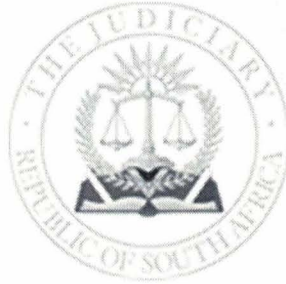


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 12837/2010

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
26/4/2018	<i>[Signature]</i>
DATE	SIGNATURE

In the matter between:

**FIRSTRAND BANK LIMITED
T/A FUTUREFIN FINANCE,
A DIVISION OF WESBANK**

Plaintiff

and

CLASS A TRADING (PTY) LTD

First Defendant

GEORGE PROKOS

Second Defendant

J U D G M E N T

KEIGHTLEY, J

INTRODUCTION

1. In this matter the plaintiff, FirstRand Bank Limited, trading as Futurefin Finance, a division of Wesbank ("the bank"), and the first defendant ("Class A") entered into an instalment sale agreement in terms of which Class A purchased a luxury motor vehicle, which was financed by the bank. Class A signed an "Instalment Sale (Inside Act)" document, as well as a document headed "Acknowledgement of Freedom of Choice".

The latter included a portion headed “acceptance of your terms and conditions of this agreement”. Both the “acknowledgment” section, and the latter “acceptance” section of the document were signed by Mr Prokas on behalf of Class A.

2. Mr Prokas also executed a deed of suretyship in respect of the instalment sale agreement, in terms of which he assumed obligations as both surety and co-principle debtor.
3. Under the instalment sale agreement monthly instalments were payable over a period of two years. Thereafter, the final instalment was in the nature of a “balloon payment” of R2 266 949. 00, which was due on 11 May 2009. This substantial sum is explained by the fact that the vehicle was at the upper end of the spectrum of luxury vehicles, being a Lamborghini Gallardo E Gear. While the monthly instalments were paid when they fell due, the final balloon payment was never paid. In January 2010, Mr Prokas voluntarily returned the vehicle to the bank, and Class A was liquidated shortly thereafter.
4. All of these facts are common cause.
5. The bank now proceeds against Mr Prokas as surety and co-principal debtor. It claims from him the outstanding balance under the installment sale agreement. The sum claimed represents the amount the bank would have received had the obligations under that agreement been met. The bank calculates this amount as being the amount due under the final balloon payment, less the amount for which the vehicle was ultimately sold at public auction (R1 450 080. 00) on 18 March 2011. On this basis the bank claims contractual damages in the amount of R1 889 600. 90, plus interest.

6. In support of the substance of its claim, the bank relies on the instalment sale agreement and the deed of suretyship, with associated documents.
7. As far as the instalment sale agreement is concerned, the bank's case is that two pages of what appear to be in the nature of some form of standard terms and conditions ("the T's & C's") formed part of the agreement, and thus bind Mr Prokas as co-principal debtor and surety. One of the terms permits that bank to rely on a certificate of balance as prima facie evidence of the amount due to the bank. The T's & C's document is not signed by Mr Prokas. He disputes that they formed part of the instalment sale agreement.
8. As far as the suretyship agreement is concerned, it is common cause that it does not include an express certificate of balance clause.
9. In support of its damages claim, the bank relies on:
 1. A certificate of balance signed by one Maureen Vorster, who is designated as Legal Manager of the Specialised Collections Department. It reflects that Class A is indebted to the bank in the amount of R1 880 266. 53.
 2. A copy of what is described as a detailed statement of account ("the statement of account"). It is a computerised statement and reflects the debits and credits associated with the account from 12 May 2007 to 1 April 2011. The debits include, among others, tracing fees; repossession costs; auction fees; storage fees and arrear interest. The credits include an amount of R1 450 080. 00 reflected as being "repossession proceeds".

