REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **1483/2011**

In the matter between:	(1) REPORTABLE: YES/NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED **Date:** **WHG VAN DER LINDE**

Nedbank Limited **Plaintiff**

And

Binder: Joseph Frederick **Defendant**

JUDGMENT

Van der Linde, J:

Introduction

[1] This judgment follows on the trial of an action in which the plaintiff, a bank, claims R356 687.41 from the defendant, a businessman, who is the surety of the plaintiff's debtor. The debtor, a company, was liquidated on 6 April 2010, and the defendant

was one of its shareholders and directors. The amount due and owing by the debtor to the plaintiff is common cause. It is R856 687.41, and it is also common cause that this arises from an instalment sale agreement ("ISA") whereby the plaintiff sold the equipment to the debtor, the first instalment of which was payable on 1 September 2008 and the final instalment three years later on 1 August 2011. The debtor had defaulted in respect of five instalments before being wound up at the instance of third party creditors.

[2] There was some argument by the defendant that the plaintiff had initially sued for accelerated payment of the full outstanding balance[1] of the debt, and thereafter inconsistently and thus impermissibly changed tack instead to claim liquidated damages represented by the difference between the balance outstanding after repossessing the equipment, and its market value.[2]

[3] However, there was no estoppel raised against this conduct; and if the plaintiff were to be held to claiming the full outstanding balance of R856 687.41 without any provision for a credit for the value of the equipment, the defendant would be worse off. If the lease ought to be viewed as never having been cancelled, the lease period will in any event by now have run its course, and the full outstanding balance will be claimable.

[4] Whether the plaintiff's case, which involved crediting the defendant with the value of the equipment, must be viewed as being for specific performance of the rental payment obligation (with what would then be a gratuitous credit of the value of the equipment), or instead as being for contractual liquidated damages following

[1] Cl 19.2.1 of the ISA.
[2] Cl 19.2.2 of the ISA. In cross-examination the defendant conceded that the liquidator had actually voluntarily surrendered the equipment to the plaintiff.

cancelation and repossession, seems to matter not. Either way, the parties are agreed that the value of the equipment properly became an issue in the trial. They were agreed too that the date on which the plaintiff's damages, if any, are to be reckoned is 6 April, 2010, the date of liquidation.

[5] Although the pleadings ranged further, after the submissions at the end of the trial had been concluded, there remained really three central issues for determination. The first was whether the plaintiff's reliance on a certificate of balance was justified; the second, whether the value of the equipment exceeded or fell short of the outstanding balance; and the third, if the value fell short of the outstanding balance and the defendant thus became liable to pay that difference, whether the plaintiff breached an implied duty to mitigate its loss. I deal with these in turn.

The certificate of balance

[6] The trial started with the plaintiff handing up, without objection, a certificate of balance, received as exh D. It asserts that the balance owing by the defendant to the plaintiff is R356 687,41, plus interest at the applicable rate calculated from 6 April 2010, being the date of liquidation, to date of payment. It also handed up as exh A a set of photographs of the equipment, as exh B a signed minute of a meeting between the two sides' experts, and as exh C a paginated bundle of documents, which was admitted for face value but not for truth of content. The plaintiff then closed its case on those issues in respect of which it had the onus of proof.

[7] The clause in the suretyship agreement relied upon by the plaintiff for the legitimacy of exh D, is clause 6: *"The nature and amount of my obligation, as well as the interest rate applicable 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 169 (3) of the National Credit Act, 2005, if applicable). This certificate or other form of evidence, as the case may be, will upon the mere production thereof be binding on me 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 me, and will be valid as a liquid document against me in any competent court."

[8] Interpretation starts with the ordinary meaning of words.[3] The ordinary meaning of the words used in this clause has the effect that the defendant cannot challenge a certificate of balance. Clauses of this ilk were specifically referred to and authoritatively examined by the then Appellate Division in Ex parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd, and Donelly v Barclays National Bank Ltd.[4]

[9] That court held that a clause such as the one under discussion was, on the authority of Sasfin v Beukes,[5] invalid as offending public policy. The offensive aspect was that the terms purported to oust the jurisdiction of the courts to enquire into and determine the accuracy and the validity of the issue covered by the certificate. The court held that where the certificate was authored by an independent third party, that was different, and was permissible. But where, as in that case, and also in the present case, the certificate was to be authored by the other contracting party, the objection applied.

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[3] Cf. Cool Ideas 1186 CC v Hubbard and Another, 2014(4) SA 474 (CC) at [28].
[4] 1995(3) SA 1 (AD).
[5] 1989(1) SA 1 (AD).

