreements, in this instance by the failure to pay the instalments on the due date. This alleged breach can only arise, upon arrival of the due date for payment provided for by the relevant agreement itself. No due date appears ex facie annexure 105, 111, 117 and 123 to the summons. Only the person who acted on behalf of OVK in concluding the agreements can testify when payment was agreed to be due (which in itself will require rectification of the agreements). On OVK's version in reply, the latter does not even know who acted on its behalf; it was some unidentified administrative lady.

New Evidence

- *A replying affidavit may not introduce evidence which should have been introduced in the founding affidavit*

- *It is submitted that the following evidence in the replying affidavit stands to be struck out or disregarded on the basis that it was/were known to OVK when launching the application, cannot be raised as a cure to the founding affidavit and causes MT Naval to suffer prejudice in that it does not have a right to reply thereto:*

  ** *pp 453 par 7 read with "REP2"and "REP3" (pp481-487);*

  ** *pp455-456 par 12 -15 read with "REP4.1" to "REP4.22"(pp488- 509) (the "opsommings");*

  ** *pp456-459 par 16 – 19 and 21;*

  ** *pp461-462 par 25.1 – 25.6 read with annexures ""RP1"- "RP3"(pp 470 -487)*

** *pp463 par 25.8 read with annexures "RP24a" and "RP24b" (pp 510-511) ;*

** *pp465 par 28.1 – 28.2. It is submitted that OVK was obliged to disclose the pending action in its founding affidavit and its election not to do so, cannot be cured in reply.*

** *pp466 par 29. It is submitted that the introduction of certificates of balance in reply when the non-annexing of same was raised in the answering affidavit, does not justify the annexing of "new updated" certificates. MT Naval was not afforded the opportunity to deal with the new certificates.*

** *annexure "REP1"at paragraphs 2.1 – 5 & 6.1-6.8 & 10 - 15 (pp471- 479). This version ought to have been raised in the founding affidavit.*

** *annexure "REP3" at paragraphs 4 - 6 (pp 486 -487). Apart from the evidence being raised for the first time in reply, it is clear that par 4 constitutes hearsay.*

Litigation by Ambush

- *With respect, the founding affidavit does not validly make out a case in that OVK is not allowed to refer and incorporate hundreds of pages of documents without specifying what features of those documents they rely upon (sometimes referred to as proceeding by ambush). Even a Court is not allowed to do so. With respect, that is precisely what OVK does with case 1011/2012. The founding affidavit states that OVK intends providing an indexed bundle of the record of case 1011/2012 which must be "... gelees word, vir sover toepaslik, asof dit spesifiek by hierdie verklaring*

ingelyf en herhaal is." They do not specify what portions of that record they intend relying upon.

- *The following features of case 1011/2012 demonstrate why the incorporation of the papers in that case constitute proceeding by ambush:*

    ** *The simple summons in case 1011/2012 consists of two lever arch files full of papers which were not paginated at the time when MT Naval was required to consider them and which run into some 800 pages.*

    ** *OVK's founding affidavit does not disclose what allegations and annexures it intends to rely upon for purposes of this application.*

    ** *The claims and the annexures supporting each claim are difficult to compare. They are similar, but not identical or mutatis mutandis identical.*

- *MT Naval has a right to know what case it is required to meet when preparing its answering affidavit. With respect, OVK does not have the right as claimed in the last paragraph under paragraph 11 of the founding affidavit to unilaterally determine the relevant parts of the papers in case 1011/2012 to be considered by the Judge after MT Naval has delivered its answering affidavit.*

Disputes of fact

- *In reply OVK contends incorrectly, that the essential elements of its case are common cause. As is dealt with elsewhere in these heads that is not correct. OVK contends that, should the Court find there to be factual disputes, the matter ought to be referred to oral evidence. We respectfully*

submit that, if the Court so finds, the application must, for these reasons, be dismissed with costs. The general rule is that an applicant must at the commencement of the hearing choose between arguing the application as it stands and asking for a referral to oral evidence. It does not have the right to test the water by asking the Court to refer the matter to oral evidence if the Court finds that there are disputes of fact which require such a referral. The application is for interim relief pending the outcome of an action when the very issues will be determined. If the application is referred to oral evidence, the same issues will be determined by oral evidence twice.

[6] Because the objections are intertwined with the merits of the main application, I chose to deal with them together during my analysis of the merits.

C. SUBMISSIONS BY APPLICANT

[7] The applicant's counsel submitted that it is common cause between the parties that some of the implements are not in the possession of the respondent but in the possession of the third respondent, Van Rooyen. How it came about that possession was given to Van Rooyen is in dispute. It was disclosed in the founding affidavit.

[8] Further that the version put forward by Booyse is *prima facie* and inherently more plausible and probable than that of the deponent to the respondent's answering affidavit because:-

8.1 firstly Booyse states emphatically that if there were to be a delegation and cession it would have been properly documented which was not done, and

8.2 secondly the second meeting referred to at **page 475, par.15** of the replying affidavit would not have taken place with both the second and third respondents.

