IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.851/00

In the matter between:

AFINTA FINANCIAL SERVICES (PTY) LTD	**APPLICANT**
AND	
SWAZI RICE (PTY) LTD	**RESPONDENT**

CORAM	**:**	**ANNANDALE J**
FOR THE APPLICANT	**:**	**P.R. DUNSEITH**
FOR THE RESPONDENT	**:**	**P.M. SHILUBANE**

JUDGMENT

19TH JUNE 2001

Under a certificate of urgency, applicant initially approached the court by way of Notice of application on 6th April 2001 for an order in the following forms:-

1. Waiving the usual requirements of the rules of Court regarding notice, service and form of applications and hearing the application as one of urgency.
2. Declaring the Vehicle Rental Agreement entered into between the parties on or about 7th July to be cancelled.
3. Directing and ordering the respondent to restore the following vehicle to the possession of the applicant within 48 hours:-

CERTAIN	:	AMC 894 Truck
YEAR	:	1998
REGISTRATION NUMBER	:	SD911CN
ENGINE NUMBER	:	9804506
CHASSIS NUMBER	:	ABA894Z0198E10050
COLOUR	:	WHITE

(hereinafter referred to as “the vehicle”)

4. Should the respondent fail to comply with paragraph 3 above, then the Sheriff or his Deputy is authorised and directed to seize and attach such vehicle and restore it to the possession of the applicant.
5. Costs.
6. In the event of this Honourable Court ordering a *rule nisi* in terms of the above prayers, alternatively postponing the application in respect of the above prayers, then the applicant prays for an interim order in the following terms:-
    6.1. Directing and ordering the respondent to deliver the said vehicle within 48 hours into the custody of the applicant, which shall retain the said vehicle pending final determination of the application.
    6.2. Should the respondent fail to comply with paragraph 6.1 above, then the Sheriff or his Deputy is authorised and directed to seize and attach such vehicle and to deliver it into the custody of the applicant, which shall retain the said vehicle pending the final determination,
7. Further or alternative relief”.

After an initial hearing of the parties in open court, it was resolved in chambers, following lengthy discussions of the issues involved, to enter the following interim agreement by consent:-

> “Ordered in terms of prayer 6; 7.1 as amended to include ‘applicant shall not dispose of, use, alienate or remove the vehicle from its premises’ and 6.2, and the matter was postponed to the contested rolls of the Motion Court on 27th April 2001.

Subsequently, following a further postponement, the same issues initially raised as points of contention, came to be heard.

In essence, the point to be decided is which law applies to the agreement; South African or Swazi, and how it will affect the litigants. Should the Credit Agreements Act of 1980, promulgated in the Republic of South Africa be applicable, the provisions of that Act will preclude applicant form obtaining the relief it seeks, i.e. for an order declaring the “Vehicle Rental Agreement” to be cancelled and confirming repossession of the vehicle.

An unopposed application is granted, as asked for by applicant, to amend the erroneous reference to the South African Credit Agreements Act of 1981, to be amended to read an Act of 1980 – this is the contentious Act referred to in Clause 21 of the Agreement.

Section 11 of the contentious South African Agreements Act has peremptory requirements that have to be complied with before a credit grantor may call for the credit receivers contract to be cancelled and retain possession of the goods concerned, with the resultant final consequences in monetary obligations.

The point of law raised by Mr. Shilubane on behalf of respondent is that the South African Credit Agreements Act of 1980 (Sections 11 and 19) applies, barring the relief sought.

Applicant relies on the contract entered between the parties to exclude the operation of that Act.

The written "Rental/Lease Agreement" was entered into between the parties on the 27th July 2000 at Matsapa, Swaziland. Above the signatures of the litigants appears the following words:-

> "I hereby acknowledge that I have read, understood and agreed to the conditions as laid down by Afinta Financial Services (Pty) Ltd as contained in the Rental Agreement attached hereto marked annexure A and annexure B".

Annexure A sets out details of Respondent Company, its bank particulars, names of its directors, sureties, vehicle particulars and payment details.

Annexure B is titled "Vehicle Rental Agreement". It is a lengthy detailed exposition of terms and conditions which includes *inter alia* details of acknowledgement of the fair and fine receipt of the vehicle itself, obligations of the lessee concerning its maintenance and repairs, usage conditions and a plethora of further contractual details with various obligations, warranties etcetera.

From a mere casual reading the Agreement, it is apparent that it was drafted with the aim of using it in the Republic of South Africa by Afinta, the applicant. I say so due to the following inclusions in the body of the *pro forma* contractual clauses:-

5.5.2.3 "Outside the Republic of South Africa without the written consent of the lessor… (pertaining liability of the lessee through acts of negligence and were the vehicle may be used)

12.1.3 The lessee will immediately report such occurrence to the lessor and/or the South African Police…

16.1…any claim which it may have against the Lessee in terms hereof in the Magistrates Court of the District of Johannesburg…or in the Witwatersrand Local Division of the Supreme Court of South Africa…

16.2 This agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa.

21 Nothing in this agreement shall be interpreted as implying an intention by the parties that this agreement shall be subject to the Usury Act, 1968 as amended, or to the Credits (sic) Agreements Act, 1981 (sic) or any amendment or statutory re-enactment of the same, this agreement being entered into by the parties in the common belief and on the common understanding that the said Acts do not hereby waives to the extent permitted, all rights under and in terms of the aforesaid Acts".

As already done above, the incorrect reference to the year "1981" of the South African Credit Agreements Act has been amended to read "1980".

