



## **IN THE HIGH COURT OF SWAZILAND**

### **JUDGMENT**

Case No. 684/2013

In the matter between:

**FIRST NATIONAL BANK t/a WESBANK**

**Applicant**

**And**

**TIMAN (PTY) LIMITED**

**1<sup>st</sup> Respondent**

**MONA HASSAN**

**2<sup>nd</sup> Respondent**

**LUCKY HOWE N. O.**

**3<sup>rd</sup> Respondent**

**THE MASTER OF THE HIGH COURT**

**4<sup>th</sup> Respondent**

**THE ATTORNEY GENERAL**

**5<sup>th</sup> Respondent**

**Neutral citation:** *First National Bank t/a Wesbank v Timan (Pty) Limited and 4 Others 104 (684/2013) [2013] SZHC 104 (23<sup>rd</sup> May 2013)*

**Coram:** **M. Dlamini J.**

**Heard:** **17<sup>th</sup> May 2013**

**Delivered:** **23<sup>rd</sup> May 2013**

*Insolvency Act – merx under lease agreement – lessor subsequently declared insolvent - whether lessee entitled to demand merx as*

*security for arrear rentals and balance thereof before filling claim with trustee – well establish principle of our law that ownership pass to the insolvent estate upon date of sequestration order- meaning thereof on the right of lessee to demand merx as security – effect of ownership passing to insolvent estate upon sequestration – exercise of court’s discretion on question of costs.*

Summary: The applicant entered into a lease agreement with 1<sup>st</sup> respondent. 1<sup>st</sup> respondent fell in arrear rentals. Shortly before applicant could cancel the lease agreement and demand perfection of its hypothec, the 1<sup>st</sup> respondent was put into provisional liquidation. Applicant demanded the return of the *merx* as security for its arrear rentals from 3<sup>rd</sup> respondent who was the liquidator. Respondent resisted the demand and called upon applicant to lodge its claim like all other creditors of the 1<sup>st</sup> respondent.

[1] The applicant basis its case on a lease agreement as follows:

“10. *On or about February 2011, at or near Mbabane, the applicant duly represented by Khetsiwe Khumalo and the Respondents duly represented by Mona Hassan, concluded and signed a written Lease Agreement in terms of which the applicant leased and delivered to the 1<sup>st</sup> respondent a certain motor vehicle to which, 2010 Demo Vivaro 1.9 CDTI Enjoy Bus, Engine No. F9QU7C680031, Chassis No.WOLJUCA69V618584. The motor vehicle was sold for the sum of E230,000.00 (Two Hundred and Thirty Thousand Emalangeni) and the 1<sup>st</sup> Respondent was to pay monthly installments of E5,314,29 (Five Thousand Three Hundred and Fourteen Emalangeni Twenty nine cents) with effect from on or about the 10<sup>th</sup> of September 2011.”*

[2] and further avers:

*“11.5 The goods shall remain the property of the Lessor and nothing in this agreement shall be construed as conferring on the Lessee any right or interest other than as the Lessee;*

*11.6 The Lessee shall at his own expense keep the goods free from attachment, hypothec, or other legal charge or process and shall not, without any prior written consent of Lessor sell, let, loan, pledge, transfer, or otherwise encumber the goods in any way, or permit any lien to arise in respect of the goods.”*

[3] The agreement attached as some of the conditions the following:

*“11.7.3 Commit any act of insolvency or being a natural person, assign, surrender or attempt to assign or surrender his estate, or being partnership is dissolved;*

*11.7.4 Be sequestrated or be wound-up, whether provisionally or finally;*

*11.7.7 Allow the goods to be seized under any legal process issued against Lessee;*

*11.8 Then, upon the occurrence of anyone or more of these events, Lessor shall be entitled, but not obliged, and subject to the provisions of any legislation which may be applicable to this transaction, in its sole and absolute election, and without prejudice to any rights it may have at Law, including the right to claim damages, to either claim immediate payment of all amounts then due to it under this*

*agreement together with the present value of the rentals for the unexpired term of the hiring ..., or terminate this agreement and obtain immediate possession and the Lessor shall be entitled to claim as damages payment of all rentals and other amounts then due in respect of the goods.”*

[4] The applicant continues to divulge:

*“16.3 The applicant has been advised by the 2<sup>nd</sup> Respondent that the 1<sup>st</sup> Respondent is now put under liquidation thus the motor vehicle belonging to the Applicant has also been attached and / or encumbered with the liquidation of the 1<sup>st</sup> Respondent and it might end up being liquidated as if it is the asset of the 1<sup>st</sup> Respondent yet, it does not belong to the 1<sup>st</sup> Respondent.”*

and it prays as follows:

