

SOUTH AFRICA / JUDGMENT

## Caterpillar Financial Services South Africa (Pty) Ltd v Elephan-te Trading (Pty) Ltd (2023/081166) [2024] ZAGPPHC 1368 (27 December 2024)

[2024] ZAGPPHC 1368

COURT

North Gauteng High Court, Pretoria

BEFORE

BAM

CASE / FILE NUMBER

2023/081166

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

CASE

NO: 2023/081166

HEARD: 26 NOVEMBER 2024  
DECIDED: 27 DECEMBER 2024  
1)  
REPORTABLE: NO  
2)  
OF INTEREST TO OTHER JUDGES: NO  
3)  
REVISED.  
DATE 27 DECEMBER 2024  
SIGNATURE  
In

the matter between: CATERPILLAR  
FINANCIAL SERVICES  
Applicant  
SOUTH  
AFRICA (Pty) Ltd. Registration

number: 2017/486709/07  
And  
ELEPHAN-TE  
TRADING (Pty) Ltd.  
Respondent  
Registration  
number 2013/225840/07  
Summary: claim based on  
rei vindicatio; challenge that termination of right to hold not in  
compliance with the terms of the agreement; interpretation of  
contracts; case for the adoption of sensible and businesslike  
interpretation  
This judgment has been  
handed down remotely and shall be circulated to the parties by way of  
email / uploading on caselines. The  
date of hand down shall be deemed  
to be 27 December 2024  
ORDER  
1.  
The application succeeds.  
1.1  
The respondent is ordered to deliver to the Sheriff of the High Court  
within 24 (twenty four) hours of service of this Order  
on the  
respondent by email addressed to l[...]  
and i[...]  
the

following:

- 1.1.1 a Caterpillar Large  
Excavator 330 with serial number K[...];
- 1.1.2 a Caterpillar Soil  
Compactor with serious number T[...] (the Units)
2. In the event of the  
respondent failing to comply with paragraph 1 above, the Sheriff of  
the High Court is authorised and ordered  
to take possession of the  
Units from wherever he/she may find, and the Sheriff is authorised to  
retain possession of the Units  
until delivered to the applicant or  
its duly authorised representative.
3. The respondent is  
ordered to pay the costs of the application on the scale as between  
attorney and own client.

## JUDGMENT

BAM J

### Introduction

1. The sole issue to be decided in these proceedings is whether the applicant was entitled to cancel the instalment sale agreement without first obtaining an order from this court. The applicant is claiming the return of two of its machines, an excavator and soil compacter, (the units) from the respondent. The applicant's case is premised on the fact that it is the owner of the units and the respondent is in possession thereof. The respondent opposes the application on the basis that it was not open to the applicant to terminate the agreement without first obtaining this court's order. For this contention, the respondent  
  
says it relies on clause 10 (k) of the agreement.

### Parties

2. The applicant, Caterpillar Financial Services South Africa, is a duly registered and incorporated South African company, in line with the company laws of South Africa. It has its principal place of business at Witfontein, Kemptpn Park, Gauteng. The respondent is Elephan-te Trading Proprietary Limited, a private company duly incorporated in terms of the company laws of South Africa, with its registered address and domicilium citandi et executandi at 6[...] P[...] Road, Rooihuiskraal, Centurion. The respondent is represented in these proceedings by its sole member, Ms Lufuno Masindi Ndou.

## Background

3. On 10 October 2019, the applicant and the respondent concluded a written instalment sale agreement (the agreement). The material terms of the agreement included, inter alia: (i) that the applicant would lend and advance the aggregate capital sum of R 3 626 000 to the respondent to purchase the units; (ii) The units would remain the property of the applicant until all amounts owing to the applicant have been paid in full; (iii) The respondent would make payment of the financed amount to the applicant over a period of 36 months; (iv) An event of default would occur if the respondent failed to make payment when due in terms of the agreement; (v) Upon the occurrence of an event of default the applicant would be entitled to declare the agreement in default and to cancel the agreement; The respondent accepted liability for the applicant's legal costs on the scale as between attorney and client.
4. The applicant complied with its obligations under the agreement and, in particular, delivered the units to the respondent. It is common cause that the respondent breached the agreement by failing to make payment of the amounts due in terms of the agreement. On 20 June 2023, the applicant, through its attorneys, addressed a demand to the respondent, informing it that it was in arrears in the amount of R 345 210. Payment of the full amount was accordingly demanded. Following discussions, which failed, the

applicant, on 28 June 2023 gave notice of termination of the agreement as provided for in the agreement (in terms of Clause 10 b). In pursuit of its claim of rei vindicatio, the applicant now seeks an order from this court for the retrieval of the units as the respondent failed to hand them over.

## Issue

5. The issue to be resolved is whether, the applicant was entitled to terminate the agreement without first obtaining an order from this court.

## Relevant Legal principles

6. There is no dispute that in so far as proving its claim all that the applicant need do is establish ownership of the units and that the respondent is in possession thereof; the onus being on the respondent thereafter to establish any right to continue to hold[1]. It is also for the plaintiff to prove the termination of any right to hold which it concedes the respondent would have had but for the termination[2].
7. The applicant 'exercises its right to cancel it a) by words or conduct manifesting a clear election to do so b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either

requirement. Any conduct complying with those conditions would therefore qualify as a valid exercise of the election to rescind[3].

