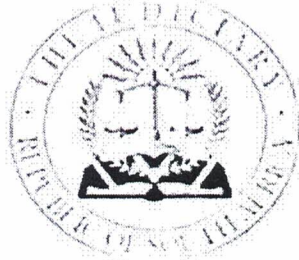


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A157/2018

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED.</u>
<u>31 May 2021</u> DATE	
 SIGNATURE	

In the matter between:

NEDBANK LIMITED

Appellant

and

FIXTRADE 760 (PTY) LTD (In liquidation)

First Respondent

DANIEL JOSEPH SHALALA

Second Respondent

CLAUDE BOULOS AZAR

Third Respondent

J U D G M E N T

The judgment and order are accordingly published and distributed electronically. The date and time of hand is deemed to be 10:00 on 31 May 2021.

TEFFO, J (HUGHES AND COLLIS JJ CONCURRING):

Introduction

[1] The appellant, Nedbank Limited ("*Nedbank*") appeals against the judgment of this Court in terms of which an action instituted by it against the respondents in respect of claim B for payment of the sum of R5 536 068,14 for monies due and payable in terms of an invoice discounting agreement ("*the agreement*") entered into by and between it and the first respondent, Fixtrade 760 (Pty) Ltd (In liquidation) ("*Fixtrade*"), was dismissed with costs.

[2] The second and third respondents were sued in the action in their capacities as sureties and co-principal debtors *in solidum* for all or any sum(s) of money which Fixtrade may from time to time owe or be indebted to Nedbank, its successors or assigns.

[3] Leave to appeal was granted on petition by the Supreme Court of Appeal ("*the SCA*") together with condonation for the late filing of the appeal.

[4] The appellant also seeks an order condoning the non-compliance with Rule 49(6)(a) for failure to apply to the Registrar for a date for the hearing of the appeal within 60 days after delivery of the notice of appeal. This application was not opposed. Accordingly, condonation was granted by this court.

[5] The appellant simultaneously with its appeal, has also filed an application for the amendment of the particulars of claim. This application is opposed by the respondents.

The parties

[6] It will be convenient in this appeal to refer to the parties as follows: the appellant as Nedbank, the first respondent as Fixtrade, the second

respondent as Mr Shalala and the third respondent as Mr Azar. Where appropriate the first, second and third respondents will be referred to jointly as the respondents.

Background

[7] On 28 May 2012 Nedbank concluded an agreement with Fixtrade in terms whereof Fixtrade obtained finance by selling existing and new debts to Nedbank (*the discounting agreement*). Nedbank purchased Fixtrade's debtors. Fixtrade would render services and/or supply goods to its customers in the ordinary course of business and would invoice its customers accordingly. The debt due to Fixtrade as set out in the invoices, was sold to Nedbank and Nedbank would pay an amount equivalent to 75% of the invoice value to Fixtrade. The amount so paid to Fixtrade would effectively be an advance payment of the debt due in terms of the invoice. All amounts due in terms of the invoices which Fixtrade issued to its customers and which were sold to Nedbank would be paid into a designated deposit account held by it with Nedbank, called a "*Debtors Deposit Account*". Once payment is received in the deposit account, Nedbank would pay the remaining 25% of the invoice value. Nedbank will charge a certain fee, linked to the prime lending rate from time to time. Fixtrade would, on a monthly basis, electronically provide Nedbank with details and particulars of the invoices which it had issued to its customers. Nedbank will use the information to establish and calculate the amounts which would be paid over to Fixtrade.

[8] On 17 April 2013, Nedbank obtained a provisional winding up order against Fixtrade. The final winding up order of Fixtrade was granted on 13 August 2013.

[9] Prior to the final winding up order being granted and on 24 April 2013 Nedbank issued summons against the respondents in respect of two claims. Claim A was for payment of the amount of R32 721,44 for monies lent and advanced in terms of an oral agreement entered into between Fixtrade and Nedbank in respect of which Fixtrade opened a cheque account with Nedbank. Claim B was for payment of the amount of R5 536 068,14 for monies that were due and payable to it in terms of the discounting agreement concluded between them. As per the particulars of claim, Nedbank alleged that Fixtrade has breached the agreement in that it ceased to make any payments promptly when it fell due or at all. Nedbank further alleged that as a result thereof, it has cancelled the agreement, alternatively does so herewith, as it was, alternatively is, in the circumstances entitled to do so.