8.3 it is therefore submitted, that the applicant will be entitled to an order also in respect of those implements in the possession of Van Rooyen.

[9] Further that the relief sought in the notice of motion is competent to be granted by the Honourable Court both at common law and in terms of the National Credit Act, 34 of 2005 ("the Act"). This applies to an agreement for the sale of movables which provides that, despite the delivery of the *merx* ownership therein is reserved in favour of the seller until such time as the full purchase price has been paid. The only precondition for the grant of the relief is that it can only be granted after cancellation of the agreement due to default by the purchaser. The relief is *interim* in nature and the applicant has to comply with all the requisites of an *interim* interdict with the rider added that because the claim is a vindicatory one the element of irreparable harm is presume.

[10] Further that the dealing with the balance of convenience **Boruchowitz, J** at **par.30** of the **SA Taxi Securitisation (Pty) Ltd v Chesane, 2010 (6) SA 557 (G&J)** case had the following to say:

> "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. …* It is self-evident that the vehicles are depreciating by use and that the respondent's continued utilisation of the vehicle 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 likely 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."

[11] An argument by the respondent in that case that he will suffer substantial prejudice if he is deprived of the vehicles did not find favour with the Court. At **paragraph 32** the judgment continues as follows:

> "(32) The question of the balance of convenience must be placed in its proper prospective. It is a well settled principle that the stronger the case which the applicant makes out the less balance of convenience in favour of the applicant there needs to be, for *interim* relief to be granted."

[12] Further that in the present instance the applicant has made out a strong right to cancellation of the agreements and restoration of the vehicles in the pending action.

[13] Further that, relying on the well-known authorities of **WEBSTER v MITCHELL, 1948 (1) SA 1186 (W)** and **GOOL v MINISTER OF JUSTICE & ANOTHER, 1955 (2) SA 682 (C)** the Constitutional Court recently in **NATIONAL TREASURY & OTHERS v OPPOSITION TO URBAN TOLLING ALLIANCE & OTHERS, 2012 (6) SA 223 (CC) at par.41** reiterated the requirements for the grant of an *interim* interdict. At **paragraph 41** of the judgment the following is said:

> "(41) The High Court relied on the well-known requirements for the grant of an *interim* interdict set out in Setlogelo and refined thirty four years later in Webster. The test requires that an

applicant that claims an *interim* interdict must establish – (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and eminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other remedy."

[14] Further that, in **paragraph 55** of this judgment the following appears.

> "A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant, if *interim* relief is not granted, as against the harm respondent will bear, if the interdict is granted. Thus a court must assess all relevant factors carefully in order to decide where the balance of convenience rests."

[15] In **WEBSTER v MITCHELL**, ***supra*** (and applicant quote from the head note), it was decided that in an application for a temporary interdict, "applicant's right need not be shown by a balance of probabilities. It is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether having regard to the inherent probabilities the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by respondent should then be considered and if serious doubt is thrown upon the case of applicant he could not succeed.

In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the court acts on the balance of convenience. If, though there is

prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted, subject, if possible to conditions which will protect the respondent."

The test for adjudicating whether a *prima facie* right open to some doubt is established found approval from the Supreme Court of Appeal in **SIMON NO. v AIR OPERATIONS OF EUROPE AB & OTHERS, 1999 (1) SA 217 (SCA), p.228.**

[16] Further that in so far as it may be found (which is not conceded) that some of the evidence proffered by the applicant in its founding affidavit amounts to hearsay evidence, it is submitted with respect that such evidence should be admitted in terms of section 3(1) of the Law of Evidence Amendment Act, 45 of 1988. This section provide, as far as applicable, as follows:

"(3) Hearsay evidence

(1) Subject to the provisions of any other Law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) ….;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings, or

(c) the court having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose

credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."

[17] Further that the provision of section 3(1) of the Act was authoritatively discussed in **HEWAN v KOURIE NO, 1999 (3) SA 233** and by **Cameron, JA** (as he then was), in **S v NDHLOVU & OTHERS, 2002 (6) SA 305 (SCA).**

[18] The respondent's objections against the so-called hearsay evidence is levelled at the contents of **paragraphs 13.1 to 13.22** (the conclusion of the agreements), **14.1 to 14.22** 9 (the outstanding balances), 15 (applicant's alleged compliance with its obligations in terms of the agreements) and certain sub-paragraphs **of paragraph 16.2, 18 and 19** of the founding affidavit. It is submitted with respect that the passages objected against do not amount to hearsay evidence. If it does, which is not conceded, the position is completely remedied by the affidavits of Booyse, Van Wijk and Crouse annexed to the applicant's replying affidavit. It is in any event submitted that there is nothing precluding a person in the possession of Hechter, being the head of legal services and the company's secretary to testify on what is found in the records of the company.

