

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1153/96

In the matter between:

DURAFIN (PTY) LIMITED

APPLICANT

And

SOLOMON NKONTENI KUNENE t/a INQABA BUS SERVICE

RESPONDENT

CORAM :

DUNN J.

FOR THE APPLICANT :

MR FLYNN

FOR THE RESPONDENT:

DUNSEITH

JUDGMENT

26TH SEPTEMBER 1996

By Notice of Motion issued on the 10th May 1996, the applicant seeks an order against the respondent in the following terms-

2. That a rule nisi do issue calling upon the Respondent to show cause at such time as this Honourable Court may direct, why an Order should not be made in the following terms:-

2.1 declaring the Instalment Sale Agreement marked "WB2" to the Applicant's Founding Affidavit to be cancelled;

2.2 directing the Respondent to deliver to the Applicant certain Bus with Chassis number 323 0762 0762 and engine No. SB 07010SA0086441 (the Bus")

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2.3 that failing the return of the Bus to the Applicant forthwith, the Sheriff or his Deputy be authorised and directed to take possession of the Bus wherever the same may be found, and to hold under attachment and deliver same to the Applicant;

2.4 directing the Respondent to make payment to the Applicant in the amount of E72,289.40 together with interest thereon at the rate of 26.50% per annum calculated from the 30th April 1996 to date of payment;

2.5 that the Respondent pay the costs of this application on the scale as between attorney and client, alternatively, directing that the costs of this application be costs in the application or action to be instituted for the determination of the relief set out in 2.1,2.2,2.3 and 2.4 above;

2.6 alternatively to 2.1 to 2.5 above and pending the outcome of this application, alternatively, pending the outcome of the proceedings to be instituted for the determination of the relief set out in 2.1 to 2.5 above, that the Sheriff or his Deputy attach and remove the Bus wherever the same may be found and to deliver the Bus to the Applicant to hold in safe custody, alternatively that the Sheriff or his Deputy hold the Bus under attachment.

3. Pending the return day herein, an Order in terms of 2.2 and 2.3 above, operate as an interim order with immediate effect.

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The terms of the agreement that is the subject of this application are set out in the founding affidavit. It is alleged at paragraph 11 of the affidavit that the respondent has defaulted in the monthly instalments payable in terms of the agreement. The respondent's default, it is argued, entitled the applicant to invoke the provisions of Clause 9 of the agreement to cancel the agreement and claim a return of the Bus.

The application is opposed by the respondent. The respondent's main argument is that he is not in breach of the sale agreement. He has given details of payments he states he has made and has also given details of amounts which he alleges were improperly claimed by the applicant. These amounts relate to interest and insurance charges which he maintains are not due under the agreement. There is clearly a dispute on the affidavit evidence, on the question of the instalments, which can only be resolved by a referral to oral evidence for the production and explanation of the supporting documentation.

The respondent's next argument is that even if it were established that he has breached the agreement by defaulting in his instalments, the applicant's right to cancel the agreement and claim a return of the bus is subject to the provisions of section 11 of the South African Credit Agreement Act 1980.

Clause 9 of the agreement between the parties provides as follows:-

9.1 The Seller shall be entitled (but not obliged) to terminate this agreement without giving notice to the Buyer should the

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Buyer fail to make any payment in terms of this agreement within seven (7) days after it becomes payable, or if the Buyer fails to comply with any other provision of this agreement or any legal provision applicable in respect of this transaction, or should the Buyer die or as the case may be, an application be made for the voluntary surrender or sequestration of the Buyer's estate, or for his liquidation or for an order of judicial management of the Buyer or, if the Buyer commits an act of insolvency or takes steps to reach a compromise with or make an offer of composition to his creditors or to effect a transfer of his estate to the benefit of his creditors or, if judgement is obtained against the buyer for payment of an amount, which amount is not paid within seven (7) days of such judgement, or if the Buyer does not take steps within the abovementioned seven (7) days to have such judgment set aside or to appeal against such judgment, or if the Buyer provided false information to the seller at the time of his application for this transaction, or failed to mention relevant facts regarding his financial position or assets,

9.2 If this agreement is terminated by the Seller in terms of sub-clause 9.1, the Seller shall be entitled, subject to the provisions of Section 11 of the Credit Agreement Act of 1980, to the return and possession of the goods and the Buyer shall be obliged to deliver the goods to the Seller at his own cost and in good working order together with all licensing documents, registration certificates, compulsory motor vehicle insurance stickers and any other relevant documents in respect of the goods, at the above address of

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the Seller or at such other address as the Seller may have notified or may notify him of in writing.