10. The parties agree that the statement of account is “data” within the meaning of that term as defined in the Electronic Communications and Transactions Act¹ (“ECTA”). As such, that Act applies to the production of the statement as evidence in the trial.
11. It is common cause that the bank did not discover as evidence any original documentation relating to the transactions. In response to a request for further discovery, the bank responded that it did not have in its possession either the original instalment sale agreement, or the original suretyship agreement. Furthermore, the bank did not discover any documents supporting the debits or credits reflected on the statement of account as listed above. There was no explanation provided for this state of affairs.
12. To add to this, the bank did not lead the evidence of Ms Vorster, who, as I discuss in more detail below, signed not only the certificate of balance, but also a certificate under section 15(4) of the ECTA. Her failure to testify is somewhat puzzling given that, according to Mr Khan, the one employee called to testify by the bank, Ms Vorster is his supervisor and has been in the bank’s employ for a substantial period. For reasons that will appear shortly, I would have thought that she would have been a more appropriate employee than Mr Khan to shed light on the bank’s systems and processes. Unfortunately, this was not to be. Moreover, the bank did not lead the evidence of anyone who was directly involved in the finalisation of the instalment sale agreement, or the suretyship agreement. Mr Khan readily conceded that he had not been in the employ of the bank at the time the instalment sale agreement had been entered into, or at the time that the bank initiated proceedings against Class A and Mr Prokas consequent on the alleged default. Accordingly, he was unable to provide any first-hand,

¹ Act 25 of 2002

personal testimony on the relevant issues. I will return to these aspects of the case shortly.

13. As is evident from the dates cited above, for unknown reasons this dispute appears to have meandered its way to trial in lackadaisical fashion. The action was instituted in 2010, but was only brought to trial eight years later. One of the consequences of this is that by the time the matter came to trial the issues in dispute were substantially whittled down. In fact, it became evident to both parties during the course of the trial and closing argument, that the following were the essential issues in dispute:

1. Whether the bank had established that the T's & C's (and in particular, the certificate of balance clause) were part of the instalment sale agreement ("the T's & C's issue").
2. If the bank satisfied the court in this regard, the next issue was whether the certificate of balance clause (which formed part of the T's & C's) could be applied to Mr Prokas, as surety, in circumstances where the suretyship agreement itself did not contain such a clause ("the certificate of balance issue").
3. If the bank was unable to satisfy the court as regards the T's and C's issue and the certificate of balance issue, it was then reliant on the statement of account to prove its claim against Mr Prokas. The issue that then arises is whether, under the ECTA and the general principles pertaining to hearsay evidence, the court could accept the statement of account as evidence establishing Class A's (and hence Mr Prokas as surety) indebtedness to it for the contractual damages claimed ("the ECTA issue").

14. For the sake of clarity, I should add that if the bank satisfied the court on the first two issues, it would be entitled to rely on the certificate of balance to prove Mr Prokas's in-

debtedness, and the ECTA issue would not arise. I should also add that while in the pleadings Mr Prokas raised a defence based on an alleged repudiation of the instalment sale agreement on the part of the bank, he did not persist with this defence at trial. Nor did he persist with the defence that the bank had acted to the prejudice of Mr Prokas, as surety, and hence that he was not legally liable to the bank. In essence, then, the question is whether the bank has placed sufficient evidence before the court to prove its contractual damages against Mr Prokas in the amount of R1 889 600. 90 as claimed.

15. The bank called two witnesses in support of its claim: Mr Khan, to whom I have referred, and Mr Anderson, an ex-employee of the bank. Mr Anderson's evidence related to communications he had with Mr Prokas after the balloon payment had fallen due and was not paid. The relevance of his evidence was in respect of the two defenses that Mr Prokas did not pursue. It bore no material relevance to issue ultimately in dispute between the parties. Mr Prokas closed his case without leading any evidence.