*“16.5 Therefore, the Applicant humbly seeks protection against the liquidation of its motor vehicle as if it were the assets of the 1<sup>st</sup> Respondent as well as the deterioration of the said motor vehicle at the hands of the Respondents, so that the said motor vehicle may be preserved pending the finalization of this application on inter alia declaration that the said Lease Agreement is cancelled and the return of the said motor vehicle to the Applicant.”*

and at paragraph 22 it submits:

*“22. Under the circumstances, it is my humbly submission that the balance of convenience favours that an Interim Order be granted in favour of the Applicant for the repossession of the motor vehicle and /or interdicting the 3<sup>rd</sup> Respondent from including the said*

*motor vehicle in to the liquidation account of the 1<sup>st</sup> Respondent. I submit that there is no prejudice that will be suffered by the Respondents if such orders are granted in the Interim, as will be afforded an opportunity to file their papers and have the matter dealt with to finality. As it stands the Applicant is about to lose the motor vehicle and the interest of justice favours the grant of such Interim Order to protect the expressly enshrined rights of the Applicant in the motor vehicle.”*

[5] The 3<sup>rd</sup> respondents vociferously opposes this application by raising a number of interesting points which are as follows:

*“IN LIMINE*

5.1 *The Applicant does not have a cause of action against 1<sup>st</sup> and 3<sup>rd</sup> Respondents for the reason that he has failed to exhaust all remedies available to him prior to coming to this Honourable Court for relief;*

5.2 *More particularly the Applicant has failed to file a claim form and prove his claim in the manner provided for by Section 44 of the Insolvency Act No. 81 of 1955 notwithstanding direction by the 3<sup>rd</sup> Respondent to do so.*

5.6 *The matter is not urgent for the reason that the order placing the 1<sup>st</sup> Respondent under final liquidation was granted by this Honourable Court on the 26<sup>th</sup> April 2013 and a Creditors Meeting, whereat the Applicant may state his claim is yet to be called and convened.”*

[6] The issue for determination is whether the applicant is entitled to demand the said motor vehicle as security or should, like all creditors of the 1<sup>st</sup>

respondent, file and prove his claim before the 3<sup>rd</sup> respondent in the ordinary course.

[7] The 3<sup>rd</sup> respondent in brief contends that should applicant be allowed to keep the *merx* as security, the rights of the other creditors would be prejudiced.

[8] The property, the argument advanced on behalf of respondent and correctly supported by plethora of authorities as I will later refer to them in this judgment passed ownership to the insolvent estate (1<sup>st</sup> respondent) on the date of the provisional liquidation order.

[9] His Lordship **Ludorf J.** in **Williams Hunt (Vereeniging) Ltd v Slomowitz and Another 1960 (1) 494** at 501 held:

*“Prior to the sequestration the applicant was the owner of the motor car and the effect of the sequestration was that the applicant lost ownership in the car and became a secured creditor...”*

[10] Upholding this principle of our law, **Le Roux J.** in **Avfin Industrial Finance (Pty) Ltd v Interject Maintenance (Pty) Ltd 1997 (1) S. A. 807** at 808 stated:

*“It was trite law that Section 84 (1) deprived the hire-purchase seller of his ownership, which passed to the estate. The creditor then became a secured creditor only.”*

[11] I must point out that section 84 (1) of South African Insolvency legislation is *pari materia* with our section 86 (1) of our Insolvency Act No.81 of 1955 as amended except for one wording which I will highlight later herein.

[12] The rationale for this principle of sequestration orders passing ownership to the insolvent estate and having seller under installment agreements as is often referred to, is found in the very purpose or intention of the insolvency legislation. **Sharrock – Smith – Van der Linde in “Hockly’s Insolvency Law” 7<sup>th</sup> Ed.** at page 4 pointed as follows:

*“The law proceeds from the premises that once an order (or provisional order) of sequestration is granted, a concursus creditorum (coming together of creditors) is established and the interest of creditors as a group enjoy preference over the interest of individual creditors.”*

[13] To expatiate on this rationale, the learned author cites his **Lordship Justice Innes C. J. in Walker v Syfret N. O. 1911 A. D. 141** at 166 as follows:

*“The object of the [Insolvency Act] is to ensure a due distribution of assets among creditors in the order of their preference... The sequestration order crystallizes the insolvent’s position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to the estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.”*

[14] That as it may, the question still remains, is the applicant barred therefore from demanding as security the subject matter of a lease agreement.