[10] The respondents filed a plea and counterclaim. Nedbank abandoned its claim A at the commencement of the trial and the counterclaim was also not pursued. On 15 August 2016 the *court a quo* dismissed Nedbank's claim B with costs. Nedbank applied for leave to appeal against the dismissal of its claim B. Leave to appeal was dismissed. Eventually Nedbank petitioned the SCA for leave to appeal. Leave to appeal was ultimately granted on petition to the Full Court of this division.

[11] In the *court a quo* Nedbank's evidence through Mr Kabue was about the breaches that were allegedly committed by Fixtrade, the fact that the

directors of Fixtrade, Messrs Azar and Shalala, were made aware of the breaches and they did not dispute them. Meetings were held prior to the cancellation of the agreement and thereafter between Nedbank's representatives and the directors of Fixtrade to discuss the conduct of Fixtrade on Nedbank's account. Further that the agreement between Fixtrade and Nedbank was eventually cancelled.

[12] Further evidence by Messrs Samuelson and Lourens of Nedbank related to the meeting of 19 December 2013 where the directors of Fixtrade did not dispute Nedbank's cancellation of the discounting agreement. They did not dispute providing Nedbank with false information and Nedbank Debtors Management's discounting parts exposure of approximately R5,5 million. It was also tendered as evidence that the directors of Fixtrade offered to repay the facility. However, Nedbank rejected the offer.

[13] Ms Warricker, the liquidatrix of Fixtrade who testified on behalf of the respondents corroborated the evidence of Nedbank's witnesses with regard to certain breaches committed. This evidence will be elaborated in the judgment.

[14] The *court a quo* per Kubushi J had to determine whether Fixtrade had breached the agreement as alleged by Nedbank and whether as a result thereof, Nedbank cancelled the agreement lawfully.

[15] The *court a quo* found that Mr Kabue's evidence raised other defaults which were not alleged in the particulars of claim. The evidence did not establish the conduct complained of in the particulars of claim that Fixtrade ceased to make payments due in terms of the agreement promptly and on due date. It found that it was common cause that Fixtrade was making

payments and that no case was made that the amount claimed or any other amount was due and payable at the time of the cancellation of the agreement or that on any particular date Fixtrade was in arrears with its monthly payments or failed to make payment due on any particular due date.

[16] It further found that the evidence of Mr Kabue relating to the audit report was hearsay in that the person who compiled the report did not testify and the report was not handed in at the trial.

[17] The *court a quo* dealt with the various breaches allegedly committed by Fixtrade and concluded that they were not proved by oral evidence. With regard to the allegation that Fixtrade opened a new account with Standard Bank and deposited debtors' monies therein, the trial court concluded that while the respondents do not dispute the allegations, there was no evidence that the account was opened prior to the cancellation of the agreement. Regarding the evidence that the invoices were inflated, it was found that although Fixtrade admitted the facts in that regard, Nedbank could not attribute the blame on it without having alleged and proved that Fixtrade was vicariously liable for the conduct of its employee, Ms Sharneck. Further that even if it could be concluded that Fixtrade was vicariously liable for the conduct of Ms Sharneck, Nedbank was not entitled to cancel the agreement on that ground.

[18] In relation to the evidence about the invoices allegedly owed by Cashbuild, it was held that no evidence was led to prove that the invoices existed, that they were paid to Fixtrade and that Fixtrade did not pay the amount thereof to Nedbank. Furthermore, that there was no evidence to prove

that some of the invoices were indeed for Fixtrade's sister company in Cape Town.

[19] Having regard to the totality of the evidence, the *court a quo* concluded there were no proper reasons for Nedbank to cancel the agreement as it did.

[20] Accordingly, it held that Nedbank failed to prove claim B against Fixtrade and that it cancelled the agreement unlawfully.

