

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

- (1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED

DATE..19/3/19

SIGNATURE.....

Case No: 2265/2018

FIRSTRAND BANK LIMITED T/A WESBANK
and

MPHELA CALTON MABOTJA

PLAINTIFF

DEFENDANT

Case no.4690/2018

FIRSTRAND BANK LIMITED t/a WESBANK
and

NTVL FUNERAL AND COFFINS CC

And

PLAINTIFF

DEFENDANT

3681/2018

FIRSTRAND BANK LIMITED T/A WESBANK

PLAINTIFF

And

TAISEN SHIPALANA

DEFENDANT

Case no: 2987/2018

FIRSTRAND BANK LIMITED T/A WESBANK

PLAINTIFF

And

SAMSON MOLEA

DEFENDANT

and

CASE NO: 5724/2018

FIRSTRAND BANK LIMITED T/A WESBANK

PLAINTIFF

and

DIKOMOS AND SONS BUSINESS ENTERPRISE t/a

DIKOMOSO AND SONS BUSINESS ENTERPRISE

Defendant

Case no: 6162/2018

FIRSTRAND BANK LIMITED

PLAINTIFF

And

PETER PELOKGOLO MAKUA

DEFENDANT

And

CASE NO: 5726/2018

FIRSTRAND BANK LIMITED T/A WESBANK

PLAINTIFF

AND

JLA BRATS – CK 2011/098809/23

DEFENDANT

AND

Case No: 1363/2018

TOYOTA FINANCIAL SERVICES SA LTD

PLAINTIFF

AND

JOZI MARKETING AND PROJECTS PTY LTD

DEFENDANT

AND

CASE NO: 6160/2018

FIRSTRAND BANK LIMITED T/A WESBANK

PLAINTIFF

And

MERCY MABADZHABADZHA

DEFENDANT

And

CASE NO: 6159/2018

FIRSTRAND BANK LIMITED T/A WESBANK

PLAINTIFF

And

TSHABELANGKENO SUPPLIERS

DEFENDANT

And

CASE NO: 1767/2018

NEDBANK LTD T/A MFC

PLAINTIFF

And

PETRUS JOHANNES SEEGER

DEFENDANT

JUDGMENT

MULLER J:

- [1] Several similar matters came before me in the unopposed court for default judgment. The attention of counsel, who appeared in these matters, were drawn to the similarly worded letters of demand attached to the papers. They were requested to present argument whether or not the plaintiffs made an election in the letters of demand, in each case, to adhere to the contracts or whether they have elected to cancel the contracts. The applications were postponed until 15 March 2019 to afford them the opportunity to prepare and present argument.
- [2] Mr Jacobsz appeared on behalf of all the plaintiffs when the matters were called. The court is grateful for his assistance.
- [3] At the commencement of the proceedings counsel intimated that the papers filed in case no 2265/2018 will be used during the argument and that any order the court

might make will apply to all the applications for default judgment. The argument proceeded on that basis.

- [4] For a proper understanding of the issues, it will necessary to set out the background facts as recounted in the particulars of claim.
- [5] The plaintiff is a bank and a registered credit provider. It entered into a written instalment sale agreement with the defendant in terms whereof it sold a motor vehicle to the defendant. The ownership of the vehicle remained with the plaintiff until such time that it was full paid. The vehicle was delivered to the defendant. The defendant breached the terms of the contract by failing to pay the monthly instalments on the due dates as provided in the contract and is in default with the payments of the instalments for longer than 20 days.
- [6] As a result of its breach of contract the attorney of the plaintiff delivered to the defendant a letter of demand in terms of section 129 of the National Credit Act.¹ The contents of the said letter of demand reads as follows:

"We have been instructed by our client, **FIRSTRAND BANK LIMITED T/A WESBANK** that the above mentioned Credit Agreement is in arrears with an amount of **R 15 632.94**. The next instalment in the amount of **R 3 538.87** is due and payable on **31/03/2018**. The total balance outstanding under the Credit Agreement amounts to **R 74 853.84**.

You are requested to make contact with our client on telephone number: 011 649 4593 to make suitable repayment arrangements, for the arrear amount.

If you fail to make suitable repayment arrangements, you have the following options:

1. Pay the full arrear amount within 10 (ten) business days from the date of posting or acceptance of the this letter; or
2. Refer the Credit Agreement to a Debt Counsellor, alternative Dispute Resolution Agent, Consumer Court or Ombudsman with jurisdiction, in order to resolve any dispute under the Credit Agreement or to develop and agree a payment arrangement to bring the above arrear amount up to date.

Should you choose to refer the Agreement to a Debt Counsellor, you shall be liable to pay an application fee to the Debt Counsellor as prescribed by Schedule 2 of the Regulations of the aforementioned Act.