[15] A similar question faced the Honourable **Van Zyl J. in Van Zyl N. O. v Bolton 1994 (4) S. A. 648.**

[16] The learned Judge firstly quoted Section 84 (1) of the Insolvency Act. As I have stated prior, that section corresponds with our section 86 (1) of our insolvency legislation. I hereby cite our legislation and it reads as follows:

“Special provision in case of sale of goods under a suspensive condition.

86. (1) *If any property was delivered to a debtor in pursuance of an agreement which is a hire-purchase agreement in terms of section 2 of the Hire-purchase Act No.11 of 1969, such agreement shall be regarded on the sequestration of the debtor’s estate as creating in favour of the creditor a hypothec over that property whereby the amount still due to him under the agreement is secured and the trustee of the debtor’s insolvent estate shall, if required by the creditor, deliver the property to him, and thereupon the creditor shall be deemed to be holding that property as security for his claim and section 84 shall apply.”*

[17] I must point out that although our legislation, unlike the South African one, still maintains the wording “*hire purchase agreement*” the subject indicating “*sale of goods under a suspensive condition*” seems to me to suggest that this provision applies in agreements of the nature in *casu* as well.

[18] His Lordship **Van Zly** *supra* points out at page 651:

*“The hypothec provided for in section 84(1) (section 86 (1)) may be described as a statutory or legal hypothec.”*(words in brackets mine).

[19] From the wording of the section, the learned judge wisely propounds at page 652:



*“The only prerequisites for the creation of a hypothec are set forth in the first sentence of Section 84 (1). They are, firstly, delivery by the seller (creditor) to the purchaser (debtor) of the property sold by means of an installment sale and, secondly, sequestration of the purchaser’s estate. It is the compliance with these prerequisites, rather than the transaction, as suggested by the said section, which creates the hypothec.”*

[20] The learned **Van Zyl J.** proceeded to enquire whether the prerequisites as laid above were present in that (**Van Zyl N. O. supra**) case. It is apposite for me to do likewise.

[21] In *casu*, it is not in issue that the motor vehicle which is the subject matter of the lease agreement was delivered to the 1<sup>st</sup> respondent.

[22] This can be deduced from applicant’s averment at paragraph 16.1 page 15 of the book of pleadings where it is deposed:

*“The applicant’s motor vehicle is in the possession of the 1<sup>st</sup> respondent....”*

[23] In answer 3<sup>rd</sup> respondent states at page 38 paragraph 16.5:

*“I reiterate that the motor vehicle was surrendered by the 1<sup>st</sup> respondent to me after it was placed under liquidation....”*

[24] It is further common cause that the agreement herein can be described in the words of his Lordship **Van Zyl N. O. supra** as “installment sale”.

[25] Again this can be gathered from applicant who avers at paragraph 16.1 page 15:

*“16.1 The Applicant’s motor vehicle is in the possession of the 1<sup>st</sup> Respondent and / or any of the Respondents who is in arrears with its monthly rentals in the amount of E5,275.11 (Five Thousand Two hundred and seventy five Emalangenzi Eleven Cents) and / or has breached the Lease Agreement, thus entitling the Applicant to take repossession of the motor vehicle. (words underlined indicative of instalments)*

[26] To which respondents react at page 37 at paragraph 15.1:

*“15.1 Save to admit the arrear rental due...”*

[27] In the premise I find that applicant has established the prerequisites necessary to create a hypothec in terms of section 86 (1), thereby having a right to invoke section 86 (1).

[28] The learned judge **Van Zyl** in **Van Zyl N. O.** *op cit.* continues at page 652 and wisely states:

*“The second sentence in Section 84 (1) ( in our case it should read”the remainder of the sentence in section 86 (1)” ) deals with the resulting rights of the seller and the concomitant obligation of the trustee of the purchaser’s insolvent estate once the hypothec has been established as aforesaid.” (words in brackets my own)*

[29] The Honourable Judge (**Van Zyl**) then points out those rights and obligations as follows:

*“The seller is entitled to call for delivery of the property by the trustee so that he may hold it as security for his claim, while the trustee is obliged to deliver the property to him.” (words in brackets my emphasis)*

[30] Applying this well defined position of our law to the case in *casu*, I see no reason why the applicant who has demanded for the return of the motor vehicle in exercise of its rights from the 3<sup>rd</sup> respondent in his capacity as trustee of 1<sup>st</sup> respondent in order to hold it (motor vehicle) as security for its claim in the insolvent estate, 3<sup>rd</sup> respondent should not be ordered as trustee to deliver the motor vehicle as per his obligation created by Section 86 (1) of the Insolvency Act No. 81 of 1955 as amended.