[21] It is this judgment that Nedbank seeks to appeal.

The grounds of appeal

[22] Nedbank contends that the *court a quo* erred in finding that: it failed to prove Fixtrade's breach of the agreement as pleaded in the particulars of claim; it failed to prove the quantum of its claim and that the amount was due, owing and payable. Further that no regard should be had to the common cause facts, which were not specifically pleaded but fully traversed and canvassed during the trial which all point to and proved the appellant's entitlement to have cancelled the invoice discounting agreement.

The application for leave to amend the particulars of claim

[23] Nedbank applies for leave to amend paragraph 11 of its particulars of claim. It contends that the purpose thereof is to introduce further allegations which were fully canvassed during the trial without objection, which would entitle it to the relief sought in the summons. It asserts that the evidence that was presented on its behalf in the *court a quo* which related to Fixtrade's breach of the agreement and the subsequent cancellation thereof, remains

uncontroverted. The trial court accepted the evidence and did not make any adverse findings in respect of its witnesses' credibility.

[24] Nedbank further contended that Mr Azar was present throughout the trial and at all material times approached his legal representatives to give them instructions. Mr Azar's version was put to Nedbank's witnesses when they testified but he was not called to testify. The *court a quo* was informed at the commencement of the trial that Fixtrade and Mr Azar would keep Nedbank strictly to its pleadings. Further that the only ground for cancellation of the agreement was that pleaded in paragraphs 11 and 12 of the particulars of claim that Fixtrade ceased to make any payments due in terms of the agreement promptly on due date or at all.

[25] Notwithstanding this, the respondents' legal representative did not keep Nedbank strictly to its pleadings. Instead, it participated fully and canvassed all other issues.

[26] Nedbank submitted that it succeeded in proving that Fixtrade failed to make payments due in terms of the agreement, promptly on due date or at all.

[27] Nedbank further contends that there was no objection to its evidence relating to the breach of the agreement which was not specifically pleaded. The issues pertaining to that evidence were fully canvassed and ventilated. The *court a quo* ought to have taken into account all the facts and circumstances that gave rise to the cancellation. In so far as it relied on Fixtrade's breach of the agreement to support its cancellation of the agreement which breach was not specifically pleaded but fully canvassed

during the trial, it applies for leave to amend its particulars of claim in order to bring the pleadings in line with the evidence tendered in the court below.

[28] In opposing the application, the respondent gave the history of the matter and contended that the application has been launched seven years after the service of the summons, over four years after the trial and three months before the hearing of the appeal. It was submitted that Mr Azar has in the process passed on and his demise was regarded as a substantial problem which would prejudice it in the conduct of the litigation.

[29] The respondent concedes that Mr Azar was present throughout the trial. However, he elected not to testify. It claims that the appellant is now attempting to change its pleadings and lead a new case after the death of Mr Azar and in circumstances where Mr Azar is no longer available to adduce evidence and dispute the allegations. It denies that the matter was fully ventilated in the trial court as the evidence of Mr Azar was not heard. It contends that the prejudice that it will suffer cannot be cured by an order of costs.

[30] The respondent further submits that it would be impossible for it to plead or reopen its case and lead evidence to the case the appellant is attempting to present to this Court.

Applicable legal principles

[31] In deciding whether to grant or refuse an application for an amendment, the court exercises a discretion and, in so doing, lean in favour of granting it in order to ensure that justice is done between the parties by

deciding the real issue between them¹. Amendments will usually be allowed unless the amendment is *mala fide* or would cause prejudice to the other party which cannot be compensated by a costs order or some other suitable order such as a postponement².

[32] An amendment must raise a triable issue – i.e., it must be of sufficient importance to justify any procedural disadvantages caused by the amendment proceedings in the sense that the issue is viable and relevant or will probably be covered by the available evidence³.

[33] Broome JP held as follows in *British Diesels Ltd v Jeram and Sons*⁴:

“If it should appear that any substantial issue was duly canvassed in the court below, then in my opinion we ought to regard it as an issue to be decided between the papers whether it has been formally pleaded or not. If on the other hand, the application is to put on the record issues which were not fully canvassed, then no amendment ought to be allowed at this stage.”