¹ Act 34 of 2005.

Should you fail to adhere to this notice, legal action will be instituted against you claiming:

- a) Cancellation of the Agreement;
- b) Return of the goods ;
- c) An Order declaring all payments already made to be forfeited ;
- d) Damages for depreciation of the goods to be assessed after the goods have been placed in possession of our client ;
- e) Costs of suit on the Attorney and Client Scale.

3. This notice also serves to advise you that **FIRSTRAND BANK T/A WESBANK** has elected to claim immediate payment of all of the instalments (both arrear and future instalments) owing in terms of the agreement should the demand not be complied with.

4. Should you not comply with the demands contained in this letter, **FIRSTRAND BANK LIMITED T/A WESBANK** will, without notice, cancel the agreement"

[7] The claim of the plaintiff was formulated in the particulars of claim as:

"1. Cancellation of the Agreement;²

2. That the Defendant be ordered to return the following Motor Vehicle to the Plaintiff:

2008 ISUZU KB360 V6 LX P/U D/C

ENGINE NUMBER: 10H9E72480098

CHASSIS NUMBER: ADM2RD27C73435186

3. That the Damages component of the plaintiff's Claim, arising out of the Defendant's breach of the Agreement entered into between the parties, be postponed *sine die*;

4. That the Defendant be ordered to pay the Plaintiff's costs of suit;

5. Further and/or alternative relief"

[8] The credit agreement contains the following provisions appertaining to breach of contract:

"12.2. Upon the occurrence of any of the abovementioned events, we shall be entitled, at our election and without prejudice to:

12.2.1 claim immediate payment of the outstanding balance together with the interest and all amounts owing or claimable by us, irrespective of whether or not such amounts are due at that stage; or

12.2.2 take repossession of the Goods in terms of an attachment order and retain all payments already made in terms hereof by yourself and to claim as liquidated damages, payment of the difference between the balance outstanding and the market value of the goods determined in accordance with clause 11.5.2.3, which amount shall be immediately due and payable.

² The plaintiff claimed for judicial cancellation of the contract. See *Sonia v Wheeler* 1958 (1) SA 555 (A) 561A-C.

12.3. if we elect to enforce the Agreement a notice will be sent to you, which will set out:

12.3.1 the details of your default;

12.3.2 the period within which we require you to rectify the default; and

12.3.3 your rights to refer this Agreement to a debt counsellor, alternative dispute resolution agent, Consumer Court or an Ombudsman with jurisdiction, with the intention of resolving any disputes or developing and agreeing on a plan to bring your payments under this Agreement up to date.

12.4. Any legal proceedings will not be commenced against you unless;

12.4.1. You have been in default for at least 20 (twenty) business days;

12.4.2. At least 10 (ten) business days have elapsed since the default letter or notice referred above has been delivered (which 10) business day period may run concurrently with the 20 (twenty) business day default period);

12.4.3. You have failed to respond to the default letter or you have responded by rejecting our proposal;

12.4.4. You have not surrendered the Goods to us in terms of Section 127 of the Act.

12.5. should we elect to terminate this Agreement in terms of Section 123 of the Act, the same procedure set out in 12.3 above, will be followed prior thereto."

[9] Two questions have arisen from the wording of the demand. The first is whether the plaintiff, in the written demand, has made an election to cancel the agreement or whether it has elected to claim specific performance. The second question is whether the plaintiff was entitled to cancel the agreement and claim return of the vehicle and damages.

[10] The contract contains a *lex commissoria* which permits the plaintiff the right to demand performance of the defendant's obligations in terms of the agreement, or, in the alternative, to claim for cancellation of the agreement; retain past payments of the instalments; to recover possession of the vehicle sold to the defendant and to claim damages.

[11] The right to claim cancellation ceases once the election is made to claim upon the contract.³ A plaintiff must abide its election. A party who makes the election need to appreciate that it has a choice between two known possibilities. It is the election of one these two alternative rights which establishes the basis of the plaintiff's cause of action and the remedy.

[12] A party waives a right if it is established that the party:

"with full knowledge of [its] right, decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it."⁴

[13] It was held in *Feinstein v Niggli and Another*⁵ that:

"And election generally involves a waiver: one right is waived by choosing to exercise another right which is inconsistent with the former. Indeed, election and waiver have been equated as being species of the same general legal concept."⁶

[14] In *Thomas v Henry and Another*⁷ such an election was also described as a waiver of a right:

"Once the innocent party has decided to cancel – and has communicated his decision to the other party – he has, of course, exercised his election. He then no longer has a choice of remedies and may not, without the consent of the other party, undo his decision. The concept of election is therefore not appropriate in regard to conduct which appears to be in conflict with an intention to rely on the chosen remedy. It is perhaps more accurate to designate such conduct as a waiver or abandonment of an accrued right."⁸

[15] It is necessary to return to the contents of the letter of demand. It is a question of fact whether an election has been made. A statement in terms whereof a specific and unequivocal election or choice is made is conclusive proof of such an election or choice. There is no doubt from the contents of the letter of demand that the plaintiff

³ *Schuurman v Davey* 1908 TS 664 at 670-671; *Angehrn & Piel v Federal Cold Storage Co* 1908 TS 761 at 786-7; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) 470A.

