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

CASE NO: 33749/2020

1. Reportable: No

2. Of interest to other judges: No

3. Revised: Yes

(Signature) (Date) 24/6/2021

In the matter between:

MFC (A DIVISION OF NEDBANK LIMITED) **Applicant**

and

MOLEKWA, MINAH **First Respondent**

THE MASTER OF THE HIGH COURT

GAUTENG, JOHANNESBURG **Second Respondent**

JUDGMENT

DE VILLIERS, AJ:

[1] This matter came before me in the unopposed motion roll and the applicant ("*Nedbank"*) sought final relief in the following terms:

> "*1. The cancellation of the instalment sale agreement to be confirmed;*
>
> *2. The 1st Respondent be ordered to return to the Applicant a 2017 VOLKSWAGEN POLO VIVO GP 1.4 TRENDLINE 5DR with Engine Number … and Chassis Number …. ("the vehicle")*
>
> *3. In the event of the 1st Respondent failing and/or refusing to return the vehicles (sic) to the Applicant forthwith, then and in that event the Sheriff of the above Honourable Court be and is hereby authorised and directed to enter upon the 1st Respondent's premises, or wherever the vehicle is being kept, to attach the vehicle and return same to the Applicant.*
>
> *4. The 1st Respondent pay the costs of this application*."

[2] The breach of contract upon which Nedbank relied, was that its client died. The deponent, formulated the bank's cause of action as:

> "*17. The salient terms of the instalment sale agreement, relevant for this application, included the following:*
>
> *17.1. The vehicle purchased with the loan belonged to the Applicant until the deceased fulfilled all her financial obligations. The deceased would be entitled to possession and use of the vehicle, provided she was not in default. Upon compliance with all her financial obligations, the applicant would transfer ownership of the vehicle to the deceased [vide clauses 3];*
>
> *17.2 The deceased would be in default under the terms of the instalment sale agreements if she passed away [vide clauses 7].*
>
> *18 …*
>
> *29 Due to the death of the deceased, the Applicant, by virtue of the provisions of the instalment sale agreement, is entitled to cancel the instalment agreement, which it has now elected to hereby do*."

[3] The cause of action appeared to me to be problematic and I raised the matter at the hearing. Nedbank persisted with the application and I reserved judgment.

[4] Excluding the headings and usual ending, the founding affidavit was seven pages long. There is one other matter that regularly appears in founding affidavits, and in this one too, that I may as well address formally. The

deponent, "*the Manager of Litigation in the Specialised Support department of the Applicant*" averred that she made submissions of a legal nature, she did so based on the advice that she had received from the applicant's legal representatives. She stated that she has no reason to doubt the advice and believe it to be correct. Such advice would have been completely irrelevant.

[5] I do not understand why similar averments about legal advice are made with such regularity in affidavits. It seems to be based on a confusion of what evidence and what pleadings are. A deponent is duty bound to allege the material facts for the relief sought, and where such facts do not fall in his or her personal knowledge, to address the admissibility of the hearsay evidence. But legal submissions (the pleadings) are not presented as expert evidence. A lawyer is fully entitled to argue a case he or she has advised on current law will fail, or probably will fail, or might succeed, or probably will succeed. No judge ought to know what the advice by the different lawyers were or where in the spectrum the advice fell. No lawyer assisting in the preparation of the application, or appearing before a judge, should be ethically bound to disclose that he or she in fact did not advise the applicant that the case will succeed. It would undermine legal privilege if legal advice were to become part of every case.

[6] The applicant joined two respondents in the application, Ms Minah Molekwa and the Master. Ms Minah Molekwa is not the deceased. I refer to Ms Minah Molekwa as "*the first respondent*", as she is. The deceased is Ms Daisy Molekwa. I refer to her as "*the deceased*".

[7] The deponent knows very little about the first respondent, as one would have expected of someone in her position. Accordingly, the founding affidavit contains no averments as to the relationship between the deceased and the first respondent, or even where the deceased resided. The deponent baldly avers that the first respondent resides at a residential address without even a street number: "*27 Athol Bank Townhome, Froome Street, Sandton*". There is no suggestion that the deponent would have had any reason to know where the first respondent resides. I could have struck the matter from the roll, as the return of service on the first respondent stated that it was served at 27 Athol

Bank Townshouse, Froome Street, Sandton by affixing the application to the principal gate, being her alleged chosen *domicilium citandi et executandi*. It is not her chosen *domicilium citandi et executandi* and I was presented with no evidence about her residential address. She may well not even know of the application.

[8] I could have struck the matter from the roll also, as the application was not served on the second respondent, however I decided to address the real issue, the pleaded cause of action. This would have caused no prejudice to the respondents, as I intended to dismiss the application.

[9] The deceased and Nedbank entered into an instalment sale agreement on about 13 October 2017. The vehicle was a 2017 Volkswagen Polo Vivo GP 1.4 Trendline 5DR. The cost price (and thus the value) was R212 154.12, well within the jurisdiction of the magistrates' courts. The total contract sum was R328 914.26, payable in monthly instalments over 72 months. The founding affidavit contains no averments as to the payment of the monthly instalments, or that they are or are not still being paid, or what the outstanding value is.

[10] The sole pleaded issue is that the deceased is in breach of the contract as a result of her death, hence the contract has been cancelled, hence Nedbank is entitled to attach the motor vehicle. This approach is necessary, as Nedbank seems to accept that without a valid termination of the agreement, Nedbank is not entitled to seek the return of the vehicle.