The mere fact that the contract was drafted for use in South African does not *per se* makes it unsuitable for use in Swaziland. For present purposes it is not necessary to decide, for instance, whether the matter should have been brought to the High Court of Swaziland, or the Johannesburg courts agreed in the contract. What does have to be decided is whether the South African Credit Agreements Act is applicable, or not.

In **BURGER V CENTRAL SOUTH AFRICAN RAILWAYS** 1903 TS 571, an agent signed a consignment note, which was also signed by an official of the Railways, and it was stated on the face of it that it was issued subject to the goods traffic regulations in force on the railway, in which there was a clause that materially limited liability in the case of goods lost in transit. It was held that the reference to the regulations on the consignment note, though not actually printed as part of it, did not alter the legal position of the consignor. Otherwise put, a contract can include separate or additional terms to be incorporated by way of reference to it in the written agreement between contracting parties. Thus, the inclusion of the

reference to a separate set of governing rules (the Credit Agreements Act) in a contract like the present, can include or exclude its operation and effect on the applicable provisions of that Act.

In **BHIKHAGEE V SOUTHERN AVIATION (PTY) LTD** 1949 (4) SA 105 (E) Gardner J followed the further principle enunciated in the Burger case (*supra)* 40 years later, quoting from page 578:-

> "It is a sound principle of our law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature."

In casu, the ordinary meaning and effect of the words in clause 21 of the Rental/Lease Agreement is that nothing in their agreement shall be subject to the South African Credit Agreements Act of 1980. The parties have clearly agreed to it. Respondent is precluded from raising, as a point of law, that sections 19 and 11 of that Act applies to the application and that its legal effect is that applicant is not entitled to the relief being claimed in the application. It may well be that this point of law could have had merits if it was to be raised in South Africa, if the Act prohibits a waiver of its operation.

To include or exclude reference to a separate set of rules and terms, which by agreement forms part of the contractual terms or, us here, are agreed not to form part of the contract, falls to be within the contractual freedom of the parties to a contract. This is of course subject to the ability to do so in as far as the law permits. Certain Acts of Parliament have mandatory applicability on contractual terms, which may prohibit exclusion of its provisions in certain agreements. Where parties enter into an agreement in Swaziland, they have the liberty to exclude the operation of a South African Act if they chose to do so, even if it would not be permissible to do so in South Africa.

Here, both the South African Usury and Credit Agreements Acts have been agreed to between applicant and respondent not to apply to their contract. Respondent cannot now want to change the contractual terms and require the provisions of an excluded Act to first be applied before the applicant may proceed o its rights under their mutually agreed contract.

Accordingly, the point of law raised by respondent is dismissed – whatever the terms of the South African Credit and Usury Acts are, it does not apply to this contract and there is no point on proving those terms, whatever effect it may have had on this particular agreement.

Mr. Shilubane wanted an opportunity to argue on the merits of those excluded South African Acts if it was found to be applicable. For the reasons above, that consideration falls by the wayside.

This brings the matter back to its original consideration on the merits. Applicant seeks a final order to declare the contract labelled "Rental/Lease Agreement", dated 7th July 2000, to be cancelled, confirming the repossession, and costs. Interim repossession has already been ordered on the 6th April 2001.

Clause 13.3 of the Agreement provides that:-

> "Upon the happening of any of the events specified in 13.2 (13.2.1 states that should the lessee fail to make any payment which is due and payable in terms of this agreement on the due date thereof or breach any of the provisions of this agreement) the lessor shall be entitled without prejudice to any other right which it otherwise may have (13.3.1) to immediately and without notice cancel this agreement in respect of any of the vehicles covered by this agreement, take possession of the said vehicles and (13.2.2) recover from the lessee the difference between (13.3.1) the total of the rentals which would have been payable in terms of the agreement/s cancelled (whether such amounts are then due for payment or not) if the said agreement had continued in force for the contract period, plus the aggregate of the actual costs to the lessor of repairing any damage to the vehicles and the cost to the lessor of placing the vehicle in the same condition as it was on the effective date, fair wear and tear excepted; and 13.3.2.2 the total amount of the rentals already paid by the lessee to the lessor in terms of the agreement in respect of the vehicle in question; and to recover from the lessee all legal fees, costs and disbursements…on a scale as between an attorney and his own client".

These are clear and ambiguous terms that govern the results of failure to make any due payment. It is what the parties have contractually agreed to.

Provision has also been made for the event where payments are withheld or set off. Clause 26.3 reads:

> "The lessor shall be entitled to appropriate any amount received from or on behalf of the lessee to any indebtedness of the Lessee to the Lessor. The Lessee shall under no circumstances be entitled to withhold payment or claim set-off in respect of any amounts owing by the Lessee to the Lessor".

In its founding affidavit, applicant's authorised General Manager states the amount of arrears as at 15th March 2001 to be E31 891.01. Respondent's authorised director does admit being in arrears, in paragraph 6 of his opposing affidavit.

Respondent avers entitlement to set-off expenses incurred due to repairs effected and alleges latent defects in the vehicle. These issues are not such that it precludes the relief applicant applies for. It may or may not come into play at the time applicant has calculated its losses and damages and institutes a separate action for recovery of those amounts.

For the reasons above it is ordered that:

1. The Vehicle Rental Agreement entered into between the parties on or about the 7th July 2000 be cancelled;
2. The interim repossession of the vehicle, certain AMC 894 truck bearing registration number SD911CN, provisionally ordered on the 6th April 2001, be confirmed; and
3. Costs for applicant, on an attorney and client scale.

J.P. ANNANDALE
JUDGE