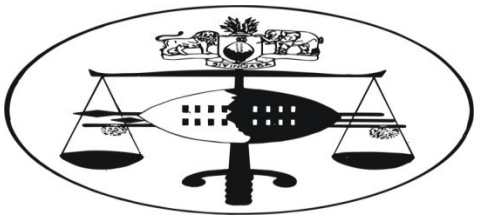

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CIVIL CASE NO: 155/17

In the matter between:

STANDARD BANK SWAZILAND LIMITED, VEHICLE APPELLANT

AND ASSET FINANCE

AND

MDUDUZI GIFT BUTHELEZI	1ST RESPONDENT
ALPHA INNOVATIVE SOLUTIONS (PTY) LTD	2ND RESPONDENT
CENTRAL MOTOR REGISTRY	3RD RESPONDENT
NATIONAL COMMISSIONER OF POLICE RESPONDENT	4TH
THE ATTORNEY GENERAL	5TH RESPONDENT

Neutral Citation:	*Standard Bank Swaziland Limited, Vehicle and Asset Finance vs. Mduduzi Gift Buthelezi & 4 others (155/2017 [2017] SZHC (90) (31 May 2076)*
Coram:	**MLANGENI J.**
Heard:	**05 May 2017**

Delivered: **31 May 2017**

Summary: *Law of contract – Written lease agreement in respect of motor vehicles and equipment – agreement not making provision for notice of cancellation but lessor issuing letter of demand prior to court process – letter of demand not specifying the intention to cancel the agreement – court a quo holding that common law requirement of notice of cancellation should have been complied with by the lessor.*

On appeal, held:

1. *the parties having expressly agreed the terms applicable, the effect was to exclude the common law requirement;*
2. *the lessor, by issuing the letters of demand, did not thereby make the common law requirement applicable.*
3. *appeal upheld with costs.*

JUDGMENT

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[1] Financial institutions, especially banks and other money lenders, are like the woof and warp of commercial and economic life of a vast majority of entrepreneurs in any given society. For many, it is impossible to start up without financial assistance in the form of borrowed capital or lease of equipment, and for most it is impossible to sustain operations without their assistance in the form of overdrafts,

bridging finance, etcetera. And then there are social demands as well – for a personal motor vehicle, to build a house or to pay school fees – for which we may look to financial institutions. In today's world one could well describe these institutions as the life line of social development, a well from which just about everyone, directly or indirectly, drinks. It is an unfortunate reality, however, that the vicissitudes of life are such that a customer – bank relationship that starts off with a pleasant shaking of hands sometimes ends in a stand – off occasioned by default on the part of the customer. The stand – off often escalates to acrimony, with one party accusing the other of this and that – excessive interest, high service charges, late payment or non-payment.

[2] The financial institutions are in the business for making profit, and the sustainability of their operations is predicated fully upon repayment by those who receive loans and other forms of financial advances. The advent of the lease model has made equipment and motor vehicles of all classes more readily accessible for personal and commercial use, due to the fact that collateral is not required. The asset that is financed serves as the only security in favour of the finance giver.

[3] The written agreements that are executed by the parties are usually long and prolix, often going into numerous pages of medium and small print that is intended to cover every possible eventuality. Such agreements are standard and are always drafted by the lender and signed by both parties in genuine anticipation of mutual fulfillment. If the deal goes well no one has issues with the other. If the deal goes wrong there might be serious disagreements regarding what should happen, when and how. The present appeal from the Magistrate's Court, Mbabane, is one such matter.

[4] The Appellant is Standard Bank Swaziland Limited, Vehicle and Asset Finance division. It concluded several concurrent finance lease agreements with the Respondents, Alpha Innovative Solutions (Pty) Limited and Mduduzi Gift Buthelezi, in different combinations. In some transactions Mr. Buthelezi was alone and in others he was with the corporate entity that he is a director of, Alpha Innovative Solutions (Pty) Limited. In this judgment I may, for convenience, refer to the Appellant as ***'the bank'*** or ***'the lessor'***, and to the Respondent(s) as the lessee(s).

