



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 44366/2020

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
DATE: 9 APRIL 2021	
SIGNATURE:	

In the matter between:

NEDBANK LIMITED

Plaintiff/Applicant

And

TIS INVEST (PTY) LTD

First Defendant/Respondent

TLADI TSIE HOWARD MALEFANCE

Second Defendant/Respondent

MAVIS LEMAO MOTAUNG

Third Defendant/Respondent

THABANE SILAS MOLOKO

Fourth Defendant/Respondent

TLADI CONSULTING SERVICES CC

Fifth Defendant/Respondent

MEDUPE DISTRIBUTORS CC

Sixth Defendant/Respondent

SAMO ENGINEERING GROUP (PTY) LTD

Seventh Defendant/Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The plaintiff prays for summary judgment against the third, fourth, sixth and seventh defendants ("the defendants") for payment of monies due by the first defendant in terms of Instalment Sale Agreements, an operating rental agreement and an overdraft facility entered into between the plaintiff and first defendant. The third, fourth, sixth and seventh defendants are cited in their capacities as sureties for the amounts due by the first defendant.

DEFENCES

- [2] The defendants raised various technical defences in their answering affidavits. Mr Labuschagne, counsel for the defendants, to his credit, indicated that the defendants only rely on two defences, to wit:

[2.1] liquidity; and

[2.2] election and waiver.

Liquidity

- [3] The liquidity defence was raised as a point *in limine*.
- [4] The point, in my view, however, pertains to the merits of the summary judgment application and is not capable of separate determination.
- [5] Rule 32(1) reads as follows:
- “32(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only —*
- (a) on a liquid document;*
- (b) for a liquidated amount in money;*
- (c) for delivery of specified movable property; or*
- (d) for ejectment;*
- together with any claim for interest and costs.”*
- [6] In proving the amount due and owing by the defendants the plaintiff, *inter alia*, attached certificates of balance to its particulars of claim.
- [7] The certificates are issued in terms of the provisions of clause 6 of the suretyship agreements, which clause reads as follows:
- “6. The nature and amount of our obligation, as well as the interest payable in respect thereof, shall be determined and proved by a certificate purporting to have been signed by a manager or accountant for the time being of any branch or the head*

office of Nedbank, whose capacity or authority it will not be necessary to prove [or any other form of evidence contemplated in section 109(3) of the National Credit Act, 2005, if applicable]. This certificate or any other form of evidence, as the case may be, will upon the mere production thereof be binding on us and be proof of the contents of such certificate on the face of it and of the fact that such amount is due and payable in any legal proceedings against us, and will be valid as a liquid document against us of its proving such claim."

[8] Mr Labuschagne submitted that clause 6 is invalid as a rebuttal is not possible and as such, the clause offends public policy. In the result, the plaintiff may not rely on the certificates and have thus failed to prove the amount due and owing by the defendants.

[9] It is trite that a clause that provides that a certificate will be final instead of *prima facie* proof of the amount due and owing is against public policy. [See: *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).] The question to be decided is therefore, whether the certificate referred to in clause 6 provides for *prima facie* or final proof.

[10] Mr Labuschagne submitted that the words "*on the face of it*" with reference to the certificate in clause 6 amounts to final proof. In support of this contention, Mr Labuschagne relied on the judgment of Sutherland J in *Nedbank Ltd v McGlashan and Others* (14713/2016) ZAGPJHC 266 (4 August 2016) in which the learned Judge dealt with clause 6 *supra* in a similar worded suretyship agreement of the

plaintiff. Sutherland J, with reference to the unreported decision of Van der Linde J in *Nedbank Ltd v Binder SHGJ 1483/2011* delivered on 7 April 2016, held at paragraph [21] as follows:

"[21]Clause 6 does not provide for prima facie proof. The use of the phrase 'on the face of it' in the particular sentence does not give rise to the meaning that there is 'prima facie' proof, but rather that the contents of the certificate itself 'on the face of it' are to be taken as proof. The source of the error in the submission is the assumption the words 'prima facie' when translated into English mean 'on the face of it'. This is incorrect. The words 'on the face of it' if one is obliged to use Latin, it is correctly translated as 'ex facie' not prima facie. Prima facie means the first or provisional view. 'on the face of it', or ex facie, means exactly that, on the face of it, it is so."

[11] Sutherland J held that clause 6 prevents a defendant from challenging the amount due and owing and is in the result against public policy. Consequently, the certificate of balance could not be introduced into evidence and the amount due and owing had not been established for the purposes of summary judgment.

[12] Mr Wessels, counsel for the plaintiff, pointed out that the plaintiff does not rely solely on the certificates of balance to prove the amount due and owing by the defendants. The plaintiff has also attached detailed bank statements to the particulars of claim as proof of the amounts that are due and owing.

[13] These bank statements, according to Mr Wessels, qualify as *"a liquidated amount in money"* and comply with the liquidity requirement in rule 32. In this regard the

phrase “*a liquidated amount in money*” was defined in *Botha v W Swanson & Company (Pty) Ltd* 1968 (2) PH F85 CPD by Corbett J as follows:

“[A] claim cannot be regarded as one for ‘a liquidated amount in money’ unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation.”

[14] In order to determine whether the amount is easily ascertainable, a court does not only have regard to the summons, but also consider the defence as disclosed in the defendant’s opposing affidavit. [See: *Neves Builders & Decorators v De la Cour* 1985 (1) SA 540 C; *Tredoux v Kellerman* 2010 (1) SA 160 (C)]

[15] *Ex facie* to the bank statements it is not difficult to calculate the amount due and owing by the defendants.