[34] This principle was adopted by Howard JP in *Desai v NBS Bank*⁵ where he said:

“I do not consider it as proper to grant an amendment of pleadings on appeal to introduce issues which have not been fully canvassed in the

¹ *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (N) reviewed the older authorities in detail. See also *Kasper v André Kemp Boerdery CC* 2012 (3) SA 20 (WCC)

² *Imperial Bank Limited v Hendrick Barnard NO* (349/12) [2013] ZASCA 42 (28 March 2013) at [8]

³ *Caxton Ltd v Reeve Forman (Pty) Ltd Ciba-Gergy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) 462-463

⁴ *British Diesels Ltd v Jeram and Sons* 1958 (3) SA 605 NOP at 606

⁵ *Desai v NBS Bank Ltd* 1998 (3) SA 245 (NPD)

court below. If such issues have not been fully canvassed in the court below, prejudice to the other party is conclusively presumed."

Discussion

[35] Paragraph 11 of the Particulars of Claim reads as follows:

"The first defendant, has in breach of the discounting agreement, ceased to make any payments due in terms thereof promptly on due date or at all."

[36] The amendment sought is as follows:

1.1 That paragraph 11 be deleted *in toto* and be substituted with the following:

"11. The first defendant has, in breach of the discounting agreement:

11.1 ceased to make any payments due in terms thereof promptly on due date or at all; and/or

11.2 breached its warranty given to the plaintiff that the debts would be bona fide debts, owing to the first defendant; and/or

11.3 was placed in final liquidation on 13 August 2013; and/or

11.4 withheld any money which is due to the plaintiff; and/or

11.5 opened a new banking or similar account without first informing the plaintiff in writing; and/or

11.6 acted contrary in any way directly or indirectly to the interests of Nedbank; and/or

11.7 failed to pay money received by it in respect of debts sold to the plaintiff within 24 hours of receipt thereof.”

[37] The evidence relating to the alleged breaches of the agreement by Fixtrade remains unchallenged. It was also corroborated by Ms Warricker who testified on behalf of the respondents. Her evidence under cross-examination was that after her appointment as a liquidatrix of Fixtrade, she was provided with the debtors' statements of Fixtrade. She established that Fixtrade had a Nedbank and Standard Bank account. She found that some debts which appeared on the schedule of debtors owned by Nedbank were paid into the Standard Bank account, and bad debts which were written off were sold to Nedbank. She knew that the debtors received an instruction from Fixtrade to pay the amounts for their debts into the Standard Bank account.

[38] Although Mr Kabue introduced the evidence that related to various breaches of the agreement by Fixtrade which was not pleaded, that evidence was allowed and fully ventilated during cross-examination. The crux of his evidence was basically that money was not paid into Nedbank's debtors deposit account when it was supposed to have been paid in terms of the agreement.

[39] Regarding the Cashbuild account and the alleged inflation of the invoices, Mr Kabue's evidence was that sometime in December 2012 the auditors reported to Nedbank Debtors Management (NDM) how Fixtrade conducted its account. There was no written report from the auditors at that stage but Nedbank received information and held a meeting with Mr Azar who tried to call Cashbuild and also blamed their system for the inflation of the invoices. Following that meeting, Mr Azar attended another meeting with Mr Shalala in February 2013 before the letter of cancellation was sent out. At that meeting Nedbank's representatives showed Messrs Azar and Shalala a statement that indicated that Cashbuild still owed Fixtrade money and then requested Mr Shalala to pull out Fixtrade's statement from the computer at their office and show it to them. Mr Shalala came back and confirmed that on their side Cashbuild had paid its account in full and he started blaming their bookkeeper, Ms Sharneck.

[40] This was crucial evidence which should have been challenged however, it was not.

[41] Having regard to the proposed amendment we do not agree that the appellant is trying to bring in new causes of action and/or a new case which requires new evidence to be led in answer to the allegations as alluded to by the respondents. The proposed amendment is, in our view, in line with the evidence that was presented in the trial court⁶. We also do not agree that because Mr Azar did not testify, the evidence was not fully canvassed and ventilated. Mr Kabue was cross-examined at length on the evidence.