⁴ *Mahabeer v Sharma NO and Another* 1985 (3) SA 729 (A) 736J-737A.

⁵ 1981 SA (2) 684 (A).

⁶ 698 G-H.

⁷ 1985 (3) SA 889 (A).

⁸ 896 D-G.

was keenly aware of its rights and its obligations in terms of the *lex commissoria* contained in the contract. The letter of demand conveys in no uncertain terms knowledge on the part of the plaintiff of the right to cancel and an awareness of the right to abide by the contract. The letter of demand is no by no means unequivocal. It contains, on the one hand, an election to cancel the contract by stating:

"Should you fail to adhere to this notice, legal action will be instituted against you claiming:

a) Cancellation of the agreement..."

[16] On the other hand, it also contains an election by the plaintiff to adhere to the contract:

"FIRSTRAND BANK T/A WESBANK has elected to claim immediate payment of all the instalments"

[17] The final paragraph of the letter of demand reads:

"Should you not comply with the demands contained in this letter, **FIRSTRAND BANK T/A WESBANK** will, without further notice, cancel the agreement."

[18] In the final paragraph the plaintiff impermissibly conflated the two conflicting remedies by recording that the plaintiff will cancel the contract if either of the two demands contained in the preceding paragraphs of the letter of demand are not complied with.⁹

[19] It is to be noted that clause 12.2.1 read with clause 12.3 of the contract requires of the plaintiff to follow a prescribed procedure if the plaintiff elected to adhere to the contract. Clause 12.2.2 read with clause 12.5 also requires of the plaintiff to follow a similar procedure if the plaintiff has elected to cancel the contract.

⁹ The plaintiff retained the right under the common law, to claim rescission of the contract and to claim damages, when specific performance of the contract is claimed and the defendant has failed to comply with a judgment of a court to perform its obligations in terms of the contract. It is open to the plaintiff, should the defendant fail to comply with the order of court for specific performance, to claim for cancellation of the agreement and damages in the same action. See *Custom Credit Corporation (Pty) Ltd v Shembe* (fn 3) at 470D.

[20] Instead of making an election between the rights in clause 12.2.1 and 12.2.2, the plaintiff in paragraph 3 of the letter of demand, has elected to adhere to the contract and to simultaneously cancel the contract, in paragraph 2 thereof.

[21] It is the very purpose of the demand to unequivocally inform the defendant which of the two rights the plaintiff has elected to pursue.¹⁰ The use of the words '*legal action will be instituted against you*' and '*elect to claim immediate payment of the instalments*' in the letter of demand conveyed to the reader that a particular election was made. The plaintiff knew full well when the letter of demand was drafted that it was obliged to make a choice between enforcing the contract and the dissolution of the contract. The plaintiff cannot blow hot and cold at the same time. The election of both remedies is not permitted and is ineffectual.¹¹

[22] In the result default judgment must be refused.

ORDER

The application for default judgment in each of the following actions is dismissed:

Case no 2265/2018

Case no 4690/2018

Case no 3681/2018

Case no 2987/2018

Case no 5724/2018

Case no 6162/2018

¹⁰ *Jaffer v Falante* 1959 (4) SA 360 (C) 362F-363E; *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) par 29.

¹¹ *Kwagga Kamma Estates CC and Another v Flangan* 1995 (2) SA 367 (A) 375C-F.

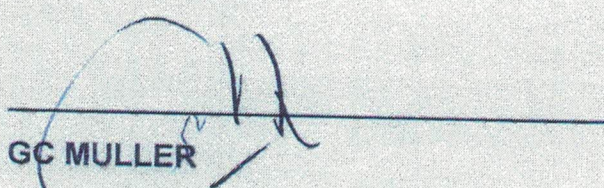
Case no 5726/2018

Case no 1363/2018

Case no 6160/2018

Case no 6159/2018

Case no 1767/2018



GC MULLER

JUDGE OF THE HIGH COURT OF LIMPOPO: POLOKWANE

APPEARANCES

For Plaintiffs	:	Adv PSAJ JACOBSZ
Argued on		15 March 2019
Judgment on		19 March 2019