

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

CASE NO: 155/03
Reportable

In the matter between

UKUBONA 2000 ELECTRICAL CC

First Appellant

ABB SOUTH AFRICA (PTY) LIMITED

Second Appellant

and

**CITY POWER JOHANNESBURG
(PTY) LIMITED**

Respondent

CORAM: HOWIE P, CLOETE, LEWIS, HEHER JJA, PATEL AJA

HEARD: 17 MAY 2004

DELIVERED:

Summary : Section 84 of the Insolvency Act 24 of 1936 does not create a statutory hypothec for a creditor who does not own the *merx* at time of the insolvency of the debtor. Definition of 'instalment sale transaction' in s 1 of the Credit Agreements Act 75 of 1980 interpreted to include a sale in terms of which the purchase price is payable in one lump sum in the future.

JUDGMENT

PATEL AJA

[1] Drivecor (Pty) Ltd (Drivecor), prior to its final liquidation on 17 September 2002, carried on business as a manufacturer and supplier of electrical and electronic equipment. The first appellant, Ukubona 2000 Electrical CC, and the second appellant, ABB South Africa (Pty) Ltd, applied to the Johannesburg High Court (Tregrove AJ) for an order declaring, inter alia, that they held security in respect of certain electronic components in the possession of Drivecor by virtue of s 84 read with s 83 of the Insolvency Act 24 of 1936 ('the Act'). The respondent, on the other hand, claimed ownership of these components.

[2] The appellants' claims were dismissed with costs. This is an appeal against that portion of the judgment of the court *a quo* dismissing the appellants' claims to be declared secured creditors of Drivecor, as contemplated by s 84 of the Act.

[3] In the court below, the appellants also sought an order declaring an action commenced by the respondent in the same court, in which it had claimed ownership of the various goods, to be frivolous and vexatious. That part of the relief claimed was also dismissed. The action by the respondent relates to the very goods

over which the appellants are claiming a statutory hypothec. That action has not yet proceeded to trial.

[4] The factual background, very briefly, is the following. In 2001 Drivecor entered into a contract with the respondent in terms of which it undertook to manufacture, supply, install and commission control panels at two electrical substations run by the respondent on behalf of the municipality of Johannesburg

[5] Drivecor purchased from the appellants some of the electrical and electronic equipment it required for the manufacture of the control panels. The appellants had, in turn, acquired these components from various suppliers. It is over these components that the parties lay competing claims. Besides purchasing components from the first appellant, Drivecor also subcontracted the first appellant to perform a part of the work required for the manufacture and the commissioning of the panels. To this end, it delivered the control panels to the first appellant's premises. Once the first appellant had completed its part of the work, it would have returned the control panels to Drivecor for completion and installation at the power station.

[6] At the time of Drivecor's liquidation, the control panels were still being assembled and some of these panels were located at the premises of the first appellant. The components supplied by the first appellant had been built into the incomplete panels. At all material times Drivecor had not fully paid the appellants for the components although the outstanding amount is not clear from the record.

[7] The respondent had made substantial payments to Drivecor and claimed to have acquired ownership over the panels. It is the respondent's case that it had entered into an agreement with Drivecor whereby ownership was transferred to it by attornment.

[8] The liquidators of Drivecor, whilst supporting the claims of the appellants, elected to abide the decision of the court both in the application and in this appeal.

[9] The crisp question to be answered now is the contention by the appellants that they have statutory hypothecs over the components in terms of s 84 of the Act, in that their contracts with Drivecor for the supply of the components were 'instalment sale

transactions' as contemplated by s 1 of the Credit Agreements Act 75 of 1980.

[10] The documents relating to these transactions between the appellants and Drivecor show that the purchase price was payable in one lump sum on a future date. It is common cause that Drivecor had not fully paid the appellants for the parts which were used in the panels.

[11] In the court below it became common cause that the appellants are not the owners of the electronic parts over which they seek the hypothec since the suppliers from whom they had purchased them had reserved ownership and these suppliers had not been paid.

[12] Can non-owners, in the position of the appellants who have sold goods where the purchase price is payable in one lump sum on a future date, claim to have a statutory hypothec in terms of s 84 of the Act? If the answer is in the negative, the appellants must fail.

Section 84 (1) of the Act provides as follows:

‘ If any property was delivered to a person (hereinafter referred to as the debtor) under a transaction which is an instalment sale transaction contemplated in paragraphs (a) and (b) of the definition of “instalment sale transaction” in section 1 of the Credit Agreements Act, 1980, 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) a 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.’

Paragraphs (a) and (b) of the definition of “instalment sale transaction’ in s 1 of the Credit Agreements Act 75 of 1980, read as follows;

‘ “instalment sale transaction” means a transaction in terms of which-

- (a) goods are sold by the seller to the purchaser against payment by the purchaser to the seller of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future; and

(b) the purchaser does not become owner of those goods merely by virtue of the delivery to or the use, possession or enjoyment by him thereof.'