The T's & C's issue

16. As I have already indicated, the T's & C's document was not signed by Mr Prokas on behalf of Class A, or by anyone else for that matter. The document is completely unsigned. It was inserted as an attachment to the particulars of claim as part of a four page bundle of documents identified in the particulars as the written instalment sale agreement. The first of these four pages is the document I referred to earlier as the "Instalment Sale (Inside Act)" document. The fourth page is the document I referred to earlier as the "Acknowledgement of Freedom of Choice" document. Both of these documents are branded with the FutureFin Finance label. The first page document reflects an agreement between the bank and Class A. On the top right is what appears

to be an official description indicating that it is an "Instalment Sale Agreement (Inside Act) ("ISA1") WHITE", and it goes on to state that it is an agreement:

"By which the Seller (the bank) sells to the Buyer (Class A) the goods described below ... on the terms and conditions set out in this agreement." (Emphasis added)

17. The document goes on to list items such as amounts debited as "structure fee", "licence fee"; the agreed selling price, the amount of the initial payment, the principal debt, the amount due as finance charges, and the total amount payable. In addition, the document sets out the applicable fixed interest rate (12.5%), prime interest rate (12.8%) and contract interest rate (12.8%). The document sets out the applicable payment structure of the instalments due (commencement date, amount of first instalment, when due, number of remaining instalments, amounts due and when, and the final instalment amount and when it would fall due). Finally, there is a section headed "Acknowledgements", requiring signature on behalf of Class A, stating that the buyer "hereby irrevocably authorise(s) debits to (its) bank account with all the amounts that might at any future time become due in respect of my obligation under this agreement", and an undertaking to advise the bank of any change in contact information. Mr Prokas signed this document.

18. The document on the fourth page of the attachment to the particulars of claim is, as I have indicated, headed "Acknowledgement of Freedom of Choice". It states as follows:

"You have applied for finance from Wesbank who may require certain security from you to protect its interest either in the form of a cession of a life policy or the making available of a short-term policy or both. Should this be the case, you may

choose whether to cede an existing policy having an appropriate value or to enter into a new one. If you wish to enter into a new policy or make an existing policy available you have the freedom of choice as to (among others, the insurer, whether the policy would exceed the value of the debt) ... Wesbank request that you acknowledge, by signing below, that before the policy is used as security for your debt or obligations to Wesbank: (i) you have been given written notification of your entitlement to freedom of choice (see above); (ii) you have exercised it; and (iii) you were not coerced or induced in any way in the exercising of your choice."

Thereafter, Mr Prokas signed under the heading "Acknowledgement". At the bottom of the Acknowledgement of Freedom of Choice document is a block headed "Acceptance of your terms and conditions of this agreement". Mr Prokas signed above the statement: "Please sign here to acknowledge that you, the Buyer, have received the Terms and Conditions". (Emphasis added)

19. The T's & C's are inserted between the first and the fourth pages of what is described in the particulars as being the instalment sale agreement relied on by the bank. The bank's case is that the T's & C's attached were those agreed to by Mr Prokas at the time that he entered into the agreement on behalf of Class A. In disputing that the T's & C's attached to the particulars of claim formed part of the agreement between Class A and the bank, Mr Prokas points out (through his counsel, Mr Heher) that:

1. While the first and final pages of what the bank contended formed part of the bundle of documents constituting the instalment sale agreement were clearly FutureFin branded documents, this was not the case with the T's & C's document. It was simply headed "Wesbank Instalment Sale Agreement (Inside ACT) ((ISA1))".
2. As I have already indicated, the T's & C's bear no signature or initial by Mr Prokas, or by anyone on behalf of the bank.

3. While the first and fourth pages of the attachment bear a fax transmission imprint dated 18 May 2007, indicating that they were pages 5 & 12 respectively of the transmission, there is no fax transmission imprint at all on the two T's & C's pages.
4. Significantly, there is no indication from the first page of the agreement that any terms and conditions, other than those set out in that document itself, are incorporated by reference therein. Consequently, it falls to the bank to establish that the T's & C's attached are actually those assented to by Mr Prokas on behalf of Class A.