[10] The validity of the clause concerned was not raised by the defendant in this case, but in my view a court cannot adopt a *non possumus* attitude when such a clause features in a matter before it. This applies particularly where the party favoured by the clause actually relies on it for relief claimed in the proceedings.

[11] On the basis then of Abstein, clause 6 of the suretyship, as it stands, is invalid. The Abstein court was not asked to decide whether there was scope for the court to sever the objectionable part of the clause from its unobjectionable part, thereby to preserve for the clause some degree of enforceable legitimacy. In particular, the question arises whether a court would have the power to apply such a clause, despite its express meaning, in a way that curtails its express effect, such as meaning that such a certificate would simply be *prima facie* evidence of its contents?

[12] Sasfin held that the court did have the power, under the principle of severability, within an instrument as a whole to sever the objectionable clauses from those that were unobjectionable, thereby preserving the enforceability of the balance of the instrument.[6] Whether this power should be exercised in a particular instance would depend on the intention of the parties and, in particular, whether it could be said that that which would remain after severance would still represent that which the parties had agreed upon.

[13] But the situation is different here. To begin with, both sentences of the clause contain words that indicate the final and binding nature of the certificate: in the first sentence, the words, *"shall be determined and proved"*; and in the second sentence, the words, *"be binding on me and be proof of the contents of such certificate on the face of it and the fact that such amount is due and payable."* This implies either that

[6] At page 15 *in fin* and ff.

both sentences must be adjusted, or that a rider would have to be added qualifying both, say by describing the effect of the certificate as being only *prima facie*.

[14] Doing either of the two is not per se objectionable, since our courts have moved away from antiquated notions of permitting only severance but not addition; substance vanquished form. A good example of the strides our courts have made in this respect, and the way in which these have been made, is found in cases where unreasonable restraints of trade are limited.[7]

[15] But in those cases the typical candidate for judicial surgery has been a clause, bona fide and seriously drafted to reflect a reasonable restraint, but which was then upon judicial scrutiny held to have gone too far. It is thus typically a case of many shades of grey along a continuum between two poles that are black and white.

[16] In the case with which we are dealing here, there are only two choices: conclusive proof or *prima facie* proof. That clear choice was available to the drafter of the clause, who chose the former in preference to the latter; and in circumstances in which since Abstein, of more than a decade's vintage, the law on this aspect has been settled. The harshness which the softening of restraint of trade clauses was intended to assuage, does not apply here.

[17] In my view if the court were here to snip away at clause 6 so as to reduce its impact, or to apply it less strictly despite its express words, this would involve impermissible contract-making for the parties.[8]

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[7] RH Christie & GB Bradfield, Christie's The Law of Contract in South Africa, 6th Ed, LexisNexis 2011, pp 382 to 383.

[8] Sasfin op cit at 16 I, referring to Laws v Rutherford, 1924 AD 261 at 264.

[18] In the result, I am afraid that in this case the judicial pen stops after the downward stroke whereby the clause was deleted. Nothing can come in its place. Consequently I find that clause of the suretyship is invalid and unenforceable.

[19] That is not the end of the plaintiff's case. The amount outstanding was common cause; the fact that the value of the equipment had to be credited to that amount was common cause; and that the equipment did have some value as at date of liquidation, was common cause. The only final impact of the finding concerning the certificate, is that the interest rate has not been proved.

The value of the equipment

[20] The material available on which to reach a decision on this issue are the agreements recorded in the minute of the experts' meeting, and the viva voce evidence of the defendant's expert, Mr Kioilis. And in this context, there are really two issues. The first is whether the experts' agreement as to the value of the equipment has any relevance to the requirements of clause 19.3 the ISA, specifically since the experts described their agreed value as a *"forced-sale value"* and that clause requires the determination of a *"market value"*; and the second is whether the agreed *"forced-sale value"* requires further reduction by the cost of dismantling, removal, and re-assembly.

[21] The experts' minute, exh B, was signed on 16 March 2016, and records their agreement reached some three weeks earlier on 23 February 2016. According to the minute, they agreed that the value of the machine, *in situ* – meaning operational – in

April 2010 was R1,2m.[9] They agreed too that in a dismantled state, the value was R1m.

