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CASE NO. A 191/98

IN THE HIGH COURT OF NAMIBIA

In the matter between

DORBYL VEHICLE TRADING AND FINANCE

COMPANY (PTY) LIMITED **APPLICANT**

and

ANDREAS JOHANNES

NWAYA
ERESPOND
KENT

CORAM:

COETZEE, A.J.

Heard on: 1998.06.12

Delivered on: 1998.09.04

JUDGMEN

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Capplication
Oin which the
EApplicant
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Directing the Respondent to deliver to the Applicant

d) 1 x 1992 Tridem Tridem (sic) Interlink Trailer bearing Chassis Number K06/10065/001/002; and

e) 1 x 1992 Tridem Tridem (sic) Interlink Trailer bearing Chassis Number K06/10064/001/002 (hereinafter collectively referred to as "the Trailers")

That failing the return of the Trailers to the Applicant forthwith, the Sheriff or his Deputy be authorised and directed to take possession of the Trailers, wherever the same may be found and to deliver the same

to the Applicant.

Directing the Respondent to make payment to the Applicant in the amount of R144 650,70 (One Hundred and Forty Four Thousand, Six Hundred and Fifty Rand and Seventy Cents), together with interest thereon at the rate of 15,5% per annum calculated from the 2nd day of March 1998 to date of payment.

That the Respondent pay the costs of this application on the scale as between as between attorney and client.

Granting the applicant further or alternative relief."

In its founding affidavit the applicant alleges that it entered into two rental agreements with the Respondent on 30 September 1992 in terms whereof it rented two trailers to the Respondent for a period of four years, with effect from 25/10/1992 and at the rental as set out in schedule "A" to the said agreements. Although a separate agreement was concluded in respect of each trailer it appears that the trailers are exactly the same and the terms of the agreements are for all practical purposes identical. Copies of the two agreements were attached as annexures "B" and "C" to the founding

affidavit.

The agreements provide, *inter alia,* that the trailers shall remain the property of the Applicant and that, in the event of the Respondent defaulting in the punctual payment of any rentals falling due in terms of the agreements, the Applicant would be entitled to cancel the agreements and to obtain possession of the trailers which the Respondent shall be obliged to forthwith deliver to the Applicant. The Applicant would furthermore be entitled to claim from the Respondent payment of all amounts which are in arrears as at the date of cancellation as well as any damages that the Applicant may have suffered as a result of the breach of the agreements.

The Applicant alleges that the trailers were duly delivered to the Respondent and that it duly complied with all its obligations in terms of the agreements. The Applicant goes on to allege that the Respondent defaulted in the instalments payable in term of the agreements and that the Respondent was in arrears in an amount of R140 180,46 as at 9 January 1998 in respect of the two trailers.

It is common cause that the parties concluded the two agreements, that the Applicant duly delivered the two trailers to the Respondent and that the Respondent defaulted in the instalments payable in terms of the agreements. Mr Vaatz, who appeared for the Respondent, nevertheless submitted that the Applicant is not entitled to thsrelief claimed and relied in this regard on the following:

(a) He submitted that the matter cannot be decided on affidavit and that the Court should therefore direct that oral evidence be heard in regard to certain issues in accordance with rule 6(5)(g).

f) That the Court should in the first place "come to a decision on the counterclaim ie Respondent's claim for a refund of R150 000,00 paid in respect of the MAN horse. Ifthe Court comes to the conclusion that Applicant should have refunded the Respondent the said R150 000,00 in 1993 the Court will come to the conclusion that if this amount had been credited to the Respondent's two lease contracts in 1993 - as it

should have been - no balance would be owed in March (or October) 1996 when Respondent discontinued making further payments" (Heads of Arguments, p7, par 1.5).

g) That the agreements are not ordinary rental agreements but in fact financial lease transactions.

h) That the Applicant made a material representation to the Respondent before entering into the agreements, namely that on the expiry of the agreements he would become the owner of the two trailers.

i) If the Credit Agreements Act, 1980 (Act 75 of 1980) applies to the transactions the Applicant failed to comply with the provisions of section 11 thereof in that the letter of demand addressed to the Respondent on 09/01/1998 only provided for seven days notice and not 30 days notice as required by the said section and that the Applicant is therefore not entitled to claim the return of the trailers.