[19] Further that in **paragraph 12, page 14** of the founding affidavit, it is alleged that in the summons in the action (as confirmed in the founding affidavit) 21 agreements were concluded between the applicant and the respondent. To this the respondent replies in **paragraph 80 at page 278** of the answering affidavit as follows:

> *"In case 1011/2012 OVK claims rectification of AVO'S by changing the name of the purchaser from MT Naval Trading JM Fourie to M Naval Trading 502 BK."*

This certainly does not constitute a denial of the existence of the agreements nor does the deponent to the answering affidavit and the signatory to each of the agreements deny that the agreements were signed on behalf of the respondent nor that delivery of the farming implements took place in terms of the agreements and that the respondent made payments in respect of the indebtedness arising out of the agreements.

[20] The applicant further submitted that the reference to the rectification sought in the action in respect of the name of the first respondent is, once again, a red herring. In the affidavit resisting the summary judgment in the action, the heading clearly shows the name of the respondent as MT Naval Trading CC (MT Naval). Fourie declares under oath that in his affidavit he will refer to the parties by name "as defined in the heading hereof, MT Naval, …." He then proceeds in **paragraph 3** on the same page by saying that he is duly authorised by MT Naval to depose to the affidavit. The issue of rectification is raised in respect of each of the agreements in similar terms to the agreement forming annexure **"2"** to the founding affidavit in the application and the declaration. Nor the respondent

nor any of the other respondents in the action filed a plea whereupon a notice of bar was served in response to which a plea was not filed.

[21] Further that it is to be noted that the terms and conditions of each instalment sales agreement are identical and the applicant only refer, as an example, to the terms of annexure **"2"** to the founding affidavit. Despite delivery of the *merx* in each instance ownership in the *merx* could not pass to the respondent until such time as all amounts owing in terms of the agreement have been fully paid. A certificate signed by any of the applicant's officials mentioned in clause 10 is *prima facie* proof of all the facts contained in such a certificate and of the amounts owing to the applicant by the respondent without proof of the appointment of the signatory to such certificate. In terms of clause 4.1 **(p.43)** the applicant is entitled to cancel the agreement after giving seven days notice to the respondent if the respondent is in default with the payment of any amount due in terms of the agreement.

[22] Further that Clause 4.2 of the agreement provides that after cancellation of the agreement, the applicant is entitled to delivery of the *merx* :-

> " … en die Koper (is) verplig om op eie koste die goedere in behoorlike werkende toestand aan die Verkoper te lewer, tesame met alle lisensiedokumente, registrasiesertifikate en enige ander tersaaklike dokumente ten opsigte van die goedere by die Verkoper se bogemelde adres of sodanige adres van die Verkoper as wat die verkoper skriftelik aan die koper bekend maak of bekend gemaak het."

[23] Clause 19.2 of the agreements reads as follows:

> "19.2 Tensy die Koper binne 3 (drie) maande na die pos van 'n rekeningstaat wat op hierdie ooreenkoms van toepassing is, skriftelik per aangetekende pos teen enige debiet of krediet wat daarop verskyn, beswaar maak, sal dit vir alle doeleindes geag word dat die inhoud van sodanige rekeningstaat korrek is en sal sodanige rekeningstaat in enige regsgeding afdoende bewys wees dat die inligting wat daarin vermeld word en die debiete en krediete wat daarin verskyn korrek is."

Such statements are annexed to the summons.

[24] Furthermore, in **paragraph 14** of the founding affidavit details are given of the outstanding balance on each agreement as at 28 February 2012. To this the respondent responds at **page 278, paragraph 81**, by denying the allegations and referring to the "evidence under the previous hearings." To what evidence reference is actually made is not clear but whatever evidence is proffered by the respondent in an attempt to dispute its indebtedness and the arrears is gainsaid by, *inter alia,* the following:

24.1 Attached to the plaintiff's summons in the action are various certificates of balance of which annexure **"3"** at **page 279** of the action is but one example. All these certificates provide *prima facie* proof as set out above in the agreements;

24.2 The certificates annexed to the replying affidavit are merely for illustrative purposes and reflects the balances that would have been due had it not been for the cancellation of the agreements.

[25] The payment schedules annexed to the replying affidavit at **pages 484 – 505** are self-evident. It reflects in clear terms what in respect of each agreement became payable in terms thereof on which date and what was in fact paid. These schedules should be read with the affidavit of Booyse who explains that from the word go the applicant had grave difficulty in obtaining payment of even in some instances the required deposits.

[26] Applicant further submitted that it is to be emphasised that over the years the respondent received monthly statements containing all information of debits and credits passed in the course of that particular month including debits in respect of interest and credit life insurance. There is no allegation made on behalf of the respondent that it ever objected against the information documented in the monthly statements. Surely the situation must be similar to **SENEKAL v TRUST BANK OF AFRICA LTD, 1978 (3) SA 375 (A)** approved of in *inter alia* **ABSA BANK BPK h/a VOLKSKAS BANK v RETIEF, 1999 (3) SA 322 (NC).**

***Vide*, clause 19.2 of the agreements**

It is submitted, with respect, that the evidence is overwhelming that the agreements had been breached and as a result thereof the applicant was entitled to avail itself of the cancellation provision in the agreements.