⁶ *British Diesels Ltd v Jeram and Sons supra*

[42] The argument that the amendment comes at a very late stage of the proceedings and should therefore be refused is without merit in that delay on its own is not necessarily a ground for refusal of an amendment⁷.

[43] The contention that the proposed amendment would be prejudicial to the respondents in that Mr Azar is no longer available due to his death to dispute the allegations is, in our view, also without merit. Mr Azar was present throughout the trial. Evidence was presented at the trial which implicated him and Mr Shalala. Mr Kabue was told that Mr Azar would testify and dispute his evidence that the first meeting he attended with Nedbank's representatives was on 19 February 2013 when he was given a letter of 15 February 2013. He denied the allegations but Mr Azar elected not to testify to gainsay his evidence.

[44] The respondents also contended that there are no prospects of success in the action even if the amendment is granted and that the granting of the amendment will be a waste of time. For the reasons that will follow in the judgment, we are of the view that there are prospects of success in the action and we find merit in the application for leave to amend. This application should, under the circumstances, succeed.

The merits

[45] We agree that when Mr Kabue testified he mentioned various other alleged breaches of the agreement which were not pleaded. As discussed above the issue of Cashbuild is but one of the facts that established that

⁷ *Water Renovation (Pty) Ltd v Goldfields of SA Ltd* 1994 (2) SA 588 (A) 605H

Fixtrade ceased to make any payments due in terms of the agreement promptly on due date or at all.

[46] The *court a quo* took the view that because Kabue testified that prior to February 2013 there were no arrears on Fixtrade's accounts, the appellant did not prove that there was money owing on the accounts. This conclusion loses sight of Kabue's evidence that Nedbank's employees were alerted of the problems in December 2012 by the auditors. They could not do anything because Fixtrade was closing for the festive season. They managed to meet with Mr Azar and made him aware of their concerns and also requested the auditors to visit Fixtrade's offices again in order to get the latest information and then prepare a written report. Mr Kabue was not aware of any breaches of the agreement until the auditors reported to him. The concerns raised related to the periods of December 2012 and January 2013. It cannot therefore be correct to conclude that prior to February 2013 and at the time of the cancellation of the agreement, Fixtrade did not owe any money to the appellant.

[47] It can also not be correct to conclude that Mr Kabue's evidence relating to the audit report was hearsay. Mr Kabue testified that after it was reported that there were some concerns in the conduct of Fixtrade of Nedbank's account, he went with his team from NDM to Fixtrade's offices after meeting with Mr Azar in December 2012. They met with Messrs Azar and Shalala and verified the information after comparing their records to that of Fixtrade. Mr Shalala confirmed that the Cashbuild account was paid in full from their side. In Nedbank's books, Fixtrade reflected it as still owing. This according to his

evidence meant that Fixtrade was paid by Cashbuild in full but the money was not paid into Nedbank Debtors Deposit account as per the agreement.

[48] In the face of this evidence which was not contested, the *court a quo* held that no evidence was presented to the effect that the invoices owed by Cashbuild existed.

[49] The record shows that the auditor's report was introduced as evidence without objection. It formed part of the exhibit bundle that was used in the trial. Nedbank submitted that at the pre-trial conference held on 3 March 2016, the parties *inter alia* agreed that all documents contained in the exhibit bundle are what they purport to be (without there being any admission of the correctness of the allegations therein) and need not be formally proved. We therefore conclude that the *court a quo* erred in finding that Mr Kabue's evidence flowing from the auditor's report regarding the various breaches of the agreement allegedly committed by Fixtrade and which resulted in the termination of the agreement was hearsay and therefore inadmissible.

[50] We further do not agree that there are no defined time periods in the agreement within which Fixtrade was to make payment. Clause 18.2.6 of the agreement provides that the seller shall be in default if it fails to pay money received by it in respect of the debts sold to Nedbank within 24 hours of receipt thereof and this was the evidence of Mr Kabue which was not contested.