8. On the question of interpretation of the relevant clauses of the agreement dealing with remedies in the event of breach, the relevant

point of departure, as the authorities suggest, is the language of the provision itself[4]. 'Where more than one meaning is possible each possibility must be weighed. The process is objective not subjective. A sensible

meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the

document.'

#### Discussion

9. The relevant clauses, which are at the heart of the dispute between the parties, are located in clauses 10

- (b) and 10 (k). Clause 10 as a whole deals with remedies. It is preceded by clause 9, which defines breach in the context of the agreement. The relevant aspects of clause 10 may be summarised thus:

Remedies: If an event of default occurs, we will have the rights and remedies provided by this Agreement. We will also have all rights and remedies as a secured party under any law or otherwise.

- i. Among these rights and remedies are to:

- a) enforce specifically your performance or to recover damages;
- b) declare this Agreement in default, and cancel this Agreement or otherwise terminate your right to use any Unit and your other rights, but not your obligations;
- c) declare all amounts due or to become due under this Agreement immediately due and payable....
- k) Take control of and take possession of the Unit and it is expressly recorded for this purpose that you consent to such taking control and possession by us; and

should you breach any of your obligations and our rights under Clause 10 (b) to (k), we will approach a court of law and obtain a court order to permit us to exercise such rights.

10. A reading of Clause 10 shows that it carries a range of remedies. These remedies include what one would call harmless remedies to those that would amount to the applicant engaging in self help, which our law proscribes. I shall style these drastic remedies. They are drastic because unless they are preceded by a court order, they would be inimical to the rule of law on which our Constitutional order hinges[6].

11. Declaring an agreement in default and cancelling or terminating it can hardly be referred to as harmful or amounting to self help. It is usually done by means of a letter to the debtor, which letter may be delivered by the Sheriff or emailed, depending on the requisites of the contract. Creditors, in particular financial institutions, where the circumstances of the agreement justify, exercise their entitlement to terminate agreements routinely in this country, without reference to the courts.
12. Clause 10 (j) for example, entitles the applicant to trace the contracting party, its directors and shareholders and the unit itself via credit bureaus and tracing agents. Again, in the ordinary course of commercial dealings, creditors trace debtors or their directors and shareholders all the time, without reference to courts. The examples of Clause 10 I have just referred to amount in my view to what I call harmless remedies and for which no court order is required.
13. To contend that in respect of each remedy, regardless of what it constitutes in terms of harm, the applicant requires a court order, would in my view spawn confusion and place untold hardship on the applicant. I have doubts that the parties had intended that to implement harmless remedies, the applicant would have to run to court. That would also put the cost of the machines way more than their real cost.
14. The more sanguine and harmless interpretation of Clause 10, which aligns with the businesslike and objective interpretation encouraged in *Endumeni*, requires that those remedies that are harmless to the respondent's rights and to the rule of law be isolated from those that require court intervention. That approach strikes me as sensible.
15. In spite of the language of Clause 10 (k), which suggests that the applicant will approach the court to exercise any of the remedies set out in 10 (b) to 10 (k), it is the exercise of drastic remedies that amount to self help that requires the applicant to obtain a court order, hence the applicant is before court to exercise its rights as set out in Clause 10 (k). The applicant need not obtain a court order to exercise its right to declare the agreement in default and terminate or cancel the agreement (10 b).

## Conclusion

16. Having concluded on the sensible, objective and businesslike approach to interpreting Clause 10, in particular clause 10 (b) and 10 (k), the respondent's defence must fail. That means the applicant is entitled to its order.

## Order

1. The application succeeds.

1.1 The respondent is ordered to deliver to the Sheriff of the High Court within 24 (twenty four) hours of service of this Order on the respondent by email addressed to I[...] and i[...] the following:

2. In the event of the respondent failing to comply with paragraph 1 above, the Sheriff of the Hight is authorised and ordered to take possession of the Units from wherever he/she may find, and the Sheriff is authorised to retain possession of the Units until delivered to the applicant or its duly authorised representative.

N.N BAM

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA

Date of Hearing:

26 November 2024

Date of Judgment:

27 December 2024

Appearances:

Counsel for the Applicant: Adv N Horn Instructed by: Werksmans Attorneys c/o Serfontein, Viljoen & Swart Attorneys Brooklyn, Pretoria Counsel for the Respondent: Adv M Mapila Instructed by: T Radzilani Attorneys Edenvale, Johannesburg

- [1] Robert Paul Serné N O and Others v Mzamomhle Educare and Others (588/2023) [2024] ZASCA 152 (12 November 2024), paragraph 27.
- [2] Mzamomhle Educare, note 1 supra, paragraph 30.
- [3] Datacolor International (Pty) Ltd. v Intamarket (Pty) Ltd. (2/99)
- [2000] ZASCA 81; 2001 (2) SA 284 (SCA); [2001] 1 All SA 581 (A) (30 November 2000), paragraph 28.
- [4] Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (470/2020) [2021] ZASCA 99 (09 July 2021), paragraph 25.
- [5] Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012), paragraph 18.
- [6] Merafong City Local Municipality v AngloGold Ashanti Limited (CCT106/15) [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (24 October 2016), paragraph 42.

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