[22] They described these two values as the *"fair and reasonable"* values in those respective states, *in situ* and dismantled.[10] They explained that in arriving at these two values, *in situ* and dismantled, they assumed the presence of a willing buyer; and whether the buyer would be able to use the machine on the premises or would have to remove it, was also a relevant factor they took into account.[11]

[23] In paragraphs 8 and 9 of exh B the experts provided agreed estimates of the removal costs (R250 000), and the re-assembly costs on another site (R250 000). Of the removal costs in paragraph 8 they recorded: *"… and the removal costs of the machine were not included in the values as these were costs for the buyer and estimated at about R250 000."* Since this paragraph precedes paragraph 9, dealing with the re-assembly costs, that the latter would also be *"costs for the buyer"* seems *a fortiori*.

[24] The minute concludes with, *"It is agreed that all the values discussed and agreed upon hereinbefore are so-called 'forced-sale values' as are prevalent during a liquidation process."*[12]

[25] In my view this minute, properly construed, reflects that the parties' experts had agreed the following. First, they agreed two separate values for the equipment, both

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[9] Exh B, p 2 para 2; p 3 para 3.
[10] Exh B, p 3 para 5; p 4 para 7.
[11] Exh B, p4 para 6. Clause 6 of the minute does present some interpretation problems initially, but on reflection I believe that in the context the experts were being asked as to the factors that they actually took into account in arriving at the *in situ* value. In their answer they explained also the factors they took into account in arriving at the value of the equipment in dismantled state. In other words, the R200 000 cost of dismantling referred to at p 3 para 4 was taken into account in arriving at the R1m at p 3 para 3.
[12] Exh B, p 5 para 10.

in full working order and dismantled, which were values that they regarded as fair and reasonable.

[26] Second, in their assessment of what was fair and reasonable, they took into account that the owner of the equipment was a company in liquidation, meaning that the equipment had to sell, and the seller would not have had much leverage to hold back if what was viewed as a low offer was received. This is what they had in mind when the referred to *"forced-sale value"*.[13]

[27] Third, the dismantling costs of R200 000 served to reduce the fair and reasonable costs of the equipment from R1,2m to R1m; in other words, the dismantling costs impacted directly on the bottom line of the fair and reasonable valuation.

[28] Fourth, the same does not however apply in respect of the removal costs and the re-assembly costs. These were costs that *"were for the buyer"*, meaning it did not affect the bottom line of the estimated fair and reasonable value of the equipment.[14]

[29] There was cross-examination of the defendant's expert, Mr Kioilis, on these issues. It was put to him that the notional buyer would take into account that he would have to expend R250 000 to remove the equipment, and would have to expend another R250 000 to re-assemble it.

[30] Mr Kioilis conceded this. But, of course, the written evidence of the agreement reached by the two experts expressly deals with these issues; and clause 8 expressly states that the agreed values for the equipment do not include removal costs. Clause 9 and its topic were to be dealt with the same way as clause 8, given that both

[13] I have in mind here the evidence of Mr Kioilis.

[14] In common parlance, when a price is given, and other items to be included in the sale are described as being *"for the buyer"*, it means that the buyer must pay for them; the seller does not, i.e. the selling price is not affected by those other items.

clauses dealt with topics likely raised after the values had been agreed, given their position at the end of the document.[15]

[31] There is no suggestion that the plaintiff does not regard itself as being bound by that agreement. Although it was put to Mr Kioilis in his cross-examination that the plaintiff's expert, Mr Lazarus, expresses the opinion that the cost of re-assembly ought to be taken into account in arriving at the value of the equipment, Mr Kioilis disputed this. Not only was Mr Lazarus not called, but it was not put that he did not consider himself bound by the express terms of the minute of their expert meeting.

[32] Second, neither did Mr Kioilis suggest that the agreement that he and the plaintiff's expert had reached, should be amended. He had affirmed the experts' agreement in chief. And he had explained in chief that the clauses 8 and 9 issues do not feature in the values that the two experts had agreed, because these were buyer's items.

[33] What he conceded was that a buyer would take these two items into account in deciding on the offer that that buyer would make. But that does not detract from the fact that the two experts had agreed on the two values, recorded in their joint minute. After all, why agree on those two values, only then to qualify these later below in clauses 8 and 9, leaving aside that the language of qualification actually goes the other way?

[34] In these circumstances the parties' experts agreed that the fair and reasonable value of the equipment as of 6 April 2010 was either R1,2m or R1m, depending on whether the buyer would remove it. Since the likelihood was the latter, the value was R1m.

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[15] This was also the direct evidence of Mr Kioilis.

[35] A court is not bound by what experts have agreed; it has to be persuaded of the intrinsic validity of the reasoning they advance.[16] In this instance one has the evidence of the defendant's expert who valued the equipment before litigation was on the radar screen, at a market value of R3,5m and a fire-sale value of R1,5m, on 12 January 2010.[17] He inspected the equipment at the time, and took photographs of it. He explained that he had assumed a willing buyer and seller, and that the values were net of removal costs.