[51] We agree that both Mr Kabue and Ms Warricker were not certain as to when the Standard Bank account was opened, whether it was before or after the cancellation of the agreement. What is important is that the evidence that

Fixtrade opened a Standard Bank account wherein the debtors' monies which were due to Nedbank were deposited without Nedbank's knowledge is prima evidence that Fixtrade had breached the agreement.

[52] The evidence that Fixtrade admitted that the invoices were inflated and that Nedbank was defrauded was also not contested. The fact that its bookkeeper was blamed and even disciplined for what she had allegedly done, does not in our view assist Fixtrade or their directors' cases. It is immaterial.

[53] This evidence together with the common cause fact that Fixtrade has been liquidated clearly establish that Fixtrade breached the agreement in one way or another.

Whether the breach committed entitled Nedbank to cancel the agreement

[54] Clause 18.3 of the agreement provides that if a party is in default, the other party ("*the aggrieved party*") shall be entitled, in addition to all other remedies at law, to forthwith cancel, or to uphold, the agreement.

[55] Nedbank submitted that as a result of the breaches committed by Fixtrade it was entitled to "*forthwith*" cancel the agreement. No provision is made in the agreement that it should first have discussed with Fixtrade or its directors before cancellation nor are there any special formalities to effect such cancellation. The facts that Fixtrade defrauded it and presented it with inflated invoices and that its bookkeeper was disciplined for the misconduct would have entitled it to terminate the agreement but were only discovered subsequent to the cancellation.

[56] It asserts that even if we find that it relied on the wrong reason for cancellation in its pleadings (which is denied); cancellation for a wrong reason does not invalidate the cancellation provided that it can show that valid reasons existed at the time of cancellation.

[57] The respondents submitted that Nedbank was not entitled to terminate the contract unilaterally without notice. It should have acted in terms of clause 17.5 of the agreement.

[58] Clause 17.5 provides:

“Upon the occurrence of one or more of the following events Nedbank will be entitled to demand from the seller to repurchase all the debts or any of the debts at the repurchase price and the seller agrees to repurchase such debts at the repurchase price:

17.5.1 the seller being in default or committing any breach of this agreement;

17.5.2 ...

17.5.3 the seller’s insolvency or the insolvency of any guarantor or indemnifier in respect of the seller’s liability or obligations to Nedbank however arising;

17.5.4 the giving of Notice by Nedbank to the seller to terminate this agreement;

17.5.5 the seller terminates the agreement in accordance with the agreement.”

[59] It is common cause from the evidence that Nedbank sent a notice of cancellation of the agreement dated 15 February 2013 to the respondents and that they acknowledged receipt thereof. It is therefore not correct that the agreement was terminated without notice. According to the evidence Nedbank did not invoke the provisions of clause 17.5. It relied on the provisions of clause 18 of the agreement. It opted not to demand the repurchase of all the debts it bought from Fixtrade. Furthermore, this issue was not pleaded.

[60] We agree that the various breaches which were not pleaded, were provided as the reasons for the cancellation of the agreement. In *Datacolour International (Pty) Ltd v Intamarket (Pty Ltd)*⁸ it was held that the innocent party to a breach of contract justifying cancellation, exercises its rights to cancel the contract (a) by words or conduct manifesting a clear election to do so; (b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement. The innocent party need not identify the breach or the grounds on which he relies for cancellation. It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed but was not discovered at the time.

[61] The evidence that Fixtrade defrauded Nedbank and presented it with inflated invoices would have entitled Nedbank to terminate the agreement if it was discovered prior to the cancellation of the agreement. There is no evidence to counter the fact that that evidence did not exist at the time of the

⁸ 2001 (2) SA 284 (SCA) at 299E-G

cancellation of the agreement. Nedbank may therefore rely on that evidence to cancel the agreement.

[62] The fact that Fixtrade was liquidated also constitutes a breach of the agreement that entitles Nedbank to cancel the agreement. We find that Nedbank was therefore entitled to cancel the agreement.