[13] In *Sandoz Products (Pty) Ltd v Van Zyl* NO 1996 (3) SA 726 (C), Blignault AJ, in my view correctly, held that that a transaction for the sale of goods in terms of which the purchase price is payable by way of one lump sum at a future date would be covered by the terms of para (a) of the definition of 'instalment sale transaction' in s 1 of the Credit Agreements Act. The effect of this judgment is that the definition encompasses a sale where the purchase price is payable in a lump sum at a future date as well as one where the purchase price is payable, in whole or in part, in instalments. The contrary view by Professor J M Otto¹ cannot be supported as it results in an interpretation of the Afrikaans version of the definition which is irreconcilable with the English version. It is unnecessary to repeat the interpretive analysis in *Sandoz* of the meaning of para (a) of the definition of 'instalment sale transaction'. In my view it is persuasive. It is only necessary to add that if the interpretation were to exclude the instance where the purchase price is payable in one lump sum, then it would have this anomalous consequence. A seller in such a case would be

¹ *Lawsa* vol 5 Part 1 (First Reissue) p8 para 7.

accorded no rights in terms of s 84 of the Act. By contrast s 36 of the Act allows the seller to reclaim property sold for cash where ownership has passed, and s84 (1) of the Act grants the seller a hypothec where the purchase price is payable in instalments. On this leg of the enquiry, I find that the transactions of both the appellants fall within the ambit of para (a) of the definition of 'instalment sale transaction'.

[14] Section 84(1) creates a statutory hypothec in favour of the seller of the goods sold whereby the balance still due under the transaction is secured. Where the creditor/seller is the owner of the goods, ownership over the goods of necessity passes to the trustee of the buyer's insolvent estate.² The reason is that no-one may have a hypothec over his own property. If authority is required for this obvious proposition it is to be found in D13.7.29 and 50.17.45; Voet *ad Pandectas* 20.6.1 and *SA Loan, Mortgage, and Mercantile Agency v Cape of Good Hope Bank and Littlejohn* 6 SC 163 at 187) . It is contrary to principle for the owner of the *merx* to be given a restricted real right in the form of a statutory hypothec

² *Williams Hunt (Vereniging) Ltd v Slomowitz* 1960 (1) SA 499 (T) at 501 E-G; *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 652 E-G; E Spiro *The Hire-Purchase Agreement in South African Law and its Problems* (1940) 57 SALJ 263 at 273; Mars *The Law of Insolvency in South Africa* 8 ed (1988) at 152 (para 8.15); LAWSA vol 11 (First Issue) 163 para 177; Meskin, *Insolvency Law* 5-72 para 5.2.1.8.2; Smith, *The Law of Insolvency* 3rd ed (1988) at 166-8; Wille's *Mortgage and Pledge* 3 ed (1987) 105.

over property he owns. The effect of s 84 (1) therefore is that the seller's ownership in the goods sold is replaced with a hypothec over the *merx*. His right is thus diminished.

[15] The essential question, however, is whether the legislature when drafting s 84(1) contemplated a non-owner of the *merx* enjoying a statutory hypothec over the property.

[16] As to whether a non-owner of the *merx* can qualify as a creditor in terms of s 84(1), the section was first introduced to regulate what were, in effect, common law hire-purchase agreements. The relevant portion of s 84(1) in its original formulation read:

‘ If any property was delivered to a person (hereinafter referred to as the debtor) under an agreement which provided for the passing of the ownership of that property when certain payments prescribed in the agreement have been made, such agreement shall be regarded on the sequestration of the debtor's estate as creating in favour of the other party to the agreement (hereinafter referred to as the creditor) a hypothec over that property whereby the amount still due to him under the agreement is secured. ‘

That formulation clearly envisaged only a creditor/owner enjoying a hypothec since it is only a creditor who is the owner who would be in a position to pass ownership.

[17] Section 84 was amended by the Hire Purchase Act 36 of 1942 by the substitution in subsection (1) for the words 'provided for the passing of the ownership of that property when certain payments prescribed in the agreements have been made' of the words 'is a hire-purchase agreement in terms of section one of the Hire-Purchase Act, 1942'. Under the Insolvency Amendment Act 101 of 1983 the subsection was made to refer to 'instalment sale transactions' as defined in s 1 of the Credit Agreements Act. The creditor/ seller was not further defined. Both forms of hire-purchase agreement defined in the Hire-Purchase Act, as well as an instalment sale agreement as defined in the Credit Agreements Act, contemplated that when ownership passes to the buyer it passes from the seller. If the original reason of the law is to be the life of the law then 'creditor' can have no meaning in s 84(1), other than the owner of the *merx*.

[18] I accordingly conclude that the legislative intent in s 84(1) was to allow only a creditor/seller who is the owner of the *merx* to

be secured for the amount due to him which is achieved by replacing his ownership with a hypothec.

[19] Because the appellants were not owners of the components when Drivecor's insolvency intervened, their appeal must fail. It may be mentioned in passing that the first appellant would in any event have failed on the ground that it did not reserve ownership in the goods as is required by part (b) of the definition of 'instalment sale transaction'.

[20] It is not necessary to deal with the various other matters raised on the papers or in argument since those matters are not decisive of the appeal and could properly be ventilated, in so far as necessary, at the trial where the respondent seeks to vindicate the components.

[21] The respondent asked for costs of two counsel. I am satisfied that the appeal has raised an issue of law sufficiently complex as to warrant the employment of two counsel. Because two counsel were not employed at all stages of the appeal process, this must be reflected in the order.

[22] Accordingly the appeal is dismissed with costs, such costs to include costs of two counsel where two counsel were employed.

C N PATEL AJA

Concur:

Howie P

Cloete JA

Lewis JA

Heher JA