[27] It is applicant's further submission that **paragraph 16** of the founding affidavit **(p.30)** reference is made to the fact that it is alleged in the summons that applicant had exercised its contractual right to cancel the agreements. There is no direct response to this allegation in the answering affidavit at **page 278** where the content

of **paragraph 16** of the founding affidavit is not directly addressed. In respect of each of the agreements it is alleged in the summons that the respondent failed to make payment of arrear amounts within a period of seven days after it had become due and payable. See for example **paragraph (xiv) at page 6** read with **paragraph (xx) page 8** and **paragraph (xxi) pages 8 to 9**. The last sentence of the latter paragraph makes it clear that the plaintiff terminates the relevant agreement due to the respondent's failure to pay the arrear instalments. It is submitted that it is clear that the applicant has, as it is entitled to do, cancelled all the agreements and is, therefore, entitled to obtain possession of its property.

[28] Applicant submitted further that it is self-evident that continued use of the implements causes them to diminish in value which can be avoided by the applicant taking possession thereof and retaining it until such time as a final order is made in the action. As was said in the **SA Taxi supra** case it is untenable for the respondent to keep possession of the implements whilst not making any payments. The respondent's response is a bare denial that it is in breach of the agreements and that the agreements had been validly cancelled. He then continues to allege that it will suffer prejudice in its farming operations if it is deprived of possession of the implements. Depreciation in value is not in dispute.

[29] As far as the issue of alternative remedy is concerned the applicant submitted that the application being a vindicatory one damages are presumed. By the use of the words "alternative remedy" is meant an adequate alternative remedy, in this particular instance, probably, in my respectful submission, a claim for damages. The fact and the inherent probabilities inferred there from clearly

demonstrate that the respondent is unable to meet its obligations as is shown by its failure throughout the existence of the agreements to comply punctually with its obligations. A claim for damages as an alternative remedy is, so I submit, in the circumstances is not an adequate remedy and there is, therefore, no adequate alternative remedy available to the applicant. If the second and third respondents, who signed suretyship in favour of the applicant were financially able to assist the respondent one would have expected them to come to the applicant's rescue in order to ensure that it is not deprived of possession of the implements with which it is used to generate an income. It is therefore submitted, with respect, that there is no alternative adequate alternative remedy available to the applicant.

[30] Lastly the applicant submitted that, there are no grounds whatsoever upon which the Honourable Court will exercise its residual discretion in favour of the respondent. In terms of the provision of the agreements the applicant is entitled to costs on the scale as between attorney and own client.

D. SUBMISSIONS BY RESPONDENT

[31] The respondent's submissions are that Millin J held in ***Loader v De Beer*** **1947 (1) SA 87 (W)** that the relief which a party in the position of OVK would normally be entitled to, is not interim possession but rather an interdict restraining MT Naval from alienating the implements pending the outcome of the action. It follows that OVK must satisfy the Court of the requirements for an interim interdict plus something more, such a risk of deterioration of the implements, as was considered in *Loader*. Like the respondent in *Loader*, MT Naval acquired a

contractual right to possess the 21 implements. MT Naval can only be deprived of that right to possession if it is proved that it committed a default entitling OVK to reclaim it.

[32] Further that the use of the implements in the manner envisaged in the instalment sale agreements does not qualify as a sufficient risk of deterioration as contemplated in *Loader*. An instructive judgment in this regard is the judgment of **Flemming DJP** with whom **Labuschagne J** concurred in ***BMW Financial Services (SA) (Pty) Ltd v Rathebe*** **2002 (2) SA 368 (W).** The following statements of law in that judgment are important for present purposes:

32.1 The consideration of the order is a matter of discretion which is dependent on the facts of each particular case.

32.2 The continued use of the property in the manner envisaged in the instalment sale agreements in question does not constitute a sufficient reason to deprive MT Naval from its contractual right to possess before a final determination of that right.

32.3 OVK needs to prove sufficient reasons to fear that serious harm to each of the implements in this case will actually occur; evidence of the notional possibility of some risk is not good enough.

32.4 A long delay by OVK is a factor against the granting of an order.

32.5 While the fate of the instalment sale agreements has not yet been determined by way of a due process, the ownership of

OVK does not trump the contractual right to possession of MT Naval.