Section 11 of the Credit Agreement Act provides as follows-

No credit grantor shall, by reason of the failure of the credit receiver to comply with any obligation in terms of any credit agreement, be entitled to claim the return of the goods to which the credit agreement relates unless the credit grantor by letter, handed over to the credit receiver and for which an acknowledgement of receipt has been obtained or posted by prepaid registered mail to the credit receiver at his address stated in the credit agreement in terms of section 5(1) (b) or the address changed in accordance with section 5 (4), has notified the credit receiver that he so failed and has required him to comply with the obligation in question within such period, being not less than 30 days after the date of such handing over or such posting, as may be stated in the letter, and the credit receiver has failed to comply with such requirement: Provided that should the credit receiver have failed on two or more occasions to comply with obligations in terms of any credit agreement and the credit grantor has given notice as aforesaid, the said period shall be reduced to 14 days.

The submissions on behalf of the respondent are that the applicant has not complied with the provisions of the latter section, with regard to the issue of a notice of default to the respondent.

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The applicant's contention is that the provisions of the Credit Agreement Act do not apply to the sale agreement between the parties. For this the applicant relies firstly on a portion of the agreement between the parties which should have been deleted if it was intended that the Credit Agreement Act should apply. The relevant portion was not deleted. Secondly, the applicant relies on the provisions of clause 19 of the agreement which provides-

No reference to the Usury Act, as amended or to the Credit Agreements Act shall raise the inference that the transaction between the parties are covered either by the Usury Act or by the Credit Agreement Act, unless the Usury Act of the Credit Agreement Act is, by its terms, applicable to this agreement.

It was conceded by Mr. Dunseith that the applicant was correct in its contention that for the two grounds stated the Credit Agreement Act as such did not apply to the agreement between the parties.

It was his submission, however, that the one provision of the Credit Agreement Act, namely Section 11 had been specifically incorporated by the parties into their agreement.

There is much to be said for this submission. The parties to a contract are at liberty to look to other legal documents or statutory provisions and to incorporate whatever provisions in such documents, as they consider appropriate and/or desirable in their agreement. Mr Dunseith referred the Court to the case of KATZEL v SEEDAT 1950(3)S.A. 715. In that case, the parties entered into a hire purchase agreement to which the provisions of the South African Hire Purchase Act, 36/1942 did not apply,

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because the value of the goods sold exceeded a certain value. Clause 7 of the agreement between the parties provided-

Should the buyer fail to make any of the payments..... Upon due date ..... the seller shall have the right, subject to the provisions of the Hire Purchase Act, 1942, either (i) .....(ii)..... (iii) to cancel this agreement and to repossess or claim repossession of the said goods.

In dealing with the contention of the buyer that by the words of the agreement the parties had incorporated provisions of the Hire Purchase Act including the requirement that the seller should give notice before enforcing his rights, Clayden J. stated at p716-

The Act itself contains many provisions which are of assistance to the buyer when cancellation of an agreement comes about. It would plainly be open to the parties to a hire purchase agreement which was not controlled by the Act to contract on the basis that those provisions were to relate to their contract, although by statute they did not.

That is clearly the position in the present application. The agreement between the parties is not governed by the Credit Agreements Act. The parties did, however, incorporate a section of the Credit Agreement Act into their Agreement. There is no question of this court being required to apply a South African Statute as contended by the applicant. The Incorporation of the section merely provides for the procedure to be followed where

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the applicant terminates the agreement under clause 9.1 and seeks the return and possession of the bus under Clause 9.2.

The applicant has failed to comply with this provision of the agreement and is not in the circumstances entitled to the relief sought in this application.

The application is dismissed with costs.

B. DUNN

JUDGE