The first issue that should, according to the submissions made on behalf of the Respondent be decided on oral evidence is whether the agreements are ordinary rental agreements or financial lease agreements.

In this regard it is necessary to refer to the fact that the each agreement is entitled "Rental Agreement" and that the parties are referred to as "the lessor" and the "lessee" respectively. The following furthermore appears at the top of page 2 of each agreement under the heading "terms and conditions of rental agreement" (my underlining):

"The lessor hereby rents to the lessee, which rents on the terms and conditions as set out in this agreement, the goods described in the transaction schedule for the period and rental stated therein. The goods shall remain the property of the lessor and nothing in this agreement shall be construed as conferring on the lessee any title, right or interest in the goods other than as lessee", (my underlining)

Clause 19 of the agreements furthermore provides as follows:

> "This agreement constitutes the entire agreement between the parties hereto. No agreement at variance with the terms and conditions of this agreement shall be of any force or effect unless it is in writing and signed by the parties to this agreement."

From the provisions quoted above it is quite clear that the parties to the agreement themselves determined in great detafl" and qmte specifically the relationship between them would be one of lessor and lessee and that the agreements did not confer on the Respondent any title, right or interest in the trailers other than as lessee.

If the agreements did not reflect the intention of the parties in this regard correctly it was open to the Respondent to apply for the rectification thereof, which he did not do.

In the circumstances I -come to the conclusion that there is no bona fide dispute as to the nature of the agreements and therefore also no basis for referring the matter to oral evidence on this alleged issue.

The second alleged issue that Mr Vaatz submitted should be referred for oral evidence is the question as to whether an amount of R150 000,00 that the Respondent paid to the Applicant as a deposit on a MAN mechanical horse should be repaid to the Respondent.

It appears from the affidavits that a third lease agreement was concluded between the parties in respect of the aforesaid MAN mechanical horse. It is common cause that the Respondent paid an amount of R150 000,00 as an initial payment in respect of the said vehicle. The Respondent alleges that this amount was paid as a deposit whereas the Respondent contents that it was paid as initial rental.

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According to a "transaction schedule" annexed by the Respondent as annexure "I" ,to his opposing affidavit a total amount of R943 127,26 was payable by the Respondent to the Applicant in respect of this vehicle in monthly instalments payable from 30/09/1992. The amount of R943 127,26 included an amount of R121 739,30 in respect of insurance for this vehicle. According to the Applicant's replying affidavit this amount was the premium for the full 4 years and in the event of, for instance, the theft of the vehicle, there would be a payment to the Applicant by the insurer of premium payments relating to the remaining period of the rental agreement.

It is common cause that the aforesaid MAN mechanical horse was hijacked on 23 November 1992, i.e. within a period of two months after it was delivered to the Respondent. It is also common cause that the Applicant was at the time of the theft the owner of the vehicle and therefore entitled to the money payable by the insurer in terms of the aforesaid insurance agreement. According to the Applicant an amount of R498 465,00 was in fact paid to it by the insurer in settlement of its claim in relation to the theft of the vehicle.

The Respondent now alleges that he, as a result of the circumstances set out above, is entitled to a refund of the "deposit" of R150 000,00 paid by him to the Applicant and that he in fact became entitled to payment of the said amount on the date that the insurer made the payment to the Applicant. He goes on to say that the Applicant should have either refunded the amount of R150 000,00 to him or should have allocated the amount to the instalments payable by him to the Applicant in respect of the two trailers. He furthermore states that if the said amount had been credited to the two accounts relating to the trailers a substantial amount of the interest claimed by the Applicant would not be claimable and that he in fact would be entitled to a refund of a sum of the money already paid."