[33] Further that since OVK seeks a discretionary remedy, its failure to ensure that its affidavits accurately cross refer to the annexures thereto is a ground for refusal of the application. As will be demonstrated more fully below, it is submitted that none of the said requirements have been proved. OVK's evidence falls short of proving that any one of the implements is likely to suffer damage or depreciation beyond that involved in the use contemplated in the agreement. Also, the case matter does not involve an applicant with no knowledge as to the condition of the implements; OVK conducted inspections of the goods. For OVK to succeed in the relief claimed in the current application, OVK has to prove breach of the AVO's relied upon and cancellation on the basis of the breach. For the sake of argument all the alleged breaches of the AVO's are dealt with as one, with reference to claim 1 as formulated in the summons, the same defence being relied upon, and applying *mutatis mutandis* in respect of the other claims. The cause of action relied upon by OVK is based on annexure "2" to the summons, being an instalment sale agreement concluded on 21 December 2007. According to paragraph x of the summons, OVK alleges that it was a term of annexure 2 that the contract sum was payable by MT Naval by way of a first instalment on or before 31 December 2008, three instalments of R675 591,33 each on 31 December 2009, 31 December 2010 and 31 December 2011 and a final instalment on or before 31 December 2012. This is not a correct paraphrasing of annexure 2. Annexure 2 does not set out the frequency or dates when each payment falls due, save for the first and last date. There is no claim for rectification of the instalment sale agreement on this point. This material

discrepancy, founded upon hearsay evidence as was dealt with above, negates reliance on an alleged breach of the agreements, rendering the cancellation relied upon, the summons and the current application premature. A litigant must have a complete cause of action at the time action was instituted (and the current application launched), failing which this application must be dismissed.

[34] The respondent further submitted that the "Orbis Kuilvoerkerwer" has been returned into the possession of OVK and is the subject matter of a case in the Free State High Court (Case 5559/2011). A copy of the combined summons in that matter appears from page 352 in the present papers. As appears from that summons:

34.1 It predates the present application. It was issued in December 2011. The present application was issued in August 2012.

34.2 In that case MT Naval claims damages of almost R10 million on the basis of breach of contract. We disclose that, according to further particulars (not before this Court) that amount stands to be reduced to approximately R5¾ million.

34.3 If any substantial part of these damages is taken into account, that in itself would greatly reduce the claim of MT Naval.

For these reasons the application stands to be dismissed with costs on the basis that OVK has not made out a *prima facie right* and on the basis of an exercise of the Court's discretion.

[35] Further that MT Naval and some of its clients made payments to OVK which have to date not been credited. It follows that OVK has

not made out a *prima facie right* of breach of contract in the form of non-payment of due instalments as relied upon.

[36] Further that the Court can, with respect, not find that OVK has a *prima facie* right while their claim is expiable. Also, since the relief claimed is discretionary, the law referred to in paragraph 0 hereof is applicable. OVK's cause of action, as confirmed by Mr Hechter in his various affidavits includes reliance on the alleged terms which are inconsistent with the very agreements referred to and relied on. Firstly there is the contradiction as to the frequency of payments which has been dealt with in paragraph 0 hereof. Secondly there are the discrepancies referred to in paragraphs 35 to 38 of the answering affidavit. OVK formulated its numerous claims in identical fashion, each formulation being defective with reverence to clauses in the agreements relied upon, rendering it necessary for MT Naval and the Court to "wade" through the voluminous 'simple' summons (in excess of 800 pages) in order to extrapolate the essentials of the claims. It follows that, for these additional reasons, MT Naval request that the application be dismissed with costs.

[37] Further that MT Naval pointed out in the answering affidavit that the interest component of OVK's claim renders the respective and cumulative claim sums unquantifiable. OVK's difficulties with the agreed interest rate are compounded by the replying affidavit. Reference is made to the following discrepancies:

37.1 The section 129 notices claimed 17.5%;

37.2 The founding affidavit claims 17%;

37.3 In reply OVK says that the interest rate is 17.5%;

37.4 The certificates of balance annexed to the replying affidavit certify to 16.5%.

37.5 OVK does not disclose what interest rates were capitalised and included in the capitalised amounts claimed in these documents. Their attitude seems to be that whatever they say goes.

It follows that OVK has not made out a prima facie right as to the quantum of its claim. This constitutes a further reason for the dismissal of the application.

[38] Respondent's further submission is to the effect that OVK's version on the life insurance premiums in reply differs substantially from the version in the founding affidavit. According to the founding affidavit the life of MT Naval (a juristic person) was insured. After this impossibility was raised in the answering affidavit, the version of OVK changed to hearsay evidence that the insurance was on the lives of the members of MT Naval. Even in reply OVK failed to disclose the policies, detail of the premiums paid and allocation thereof and even the source of the two pages relied upon. Also, those two pages indicate that a policy commenced on 1 July 2012. That date does not correspond with any related date alleged by OVK, neither has OVK disclosed what premiums on whose lives were included in the capitalised amounts claimed. As is canvassed in the answering affidavit, the legal incompetence of the purported life insurance on the life of MT Naval and the apparent inflated premiums, may well equate to as much as R600 000, which sums ought to be deducted from the quantum of the claim. That would result in some of the implements being settled in full**.** This constitute another reason why the application

stands to be dismissed with costs on the basis that OVK has not made out a *prima facie right* and on the basis of an exercise of the Court's discretion.

[39] Further that the erroneous computation of the claim has been canvassed above. In the founding affidavit OVK contends that no reasons were provided for the refusal to re-deliver the implements, a similar allegation being made by Mr Hechter, in the verifying affidavit to the summary judgment application in case 1011/2012. These allegations are disputed in detail in the answering affidavit. In reply OVK correctly contends that the disputes of fact must be determined. The relevance of the disputes for present purposed appear from the section of these heads under the heading CAUSE OF ACTION AND LAW. With respect, there is no valid basis to disregard MT Naval's contractual right to possess the implements on the basis of OVK's defective case, as set out in the answering affidavit and herein above.

