CIV. CASE NO. 123/2001

In the matter between

AFINTA FINANCIAL SERVICES (PTY) LIMITED **APPLICANT**

And

LUKE MALINGA T/A LONG DISTANCE TRANSPORT **RESPONDENT**

Coram S.B. MAPHALALA – J
For Applicant MR. P. DUNSEITH
For Respondent MR. P. SHILUBANE

JUDGMENT
(28/05/2001)

This is an urgent application where the applicant seeks an order declaring a vehicle rental agreement to be cancelled and for repossession of the vehicle. An interim repossession order has been granted by consent of the respondent and the bus is in the possession of the applicant.

The parties have joined issue in this matter by the exchange of the pertinent affidavits. The matter came for arguments before me on the 6th April 2001, where the respondent raised a point ***in limine***. That the application is fatally defective because, firstly, the law governing the construction of the rental agreement is the law of South Africa and Swaziland. Secondly, in terms of Section 11 of the Credit Agreements Act, 1980 of South Africa the applicant was required to give notice by prepaid registered mail to remedy the breach within a period of not less than thirty days. Thirdly and lastly, the rental agreement does not comply with Section 4 of the Money

Lending and Credit Financing Act 1991 because the interest prescribed in the agreement is more than 10% per annum.

These points were argued at length by both counsel and I then reserved my judgement on the matter. I now proceed to give my judgement. However, before doing so I find it proper to outline the material facts giving rise to this matter. The facts are as follows. The applicant is a motor vehicle financing company having its principal place of business at Lot 502, King Mswati III Avenue, and Matsapha Industrial Sites. The respondent is a transport operator trading as Long Distance Transport. On or about the 20th July 2000, at or near Matsapha, Swaziland the applicant and the respondent entered into a rental agreement, a copy of which marked "AFS2" is annexed to the applicant's papers. In terms of which the applicant rented to the respondent a motor vehicle described as an AMC 30 seater Peoples Mover passenger bus bearing registration number SD 750 BN. In terms of annexure "AFS2". The parties agreed that the respondent would rent the applicant's vehicle for a period of 36 months, commencing on the 20th July 2000, and that the respondent would pay to the applicant a security deposit of E2, 000-00 and 36 monthly rental instalments of E5, 781-00 each commencing on the 30th August 2000, and payable on the 30th day of each succeeding month thereafter.

The following material terms are contained in the rental agreement "AFS2" and the annexure thereto:

> "9.1 should the respondent fail to make any payment which is due and payable in the terms of this agreement on the due day, date thereof, then the applicant shall be entitled to immediately and without notice:
>
> 9.1.1 cancel the rental agreement;
>
> 9.1.2 take possession of the vehicle; and
>
> 9.1.3 recover from the respondent the balance of the rental payable in terms of the agreement plus the aggregate of the actual cost of repairing the vehicle and placing it in the same condition it was in on the effective date, fair wear and tear excepted (Clause 13.2 and 13.3, of annexure B to the rental agreement).

9.2 the respondent shall be liable for all legal fees, costs and disbursements and all costs of locating and repossessing the vehicle on a scale as between an attorney and his own client".

The vehicle was duly delivered to the respondent. The respondent has failed to make prompt and regular payment of the instalment payable in terms of the rental agreement when they became due and respondent admits that he is in arrears with payments amounting to E14, 911-55 as at the 2nd November 2000. The applicant holds that the rental agreement was thereafter duly cancelled in terms of the rental agreement as per annexure "AFS4".

The above mention are the salient points in this dispute. Now reverting to the point ***in limine.*** Mr. Shilubane for the respondent argued ***in limine*** that Clause 16.2 of the rental agreement states that:

> "This agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa and the Kingdom of Swaziland"

That it is trite law that the parties can choose which legal system will govern the construction of the agreement) ***Private International Law (2nd ED) by C.F. Forsyth at 267*** and the authorities there cited). The respondent contends that both South African Law and Swazi Law are applicable to the construction of the agreement. The Credit Agreement Act 1980 applies to annexure "AFS2" where Section 1 (b) and (a) provides as follows:

> "A leasing transaction, means the cash price at which the goods leased in terms of that leaving transaction are normally sold by the credit grantor on the date on which the leasing transaction is entered into or, if the credit grantor is not a trader normally selling any such goods, the reasonable money value of the goods as agreed upon between the credit grantor and the credit receiver".

Section 11 of the Credit Agreement Act 1980 provides that before a credit grantor can bring an action, that shall give the credit receiver 30 days notice by registered post. Mr. Shilubane submitted that there is no proof that this was done because no certificate of registered postage was annexed to applicant's papers. Alternatively, the

agreement in question is governed by the Money Lending and Credit Financing Act, 1991, which in Section 2 thereof defines a credit transaction as "any transaction by which lender and a credit receiver agree that the lender sells, supply or grant the use or enjoyment of movable property or services to the credit receiver against payment by the credit receiver to the lender of a stated or determinable sum of money at a stated or determined future date or in whole in part in instalment over a period in the future".

The applicant has charged respondent interest in terms of Clause 26.1 of the rental agreement, which is defined in Clause 1.1.10 of the rental agreement. Applicant does not deny in its replying affidavit that the applicable rates is 14% which is prohibited by Clause 3 (b) of the Money Lending and Credit Financing Act, 1991. Mr. Shilubane contends that, therefore the rental agreement is null and void and of no force or effect in terms of Section 6 of the aforesaid Act. Further, it was argued on behalf of the respondent that the vehicle in question has latent defects which respondent was not aware at the time the transaction was entered into. This is not denied by applicant. That it is trite law that the Credit Agreements Act 1980 outlaw any ***voet stoots*** clause in agreement such as Clause 3 in the rental agreement. In this connection the court was referred to the case of ***Jacobs vs Abbey Autos 1957 (2) S.A. 2 (N).***

In sum, Mr. Shilubane submitted that the application be dismissed with costs.