[5] The total value of the lease agreements is in excess of E2, 000, 000-00. They were concluded at different times during the period August

2014 and December 2015. The total monthly rentals on all the assets was approximately E45, 000-00, and at the time applications were made to court to repossess the assets the total amount of arrears was said to be approximately E250, 000-00 accumulated over a period of several months. The applications were moved simultaneously in December 2016, ex parte and on certificates of urgency, in the Magistrate's Court, Mbabane.

[6] Ex facie the applications two issues arise for a passing comment. One is in respect of the averments of urgency and the other one is in respect of citing the Police and, by necessity, the Attorney General. I deal with the issue of urgency first.

URGENCY

6.1 Letters of demand issued by the bank on the 14th September 2016 suggest that there was already default in respect of all the accounts, hence the demand for immediate payment. The actual applications for repossession were moved on the 22nd December 2016, some three months later. I need not go to the trouble of outlining the law applicable to urgency. Suffice to mention that in the majority of such cases there is absolutely no legal basis for the procedure of urgency to be invoked. In just about every such case the lessee defaults for a month or two, then in terms of the

agreement a notice of default might be issued, followed with legal action several months later, as in this particular case. The only time where the bank would be entitled to allege urgency and succeed is where it swings into action immediately upon the first default, or soon thereafter, not several months later.

6.2 The practice of moving such applications ex parte is well settled in this jurisdiction, resulting in the issuance of a rule nisi returnable at a later date that allows the lessee reasonable time, with the common law right to anticipate the return date upon short notice. The ineptitude of legal practitioners, and excessive tolerance by the courts, has allowed the blurring of the distinction between an ex parte application and an urgent one, the assumption being that urgency is a requirement of the ex parte procedure. This is equally common in applications to confirm the landlord's hypothec where a tenant who is in arrears for six months or one year is suddenly ambushed with an urgent and ex parte application. It is an indefensible example of abuse of urgency and our courts need to start seeing this in an appropriate light and adopting appropriate punitive measures.

6.3 In respect of the leases over assets the ex parte procedure is justified on the basis that the position of the lessor is obviously very vulnerable, and cases are known where the assets have

been concealed and never recovered, leaving the lessor without redress, especially where the lessee has no other known assets. It is therefore important to secure the only ***'security'***, the leased asset, before setting in motion the substantial remedial processes. The above statement of the law is so entrenched in our jurisdiction that any practitioner of the law ought to know it, and I am of the view that there is no need in this judgment to go into a detailed discussion of ex parte and urgent applications, and the requirements thereof.

CITATION OF THE POLICE

6.4 It is not the business of the Police to execute civil processes of the court. That is the business of the Sheriff and the Messengers of Court. It is demanding too much of the already burdened Police Service to expect its routine support in executing civil process – indeed, that would take substantial valuable time of the service, at the expense of its core business. It is accepted, however, that Messengers and Deputy Sheriffs are sometimes confronted with dangerous situations, especially where there is violent resistance to execution or a real threat of violence. Only then, and on the basis of keeping law and order, is The National Commissioner of Police to be cited and requested to assist. The

Messenger of Court or Deputy Sheriff must, in an affidavit, clearly outline the challenges that he or she has encountered and make it possible to determine, objectively, that the intervention of the Police Service is required in order to ensure order during the process of execution.

APPLICATIONS AT THE COURT A QUO

[7] I now go back to the applications at the *court a quo*. The applications were granted, ex parte, with the result that the assets were attached judicially and removed from the possession of the lessee(s). The rules nisi also make reference to cancellation of the lease agreements and payment of certain amounts of money, the lessee being required to show cause why final orders should not be granted in those terms. For purposes of the present appeal it is not necessary for me to detail the terms of the rules nisi.

