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IN THE HIGH COURT OF SWAZILAND

CASE NO.2491/99

IN THE MATTER BETWEEN:

BARLOWS CENTRAL FINANCE CORPORTATION (PTY) LTD t/a B.R.L. Leasing — **APPLICANT**

AND

JONCON (PTY) LIMITED — **RESPONDENT**

CORAM : **MASUKU J.**

For Applicant : **Ms J.M. Van der Walt (with Mr J.N. Hlophe, Millin & Currie)**

For Respondent : **No appearance**

JUDGEMENT
28/12/99

In this matter, the Applicant seeks relief, which was fully set out in my ruling on a point *in limine* raised by the Respondent. I find it unnecessary to repeat the same.

The point *in limine* was argued by Mr D.A. Smith S.C. on the 10th December, 1999, on which date I reserved judgement. Through the Office of the Registrar of this Court; the parties' representatives were informed that I was ready to hand down an Order on the17thDecember 1999. On that day, both parties were represented. Mr N.J. Hlophe represented the Applicant whilst Mr T.M. Simelane represented the Respondent.

I advised both parties' representatives that I declined to uphold the Respondents' point *in limine*, indicating that the reasons therefor would be delivered in due course. That has been done. In the presence of both parties' representatives, the matter was postponed for argument on the merits to the 23rd December, 1999. I requested Mr Simelane to ensure that his client's Counsel was duly notified of the date due to the fact that the matter was enrolled on an urgent basis.

On the 23rd December, 1999, there was no appearance by the Respondent's representatives. Ms Van der Walt advised me that her instructing attorney, who was present in Court had made attempts to contact the officers of the Respondent's attorneys to confirm that the matter was to proceed but to no avail.

Ms Van der Walt further informed the Court that she had been advised by her instructing attorney that he had received a message on his desk which was said to have emanated from Mr T.M. Simelane of the Respondent's attorneys. The message was to the effect that the Respondent intended appealing against the Court's ruling on the point *in limine*. Ms Van der Walt confirmed that according to her instructions no notice of appeal had been served on her instructing attorneys. I also directed a member of this Court's staff to go to the records office to ascertain if any Notice of Appeal had been filed. The response was that none had been filed.

I proceeded with the matter on the basis that no appeal had been lodged and listened to submissions by Ms. Van der Walt, who pressed for the Orders prayed for in the notice of Motion. She argued that there was no Notice of Appeal lodged and that the Court was entitled to proceed to hear the matter. She further argued that even if a Notice of Appeal was filed, the order appealed against was not appealable. I have doubts about the correctness of that submission though.

I must at the outset express my disapproval of the behaviour of the Respondent's attorneys in neglecting and / or failing to attend Court on the 23rd December, 1999, notwithstanding Notice. No explanation or apology was tendered to this Court for the non-appearance. This I consider to be an act tantamount to denigrating the dignity and authority of this Court. This must be frowned upon and condemned in the strongest possible terms because it is done by duly qualified practitioners who are officers of this Court and who took an

oath of office, which includes according this Court the honour and respect it deserves. Such conduct by the Respondent's attorneys deserves censure. Their absence harms the Court in the sense that it does not have the benefit of their assistance in discharging its responsibility.

Having listened to Ms van der Walt's submissions, there – being no appearance for the Respondent, I granted an Order in the following terms' and advised that the reasons therefor would be handed down in due course.

1. That the Sheriff or his lawful Deputy be and is hereby, pending the outcome of proceedings to be instituted for relief set out in paragraph 2.1 to 2.5, authorised and directed to attach and remove the vehicles set out in prayer 2.2.1 to 2.2.4, wherever the same may be found and to hold same in safe custody under attachment.

2. that the Applicant be and is hereby ordered to institute such proceedings within thirty (30) days of the grant of the Order, failing which the attachment shall be discharged.

3. that costs are reserved for the Court to determine the prayers set out in 2.1 to 2.5.

The reasons for the Order now follow.

The Applicant and the Respondent entered into four instalments sale agreements in respect of earth moving equipment. The agreements were entered into at Isando in the Republic of South Africa and where both parties were duly represented.

