REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 2012/12834

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

4 OCTOBER 2012

FHD VAN OOSTEN

In the matter between

LEIGH WILLIAM ROERING NO	FIRST APPLICANT
GEORGE DA SILVA RAMALHO NO	SECOND APPLICANT
BATLHOBOGILE ROSE NONYANE NO	THIRD APPLICANT
GUNVANTRAI MUGGAN NO	FOURTH APPLICANT
IGNATIUS CLEMENT MIKATEKO SHIRILELE NO	FIFTH APPLICANT

and

NEDBANK LIMITED	RESPONDENT

Insolvency – Company - effect of concursus creditorum on goods sold by bank to company in terms of instalment agreements - company in default of payments - bank delivered demand to company allowing 10 days for performance failing which cancellation - company wound-up - bank subsequently cancelled agreements - effect of concursus on bank's cancellation of the agreements - Porteous v Strydom NO 1984 (2) SA 489 (D) not followed - held: bank did not acquire a completed right of cancellation and that the goods fell into the estate of the insolvent company with effect from the date of commencement of its winding-up, pursuant to the provisions of section 84 (1) read with section 83 of the Insolvency Act 24 of 1936.

JUDGMENT

VAN OOSTEN J:

[1] At issue in this application is the fate of 7 aircraft[1] sold by the respondent (the bank) to a company known as Aircraft Africa Contracts Company (Pty) Ltd (AACC), which has since been finally wound-up due to its inability to pay its debts. The applicants, who are the appointed liquidators of the insolvent company, seek a number of declarators to the effect that the aircraft fell into the estate of AACC, with effect from the date of commencement of its winding-up, pursuant to the provisions of s 84 (1) read with s 83 of the Insolvency Act 24 of 1936 (the Act).[2] The bank, on the other hand, contends that its ownership of the aircraft, as provided for in the reservation of ownership clause[3] in the series of instalment agreements in terms of which they were sold to AACC (the agreements), survived the liquidation of the company.

[2] A résumé of the salient facts of this matter, which are not in dispute, is the following. AACC, until its winding-up on 13 September 2011, carried on business in the leasing and chartering of aircraft. The agreements were concluded in the period between 24 December 2010 and 23 February 2011 and are all in materially identical terms. In terms of the agreements the bank sold the aircraft to AACC, on credit, at the price stated in the introduction to the agreements, the ownership of which vested in the bank until payment of all amounts due in terms of the agreements had been made. It is common cause that the agreements are instalment agreements, as contemplated in s 84 (1) of the Act. The bank duly delivered the aircraft but AACC defaulted in the payment of one or more of the instalments due under the agreements. On 20 May 2011 the bank delivered a notice[4] to AACC confirming the arrears and informing it that "unless payment of the [outstanding balance] is received within 10 business days from the date

1 As listed in annexure "A" to the notice of motion. In argument the annexure at the request of counsel for the applicants was amended by deletion of the reference to the first two aircraft.
2 The sections are only applicable to where insolvency resulted from an inability to pay debts: see *Absa Bank Ltd v Cooper NO and others* 2001 (4) SA 876 (T).
3 Clause 7.
4 Pursuant to clause 17 of the agreements, the relevant part of which is quoted in para 5 *infra*.

of... delivery of this letter, the agreement will be cancelled and the full amount...will be immediately due and payable" (the demand).

[3] On 27 May 2011, and thus before expiry of the notice period of 10 days, applications for the winding-up of AACC were launched with the result that this date is deemed to be the date of commencement of the winding-up of the company in terms of s 348 of the Companies Act 61 of 1973. On 13 July 2011 the bank formally cancelled the agreements.[5] On 26 July 2011 a provisional winding-up order was issued which, despite opposition thereto, was made final on 13 September 2011.

[4] A convenient point of departure is to consider the provisions of s 84 of the Act, which provides as follows:

"84. Special provisions in case of goods delivered to a debtor in terms of an instalment agreement

(1) If any property was delivered to any person (hereinafter referred to as the debtor) under a transaction that is an instalment agreement contemplated in paragraph (a), (b) and (c)(i) of the definition of 'instalment agreement' set out in section 1 of the National Credit Act, 2005 (Act 34 of 2005), such a transaction shall be regarded on the sequestration of the debtor's estate as creating in favour of the other party to the transaction (hereinafter referred to as the creditor) the hypothec over that property whereby the amount still due to him under the transaction is secured. 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 the provisions of section 83 shall apply.

(2) If the debtor returned the property to the creditor within a period of one month prior to the sequestration of the debtor's estate, the trustee may demand that the creditor deliver to him that property or the value thereof at the date when it was so returned to the creditor, ..."

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[5] In an answering affidavit filed in an application to place AACC under business rescue, which was unsuccessful.

