CASE NO.2491/99

IN THE MATTER BETWEEN:

BARLOWS CENTRAL FINANCE CORPORATION (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 (Instructed by Millin & Currie)

FOR RESPONDENT : MR D.A. SMITH S.C. (Instructed by Bheki G. Simelane & Co.)

JUDGEMENT
28/12/99

This is an application which was brought under a Certificate of Urgency and in which the Applicant sought *inter alia*

1. Dispensing with the usual forms and procedure relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. That *rule nisi* issued (sic) calling on the Respondent to show cause at a time and date to be determined by the above Honourable Court why on order in the following terms should not be made final:-

2.1. Declaring the Instalment Sale Agreements marked annexure “A,B,C,D” to the Applicant’s Founding Affidavit to be cancelled;

2.2. Directing the Respondent to deliver to the Applicant forthwith:-

2.2.1. ONE CATERPILLAR D6H TRUCK/TRACTOR CHASSIS NUMBER 6CFO5743

2.2.2. ONE CATERPILLAR D6H TRUCK/TRACTOR CHASSIS NUMBER 9BM00446

2.2.3. ONE CATERPILLAR 428C BACKHOE LOADER CHASSIS NUMER 8RN 00924

2.2.4. ONE CATERPILLAR 317 EXCAVATOR CHASSIS NUMBER 4MM00832

2.3. That failing the return of the vehicle to the Applicant forthwith, the Sheriff or his Deputy for the District of Hhohho be authorised and directed to take possession of the vehicles wherever the same may be found, and to hold same under attachment pending the outcome of this application.

2.4. Directing the Respondent to make payment to the Applicant in the following amount:

2.4.1. CLAIM A: E426,426.56 together with interest thereon calculated at the rate of 33% per annum in respect of arrear instalments calculated from the 30th September 1999 to date payment;

2.4.2. CLAIM B: E399, 530.41 together with interest thereon calculated at the rate of 33% per annum in respect of arrear instalments calculated from 30th September 1999 to date of payment;

2.4.3. CLAIM C: E102,598.25 together with interest thereon calculated at the rate of 33% per annum in respect of arrear instalments calculated from 30th September, 1999 to date of payment;

2.4.4. CLAIM D: E216,701.05 together with interest thereon calculated at the rate of 33% per annum in respect of arrear instalments calculated from the 30th September 1999 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, 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 vehicle wherever the same may be found and to hold same in safe custody under attachment.

3. That pending the return dates herein, an order in terms of 2.2. and 2.3. above, operate as an interim order with immediate effect.

The matter appeared before Matsebula J. on the 5th November 1999 wherein by consent between the parties, an Order was made in terms of prayers 2.1. to 2.6. of the Notice of Motion. It was further agreed that the Respondent would remain in possession of the vehicles set out in sub paragraphs 2.2.1 to 2.2.4. The Respondent was further put to terms regarding the filing of Affidavits.

The Respondent accordingly filed its Answering Affidavits, to which the Applicant filed its Replying Affidavits. In the Answering Affidavit, the Respondent raised several points *in limine,* which at the hearing Mr Smith indicated that he would not pursue. The only point argued by the Respondent was relating to the question of his Court's jurisdiction to entertain the matter and which is the subject matter of this judgement.

The Respondent stated as follows regarding the point:-

"I state that the above Honourable Court is not possessed of jurisdiction to adjudicate

upon this matter.

I do so for the following reasons:

5.1. The instalment sale agreement annexed as annexure “B” to the Founding Affidavit (“the instalment agreement) provides in terms of clause 17 and 18 that:

5.2. That agreement shall in all respect (sic) be governed by and construed in accordance with the laws of the Republic of South Africa.

5.3. That the Buyer (Respondent) hereby consent (sic) to the jurisdiction of the Magistrate Court having jurisdiction over its person in respect of all Legal proceedings connected with this agreement. Notwithstanding that the value of the matter in dispute might exceed the Court jurisdiction.

5.4. Notwithstanding the aforegoing the Seller shall be entitled to institute all or any Proceedings against the Buyer connected with this agreement in any division of the Supreme Court of South Africa having jurisdiction.

The Respondent argued that regard being had to the contents of the instalment sale agreement, the only Courts having jurisdiction are the Magistrate Courts of South Africa and the Supreme Court of South Africa. By virtue of the agreement, the Respondent further argued, the jurisdiction of the above Honourable Court was thereby excluded.

The Respondent further stated that the Applicant failed to set out the basis of this Court’s jurisdiction in its Founding Affidavit, the mere citation of a *domicilium citandi* within this Court’s jurisdiction being insufficient to found jurisdiction.

From the points raised by Mr Smith, there are two issues to be decided by this Court, namely, the question of the choice of law i.e. which law should govern this dispute and secondly, whether this Court has jurisdiction to hear this matter. I will first deal with the choice of law.

