REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2021/26364

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
12/6/25 DATE	[redacted] SIGNATURE

In the matter between:

NEDBANK LIMITED Plaintiff

And

EMD HOLDINGS PTY LTD First Respondent

GODFREY, DESMOND Second Respondent

JUDGMENT

READ, AJ

INTRODUCTION

[1] This matter concerns an opposed application for default judgment by Nedbank Limited ("the applicant") against EMD Holdings (Pty) Ltd and Desmond Godfrey ("the respondents") for damages in the amount of R340,755.45.

[2] The application arises from the respondents' alleged failure to comply with a court order dated 25 November 2021, and the applicant's subsequent decision to claim damages rather than pursue recovery of a motor vehicle that served as security under an Instalment Sale Agreement ("ISA").

[3] The respondents oppose the application on the basis that the applicant has done nothing to pursue the recovery of the motor vehicle to mitigate the damages sought against them.

The Applicant's Case

[4] The applicant's case, as presented in the founding and replying affidavits, may be summarised as follows:

[5] On 25 November 2021, this Court granted summary judgment against the respondents, including an order directing them to return an Audi Q7 motor vehicle to the applicant.

[6] Despite this order, the respondents failed to return the vehicle.

[7] The applicant issued a warrant for delivery on 10 March 2022 and undertook efforts to locate the vehicle.

[8] After investigation, the applicant discovered the vehicle was held by Auction Operations (Pty) Ltd under a lien for R100,500.00.

[9] The applicant determined that recovery was uneconomical given that the vehicle was approximately 8 years old and had been damaged in a collision.

[10] The applicant now seeks damages representing the full outstanding balance of R340,755.45 under the cancelled ISA.

The Respondent's Opposition

[11] The second respondent's answering affidavit raises one main ground for opposition:

[12] The respondent argues that the applicant failed to take reasonable steps to mitigate its damages by not pursuing recovery of the vehicle through payment of the lien or challenging the lienholder's claim.

[13] The balance of the opposition was raised in the heads of argument or argument and not in the answering affidavit.

[14] The respondent challenges the quantum, arguing that the claim is supported only by a self-generated certificate of balance without proper substantiation or expert valuation evidence. Further the quantum of the Lien was unreasonably large due to the failure of the applicant to act timeously.

[15] The respondents alleged the applicant has failed to comply with the court order of 25 November 2021 without seeking its variation or rescission, constituting an abuse of process.

THE LAW

[16] In a contested default judgment application, the court must determine whether the applicant has established a clear right to the relief sought, notwithstanding the respondent's opposition.

[17] The court is not bound to accept the applicant's version in its entirety but must evaluate the merits of both parties' cases and the strength of any defences raised.

The Duty to Mitigate Damages

[18] The duty to mitigate damages is a fundamental principle of our law of contract. In ***Hazis v Transvaal and Delagoa Bay Investment Corporation Ltd*** 1939 AD 372 at 388, it was held that:

"This rule about mitigating damages relates not to what the claimant in fact did, but to what he should have done... The defendant in such a claim says 'admitting that in fact you suffered damages, you only have yourself to blame for having suffered so much, or at all, because you did not take reasonable steps to protect yourself and, therefore, me'."

[19] Crucially, the burden of proving that reasonable steps were not taken rests upon the party asserting that failure, namely the respondents.

[20] The mitigation rule requires no more than that the party who has suffered loss should take such steps to minimise it as would in the circumstances have been taken by a reasonable man.

Compliance with Court Orders

[21] While compliance with court orders is fundamental to the administration of justice, a party may legitimately choose not to pursue specific performance where circumstances make such pursuit unreasonable or uneconomical.

[22] The question is whether the decision not to enforce the order was reasonable in all the circumstances, rather than whether there was technical compliance.

APPLICATION OF THE LAW TO THE FACTS

Assessment of the Mitigation Argument

[23] The central issue is whether the applicant's decision not to pay R100,500.00 to recover the vehicle constituted a failure to mitigate damages.

[24] The applicant has demonstrated that it took active steps to locate and recover the vehicle, including issuing a warrant and conducting investigations.

[27] The evidence shows the vehicle was approximately 8 years old and had suffered collision damage, factors that would significantly reduce its market value.

[28] The lien amount of R100,500.00 represented a substantial portion of the outstanding debt (approximately 30%), creating genuine economic risk.

[29] The respondents, despite being ordered to return the vehicle, provided no assistance and failed to inform the applicant of the vehicle's location or condition.

[30] The respondents' argued that the investigations took too long thereby unreasonably increasing the Lien amount.

Evaluation of the Evidence

[31] The respondents bear the burden of proving that the applicant failed to take reasonable mitigation steps. However, this must be assessed against the evidence actually presented.

[32] The objective test requires consideration of what a reasonable creditor would do when faced with:

- A substantial lien (R100,500.00) against the security
- An aged vehicle (8 years old) with collision damage
- Non-cooperation from the debtor despite a court order
- Uncertain recovery value

[33] While the applicant has not provided expert valuation evidence, the commercial reality is that paying R100,500.00 to recover a damaged, 8-year-old vehicle creates substantial risk of further loss.

[34] The applicants are entitled to present a certificate where no valuation was done and no real dispute was raised to the amount computed.

[35] The principle in ***Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*** 1977 (3) SA 670 (A) at 689 cautions against being "too astute" to find that mitigation obligations have not been discharged, particularly where the defaulting party caused the predicament.

CONCLUSION

[36] Having carefully considered both parties' arguments and the applicable legal principles, I conclude that the applicant's case should succeed for the following reasons:

[37] The applicant's decision not to pay R100,500.00 to recover a damaged, aged vehicle falls within the bounds of reasonable commercial judgment.

[38] The respondents have not adequately discharged the burden of proving that a reasonable creditor would have acted differently in these circumstances.

[39] The predicament arose from the respondents' failure to comply with the court order and their failure to assist in recovery efforts.

[40] The law does not require creditors to throw good money after bad or to take unreasonable risks in pursuit of damaged security.

[41] The applicant took reasonable steps by investigating, locating the vehicle, and making a rational assessment of recovery prospects.

ORDER

In the result, I make the following order:

The respondents are jointly and severally, the one paying the other to be absolved, ordered to pay to the applicant:-

1. The amount of R340,755.45.

2. Interest on the aforesaid amount at the rate of 0.00% per annum from 12 April 2023 to the date of payment.

3. The applicant's costs of suit.

[redacted]

C.A READ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE: 12 JUNE 2025

Appearances:

For the Applicant:	Adv S McTurk
Instructed by:	DRSM Attorneys
For the Second Respondent:	Mr Tsotetsi
Instructed by:	Taitz & Skikne Attorneys