[31] I must reiterate that by no means does this section 86 (1) change the general position of the law that sequestration orders against the insolvent estate transfers ownership from the seller to the purchaser, now insolvent for reasons I shall advance later in this judgment.

[32] **Van Zyl J.** wisely maintaining the same view, eloquently reasoned at the same page *supra*:

*“The effect of sequestration in terms of Section 84 (1) is to deprive the seller of the property in question of his ownership thereof and to substitute for such ownership a hypothec as security for payment of the balance owing in terms of the installment sale.”(my emphasis).*

[33] In the result, the rights of other creditors are not prejudiced. Over and above, should there be a residue on the sale of the motor vehicle, the other creditors would be able to benefit by virtue of ownership having passed to

the insolvent estate. At any rate, it is also in the interest of the seller that ownership pass to the insolvent estate. This gives him the right to become part of the *concursum creditorum*. Should the property be sold at a price lesser than what is due, he will have a right to claim from the estate.

[34] I think the *dictum* by His Lordship **Steyn C. J.** in **Gunn & Another N. N. O. v Barclays Bank D. C. O. 1962 (3) S. A. 678 at 688 H** sums the whole procedure succinctly:

*“The pursuit of property is not naturally regulated in the same way as the attainment of a procedural requisite in a concursum creditorum.”*

[35] 3<sup>rd</sup> respondent has averred that in principle he has no objection in having respondent taking possession of the motor vehicle subject to the parties agreeing on the conditions for possession as can be deduced from his paragraph 12.8 at pages 35-36. This would ensure that 3<sup>rd</sup> respondent safeguard the interest of other creditors.

[36] I must state on the above apprehension by 3<sup>rd</sup> respondent that the legislature has prescribed the procedure to be followed by the applicant once he has taken the *merx* as security by means of section 84 (1):

*“84. (1) A creditor of an insolvent estate who holds as security for his claim any movable property shall, before the second meeting of the creditors of that estate, give notice in writing of that fact to the Master, and to the trustee if one has been appointed.”*

[37] The 3<sup>rd</sup> respondent therefore should have nothing to fear.

[38] On the question of urgency, it is my considered view that the applicant was entitled to move the present application under a certificate of urgency following the circumstances of the case. It is not inconceivable that an astute business person would demand his security before the meeting of creditors could take place. Further, as the legislature has allowed the lessee to demand return even before a trustee could be appointed, as can be viewed from section 84(1) *supra*, it can be inferred that the legislature appreciated that such could be treated with urgency.

[39] On the question of costs, as propounded in **William Hunt (Vereeniging) Ltd** *op. cit.*, where the court deciding on a similar application held at page 502:

*“I turn to the question of costs....The law on this aspect is clear and I have a very wide discretion.”*

[40] I consider in exercise of the above discretion the following:

- that 3<sup>rd</sup> respondent in resisting applicant’s demand was influenced by the legal principle which runs across all authorities dealing with insolvent buyers that ownership passed to the insolvent 1<sup>st</sup> respondent on sequestration;
- correctly as trustee, 3<sup>rd</sup> respondent had the interest of other creditors at heart thereby called upon the applicant to first agree on the conditions before releasing the motor vehicle to it and as the idiom goes, “*it is better to err on the correct side*” is applicable herein;

- Granting an order that costs follow the event would mean adding more liabilities to the insolvent estate thereby depleting further its assets and this would result in the *concursum creditorum* suffering further prejudice;
- Applicant failed to pray for a proper order as can be deduced from its prayers.

[41] In the totality of the above, it would be equitable and in the interest of justice that I enter no order as to costs.

[42] In the results, I enter the following orders:

1. Prayer 1 is granted.
2. The 3<sup>rd</sup> respondent is ordered to surrender motor vehicle **Demo Vivaro 1.9 CDT1 Enjoy bus; Chassis No.: WOL J7WCA69V618584, Engine No.: F9QU7C680031 registered FSD 194 AH** to applicant forthwith as security.
3. No order as to costs.

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**M. DLAMINI  
JUDGE**

**For Applicant : K. Simelane**  
**For 1<sup>st</sup> & 3<sup>rd</sup> Respondents : N. Mnisi**  
**For 4<sup>th</sup> & 5<sup>th</sup> Respondents : N. Xaba**