20. Counsel for Mr Prokas submitted that the above facts are sufficient to place doubt on the bank's version that the T's & C's annexed to the particulars of claim were indeed those to which Mr Prokas was privy, and to which he agreed to bind Class A. It is trite that a plaintiff bears the onus of establishing what it pleads. If one considers the documents prima facie, it seems to me that there is doubt as to whether the T's & C's attached to the particulars of claim were indeed those applicable to the agreement between Class A and the bank. This is a matter that could quite easily have been clarified by the bank through leading appropriate evidence to explain what processes the bank follows if it intends incorporating standard terms and conditions into an instalment sale agreement of this type: does it require the client to initial the terms and conditions? if not, how is the client bound? how are the terms and conditions brought to the attention of client etc?

21. Unfortunately, the only evidence the bank led in this regard was that of a current employee, Mr Khan, who is a Defended Actions Controller in the specialised collections department. He testified that he has been so employed for four years. He accepted that he had no personal knowledge of the transactions relevant to the dispute between

the bank and Mr Prokas. He explained that when matters are handed over by the bank for legal action, an employee in his position will be tasked to liaise with the attorney once a client defends the matter. At that stage, the employee (in this case Mr Khan) is handed the client file. It would only be from that point that he could bear any first-hand knowledge of the matter. He explained that other employees would have dealt with the file prior to his employment, which only commenced in 2014.

22. When counsel for Mr Prokas put to Mr Khan that from the features of the T's & C's listed earlier, it appeared that they had been inserted after the instalment sale was concluded, Mr Khan accepted that it did not appear that they were part of the documents faxed to Class A. He explained that he had found the T's & C's in Class A's file when it was given to him and he had simply relied on the fact that they were bundled together in the file. It seems that Mr Khan drew from this the conclusion that the T's & C's were those originally forming part of the agreement. He again conceded that he could not shed any personal light on the matter, as he had not been employed at the bank at the time.

23. Mr Khan was asked by counsel for the bank to comment on the word "White" that appears at the foot of the first T's & C's page. He explained that this designation indicated that the T's & C's were associated with a FutureFin agreement. Although the system had since been discontinued, the bank had used different colours to designate what category of vehicle (and hence which finance arm of the bank) was involved as seller. The designation of "White" indicated that it was a luxury vehicle transaction, and at that time, these were concluded by FutureFin. There is some support for Mr Khan's explanation in that the words "(ISA1) WHITE" are written on the first page of the agreement. However, Mr Khan again correctly conceded that he had no personal

knowledge of the system that he had referred to and told the court that it had been explained to him by someone at the bank. Mr Heher correctly pointed out that Mr Khan's evidence was no more than hearsay on this score.

24. The overriding difficulty for the bank is that it failed to call anyone who could give first-hand evidence to link the T's & C's attached to the particulars of claim with the instalment sale agreement. In other words, there is no evidence by the bank that the "Acknowledgement" signed by Mr Prokas on the last page of the agreement related to the T's & C's attached to the particulars of claim. While it might be supposed that the bank would require clients like Class A to bind themselves to terms and conditions like those in the T's & C's, supposition is not sufficient to meet the onus borne by the bank when, as here, there are a number of factors placing that link in doubt.

25. For these reasons, I find that the bank has failed to establish that the T's & C's it relies upon were binding on Class A. As such, the bank cannot, for this reason alone, rely on the certificate of balance clause contained in the T's & C's. It is required to prove its damages by way of other evidence.

THE CERTIFICATE OF BALANCE ISSUE

26. Even if I had concluded differently as regards the T's & C's issue, there is a further reason why the bank cannot rely on the certificate of balance clause against Mr Prokas (as opposed to Class A). I have already indicated what the ambit of the issue here involves: the suretyship agreement signed by Mr Prokas did not contain a certificate of balance clause, nor did it incorporate into the agreement the T's & C's relied on by the bank. The question that arises is whether, in these circumstances, the certificate of

balance may be entered as prima facie evidence to establish the bank's claim for contractual damages against Mr Prokas?