It is common cause that the law relating to insolvency is rendered applicable to the winding-up of AACC by the operation of s 339 of the Companies Act 61 of 1973, as read with item 9 to Schedule 5 of the Companies Act 71 of 2008. For the sake of completeness it is necessary to briefly summarise the provisions of the consequential provisions of s 83 of the Act, which becomes operative once the statutory hypothec is created in terms of s 84 (1). It provides for the realisation of securities for claims: a creditor who holds moveable property as security for a claim must, before the second meeting of creditors, give notice in writing of that fact to the Master and to the trustee,[6] the trustee may within seven days take over the property from the creditor at a value agreed between the trustee and the creditor or at the full amount of the creditor's claim or, if the trustee does not take over the property the creditor may after the expiry of the period in which the trustee may take over the property, but before the meeting, realise the property in the prescribed manner.[7] The same rights are afforded to the creditor where no trustee has been appointed, if permission is given by the Master.[8] As soon as the creditor has realised the property, the creditor must prove its claim and provide a statement of the proceeds of the realisation.[9] If the creditor has not realised the property before the second meeting of creditors, he must deliver the property to the trustee for the benefit of the insolvent estate.[10] The creditor may prove its claim and place a value on the property. [11] As soon as a creditor has realised the security by selling it, the creditor must pay the proceeds of the realisation to the trustee (or, the Master, if no trustee has been appointed) and the creditor is thereafter entitled to payment out of such proceeds of the claim as a preferent claim.[12]

[5] The controversy between the parties in essence concerns the legal effect to be given to the demand once *concursus* has intervened. The bank's contention is this: resulting from AACC's breach of the agreements and by the delivery of the demand a right to cancel the agreements accrued to the bank. I interpose to mention that the bank derives

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[6] Section 83 (1).
[7] In sub-section (8).
[8] Section 83 (4).
[9] Section 83 (5).
[10] Section 83 (6).
[11] In terms of s 44 (4).
[12] Section 83 (10).

its right to cancellation from the provisions of clause 17 of the agreements which does not contain a *lex commissoria.* The relevant part of the clause reads as follows:

"17.1 Should the [AACC] breach any term or condition contained in this agreement..., or in the event that:

...

17.1.3 [AACC] commits a breach of any of the terms and conditions of this agreement ....

17.2 Upon the happening of any of the events set out above, the Bank shall be entitled at its election and without prejudice to any other rights which the Bank may have to:

17.2.1 claim immediate payment of the loan amount ...;
17.2.2 to cancel the Agreement and take repossession of the goods in terms of an attachment order ..."

The bank contends for a restrictive interpretation of s 84 of the Act, resulting in, so the argument went, the section only applying to agreements that are in force at the date of *concursus creditorum* and not to agreements where the right to cancel has accrued prior to such date. To hold otherwise, so the argument concluded, would be to afford undue favour to an insolvent estate at the expense of the owner of the goods sold in terms of the credit transaction. In support of the contention counsel for the bank heavily relied on the judgment of Galgut AJ (as he then was) in *Porteous v Strydom NO* 1984 (2) SA 489 (D). The correctness of the *ratio* of the judgment was hotly debated before me. Counsel for the applicants aligned himself with the criticism expressed against the judgment in two authorative text books on insolvency,[13] and it is accordingly necessary to consider it in some detail.[14] Dealing with the validity of the cancellation by virtue of s 35 of the Act and the effect of the *concursus creditorum*, the learned Judge held:

"In my judgment the notice [intention to cancel] which was still running at the date of the occurrence of the *concursus* would have nothing to do with these things. The notice was merely a necessary step that had to be taken before the contract could validly be cancelled at a later date and can never in any sense be said to create a claim against the insolvent estate. For these reasons alone the *concursus* did not, in my judgment, have the effect of cancelling or rendering of no effect the notice which was given to Jacobs prior to his sequestration."

With respect to the learned Judge I am unable to follow the logic of the reasoning. I find myself in respectful disagreement with the view expressed and I decline to follow it. The

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[13] See Meskin *Insolvency Law* para 5.21.1 and *Henochsberg on the Companies Act* (Vol 1) 5th Ed 828 (of which Galgut J (as he then was) happens to be the consulting editor); Mars *The Law of Insolvency in South Africa* 9th Ed 227; and Kathrin Smith *The Law of Insolvency* 151/2.