[36] The value that he agreed to six years later with the plaintiff's expert for the equipment as of 6 April 2010, had allowed for a reduction from R1,5m to R1,2m *in situ*, fully operational.

[37] The court did not receive evidence of comparable sales, which is the usual standard if there is a market for the item. But there may not be a market for this item in the usual sense, and in any event, the witness' expertise and thus his qualifications to express his opinion were not attacked.

[38] In these circumstances to question Mr Kioilis' evidence would be the counsel of perfection, and I am prepared to accept it. If I am wrong in assessing the extent of Mr Kioilis' concession in cross-examination concerning the removal costs,[18] and if in fact he should be understood as having conceded that those costs may be employed to reduce the fair and reasonable values of the equipment as agreed, whether *in situ* or dismantled, then it seems to me the plaintiff has in any event not proved that it has suffered any damages, for the following reason.

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[16] BR Southwood, Essential Judicial Reasoning, LexisNexis 2015, pages 6-8

[17] Exh E, pp 90 ff.

[18] It is not suggested, not could it, that Mr Kioilis went further and also conceded that the agreed values should be further reduced by the costs of re-assembly at the destination venue.

[39] The actual costs to the plaintiff of the dismantling and removal of the equipment was just under R340 000. Mr Kioilis said that had he known that this was the actual cost of those items, he would have preferred to use them and not to have rested with estimating values for them.

[40] This amount is less than the aggregate amount for these two items that the two experts had estimated, being R450 000. If the R340 000 is substituted for the R450 000, and if Mr Kioilis must be regarded as having conceded that the removal costs may also be deducted so as to arrive at the fair and reasonable value,[19] then the value of the equipment comes to R860 000. This amount is still greater than the outstanding debt of R856 687.

[41] In consequence my finding is that the value of the equipment as of 6 April 2010 was no less than R1m, in dismantled form; and, at best of the plaintiff, R860 000.[20] Since either value exceeds the balance owing to the plaintiff, the defendant does not owe the plaintiff any money, and the claim must be dismissed.

Mitigation of loss

[42] Had I concluded that the value of the equipment was less than the outstanding balance, I would have had to consider the third issue, being whether the plaintiff was

[19] The defendant, for what his non-expert view is worth, conceded in cross-examination that in offering R880 000 he had factored in dismantling and removal costs. He said that R880 000 was the fire-sale value, net of dismantling and removal costs. He balked at the suggestion that re-assembly costs ought also to have been factored in.

[20] There were references to other valuations, specifically those obtained by the liquidators in May 2010. These were supposedly R1,5m *in situ*, and R360 000 at fire-sale. No evidence was led to substantiate these; and one would have wanted to understand why the *in situ* value ought to be juxtaposed to a fire-sale value. After all, such expert evidence as there was juxtaposed fire-sale value to market value, and not to *in situ* value. *In situ* value was used to describe the equipment in fully operational state, a condition on which both sides were agreed applied to this equipment as of 6 April 2010. If the *in situ* value thus obtained by the liquidators were accepted as being R1,5m, and either R450 000 or R340 000 were deducted to provide for dismantling and removal, as the plaintiff argued, then still the result is greater than R856 687.

obliged to have accepted the defendant's offer to borrow money from the plaintiff to buy the equipment. I record the view I would have taken, albeit that it is *obiter*.

[43] The defendant has the onus to prove that the plaintiff has failed by reasonable action to mitigate its loss. It is accepted that the onus is difficult to discharge.[21]In my view the defendant has not discharged that onus. The defendant suggested that the plaintiff should have accepted his offer to enter into a fresh financing agreement with the defendant, whereby the outstanding balance of the debt owed by the principal debtor would have been financed. The plaintiff did not respond to that offer.

[44] However, the plaintiff would have been rightly put off by the fact that the defendant was a director and shareholder of the very debtor that went insolvent in the first place. The defendant said in his evidence that he was good for the commitment, but in my view, having regard to the immediate history of the liquidation of the principal debtor, he was required to have gone further. He would have had to have shown why it was unreasonable of the plaintiff to have declined to lend him money. I do not suggest that that would have been an impossible row to hoe, but it certainly, in my view, would have been difficult. In view of my conclusion on value, this issue does not arise.

[45] In the result I make the following order:

The plaintiff's claims are dismissed with costs.

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WHG van der Linde
Judge, High Court

[21] Christie op cit p 578, 579.

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