In terms of the agreements, the Buyer (Respondent) agreed *inter alia* that if it should default in the punctual payment of any instalment or other amount, falling due, or if it failed to observe or perform any other of the terms, conditions and/or obligations of the agreement, or commit any act of insolvency; suffer any default judgement, which remains unsatisfied for seven days or be refused rescission within fourteen days of the default judgement, then the Seller (Applicant) shall be entitled in its election and without prejudice to any of its other rights to:

(i) claim immediate payment of all amounts payable in terms thereof, irrespective of whether or not such amounts are due at that stage; or

(ii) cancel the agreement, take repossession of the goods, retain all payments already made in terms of the agreement by the Buyer and to claim as liquidated damages, payment of the difference between the balance outstanding and the resale value of the goods determined in accordance with clause 10 b.

It is common cause that the Respondent has failed to effect payment of monies due and on due dates to the Applicant in respect of all four agreements. All that the Respondent is content to say in the face of the Applicant's allegations that the Respondent has failed to make payment in terms of the agreements is the following:-

> *"I admit that the Respondent has failed to make payment, but wish to aver that, the Applicant has been charging Respondent exorbitant interests, which interest is more than the arrears claimed. This fact is well known to Morty (i.e. Applicant's representative) who attended several meetings held by myself (i.e. Andries Van Wyk) on behalf of the Respondent and the Applicant to discuss the issue of the overcharging of interest."*

Morty, who filed Affidavits for and on the Applicant's behalf responded as follows:-

15.1 "There was only one meeting which meeting was between Barlows Isando and the Respondent at which meeting I was present. I deny that the reason for this meeting as aforesaid was to discuss the rate of interest chargeable in terms of the agreements and I further deny that interest was at any time overcharged. This meeting related to trade in prices only.

15.2 I did, however, have certain telephone conversations with Mr Van Wyk during which the question of interest was discussed. I advised Mr Van Wyk that the Applicant stood by its position on the question of interest:

From the foregoing, the Respondent agrees that it is in arrears but states that is withholding payment because of exorbitant interest charges. This can hardly be said to be a good or proper defence to the allegation of breach of the agreement. The Respondent undertook to make payments at specified intervals and its failure to do so constitutes a breach of the agreement in terms of the provisions of clause 10. This fact entitles the Applicant to invoke the provisions of clause 10 (a) (i) or (ii) at its election.

The Applicant applies for interim attachment of the goods on the grounds that the merx is being used by the Respondent, resulting in its deterioration in value. The Applicant further alleges that notwithstanding its failure to make regular and punctual payments, the Respondent continues to benefit by using the merx resulting in a doubt whether the Applicant will recover the amounts owing. It is further alleged that the Respondent's failure to effect payments in terms of the agreement is indicative of its inability to pay its debts and is an *inducium* that the Respondent probably cannot afford to maintain the vehicles resulting in deterioration and depreciation of the vehicles.

On the other hand the Respondent states that it services the articles on a regular basis and the articles are in good order and condition. This is however no answer to the Applicant's right to invoke the provisions of Clause 10 (a) (i) or (ii) of the Agreements. If it were to be accepted, as contends the Respondent that the Applicant has been dilatory in taking steps to remedy the irreparable harm, that still does not entitle the Respondent to use the vehicle without paying for them and continue to refuse to hand them over to the Applicant as the agreement requires in the event of a breach.

I am accordingly satisfied that from the Applicant's and the Respondent's papers, the Respondent is in breach of the agreement. It cannot now be stated with any degree of precision what the amount of the arrears is in respect of each agreement. That can be proved in due course in a trial. I am also satisfied that the Applicant, in the event of a breach of the agreement which has been proved is entitled, in terms of clause 10 (a) (ii) to cancel the agreement and take possession of the merx.

What the Applicant requires for now is an interim attachment of the goods, to reduce the wear and tear occasioned to the goods by use, pending an action to be instituted by the Applicant for *inter alia,* termination of the agreements, delivery of the merx to the

Applicant, payment of monies owing in respect of the agreements and costs. From the papers filed

and argument by the Applicant's Counsel, coupled with the contents of the Respondent's Affidavits, I come to the view that the Applicant is entitled to the Order for attachment set out in prayer 2.6 of the Notice of Motion and it is accordingly ordered.

T.S. MASUKU

JUDGE