[8] Upon execution of the interim orders the lessee(s) anticipated the return date and in its opposition raised points of law and pleaded to the merits as well. The arguments were heard by Her Lordship N. Dlamini, Senior Magistrate Mbabane. Six points of law in limine were initially raised by the lessee, one was abandoned and another one was

conceded by the lessee. The one that was conceded was in respect of mis-joinder of the Police and the Attorney – General. I need not say more on this one. One of the others that were raised and argued in the *court a quo* was that the lessor had failed to comply with the common law requirement of giving the other party prior notice of cancellation. It is common cause that one of the final prayers sought was for cancellation of the lease agreements and the lessee argued that it ought to have been given prior written notice of this, in terms of the common law. The *court a quo* upheld this particular point of law, and the rule nisi was discharged on this basis alone. Hence the appeal.

APPEAL

[9] The notice of appeal states the grounds of appeal as follows:-

9.1 ***"The court a quo erred in both fact and law in that the Appellant did not comply with the common law provisions of cancellation of the Hire Purchase and Lease Agreements between the Appellant and the first Respondent."***

9.2 ***"The court a quo erred in law in holding that the Appellant acted outside the scope of the Hire Purchase Agreement between the Appellant and the First Respondent".***

This one was not pursued at the hearing of the appeal.

9.3 ***"The court a quo erred in law and in fact by not holding that the letters of demand suffice for purposes of cancellation per the provisions of common law."***

[10] The gist of the judgment a quo is at page 138 of the record of appeal. I reproduce it verbatim herein –

> ***"In as much as the agreement itself does not specify any mode of cancellation, but the Applicant has elected to write a letter to the Respondents notifying them of breach. And it then follows that the notice to cancel the agreement must be included in the letters.***
>
> ***It is my considered view that the Applicant failed to give Respondent notice of cancellation of the contract prior to coming to court…"***

[11] At the hearing of the appeal the lessor made a three - pronged argument, that is –

11.1 it had no legal obligation to give written notice of cancellation to the lessee.

11.2 assuming that there was such obligation, which is denied, then the letters of demand dated 14th September 2016 should suffice for the purpose;

11.3 consequences of breach were in any event known to the lessee, being expressly spelt out in the lease agreement per clause 12.

[12] I may also observe that the lessee is always aware of his or its obligation to make monthly payments or any other periodic payments, and is the first one to know when such payment has not been made. Even before the lessor resorts to its monthly returns to see who has paid and who has not paid, the lessee is aware that it has not paid. Banda C.J., as he then was, had this to say[1]:-

> ***"The Appellant was well aware what would happen in the event that he defaulted in making the payments agreed. There is no clause under the Bond which required the Respondent to give notice of any intended foreclosure."***

[13] In a situation where the agreement is in writing, and extensively spells out the terms and conditions applicable, to the exclusion of notice of cancellation, it would be asking too much of the lessor to require that it must give notice of cancellation. This is mainly based upon the consideration that the parties, by settling their own terms explicitly, have consciously excluded the common law principles that may be otherwise relevant and applicable[2]. During the hearing of the appeal I raised a question regarding the applicability of the '***intergration rule'***, otherwise known as ***'the parole evidence rule'***. A.J. Kerr outlines this rule in the following terms –

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[1] In the Supreme Court Case of **SIBONISO CLEMENT DLAMINI N.O. v DEPUTY SHERIFF HHOHHO REGION AND ANOTHER**

[2] See Standard Bank of South Africa Ltd. v Cohen, 1993 (3) SA 846;

"----when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transanction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied----"

In short, the agreement is what the written terms provide, nothing more and nothing less[3].

[14] It is common cause that clause 12, which is on breach, has no requirement for a notice of cancellation, hence I see no need to resort to the common law requirement of notice. In any event such requirement has the effect of over – burdening a finance giver who has, in the spirit of mutual benefit, advanced monies which, in certain cases, are quite substantial. I therefore agree with the Appellant that it had no legal obligation to give written notice of cancellation, and that the common law requirement does not apply in the circumstances of this particular case.