[40] Further that, as was canvassed in the answering affidavit, MT Naval is not in possession of the implements claimed in prayers 1.1 a), b), c), i), j), d), e), f), g) h) q and 1.1u). It never opposed OVK's right to possess those implements. MT Naval requests that the Court refrains from ordering it to deliver implements not in its possession. Should an order be granted in favour of OVK, in relation to these implements, costs ought not be awarded against MT Naval. The fact that these implements were not in possession of MT Naval was known when the founding affidavit was deposed to. These implements were, to the knowledge of OVK, used by Mr van Rooyen his own gain.

[41] Further that it is submitted that what has been set out above, in regards to the conflicting interest rate versions, the non-allocation of payments received, the life insurance premiums etc applies equally to the certificates of balance, and so-called “opsommings” belatedly relied on and referred to for the first time in reply, in an attempt to supplement the failure to make out a case in the founding affidavit**.** OVK does not have a right to supplement or make out its case in reply. It is submitted that the new evidence raised in reply was clearly available (from the books and computer records) upon the application being launched and should on that basis either be struck out or disregarded by Court.

[42] Respondent further submitted that for the reasons dealt with above ,the requirements of reasonable apprehension and balance of convenience or injustice favour MT Naval. The same reasons also constitute reasons for the exercise of the Court’s discretion in favour of MT Naval. The submissions in the preceeding paragraph are also applicable in regard to the issue of prima facie right. As was dealt with in *BMW supra*, the alleged non-payment/ alleged default of the instalment sale agreements (which is denied), coupled with standard consequences and risks concomitant to the agreements do not constitute a valid basis for the relief sought. The implements are essential for MT Naval’s business. The implements in MT Naval’s possession are comprehensively insured. The time line of events contradict the purported need to prevent deterioration pending the finalisation of the action as OVK threatened with legal action in November 2011, yet only launched the various proceedings more than 8 months later. There is no proof that the implements will be used otherwise than as contemplated by the instalment sale agreements.

[43] Further that in ***Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd*** **1969 (4) SA 443 (C) Van Wyk J** (as then) held as follows with reference to tyranny caused by unnecessary delay in that case:

> "There is such a thing as the tyranny of litigation, and a court of law should not allow a party to drag out proceedings unduly. In this case we are considering an application for an *interdict pendente lite* which, from its very nature, requires the maximum expedition on the part of an applicant."

[44] Lastly that, in this case, the tyranny complained is not limited to delay. It is on these levels: Firstly there is the failure explicitly to set out OVK's full cause of action and evidence in the founding affidavit as has already been dealt with. Secondly there is the multiplication of litigation in different Courts by the financially powerful OVK against MT Naval which does not have comparable resources at its disposal. OVK allowed itself a period of many months to prepare its papers in the multiplicity of cases referred to in paragraph 8 of the answering affidavit and then issued and served the papers almost at the same time. The timing by OVK required the affidavit opposing summary judgment in case 973/2012 had to be delivered by 21 August 2012. The affidavit opposing summary judgment in case 1011/2012 had to be delivered by 28 August 2012. An application against Mr Fourie under case number 1142/2012 was issued on 8 August 2012 and was due to be heard on 30 August 2012. The answering affidavit in the present case by had to be delivered by 28 September 2012.

[45] Finally that OVK failed to disclose the security relied upon by OVK in case 1142/2012, being a general and special notarial bond, a third mortgage bond and suretyships, which are seminal to the

determination of the application as OVK's security is a viable alternative to the repossession of the implements in MT Naval's possession (should OVK prove the requisites for such relief). MT Naval requests that the application be dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

E. ANALYSIS

[46] The applicable law relating to this application has been succintly referred to by the respective counsel during their submissions, I will not repeat them here to avoid repetition.

[47] I agree with the applicant's counsel that the relief claimed is interim in nature, as applicant is only claiming possession of farming implements. Further that the defences and objections as raised by the respondent are spurious, technical and do not address the real issues. The version of the applicant in simpler terms can be summed up as follows:-

- that we have concluded an agreement;
- whereupon I delivered as agreed;
- you, (Respondent) had not (delivered) paid as agreed;
- I had already cancelled the agreement in terms of the agreed terms of our agreement
- and furthermore in terms of the agreement you are supposed to give the possession until we had settled the matter.