[16] The defendants in their opposing affidavits merely denied that they owed the amounts claimed. Although the bank statements are attached to the particulars of claim, the defendants did not point to a single entry that is incorrectly recorded or otherwise difficult to ascertain. Had the defendants raised any problems with the calculation of the amounts owing, the ascertainment of the amounts could have proven to be protracted and difficult.

[17] *In casu* and save for the bare denial, the calculations are not disputed. The Supreme Court of Appeal has recently in *NGPS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 SCA emphasised that “*bald averments and*

sketchy propositions” are not sufficient to stave off a summary judgment. [498I – 499A]

[18] In the result, I am satisfied that the plaintiff’s claims are for liquidated amounts in money.

Election and waiver

[19] The defendants allege that the plaintiff, on the date of breach of the agreements by the first defendant, did not elect to cancel the agreements but elected to continue with the agreements. This choice was evidenced by the fact that the plaintiff continued to accept payment from the first defendant in respect of the various agreements and facilities.

[20] Once an election is made it is final and irrevocable and a party may not thereafter deviate from its election.

[21] Due to the aforesaid election, the plaintiff’s cause of action based on the breach of the agreements and cancellation is thereof not sustainable in law.

[22] The defendants furthermore contend that, once the plaintiff has expressly or tacitly manifested an intention to abide despite the alleged breach, the right to cancel is waived on account of that particular breach.

[23] Mr Wessels made two submissions in answer to the above submissions on behalf of the first defendant:

[23.1] firstly, clause 5.5 of the standard terms and conditions of the agreements states that: *"No indulgence or extension of time granted by Nedbank to the Borrower must be deemed to be a waiver of any of Nedbank's rights"*; and

[23.2] secondly and with reference to *Primat Construction CC v Nelson Bay Metropolitan Municipality* 2017 (5) SA 420 SCA, if it should be found that the plaintiff notwithstanding the express wording of clause 5.5, elected at the time to keep the agreements intact, each subsequent breach creates a new opportunity for the plaintiff to elect whether to abide by or to cancel the agreement.

[24] The plaintiff alleges in the particulars of claim, that the first defendant breached the terms of the instalment sale agreements, the operating rental agreement and the overdraft facility because it *"...defaulted in the punctual repayment of the instalments, alternatively committed an act of insolvency, alternatively resolved to commence business rescue proceedings, further alternatively applied to court for an order commencing business rescue proceedings, and therefore is in breach of the terms of the instalment agreements. Kindly find attached hereto a copy of the application to commence business rescue dated 17 September 2019 marked Annexure 'A5'."*

[25] The plaintiff further alleges that the first defendant had defaulted with its repayments in respect of the instalment sale agreements, operating rental agreement and overdraft facility and details the amounts due and payable as a result of the aforesaid breach as at 6 July 2020.

[26] The plaintiff with reference to each agreement alleges that it *“cancelled the agreement due to the First Defendant alternatively hereby cancels the agreement”*.

[27] When one has regard to the bank statements, it is clear that the first defendant although it made some payments after 19 September 2019, did not pay the monthly instalments punctually. The breach of the instalment sale agreements entitles the plaintiff to cancel all other facilities and agreements it has with the first defendant. [Clause 6.2.3.1].

[28] In the result, the first defendant committed further breaches after 19 September 2019, entitling the plaintiff to cancel the agreements.

Conclusion

[29] In view of the aforesaid conclusions, the defendants have not set out any defence to the plaintiff's claim and the plaintiff is entitled to summary judgment.

Order

[30] In the premises, I grant the following order:

1. Summary judgment is granted in favour of the Plaintiff against the Third, Fourth, Sixth and Seventh Defendants, jointly and severally the one paying the other to be absolved, as follows:
 - 1.1 R86,427.77 (eighty-six thousand four hundred and twenty-seven rand and seventy-seven cents) plus interest on the aforementioned amount at 8.25% per annum (prime plus 1.25%), compounded daily and capitalised monthly from 12 December 2020 to date of final payment (both days inclusive).
 - 1.2 R75,236.94 (seventy-five thousand two hundred and thirty-six rand and ninety-four cents) plus interest on the aforementioned amount at 8.00% per annum (prime plus 1%), compounded daily and capitalised monthly from 12 December 2020 to date of final payment (both days inclusive).
 - 1.3 R211,901.48 (two hundred and eleven thousand nine hundred and one rand and forty-eight cents) plus interest on the aforementioned amount at 8.00% per annum (prime plus 1%), compounded daily and capitalised monthly from 12 December 2020 to date of final payment (both days inclusive).

1.4 R6,248,745.43 (six million two hundred and forty-eight thousand seven hundred and forty five rand and forty three cents) plus interest on the aforementioned amount at 17.50% per annum (prime plus 10.50%), compounded daily and capitalised monthly from 12 December 2020 to date of final payment (both days inclusive).

1.5 Costs of suit on an attorney and client scale.

4. The application for summary judgment against the First Defendant is postponed *sine die*.



N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

17 March 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES:

9 April 2021

APPEARANCES

Counsel for the Applicant:

Advocate H.P. Wessels

Instructed by:

VDT Attorneys Incorporated

*Counsel for the Third, Fourth, Sixth and
Seventh Respondents:*

Advocate F.J. Labuschagne and

Advocate A.K. Mabena

Instructed by:

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