(i) CHOICE OF LAW

This involves the determination of what is referred to in Public International Law parlance as the proper law of contract. In **IMPROVAIR CAPE (PTY) LTD v ESTABLISHMENTS NEU 1983 (2) SA 138 at 144,** Grosskoff J. described the proper law of Contract in the following terms:-

> *"By the proper law of a contract is meant the system of law which governs the interpretation, validity and mode of performance of the contract. It is often said that the proper law is ascertained in terms of what the parties agreed or intended or are presumed to have intended. …..where the parties expressly agree that their contract is to be governed by a particular legal system, there is usually no difficulty in finding that the agreed system constitutes the proper law of contract. Difficulties arise, however, where there is no express agreement. In such event, there may be cases in which a court may conclude that the contract contains a tacit term concerning the law to be applied. …..…The true problem arises where no express or tacit agreement was concluded. The traditional solution to this problem is to impute an intention to the parties."*

> In ***STANDARD BANK OF SOUTH AFRICA LTD v EFROIKEN AND NEWMAN 1924 AD 171 at 185*** *De Villiers J.A. said:*

> *"it must not be forgotten that the intention of the parties to the contract is the true criterion to determine by what law its interpretation and effect are to be governed. … But that also must not be taken too literally, for, where the parties did not give the matter a thought, courts of law have of necessity to fall back upon what ought, reading the contract by light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties."*

This approach, which I also regard as being the proper one was followed in many cases, and which include **STANDARD BANK v OCEAN COMMODITIES INVESTMENTS 1983 (1) SA 276 at 293-4; EX PARTE SPINOZA 1985 (3) SA 633 AD; LACONIAN MARITIME ENTERPRISES S.A. v. AGRAMAN 1986 (3) SA 509**

In casu, the parties in clause 17 gave thought to the proper law of contract and stated in the following terms:

> *"This Agreement shall in all respects be governed by and construed in accordance with the laws of the Republic of South Africa."*

It is therefore abundantly clear that the parties expressed their intention and reduced it to writing. There is therefore no difficulty with holding that South African law applies. This Court must, give effect to the parties expressed intention and uphold the principle of *pacta sunt servanda.* Miss van der Walt wholeheartedly agreed with Mr Smith's submissions regarding the choice of the proper law of contract. I am also in agreement with Mr Smith's Legal propositions and hereby give effect to the intention of the parties recorded in clause 17 of the agreement.

(ii) JURISDICTION

In their work entitled "Private International law, C.F. Forsyth and T.W. Bennett, Juta & Co, 1st Edition at page 130 define jurisdiction, with which we are here concerned as follows:-

> *"Another sense in which jurisdiction is commonly used is the power or the competence of the court to hear and determine an issue between the parties… Jurisdiction here will be used to mean the power of a court to adjudicate cases involving foreign elements.*

There are, according to Forsyth and Bennett (supra) principles which underlie the rules of jurisdiction and these include the Roman maxim *extra territorium ius dicenti impune non parefur i.e* a state is limited, in the exercise of its power, to affect and bind directly only the persons and the property within its territorial control. This maxim leads to the venerable rule *actor sequitur forum sei.*

Mr Smith, for the Respondent argued that the question to be determined is not whether this Court has jurisdiction in this matter, rather, he argued, whether the parties have agreed to oust the jurisdiction of this Court. On the other hand, Ms Van der Walt, in her brief but thought – provoking submission argued that the question to be determined is whether this Court does or does not have jurisdiction. If it does not, then that marks the end of the matter. If it does, then this Court should hear the application and then deal with the applicable proper law of contract in the normal course.

The relevant clause is clause 18, which when cited *ipissima verbitela* reads as follows:-

18. **JURISDICTION**

(a) The Buyer hereby consents to the jurisdiction of the Magistrate's Court having jurisdiction over his person in respect of all legal proceedings connected with this Agreement, not withstanding that the valve of the matter in dispute might exceed the Court's jurisdiction.

(b) Notwithstanding the aforegoing, the Seller shall be entitled to institute all or any proceedings against the Buyer connected with this Agreement in any division of the Supreme Court of South Africa having jurisdiction."

It is clear by necessary implication from the foregoing that the Courts agreed upon by the parties are the Courts of South Africa, having jurisdiction, which is in my view the important phrase. It is clear therefore, that any Court approached to deal with the matter shall, in terms of (a) be a Magistrate's Court having jurisdiction over the person of the Buyer, i.e. the Respondent *in casu.* This is notwithstanding that the value of the matter in dispute is above that Court's monetary jurisdiction. It appears to me that there is no Magistrate's Court in South Africa that has jurisdiction over the Respondent's person. The question is whether this Court can exercise its jurisdiction notwithstanding the clear and unequivocal terms of the agreement.