[48] The respondent in his version did not denied the conclusion of the agreement(s). He does not further deny that the agreement(s) are

sale instalment agreement(s). The conclusion of the agreement(s) is therefore common cause in this matter. So are the terms of the agreement(s). I agree with the applicant's submission that there is nothing that precludes a person in the position of Hechter, being the head of the legal services and secretary of the company (OVR) to testify on what is found in the records of the company. I find the following remarks in the case of **Standard Merchant Bank Ltd v Rowe and Others, 1982 (4) SA (W) at 679H-680A by Nestadt J** (as he then was) equally applicable in this matter:-

> "In my opinion there is no effective denial of Holcroft's knowledge of the March 1979 agreement or of second defendant's suretyship. It does not follow that, because he had no part in the negotiations, that he could have no knowledge of the agreement. Indeed he might well have signed it on behalf of the plaintiff, though he does not describe himself as the general manager. By alleging that he is a general manager of the plaintiff there is a sufficient basis for finding that Rule 32(2) is satisfied. Moreover, as I have said, the March 1979 agreement is admitted. It is idle in these circumstances for the defendant to contend that Holcroft had no knowledge of it…."

The submission by the respondent that Mr Hechter said he has the requisite documents at his disposal, does not allege that he familiarised himself with the contents thereof, and therefore does not have personal knowledge in the application proceedings fails to address the crux of the hearsay evidence complained of, is in my view, without merit. This is equally applicable to the submission that "OVK does not even know who acted on its behalf, it was some unidentified administrative lady". The same applies to the respondent's submission that the introduction of the affidavit of Booysen, Van Wijk

and Crouse constitute introduction of a new matter. In my view, it does not, but is a proper response to the answering affidavit which was contained in her replying affidavit. I agree with the submission that even if I were to find that new matters is raised in the replying affidavit the respondent cannot be prejudiced thereby

[49] According to the respondent, in paragraph X of the summons, OVK alleges that it was a term of Annexure 2 that the correct sum was payable by MT Navel by way of a first instalment on or before 31 December 2008, three instalments of R675 591,33, each on 31 December 2009, 31 December 2010 and 31 December 2011 and a final instalment on or before 31 December 2012. This is according to the respondent not a correct paraphrasing of annexure 2 as it does not set out the frequency or dates when each payment falls due, save for the first and last date. The respondent submitted that because there is no claim for rectification of the instalment sales agreement on this point, the application falls to be dismissed on this point only. I must point out at the onset that for the sake of convenience and to curb proximity, the alleged breaches claimed by OVK were dealt with as one, with reference to claim 1 as formulated in the summary, the same defence being relied upon, and applying *mutatis mutandis* in respect of the other claims. This was agreed by the parties. The analysis of the court in respect of claim 1 will therefore *mutatis mutandis* apply to all the other claims.

[50] The submission by the respondent above that one cannot discern what dates were payment to be made according to the agreement(s) is not justified. Page 40 of the paginated papers in this matter where the

amounts referred to above are indicated, is couched in the following manner:-

> "the first payment of (1) instalment is payable on 31/12/2008 which amounts to R675 591.33. Thereafter payment (frequency) from 31/12/2012 of (3) payments which amount to R202 677 399. Final payment of (1) instalment on 31/12/12, which amounts to R675 591.33 and an amount of R3 377 956.65 which is the total amount recoverable in terms of the agreement."

This is but one example of one of the agreements as indicated above. The calculations above do not need a rocket scientist to deal with them. From the document one can easily deduce that this is a question of looking at the document itself and construing it. Although the document does not say the instalment are payable "yearly", taking into consideration the dates and the amounts indicated in their respective columns, simple arithmetic reveals that one can easily realise that the instalment are payable yearly.

[51] But this argument does not end here, it goes further than that. If we assume that MT Naval truly does not understand the manner in which the instalments were structured, it is quite surprising that nowhere in its papers did they indicate that it did not pay because it could not understand the terms of the payment or when to pay. Sight must also not be lost of the fact that according to the OVK, monthly statements of account had been sent to the respondent indicating the debits and credits in their accounts. According to clause 19.2, if no objection is raised by the respondent within 3 months of the date of issue thereof, it will be accepted that they are correct and in any trial be sufficient proof of the correct amount reflected therein. The respondent has

failed to raise objections thereto when they were sent to him. He does not even allege that he did not receive them. Surely the situation must be similar to the matter of **Senekal v Trust Bank of Africa Ltd, 1978 (3) SA 375 (A)** approved amongst others in **ABSA Bank Bpk h/a Volkskas Bank v Retief, 1999 (3) SA 322 (NC)**. A letter of demand was issued against him, thereafter a letter wherein cancellation of the agreement was sought. Summonses were subsequently issued before this current application. Surprisingly, no where during any of the stages of litigation indicated above had the respondent shown his displeasure about the issue or the non understanding of when payments were due.

[52] What crowns this issue is the fact that the respondent in his answering affidavit only makes a bare denial that he does not owe OVK. He does not say I have complied with all my obligations from the contract, nor does he supply any proof to support his defence that he had **paid all** the instalment due on each agreement, despite OVK's several demands. The only prove of payments he attached is by far outweighed by the amount he is alleged to be owing. I am of the view that the evidence is overwhelming that he agreements had been breached and as a result thereof the applicant was entitled to avail itself of the cancellation provision in the agreement. Fortunately in this matter OVK has already cancelled the agreement as alleged in the founding affidavit. There is no direct response to this allegation in the answering affidavit of the respondent. It therefore means that the respondent does not dispute the validity of the cancellation. The letter of demand also bears testimony of such intended cancellation and the declaration in the action. No plea has been filed in the declaration. As

there had been no issues raised in as far as the cancellation of the contract, it is deemed to have been validly cancelled.