The Applicant denies that it had any obligation whatsoever to refund the amount of R150 000,00 to the Respondent. As indicated earlier it also denies that the said amount was paid as a deposit and says that it was paid as initial rental. It furthermore states that the payment of the amount of R150 000,00 is irrelevant to the present application as it arises out of an entirely independent agreement relating to the mechanical horse.

Except for stating that he is entitled to a refund of the amount of R150 000,00 the Respondent failed to set out any factual or legal basis for his contention that the amount became repayable to him. The only possible source of such obligation on the part of the Applicant would be the agreement concluded between the parties in respect of the mechanical horse. The Respondent, however, failed to attach a copy of the said agreement and does not even allege that the agreement provided for such a refund. It may be that the said agreement was identical to the agreements in respect of the two trailers. Even if it can be accepted that this is the position it is of no assistance to the Respondent as the said agreements certainly do not provide for a refund of the initial payment in the circumstances under discussion.

In the premises I come to the conclusion that the Respondent did not even make out a *prima facie* case that he became entitled to a refund of the amount of Rl 50 000,00

paid by him in respect of the mechanicalJiorse^*r:r*_

It would, in any event, appear that the question as to whether the Respondent became entitled to the aforesaid refund is actually irrelevant to the present dispute between the parties. It is clear that the Respondent's reliance on the refund of R150 000,00 can only be of assistance to him in the present circumstances if it can be said that the Respondent was in law entitled to set off the amount of R150 000,00 against his own indebtedness to the Applicant in respect of the two trailers.

In this regard it is of importance to note that the parties specifically agreed that all rentals and other payments due shall be paid <u>without deductions</u> strictly on due date (clause 5.4.2) and that the Respondent shall not be entitled to withhold payment of any rentals <u>for any reason whatsoever</u> (clause 5.3).

In these circumstances it was clearly the intention of the parties that the lessee (Respondent) would not be entitled to raise set off as a defence in the event of his failure to pay the monthly instalments. That they were in law entitled to

conclude such an agreement is clear from the decision Wynns Car Care Products (Pry) Ltd. v First National Industrial Bank 1991 (2) SA 754 AD.

See also: Altech Data (Try) Ltd. v M B Technologies (Pry) Ltd. 1998 (3) SA 748 WLD

I must add here that nothing, of course, prevented the Respondent from instituting proceedings for the recovery of the amount of R150 000,00 against the Applicant. Not only did the Respondent failed to do so but it seems that he also did not, prior to these proceedings, informed the Applicant of his contention that he is entitled to "a _:1 refund of the said amount or demanded that it be repaid to him or allocated to his accounts relating to the two trailers.

In the circumstances it would clearly serve no purpose to refer this alleged issue to oral evidence and I therefore decline to exercise the discretion conferred on me in this regard in favour of the Respondent.

As far as the merits are concerned Mr Vaatz requested the Court to first of all consider and decide the Respondent's counterclaim for repayment of the amount of R150 000,00. The difficulty that I have with this request is that the Respondent did not, on the papers before me, institute any counterclaim or counter application of whatever **nature against the Appellant. Be that as it may, I have already came to the conclusion, for the reasons stated above, that the Respondent failed to make out even a** *prima facie* **case that he is entitled to the alleged refund.**

I have also dealt with the Respondent's contention that the agreements are not ordinary rental agreements but in fact "financial lease agreements". In this regard I found that the parties very clearly and definitely defined their respective roles and that it was specifically agreed that "nothing in (the) agreement shall be construed as conferring on the lessee any title, right or interest in the goods other than as lessee" (preamble at top of page 2)

TheJRespondent also relies on the fact that a material representation was made to him : prior to the conclusion of

the agreements, i.e. that he would become the owner of the trailers at the expiry of the agreements. This allegation is denied by the Applicant. Even if it be accepted that the alleged representation was made to the Respondent it is of no assistance to him in the present proceedings as he, at the time of the conclusion of the agreement, expressly agreed that he would only have the rights of a lessee in the two trailers and nothing more. As indicated above the Respondent did not apply for the rectification of the agreement in this regard. It is trite law that a lessee does not have the right to claim ownership of the goods at the expiry of an agreement of lease. It should also be noted that any agreement conferring ownership in the goods on the lessee at the expiry of the agreement would certainly provide that ownership will only pass if and when the instalments payable in terms thereof have been paid in full. In the matter under discussion it is common cause that the

Respondent did not pay all the instalments and that he is in fact in arrear in a considerable amount.