A somewhat not dissimilar situation arose in the United Kingdom in the case of **EVANS MARSHALL v BERTOLA S.A. (1973) 1 ALL E.R.,** where Sachs L.J., held that not withstanding the agreement between the parties to the effect that Spanish Courts shall have jurisdiction, English Courts would because of some special circumstances assume jurisdiction and grant the relief sought.

In that case, the special circumstances, which in the wording of DIPLOCK J. in **MACKENDER v FELDIA AG (1966) 3 ALL ER 853,** "would induce him to permit one of them (the parties) to go back on his word" were that the substance of the case was exclusively connected with the United Kingdom; all essential witnesses concerning the issues were in the United Kingdom; that Spanish law does not differ from English law in the relevant aspects.

It is clear therefor that the Court will only allow a breach of the *pacta sunt servanda* principle in cases where there are strong and special reasons. What are these in this case?

The factors that I find are sufficient to justify the jettisoning of Clause 18 are the following:-

(a) the close connection between this Court and the substance of the case. The Respondent is domiciled within this Court's jurisdiction and the goods forming the subject matter of the proceeding are within this Court's jurisdiction. I say this recognising that this aspect was lackadaisically stated in the Applicant's papers. This does not appear to be in dispute however. This Court can therefore, unlike its South African counter part issue a judgement that cannot be rendered *brutum fulmen.*

(b) the Respondent's convenience is also a relevant consideration. In this case, the Applicant is the one which has forfeited the benefits and convenience of suing in its own country and has instituted proceedings at the Respondent's backyard as it were. It has not been intimated in any way that this forum is oppressive or vexations to the Respondent. If any party has to bear costs of bringing any witnesses to this forum it is the Applicant.

(c) the law of South Africa and Swaziland is very similar as both jurisdictions apply law with the same genus, namely Roman – Dutch Law. Should any aspects of the case prove difficult, then those aspects could be proved as a fact by introducing persons practising law in South Africa, which would be easy to do.

(d) Another consideration that I take into account is whether it can be said in the circumstances that the Respondent *bona fide* desires a trial in the foreign country or is only seeking a tactical advantage. In my view, the Respondent does not seriously intend litigating in South Africa but it seeks to have some advantage in that the machinery in question is in its possession and control and will be able to use it whilst proceedings are initiated in South Africa.

Notwithstanding powerful argument advanced by the Respondent's counsel that the issue of this Court's jurisdiction is of a kind, which would have been contemplated, when the agreement was

drafted, I hold that this Court has jurisdiction notwithstanding a foreign jurisdiction clause. In such situations, the Courts are called upon to exercise their discretion in such a way as to avoid unjust results. In this case I exercise my discretion in the Applicant's favour.

There is also another ground on which this Court has jurisdiction in this case. C.F. Forsyth "Private International Law" Third Edition, Juta & CO., 1996, states as follows at page 189 – 190.

> *"It has been held that the parties cannot exclude the jurisdiction of the courts by a private agreement. The courts have a discretion whether to hear the matter or whether to stay proceedings".*

In view of the aforegoing, it cannot be properly held that the parties, by inserting clause 18 of the agreement intended to oust the jurisdiction of this Court. According to the above excerpt, the parties cannot exclude the Court's jurisdiction. It is clear that apart from the provisions of clause 18, there are connecting factors which give this Court jurisdiction, namely the Respondent's "domicile", the location of the merx and possibly performance of the contract. Furthermore, there is nothing, proper regard being had to the choice of language used by the contractants in clause 18, to indicate even remotely that there was an intention by the parties to exclude the jurisdiction of this Court, at least not as far as attachment of the merx is concerned.

In **BUTLER v BANIMAR SHIPPING CO. S.A. 1978 (4) SA 753,** the question was whether the South African Courts had jurisdiction to grant attachment *ad fundandam* jurisdictionem, not-withstanding a foreign jurisdiction clause 17 the agreement, which held that any dispute arising under that bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply i.e.
Greek law.

Howie A.J. at page 761 G – H had this to say:

> *"A foreign jurisdiction clause, although obviously not the equal of an arbitration clause in form or effect is nonetheless equivalent to the latter in the sense that neither is absolutely binding and, in the case of both, the Court in which the action is brought in breach thereof has a discretion to hear the matter itself and not to refer to the foreign court or arbitrator."*

In the circumstances, I am of the view that this Court has a discretion to exercise in this matter. In view of the attendant circumstances, this discretion shall be exercised in the Applicant's favour by holding that this Court has jurisdiction to hear this matter. The *point in limine* is therefore dismissed and I order that the matter be ventilated on its merits.

T.S. MASUKU
JUDGE

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 the17th December 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 an 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