



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5696/2021

In the matter between:

NEDBANK LIMITED

Plaintiff

and

RINOR CIVILS (PTY) LTD

First Defendant

RINOR CIVILS AND TRENCHING CC

Second Defendant

GESINA CATHARINA NOORDMAN

Third Defendant

MICHAEL ADRIAAN NOORDMAN

Fourth Defendant

MICHAEL ADRIAAN NOORDMAN N.O.

Fifth Defendant

HEARD ON: 1 SEPTEMBER 2022

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 15 SEPTEMBER 2022

- [1] The Plaintiff in this matter sued the First Defendant for payment of R1 188 139.92 plus interest in terms of a facility agreement it concluded with the First Defendant, for R222 041.72 plus interest in terms of a first instalment agreement also concluded and for R28 279.83 plus interest in terms of a second instalment agreement concluded. The Second to Fifth Defendants are sued together with the First Defendant by virtue of deeds of suretyship they provided in favour of the

Plaintiff for the repayment of all amounts which the First Defendant may owe at any time to the Plaintiff. The First Defendant is cited in his capacity as only trustee of the Kanor Trust. Before the issue of summons, the Third Defendant has passed on, and she is no longer a defendant in the proceedings.

- [2] On 23 February 2022 the First, Second, Fourth and Fifth Defendants filed a Plea in response to the Plaintiff's Summons, in which they denied liability for the payment of the amounts claimed by the Plaintiff in respect of all three the agreements. Soon thereafter, on 16 March 2022, the Plaintiff then filed an application for Summary Judgement in terms of Rule 32 of the Uniform Rules of Court. It is this application for Summary Judgement that now stands to be decided by this Court.
- [3] In their Plea, the Defendants firstly pleaded that the Plaintiff had failed to apply the correct rate of interest and that it had capitalised the interest monthly without any agreement between the parties to do so. In the result, the amounts claimed have been incorrectly calculated, it is pleaded. It is further pleaded that the Defendants are unable to reconcile the amounts due or to calculate the amounts at the correct or agreed interest rates, as the Plaintiff has elected not to furnish them with the specified calculations when it was requested to do so in a Rule 35(14) Notice.
- [4] In the second place, the Defendants pleaded that the facility agreement on which the Plaintiff had sued, was subsequently amended by an addendum, and therefore they deny any liability in terms of the original facility agreement, as it was pleaded by the Plaintiff.
- [5] The pleadings and papers before the Court show that the original facility agreement on which the Plaintiff sued, was signed by the Plaintiff and the First Defendant on 22 October 2019. In this agreement, the borrower facilities are stipulated as, firstly, a temporary overdraft facility of R1 100 000.00, granted until 25 February 2020, at which date the facility reverts to R650 000.00. Secondly, a vehicle and asset finance facility of R400 244.00, which facility includes existing vehicle-and-asset finance agreements currently running down.

- [6] The addendum to this facility agreement was signed by the parties some 5 months later. In this addendum, the borrower facilities are now stipulated to be a reducing overdraft facility of R1 100 000.00, reducing by R10 000.00 monthly until fully repaid or reduced to R650 000.00, the first payment being due on 4 April 2020. It is added that the reduction amount is reviewable every 6 months. Notably, there is no mention of a vehicle and asset finance facility.
- [7] Now it is clear that the addendum amended the terms of the original facility agreement, although it is not altogether clear to what extent. This uncertainty is probably due to the fact that the Plaintiff has not referred to the addendum in his summons in order to explain the effect of the amendments, although the addendum is simply attached to the original facility agreement. All that is certain, is that the Plaintiff relies on the terms of the original agreement in its summons. What is also certain, is that the two instalment agreements are apparently referred to in the original agreement, but not in the addendum. Again, it is not clear what the effect thereof would be.
- [8] At a first glance, there is much to be said for the submissions made on behalf of the Plaintiff at the hearing of the application that the Defendants have not denied in their Plea that they are owing money to the Plaintiff which has already become due and payable. They also do not say what amounts they are then owing, according to their own calculations, the argument went.
- [9] Despite these submissions, this Court has a certain uneasiness about the fact that the Plaintiff is suing on a document which has been amended some months later. The amendment clearly had an effect on the terms of the document. This Court cannot rule out the possibility that the Plaintiff could decide to amend his summons in this respect, for instance. For the present, at least, the Plaintiff is relying on a document which terms have changed as far as the repayment of the facility is concerned. To make it worse, the amendments do not only affect the facility agreement, but also the instalment agreements.
- [10] In the application, the Plaintiff merely states that the Defendants have failed to annex the Addendum which they allege to be in writing. This, notwithstanding the

fact that the Addendum was already annexed to the facility agreement by the Plaintiff itself in its Summons.

[11] In my view, Summary Judgement should not be granted in the circumstances, because there is clearly a defect in the Plaintiff's cause of action. I find support for my view in this respect in the decisions of **Transvaal Spice Works and Butchery Requisites (Pty) Ltd v Conpen Holdings (Pty) Ltd**¹ and **Geyer v Geyer's Transport Services (Pty) Ltd**². In these decisions it appears that if *ex facie* the document upon which the claim is founded there appears a defect in the cause of action, the court must refuse to enter summary judgement whether or not the defendant had filed an affidavit to oppose it.

[12] In the premises, I make the following order:

1. The application for summary judgement is dismissed with costs.
2. The defendants are granted leave to defend the main action, and all further steps in the proceedings must be followed in terms of the Uniform Rules of Court.


 P. J LOUBSER, J

For the Plaintiff: Adv. M. C. Louw
 Instructed by: Hill, McHardy & Herbst Inc.
 Bloemfontein

For the Defendants: Adv. H. J. van der Merwe
 Instructed by: Neuhoff Attorneys
 Bloemfontein

¹ 1959 (2) SA 198 (W) at 200 A

² 1973 (1) SA 105 (T) at 107 H