[15] The *court a quo* held that the lessor, having elected to send a letter of demand on the 14th September 2016, thereby brought upon itself the legal obligation to specifically declare its intention to cancel the contract, and because it did not do so it thereby acted in breach of the

[3] A.J. Kerr, The Principles of the Law of Contract, 6th Ed, p 348.

common law requirement. I respectfully disagree with this line of reasoning. The issue is more cut – and – dried than that: either there is a legal obligation or there isn't. And because the parties have expressly excluded such obligation in their agreement the lessor cannot, through the back door as it were, bring in such requirement just because it went the extra mile by demanding certain things of the lessee. In the *court a quo* Her Lordship appears to have been persuaded by the authority of the case of **SWART v VOSLOO[4].** I respectfully think that the case of Swart is easily distinguished from the one in *casu*. In that case the relevant clause enjoined the lessor **"to declare this lease cancelled and terminated forthwith."** Clearly, an act of declaration requires communication, and in that particular case the communication did not come to the attention of the lessee until after he had exercised his option to purchase the property. The word ***"declare"*** makes all the difference, because it rules out a silent and unilateral stance. In the present case the relevant portion is ***"----immediately cancel this agreement, obtain possession of the goods and recover----"***. This is what the bank sought to do in approaching the *court a quo*. There is no legal basis upon which it can be required to do more, especially in view of the letters of demand which were not even required by the lease agreement.

[4] 1965 (1) SA 100 AD. See page 137 of the Book where Her Lordship quotes from page 115 of the judgment in **SWART v VOLSOO.**

[16] Mr. Nkomondze for the Respondents advanced a very persuasive argument, to the effect that in terms of clause12 the lessor has an election whether to claim the arrears and let the lease agreement continue, or ***"cancel the agreement, obtain possession of the goods and recover from lessee payment of all payables----"***. Because of the two inconsistent options, goes the argument, it is imperative that a notice must be given by the lessor which spells out the option sought to be exercised. For the reason that the agreement does not spell out such obligation, I find that I cannot hold that such obligation exists. But over and above that, the option, as stated in the agreement, must not be read in a pedantic manner that suggests that the lessor must first cancel the agreement, then obtain possession of the goods, then recover from the lessee payment of all payables – in that order. Inasmuch as cancellation can be a unilateral act of one of the parties, there is nothing wrong with the lessor instituting court process that seeks to cancel the agreement and simultaneously claim ancillary relief as spelt out in the agreement.

DUTY OF DISCLOSURE

[17] In its ex parte application the lessor did not disclose the fact that an amount of about E10, 000-00 was paid by the lessee subsequent to the letters of demand and prior to instituting the legal process that is the

subject of this appeal. Further, that the letters of demand were not disclosed in the founding papers, only being disclosed in reply, in the same way that the payment was admitted in reply. The Respondents' argument is that this failure of disclosure is a sufficient ground upon which the rule nisi could be competently discharged. I am not certain that the two issues mentioned above are of such a nature that had the learned Magistrate who issued the rule nisi been aware of then he might not have issued the rule[5]. But I do not need to interrogate this aspect because it is not the subject of appeal, and the Respondents have not filed a counter - appeal in which they canvass the argument that there are other legal grounds upon which the rule stood to be discharged. Even if I assume that arguments in this regard were made in the court a quo, they are not a subject in this appeal.

[18] On the basis of the above, the appeal is upheld with costs. I therefore substitute the Learned Magistrate's order with the following orders –

18.1 The rule nisi dated 23/12/2016 in respect of case numbers 4637/16, 4638/16, 4639/16, 4644/16 and 4646/16 is hereby confirmed.

[5] The facts not disclosed must not only be relevant but they must also be such that the court **"might"** not have issued the rule nisi. The court exercises discretion. See **HVW**, The Civil Practice of The Supreme Court of South Africa, 4th Ed, p 137.

18.2 Costs at attorney-client scale as provided for in the lease agreement, including costs of appeal.

T.M. MLANGENI

JUDGE OF THE HIGH COURT

FOR APPELLANTS: **MR C.A. HLATSHWAYO, WITH T.L. DLAMINI**

FOR RESPONDENTS: **MR. M. NKOMONDZE**