Per contra Mr. Dunseith for the applicant argued that the applicable law to govern the construction and operation of the agreement is the law of Swaziland. In the premises, the Credit Agreement Act 1980 is not applicable further, the Credit Agreement Act 1980 does not in any event apply to the vehicle rental agreement (AFS2).

He argued that, in any event, the applicant did in fact give notice by prepaid registered mail to the respondent to remedy the breach within a period of 30 days. Furthermore, on the Money Lending Act Section 4 of the Act refers to an interest rate, which is more than 10 % per annum above the prime rate. The rental agreement in the case in ***casu*** does not contravene the Act, and the point raised by the respondent is misconceived. On the point about the existence of latent defects, it is the applicant's

contention that in terms of the law the respondent is not entitled in the possession and use of the motor vehicle whilst he is in arrears. To support this proposition the court was directed to the case of ***Appliance Hire Natal Ltd vs Natal Fruit Juices Ltd 1974 (2) S.A. 287 at 289 (E)***.

At this stage I shall proceed to determine the issues raised. The issues raised are as follows. Firstly, in the construction and operation of the rental agreement which system of law is applicable between the laws of South Africa and those of Swaziland; secondly, whether Section 11 of the Credit Agreement Act, 1980 of South Africa is applicable as the requirement that the applicant was to give notice by prepaid registered mail to remedy the breach within a period of not less than thirty days; thirdly, whether the rental agreement does not comply with Section 4 of the Money Lending and Credit Financial Act, 1991 because the interest prescribed in the agreement is more than 10% per annum; lastly, whether the existence of latent defects entitle the respondent to the possession and use of the motor vehicle, notwithstanding that respondent has run into arrears under the rental agreement. I thus, proceed ***in seriatum***.

Applicable Law

Section 16.2 of the rental agreement provides that the agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa and the Kingdom of Swaziland. It would appear to me that a court cannot apply two systems of law. South Africa and Swaziland have separate laws and it would be an impossible task for the court to use the laws of both countries and try and reconcile two different systems of law. It would appear that Clause 16.2 of the agreement is ambiguous and/or vague, then normal rule applies, namely that this court will apply the law of Swaziland. Where the lease agreement is entered into in Swaziland, both parties domiciled and resident and carry on business in Swaziland, and where the agreement is to be performed wholly in Swaziland, as in the case of the lease agreement AFS2 and the parties thereto, then the applicable law is the law of Swaziland. In ***casu*** the ***lex loci contractus*** governs the nature, obligations and the interpretation of the contract, the ***locus contractus*** being the place where the contract was entered into ***(Standard Bank of South Africa, Limited vs Efroiken and Newman***

1924 A.D. 185).

Credit Agreement Act 1980

It follows, therefore, that the ***Credit Agreement Act 1980*** does not apply to the vehicle rental agreement AFS2. Even if I had found that South African Law was applicable in this case the applicant did in fact give notice by prepaid registered mail to the respondent to remedy the breach within a period of 30 days to conform to Section 11 of that Act.

Money Lending and Credit Financial Act

Section 6 (1) of the Money Lending and Credit Financial Act No. 3/1991 provides that any agreement in connection with any money-lending or credit transaction that is not in conformity with the provisions of this Act shall be null and void. Section 3 (1) (b) of the Act provided where in respect of any money-lending or credit transaction the principal debt exceeds E500-00 or such amount as may be prescribed from time to time. No lender shall change an annual interest rate of more than 8% of such amount as may be prescribed from time to time, above the rate for discounts, rediscounts and advances announced from time to time by the Central Bank under Section 38 of the Central Bank of Swaziland, 1974.

My view on this matter is that in this case we are dealing with a lease agreement where the respondent is paying rentals and the interest to be charged is not on the main transaction but interest on arrear, which do not contravene the provisions of this Act. Further, Clause 26.1 provides ("should the lessee fail to pay any amount due in terms of this agreement on due date, then such amount shall bear interest at the maximum rate permitted by law from time to time from the due date for payment until receipt thereof")

The agreement does not states the interest to be charged ***ex facie*** it merely states how such an interest is to be charged. One can presume that the agreement cannot be contrary to the law, as that would invalidate it. Furthermore, no evidence was led to show what the prime rate as charged by the Central Bank in terms of Section 3 (1) (b) of the Act.

I thus rule that the rental agreement does not contravene the Act, and the point raised by respondent is misconceived.

The Voetoots Clause

There is a voetoots clause in the agreement. The question here is whether the respondent is entitled to hold on to the bus and use it but refuse to pay the rentals in terms of the agreement. It appears that in law that is not permissible. The ***dicta*** in the case of ***Appliance Hire (Natal) Ltd vs Natal Fruit Juices Ltd*** is apposite. Where it was accepted following the case of ***Arnold vs Viljoen 1954 (3) S.A. 322*** **©** that the obligation of the tenant to pay rental persists. So long as he continues in occupation of the premises. In the latter case the court dealt with the question of the extent to which the plaintiff's right of performance was conditional upon re-performance by the plaintiff of a reciprocal obligation to pay rental in terms of the agreement relied upon was not conditional upon proof by the lessor that, when the leased premises were handed over, they were in a tenantable state of repair.

In conclusion, therefore, I find that the applicant has proved its case and I thus grant an order in terms of prayers 2, 3, and 5 of the notice of application.

S.B. MAPHALALA

JUDGE