[14] *Porteous* was referred to, but not considered, in *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1984 (4) SA 510 (N) and *Herold Estates (Edms) Bpk v Shaw NO* [1998] JOL 3391(C).

learned Judge in any event did not deal with the reason for holding that the notice continued to run despite the *concursus* but in support of the proposition referred to the judgment of Friedman J (as he then was) in *Smith and another v Parton NO* 1980 (3) SA 724 (D) where the period of notice in respect of a sale of a business had expired before *concursus* and the seller had made his election to cancel thereafter. The seller's right to cancel had accordingly accrued prior to *concursus* which distinguishes it from both *Porteous* and the present matter. In *Smith* the cancellation was held good on the "only real basic principle" that the contract had survived the insolvency. In *De Wet No v Uys NO en andere* 1998 (4) SA 694 (T) Le Roux J, dealt with an accrued right of cancellation as follows:[15]

"Waar 'n party 'n *lex commissoria* wil afdwing, moet die voorwaardes wat dit in werking stel streng nagekom word. (Vergelyk *Rautenbach v Venner* 1928 TPD 26 op 30; *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T) op 606.) Indien daar 'n reg tot kansellasie ontstaan het voor insolvensie, oorleef dit die *concursus creditorum* en kan dit na insolvensie uitgeoefen word. (Vergelyk *Smith and Another v Parton NO* 1980 (3) SA 724 (D) op 729.) Dit volg dat waar so 'n reg nie ontstaan het voor likwidasie nie, die verkoper nie daarop kan aanspraak maak na likwidasie nie omdat met die werking van art 35 geen verdere prestasie van die kant van die kurator of likwidateur gevorder kan word nie."

[6] This brings me to the judgment of Heher J (as he then was) in *Standard Bank of SA Ltd v Townsend and others* 1997 (3) SA 41 (W), which the applicants relied on and sparked off much debate before me. The learned Judge said the following on the effect of s 84 (1) of the Act:[16]

"In addition the above, and whatever the usual rights of a trustee may be in relation to the continuation or cancellation of an executory contract, as to which see *Du Plessis and Another NNO v Rolfes Ltd* 1997 (2) SA 354 (A) and 363B ([1996] 2 B All SA 390 (A) at 398*g*) and the cases there cited, it seems clear that s 84 (1), which creates on sequestration of the debtor a hypothec in favour of a creditor who has delivered goods to the seller under an instalment sale agreement transaction, puts an end to the rights of the parties to enforce the terms of the contract or to cancel for breach thereof. The creditor loses his ownership in the property, which passes to the insolvent estate subject to his right to claim as a preferred creditor for the balance

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[15] At p 706D.
[16] At p 50D-E.

due under the transaction. The provisions of s 83 then apply subject to what has been said in *Venter NO v Avfin (Pty) Ltd (supra)*."

It is quite apparent from a plain reading of the passage that the learned Judge did not express a final view on the effect of s 84. Counsel for the bank pointed out that the remarks were made *obiter* as the cancellation of the agreements in that matter, although alleged in the pleadings, was no longer persisted with[17] and therefore not an issue for decision by the learned Judge and that *Du Plessis* does not constitute authority for the proposition put forward by the learned Judge.[18] Counsel submitted that the judgment on this aspect was clearly wrong and urged me not to follow it. Despite the criticisms I am unable to accede to the request as I am inclined, subject to one qualification, as I shall presently deal with, to agree with the learned Judge's interpretation of the section.

[7] Section 84 (1) applies to a transaction, as defined in the section, and therefore *a fortiori* pre-supposes an agreement that at *concursus* is still in force.[19] The section is silent on *inter alia* the status of an accrued right of cancellation. That being so, the common law principles of insolvency, accordingly, need to be invoked.[20] That an accrued right of cancellation of the agreement may survive a *concursus* appears from *Smith* and *De Wet NO.* Those cases however did not deal with the effect of s 84 of the Act. A purposive interpretation of the section ought to be followed in order to give effect to the intention if the legislature. It appears abundantly clear from the wording of s 84 that only agreements that are in force are subject to the regime of rights and obligations the section provides for. It must also be borne in mind that insolvency freezes the position as at the *concursus.* Applying these considerations to the facts of the present matter, I am of the view that only a completed accrued right of cancellation can survive a *concursus*. A telling illustration of a completed right of cancellation presents itself on the facts of this matter, save for one modification, which is to proceed on the supposition that the demand had not made and delivered. The bank's right of cancellation flowing from this hypothesis would have been complete before *concursus* and was only exercised after *concursus*. All that was necessary to effect cancellation

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[17] See p 48A of the report.
[18] The learned Judge's reference to *Du Plessis* is only in regard to the introductory sentence of the paragraph.
[19] See *Absa Bank* supra 881I-882A.
[20] See *Du Plessis and another NNO v Rolfes Ltd* 1997 (2) SA 354 (A).

was the formal act of cancellation and notification thereof.[21] Performance by either the debtor or the liquidators after the right to cancellation became complete would neither have been relevant nor could it affect the bank's right to cancel. The logical conclusion from the hypothesis is that the completed right of cancellation, which had existed prior to concursus, accordingly would have survived *concursus*. Reverting to the real facts if the present matter: the question arising is what was the status of the bank's right to cancellation at the stage of *concursus*? The demand afforded AACC a period of 10 days to perform before cancellation would be effected. I agree with counsel for the applicants: the bank thereby suspended its right to cancel the agreements for a period of ten days. To put it differently: the bank could not at *concursus* validly cancel the agreements because it was then bound by the time period allowed in the demand. Its right to cancellation therefore was incomplete - it only became complete upon non-performance by AACC or the liquidators within the stipulated time and thus only after *concursus*.[22] For all these reasons I conclude that the bank's right of cancellation at the occurrence of *concursus* was incomplete and that it accordingly did not survive *concursus*.