[11] In pleading its case, Nedbank did not plead the terms of the agreement with any clarity, save for the references to clauses 3 and 7 in the extract quoted above. Clause 7 is the breach clause, but not the clause that deals with the consequences of breach:

[11.1] Clause 7.1 states that a failure to make a payment in terms of the agreement, may lead to a notice advising the credit receiver (seemingly not simply to pay) but to refer the matter to a debt counsellor, an alternative dispute resolution agent, consumer court, or the Banking Ombud.

[11.2] Clause 7.2 states that a failure to respond to such a notice (and not simply payment) may lead to a cancellation under clause 17.

[11.3] The relevant clause in this case is the third sub-clause, clause 7.3. It lists what is described as "*events of default*". Several such events are listed, but non-payment is not expressly listed as an event of default. It may be inferred to be one, despite the wording of clause 7.1, as non-compliance with any term is listed in clause 7.3.7 as an event of default. If so, non-payment would be addressed twice in the breach clause. Clause 7.3.3 states that an event of default is "*if you die or are sequestrated or liquidated*".

[12] An event of default seems to be suggested to be a breach of contract. It is not stated in clause 7.3 or the rest of clause 7 what may or will happen when an event of default (or a stipulated breach of contract) occurs. Much later in the agreement, in clause 17.1, Nedbank repeats the approach in clause 7.1, seemingly *mutatis mutandis*. Without using the term used in clause 7 ("*events of default*"), the credit receiver is informed that Nedbank will give a notice of default, and that he or she *inter alia* may refer the matter to a debt counsellor, an alternative dispute resolution agent, consumer court, or an ombud, and in the event of a non-response to the notice, Nedbank may enforce the agreement. The clause does not mention cancelation of the agreement as an option.

[13] Clause 18 deals with *"remedies*". Clause 18.1.4 includes the right to cancel "*on default*", again not an express reference to "*events of default*" in clause 7, or that this may only happen after compliance with the notice provision in clause 17 (or any section in the National Credit Act).

[14] Against this background, when I reserved judgment, I had to address the hard questions about the applicant's cause of action. This subsequently became unnecessary as Nedbank in heads of argument concedes that death cannot be breach of contract. It no longer relies on a breach of contract as the basis for cancelling the agreement and it accepts that the agreement has not been validly cancelled. It seeks relief on an alternate basis, as owner of the vehicle,

it seeks that the first respondent must return the vehicle. This change in approach does not rescue the matter.

[15] The deceased passed away on 22 September 2019, according to a death certificate. The founding affidavit in the vaguest terms, with in some instances no attempt to allege and prove material facts in an acceptable manner, reads:

> "*11 Since the conclusion of the instalment sale agreement, it has come to the Applicant's attention[1] that:*
>
> *11.1. The deceased passed away on the 22nd September 2019;[2]*
>
> *11 .2. The deceased estate has not been reported to the Second Respondent[3] and as a result thereof, neither an interim curator nor executor/executrix has been appointed to administer the deceased estate;[4]*
>
> *11.3. The First Respondent is in possession of the respective motor vehicle*.[5]
>
> *12 …*
>
> *22 During the period November 2019 to July 2019, the applicant[6] engaged[7] the First Respondent requesting repossession of the vehicle for purpose of safekeeping pending the appointment of an executor/executrix, thereby thus envisaging an amicable settlement of the instalment sale agreement between the applicant and the executor.*
>
> *23. The First Respondent refused[8] to relinquish possession yet indicated that there weren't[9] any funds to settle the entire outstanding balance.[10]*
>
> *24. Until date hereof and to the best of my knowledge,[11] the First Respondent remains in possession of the vehicle and the Applicant is*

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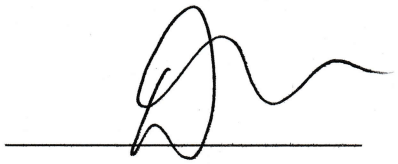
[1] Clearly this is a fact that had to be alleged and proven properly by someone who has personal knowledge?
[2] This is later in the affidavit slightly expanded upon: "*On the about the 22 September 2019, the deceased passed away at Sandton. A copy of the death certificate is annexed hereto marked "B".*"
[3] Clearly this is a fact that had to be alleged and proven properly by someone who made the enquiry?
[4] This is also later in the affidavit slightly expanded upon: "*Until date hereof and to the best of my knowledge, the next of kin of the deceased, nor the First Respondent, have reported the death of deceased to the Second Respondent and consequently an executor/ executrix has not been appointed to administer the deceased estate*."
[5] Clearly this is a fact that had to be alleged and proven properly by someone who has personal knowledge or who could testify about the facts from which a conclusion could be drawn?
[6] Clearly this is too vague?
[7] Clearly this is too vague?
[8] Clearly this is too vague?
[9] This type of language does not belong in formal court papers.
[10] Clearly this is too vague?
[11] Is this not a meaningless assurance if the deponent in fact has no knowledge?

concerned that it is being utilized without the knowledge of whether the insurance cover remains in place."

[16] Nedbank has failed to allege and prove that the first respondent is in possession of the vehicle. It also has not proven that it is entitled to the possession of the vehicle in the absence of the cancellation of the agreement with the deceased even before any steps were taken by an executor to finalise the estate. Lastly, it has failed to join the executor as a respondent. See *Gross and Others v Pentz* 1996 (4) SA 617 (A) at 625B. In addition, the application was not served on the second respondent and no case has been made out that the first respondent resides at the address where the application was served. There are too many matters to address to order that the matter be removed from the roll and for the papers to be supplemented.

Accordingly, I make the following order:

1. The application is dismissed;



DP de Villiers AJ

Heard on:	18 May 2021
Delivered on:	24 June 2021 by uploading on CaseLines
On behalf of the Applicant:	Adv JJ Durandt
Instructed by	JAY MOTHIBI INC