27. There is existing binding authority from this Division indicating that the answer to this question is no. In *Thrupp Investment Holdings (Pty) Ltd v Goldrick*² a full court held as follows in this regard:

"As regards the effect of the absence of a certificate-of-balance clause in the suretyship, counsel for the appellant submitted that a proper interpretation of the certificate-of-indebtedness clause contained in the lease agreement leads one to conclude that the production of such a certificate in fact established the liability of the lessee for the amount certified, which in turn was sufficient to constitute prima facie proof of the liability of the sureties. The argument in my view is flawed in its premise. A certificate clause, it has been held in a number of cases, is designed to, facilitate proof of the amount of liability (see Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others 1989 (3) SA 750 (T); Bank of Lisbon International Ltd v Venter en 'n Ander 1990 (4) SA 463 (A) at 478E). The certificate therefore is merely an evidentiary tool provided for in an agreement by one contracting party to the other to facilitate proof of the amount of indebtedness. It does not in itself establish liability. In casu the clause was only valid as between the lessor and the lessee and therefore could not be invoked against the sureties. The fact that the suretyship was referred to in, and in addition to that, also annexed to, the lease agreement is of no moment. The suretyship although collateral to the lease agreement, remains a separate and independent agreement and the certificate-of-balance clause therefore, as correctly held by the judge a quo, did not by reference become incorporated into the suretyship."³ (emphasis added)

28. I might add that in *Thrupp*, as here, the surety had also assumed obligations as co-principal debtor. The bank sought to distinguish the *Thrupp* case from the present one. Counsel submitted that the distinction lay in the fact that in *Thrupp* the suretyship was referred to in the lease agreement and also annexed to the lease agreement. In the present case, on the other hand, the suretyship agreement made specific reference to the instalment sale agreement, which was not the case in *Thrupp*. Mr Prokas, as surety, had acknowledged in the suretyship agreement that he "had sight of the

² 2008 (2) SA 253 (W)

³ At para 6

Agreement to which (the suretyship) refers prior to signature.” This, counsel for the bank submitted, was sufficient to establish that there was at least an implied incorporation by reference of the T’s & C’s into the suretyship agreement.

29. In my view, this is a stretch too far. The suretyship agreement says no more than that Mr Prokas had “had sight of” the instalment sale agreement. If the intention of the parties was that Mr Prokas would further be bound by the T’s & C’s attached to the agreement, I would have expected different language to have been used. Having had sight of a document does not even require that the party concerned has read it, or understands it, let alone that he or she has implicitly agreed to be bound by all terms and conditions attached to it. There was also no evidence by the bank, as I have previously indicated, as to what, exactly, was placed before Mr Prokas when he signed the instalment sale agreement on behalf of Class A, and the suretyship agreement in is personal capacity. In particular, there is no evidence that Mr Prokas “had sight of” the T’s & C’s relied on by the bank.

30. The bank does not suggest that the *Thrupp* decision is wrong. As a single judge, I am bound by it, and must apply the principle laid down there. In the circumstances, I cannot find in favour of the bank on the certificate of balance issue either.

31. This means that, for this reason too, the bank cannot rely on the certificate of balance to establish the amount claimed from Mr Prokas. It must produce other evidence to prove its damages.

THE ECTA ISSUE

32. The only other evidence provided by the bank to prove its damages is the statement of account which, both parties agree, falls within the ambit of the ECTA.

33. Section 15 in toto provides as follows:

“15. Admissibility and evidential weight of data messages

- (1) *In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence-*
 - (a) *on the mere grounds that it is constituted by a data message; or*
 - (b) *if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.*
- (2) *Information in the form of a data message must be given due evidential weight.*
- (3) *In assessing the evidential weight of a data message, regard must be had to-*
 - (a) *the reliability of the manner in which the data message was generated, stored or communicated;*
 - (b) *the reliability of the manner in which the integrity of the data message was maintained;*
 - (c) *the manner in which its originator was identified; and*
 - (d) *any other relevant factor.*
- (4) *A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.*” (emphasis added)

34. The bank produced a certificate in terms of section 15(4) of that Act. It was signed by the same Ms Vorster referred to earlier, in her capacity as Legal Manager: Specialised Collections. She certified that the statement of account was produced in the ordinary course of business of the bank, and was correct. The bank relies on this certificate to establish its damages, pointing out that Mr Prokas has produced no evidence to rebut the amounts reflected as debits and credits in the statement of account.