The certificate of balance

[63] As proof of its claim Nedbank's counsel, during trial handed up a certificate of balance from the bar. The certificate was disputed. Nedbank submitted that the certificate meets the requirements of the provisions of the agreement, the suretyship, the facility letter and the mortgage bond, and should be regarded as *prima facie* evidence.

[64] Relying on the decision in *Trust Bank v Senekal*⁹, Nedbank submitted that it does not merely cast an *onus* to rebut on the respondents but an onus in the proper sense i.e. that the respondents could only neutralise the evidentiary status of the certificate of balance, on the balance of probabilities that the contents thereof is wrong. It is the certificate of balance which provides *prima facie* proof of the respondents' liability. He argued that in *Rossouw v Firststrand Bank*¹⁰ it was held that a certificate of balance may be handed up from the bar.

[65] Clause 18.5 of the agreement provides that a certificate signed by any director or manager of Nedbank, shall be *prima facie* proof of the amount owing to Nedbank by the seller as at the date of such certificate and of the

⁹ *Trust Bank v Senekal* 1977 (2) SA 587 (WLD) at 593

¹⁰ *Rossouw v Firststrand Bank* 2010 (6) SA 439 (SCA) at 454A-C

fact that as at that date, the amount concerned is due and payable, in respect of any amounts howsoever arising or due under the agreement.

[66] The respondents claimed that after the cancellation of the agreement Nedbank received payment from the debtors and the amounts thereof were not deducted from the total amount appearing on the certificate of balance. Ms Warricker testified in her evidence in chief that two debtors, Ferreira's Honeydew and Mookgohong Electrical Hardware paid their debts to Nedbank directly and the amount thereof was not accounted for in the certificate of balance produced by Nedbank to prove its claim. She could not sustain that evidence under cross-examination. Her evidence proved that the payment made by Mookgohong Electrical Hardware was accounted for in the certificate of balance and she could not produce proof that Ferreira's Honeydew made payment to Nedbank as testified in her evidence-in-chief. The respondents could therefore not disprove the certificate of balance or prove that its contents were wrong. It therefore became conclusive proof that the amount reflected therein was due and owing to Nedbank.

[67] In our view the trial court misdirected itself by dismissing Nedbank's claim B against the respondents with costs. Accordingly, the appeal should therefore succeed.

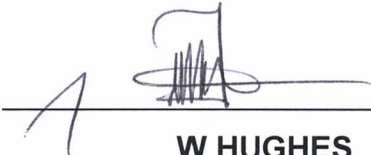
[68] In the result the following order is made:

1. The application for leave to amend the plaintiff's particulars of claim in respect of paragraph 11 thereof is granted.
2. The appellant is to pay the costs of the application.

3. The appeal is upheld.
4. The order of the *court a quo* dismissing the plaintiff's claim B with costs is set aside and substituted with the following order:
 - 4.1 *The defendants are to pay the sum of R5 536 068,14 to the plaintiff jointly and severally, the one paying the other to be absolved;*
 - 4.2 *Interest on the said sum at the plaintiff's prime lending rate (currently 8,5%) as from time to time, plus 6%, thus 14% per annum, calculated from 4 April 2013 to date of final payment, 60th days inclusive;*
5. The respondents are to pay the costs of the appeal which include the costs of the application for leave to appeal in this Court and the SCA and the costs of the action on a scale as between attorney and client jointly and severally, the one paying the other to be absolved.

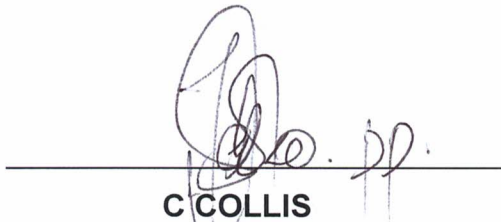

M. J. TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:



W HUGHES
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:



C COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the appellant

J Killian

Instructed by

Baloyi Swart & Associates Inc

For the second and third respondent

R Zimmerman

Instructed by

Taitz & Skikne Attorneys

c/o Mark W Nixon Attorneys

Heard on

2 December 2020

Handed down on

31 May 2021