[53] The respondent's defence that the other implement are not in his possession and further that, this application also relates to the implements that are dealt with in an action brought against it by OVR in Bloemfontein is equally without merit. In as far as the implement not in his possession is concerned, I fully agree with the submission by OVK's counsel that the version put forward by Booyse is prima-facie and inherently more plausible and probable than that of the deponent to the respondent's answering affidavit. The contract between the applicant and the respondent is in respect of many implements and involves a lot of money. The amount of only one implement amounts to a million and in others, more than a million. I fully agree that if there were to be a delegation and cession of other implements, its highly probable that it would have been properly documented, taking into consideration the amounts involved, which was not done in this matter. At any rate, at this point of time it is immaterial where the implements are, or with whom. The respondent (M T Naval) is the contracting party. If this was the case an affidavit of Van Rooyen to confirm that he was party to the agreement could have been attached.

[54] It should further be remembered that, despite the fact that the implements were delivered to the first respondent, the ownership thereof remained vested in OVK. This is the crux of the matter. The first respondent was only entitled to possess and use the implements if it complied with all of its obligation in terms of the different agreements. OVK has only to prove that it has a *prima facie* right. As long as *prima facie* it appears that there is an amount which is owed,

irrespective of what the amount is, it is the end of this matter. Unfortunately I was not told that the matter in Bloemfontein is similar to the application before me, of "*claiming return of goods / attachment thereof*". I was just told that OVK had instituted an action against the respondent in Bloemfontein in respect of some of the implements. In as much as the action that has already been instituted in this court under case No. 1011/2012 is not a bar to the institution of the current application before me, the same applies to the action in Bloemfontein. At any rate, the respondent in his submission conceded in paragraph 34 above of this judgment that the "Orbis Kuilvoerkerwer" has been returned into the possession of OVK. Therefore nothing turns out of this argument as well.

[55] In as far as the law is concerned, I fully agree with the applicant's (OVK) counsel that the **Taxi** matter referred to about is apposite to this matter. Further that the **De Beers** matter referred to by the respondent's counsel does not detract the validity of the applicant's submissions and from the principles as laid down in the **Taxi** matter. In fact, it was referred to. The same applies to the **BMW** matter although it was decided on its own facts. It is distinguishable from the current matter in the following respects:-

- The application was heard a month before trial and consideration was taken of this time factor as to why the interim order should be granted;
- The contract which was the subject matter of the interim order was about to end;

- The contract had not been cancelled by the applicant in that matter, had it been cancelled, the outcome will probably have been different.

[56] The principles dealt with in the **Taxi** matter in as far as the balance of convenience is concerned are equally applicable in this matter. See further:- **Van Rhyn v Reef Developments (Pty) Ltd, 1973 (1) SA 488 (W)** where **Margo J** said the following at **492**:-

> "It is trite that, even though an applicant might not be able to establish a clear right at the interlocutory stage, he might nevertheless be entitled to an interdict *pendent lite,* due regard being had to the balance of convenience. Webster v Mitchell, 1948 (1) SA 1185 (W) per Clayden, J, at p.1192; Johannesburg Investments Co Ltd v Mitchmore Investments (Pty) Ltd & Another, 1971 (2) SA 397 (W) per Franklin, AJ, at p. 404. If the claim of such an applicant is vindicatory and if in the circumstances he is entitled to an interim interdict restraining the use of the thing by the respondent, then I cannot see why in a proper case a further order should not be granted authorising an attachment *pendent lite* to give effect to the restraint against use and to protect the thing from deterioration".

Depreciation in value of the applicant's implement is not in dispute. Even if the implements may be said to have been insured, such insurance may cover the risk or loss but certainly not depreciation. The balance of convenience therefore favours the applicant (OVR).

[57] It is trite law as counsel for applicant submitted that use of the words "alternative remedy" is meant an adequate alternative remedy. It is obvious in this matter that OVK can claim damages. The inherent probabilities inferred from the evidence of this matter demonstrate that

respondent is unable to meet its obligations as shown by its failure to comply punctually with its obligations. The second and third respondents were expected to come to the respondent's rescue to ensure that it is not deprived of possession of the implements which he used to generate income. The reason why they chose not to do so is highly questionable and can only strengthen the probabilities I am referring to. The 21 agreements concluded involves a considerable huge amount of money which amounts to millions of rands. I am of the view that there is therefore no alternative adequate remedy available to the Applicant.

[58] Consequently the following order is made:-

"Paragraphs 1, 2 but excluding its alternatives thereof, and 3 of the notice of Motion dated 3/08/2012 are made an order of court"

_____

A M KGOELE
JUDGE OF THE HIGH COURT

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