[8] It remains to briefly revert to the bank's contention. It is important to bear in mind that the section is peremptory and has the effect of divesting the creditor of ownership and to substitute for such ownership a hypothec as security for payment of the balance owing in terms of the instalment sale. The ownership then *ipso iure* vests in the trustee.[23] The statute creates a unique structure of rights: the creditor is given a statutory or legal hypothec over the property; the creditor is entitled to call for delivery of the property to him so that he may hold it as security for his claim, while the trustee is obliged to deliver the property to him. The trustee has the right to demand delivery of the property to him or her and controls the process: the trustee can direct the process of the realisation of the security and whatever proceeds are realised by the creditor (where the trustee does not do so) must be accounted for to the trustee. Whatever claims exist

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[21] *Christie's The law of contact in South Africa* 6th ed 561.

[22] Counsel for the applicants referred to the useful analogy concerning notarial bonds: notarial bonds that are perfected prior to the *concursus* are validly perfected *(Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA)). Bonds not perfected as at the date of the *concursus*, as a general rule cannot thereafter be perfected (*International Shipping Ltd v Affinity Ltd* 1983 (1) SA 79 (C) 86G – 87D). This applies even where the creditor has acquired a *right* to perfect (but has not exercised it) prior to the *concursus*.

[23] See *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) 652B-H; *Hubert Davies Water Engineering (Pty) Ltd v The Body Corporate of 'The Village' and others* 1981 (3) SA 97 (D) 100G; *Williams Hunt (Vereeniging) Ltd v Slomowitz* 1960 (1) SA 499 (T) 501E; and *Morgan and another v Wessels NO* 1990 (3) SA 57 (O) 65B-C.

as at that date must be proved in the ordinary process. It is clear from the above that the structure of rights and obligations created by s 84 at the occurrence of concursus substitutes those existing under the contract. Section 83 by mandatory implication applies to the process of realising the security. On the bank's construction of the legal position, the entire structure provided for by ss 84 and 83 would after *concursus* be undone by the subsequent cancellation of the agreements. This would have the effect that the creditor would not have to prove the claim in insolvency: he could simply cancel the contract, reclaim the asset and walk away with it, all outside the ambit of the Insolvency Act. This, in my view could not have been the intention of the legislature in enacting those sections. But, there is a more compelling reason for rejecting the bank's contention: the period allowed for performance by the debtor in the demand, assuming it to survive *concursus*, would allow, and in fact, entitle the debtor, after *concursus* and in defiance thereof, without the concurrence of the trustee, to perform so as to avoid cancellation. Such an interpretation runs counter to the basic principle governing the effect of insolvency which is to divest the debtor of his estate and vest it in and under the control of the trustee. In this regard it is as well to quote the well-known dictum of Innes J (as he then was) in *Walker v Syfret NO* 1911 (AD) 141 at 166:

"The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises 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 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."

One final observation: the freezing of the position of the parties by s 84, and the falling away of an incomplete right to cancel the contract, poses no hardship on the creditor. On the contrary, the creditor is given a preferent claim to the asset or the proceeds of the asset. It follows that the application must succeed.

[9] In the result the following order is made:

1. It is declared that upon the grant of the final winding-up order in respect of Aircraft Africa Contracts Company (Pty) Ltd, on 13 September 2011, the

aircraft listed in annexure "X" to the notice of motion (as amended) fell into the insolvent estate of the company, with effect from the commencement of the winding-up of the company, on 27 May 2011.

2. It is declared that the aircraft referred to in paragraph 1 above, became subject to the provisions of section 84 (1), as read with section 83 of the Insolvency Act 24 of 1936, read with section 339 of the Companies Act 61 of 1973, as read with item 9 of Schedule 5 of the Companies Act 71 of 2008, and that section 84 (1) and section 83 continue to apply in respect of such aircraft.
3. It is declared that the applicants are obliged to deal with the aircraft in terms of the aforesaid sections.
4. The respondent is ordered to pay the costs of this application including the costs of senior counsel.

EHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANTS	***ADV JC BUTLER SC***
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RESPONDENT'S ATTORNEYS	***KWA ATTORNEYS***
DATE OF HEARING	***29 AUGUST 2012***
DATE OF JUDGMENT	***4 OCTOBER 2012***