The possible defence relating to the applicability of the Credit Agreements Act 1980 (Act 75 of 1980) (hereinafter referred to as "the Act) was raised for the first time by Mr Vaatz in his heads of argument. I say "possible" defence because Mr Vaatz himself stated that the defence would only be available to the Respondent if the provisions of the said Act are in fact applicable to the transactions under discussion.

Clause 23 of each agreement provides the agreement shall in all respects be governed and construed in accordance with the laws of the Republic of South Africa. In the pre-amble to the agreement the following is stated -regarding the applicability of the Act:

> "Should the Act apply to this transaction then clauses 30 and 31 shall not be applicable to this agreement. Whether or not the Act applies hereto is reflected in the transaction schedule hereunder."

Unfortunately the parties did not indicate in the said schedule whether the Act applies or not. The Respondent did not place any evidence before me to prove that the provisions of the Credit Agreement Act of the Republic of South Africa

apply to the interlink trailers forming the subject matter of the agreements between the parties. Where the Respondent wishes to rely on the defence that the Applicant did not comply with the provisions of the South African Act, the onus certainly lies upon him to prove what the law is and that it in fact applies to the transactions under discussion. Schapiro v Schapiro 1904 TS 673

Failing such proof the Court must apply the Namibian law, adopting the fiction that the foreign law is the same as the law of Namibia. This presumption does not only apply to the common law but also to law governed by a statute.

Bank of Lisbon v Qptichem Kunsmis (Edmsl Bpk 1970 (1) SA 447 (W)

Prior to Independence the Credit Agreements Act, 1980 (Act 75 of 1980) of the Republic of South Africa was applicable in Namibia. In terms of section 140 of the Namibian Constitution the said Act remained in force in the Republic of Namibia until

repealed or amended by Act of Parliament.

In terms of section 2 of the Act the provisions of the Act shall only apply to such agreements or categories of agreements as the Minister may determine from time to time by notice in the Gazette. This was in fact done by the Minister in GN R2573 of 12 December 1980. A perusal of this notice clearly shows that the provisions of the Act do not apply to interlink trailers.

See **also:** Dorbyl Vehicle Trading and Finance Company (Pry) Ltd. v K Luchtenborg, t/a Lugtenborg Transport, unreported decision of the TPD, given on 24/11/1992.

As the Act does not apply to the transactions between the parties the Respondent can obviously not rely on the non

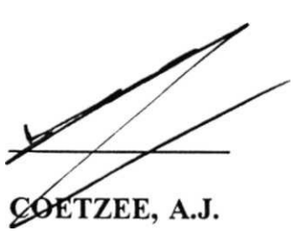
compliance with section 11 of the Act.

From the aforegoing it is clear that the Respondent cannot rely on any of the defences raised by him or on his behalf by Mr Vaatz. If follows that the Applicant is entitled to the relief claimed by it. For practical reasons it is, however, necessary that prayer 3 be amended to read as follows:

> "3. That failing the return of the trailers to the Applicant forthwith, the Sheriff or his Deputy be authorised and directed to take possession of the trailers, wherever the same may be found and to deliver same to a representative of the Applicant to be identified by the Applicant's attorneys of record."

Mr Vaatz indicated during argument that he does not object to the prayer being so amended.

Subject to the said amendment an order is granted in terms of prayers 1 to 5 of the Applicant's notice of motion.



COETZEE, A.J.

ON BEHALF OF APPLICANT Instructed by: **AM ENGELBRECHT Fisher, Quarmby & Pfeifer**

ON BEHALF OF RESPONDENT

A VAATZ

Instructed by: **A Vaatz &Partners**