35. There has been quite extensive discussion in academia and the courts on the meaning and application of section 15(4) and of its relationship with the hearsay rule, as developed under the Law of Evidence Amendment Act ("LEAA").⁴ A full court of this Division⁵ summarised the differing views of Schwikkard and Van der Merwe,⁶ on the one hand, and Zeffert et al,⁷ on the other.

36. The former took the view that the effect of section 15(4) was to subjugate the hearsay rule insofar as the admissibility of computer printouts is concerned. In other words, even if it constituted hearsay evidence, courts had no discretion but to admit it and then, in accordance with section 15(3), to weigh its probative value. Zeffert et al, took a different view. They posited as follows:

*"Consider, for instance, the situation where a party tenders in evidence, via the computer, information that has been processed and generated by that computer (where, that is, the computer has not been used merely to store information). If it is accepted - as we submit it must be - that this evidence is on the face of it - before, that is, we consider the effect of the new Act - hearsay, can section 15 be used to admit it? It can, it seems, if the only impediment to its reception is the fact that it is constituted by a data message. Would it be admissible, then, if it were not so constituted? To answer this question, one has to ask what it would be if it were not constituted by a data message. If it were to be regarded as direct oral evidence furnished by a person upon whose credibility the probative value of the evidence depends, it would clearly be hearsay and would be admissible. But if it were to be regarded as evidence tendered by a witness other than the person upon whose credibility the probative value of the evidence depends, it would still be hearsay and would, to be admissible, have to satisfy the requirements of section 3 of the (LEAA) or some other exception to the hearsay rule ..."*⁸ (emphasis in the original)

37. It seems from the full court made clear in LA Consortium, that the court was persuaded by the view of Zeffert et al, rather than by the views of Schwikkard and Van der Merwe.

The full court emphasised that the effect of the ECTA is:

⁴ Act 45 of 1988

⁵ In *LA Consortium & Vending CC t/a LA Enterprises v MTN Service Provider (Pty) Ltd* 2011 (4) SA 577 (GSJ)

⁶ Principles of Evidence (2002) at 385

⁷ The South African Law of Evidence (2003) at 394

⁸ Cited in *LA Consortium* at 591E-592B

*"not ... that hearsay is admissible just because it is contained in a data message. The principle of 'functional equivalence' does not free data messages from the normal strictures of the law of evidence, but only from those referred to in s 15(1). It follows that despite the very wide words of s 15(4), any hearsay contained in a data message must pass the criterial set out in s3 of the (LEAA)."*⁹

38. In other words, the real question is what is the nature of the data evidence in question in each case. If it is generated by a computer, and hence falls into the first category identified by Zeffert et al, then the evidence is akin to evidence given by the computer itself. It is not dependent for its probative value on the credibility of any other witness. In fact, only the computer could give direct evidence of the information generated and it does so in the form of the data provided. Thus, while the data is hearsay (in that a witness cannot be called to give direct evidence), the effect of ECTA is that it cannot be excluded solely because it is in the form of data. However, if the data is merely stored on the computer (as per the second category identified by Zeffert et al), then it falls into a different category of hearsay. To be admissible, that data would have to meet the requirements also of the LEAA, although there may be some overlap between the factors prescribed in section 3 of that Act and section 15(3) of the ECTA.

39. Mr Pretorius for the bank accepted the distinction between data generated by a computer, and data that is merely stored on a computer for purposes of the ECTA. He submitted that the statement of account fell into the former category. As such, he submitted that the statement of account was not dependent for its probative value on the credibility of any other person, and it was rendered admissible under section 15 by virtue of the section 15(4) certificate. On this submission, it is not necessary to consider whether the evidence is admissible in terms of section 3 of the LEAA.

⁹ At para 19, 592E-593A

40. Mr Pretorius based his submission on the evidence of Mr Khan. Under cross examination Mr Khan conceded that much of his evidence was based on the statement of account. He conceded further that he did not have personal knowledge of the information entered in the statement of account, or of what the origin was of that information. Thus, for example, he did not know how the interest was calculated. He stated that: "the system does it". Mr Pretorius submitted that this constituted unchallenged evidence by the bank that the statement of account constituted data that was generated by, rather than constituting information stored on, the computer.

41. This simply cannot be in a case like the present. Because of his lack of personal knowledge, Mr Khan clearly could not give first hand evidence of how the computerisation of the statements of account system worked. I mean no criticism of Mr Khan by this observation. He simply was not employed in a capacity where he would have been privy to that information. It follows that his statement (repeated more than once) that the statement of account was "done by the system" is hearsay, and in any event simply has no probative value. Mr Khan's evidence does not establish that the statement of account constitutes computer-generated (as opposed to computer-stored) data.

42. In addition, it is quite clear as a matter of common sense that the statement of account simply could not have been generated by a computer in totality. I earlier referred to the kinds of items that were entered as debits, and the credit entered after the vehicle was repossessed. It is incontrovertible that these figures were dependent on someone inputting data onto the system. The origin of that data would have been documentation (for example, the invoices from the auctioneers) provided to whoever had the responsibility of managing the accounts system and of entering the correct amounts. Unfor-

tunately, the court has before it no evidence from anyone who managed the system, and no documentary evidence to substantiate the amounts so entered. Ms Vorster, who signed the section 15(4) certificate did not testify before court to indicate what her role was regarding managing the accounts system, if any. The certificate gives no indication that she had any role to play in this regard, or on what basis she is in a position to state that the statement of account is correct. Moreover, the bank tendered no explanation whatsoever as to why this kind of evidence was not forthcoming.

43. I accordingly find that the bank has failed to establish that the statement of account constitutes computer-generated data as contended, and that it is for this reason admissible as rebuttable evidence of its contractual damages in terms of section 15(1) read with section 15(4) of the ECTA.

44. The bank, belatedly and in very lukewarm fashion, following an engagement with the court, submitted in the alternative that I should rule the statement of account as admissible hearsay evidence under section 3 of the LEAA. Of course, in view of my finding that the bank cannot succeed in its main submission that the statement of account is admissible in that it constitutes computer-generated data, the LEAA would in any event be applicable. I would be required to consider both the ECTA, together with the LEAA in order to determine the admissibility of the statement of account. The bank was correct not to press its reliance on section 3 of the LEAA with any enthusiasm: it simply failed to lead any evidence to meet the requirements laid down in that section. Accordingly, this does not provide a viable stop-gap measure for the bank.

45. For these reasons, I find that there is no admissible evidence to support the bank's claim for contractual damages. It follows that its claim must fail.

46. I wish to point out that this finding is very specific to the facts before me. The ECTA is a useful tool in this data age. As Zeffert et al point out, its purpose is probably to free as much computer-generated evidence from the hearsay trap as can be justified without doing violence to the important values of the exclusionary rule pertaining to hearsay evidence.¹⁰ However, as this case demonstrates, it is not a cure-all, nor is it a short-cut. A plaintiff relying on the ECTA must provide sufficient evidence to put the court in a proper position to enable it to determine the true nature of the data at issue, and how the data system operates. Without evidence of this nature, the court is hamstrung in making a proper assessment of the integrity of the system, and hence of the reliability of the data information sought to be admitted. These are crucial considerations for purposes of determining whether the data is admissible, whether under the provisions of the ECTA alone, or in terms of the ECTA in conjunction with section 3 of the LEAA, as the case may be.

CONCLUSION AND ORDER

47. For the reasons more fully set out above, I make the following order:

The plaintiff's claim is dismissed with costs.

¹⁰ Cited in *LA Consortium* at 591E


R M KEIGHTLEY

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date Heard	: 16 March 2018
Date of Judgment	: 26 April 2018
Counsel for the applicant	: WG Pretorius
Instructed by	: Rossouws, Lesie Incorporated
Counsel for respondent	: JM Heher
Instructed by	: Raymond Druker Attorneys