IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Date of hearing: 21 April 2016

Case number: 11810/2016

13/6/2016

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

NEDBANK LIMITED TRADING AS MFC	Applicant/Plaintiff
and	
PRINCIPLE EDUCATION AND MARKETING CC	First Respondent/Defendant
TOERIEN, TREVOR KEITH	Second Defendant

JUDGMENT

BRENNER AJ

1. On 15 December 2011, the applicant/plaintiff, Nedbank Limited ('Nedbank"), sold a seven seater Hyundai Sante Fe motor vehicle ('the vehicle") to the first respondent/defendant, Principle Education and Marketing CC ("the corporation"), in terms of an instalment sale agreement ("the agreement"). The agreement was subject

to the National Credit Act, 34 of 2005 ("the NCA").

2. The aggregate price of the vehicle, including finance and other charges, was R597 001,21, and was repayable by way of 71 monthly instalments of RS 583,77, commencing on 1 February 2012, and a final instalment in the sum of R129 553,54. In terms of the agreement, ownership remained vested in Nedbank until all payments had been made. Moreover, if the corporation defaulted on its obligations, Nedbank was entitled to cancel the agreement and claim repossession of the vehicle and to claim as forfeited the payment of all prior instalments.

3. On 17 December 2011, the second defendant, Trevor Keith Toerien ("Toerien"), stood surety for the liability of the corporation in an amount not exceeding R402 027,99.

4. According to the Summons, the corporation was in arrears as at 20 November 2015, in the sum of R26 797, 17, with the balance of the debt being R322 340,98. Following the service by registered post of a notice under section 129(1)(a) of the NCA, the agreement was cancelled by notice given on 8 January 2016.

5. On 15 February 2016, Summons was issued in an action against the corporation and Toerien for the return of the vehicle and ancillary relief. On 10 March 2016, Toerien, acting for the corporation and himself, signed a document entitled "Response to Combined Summons - Acceptance". This document was filed on 11 March 2016. While the document does not reflect that it is a notice of intention to defend, in substance, and on a proper perusal thereof, it appears to intimate as much.

6. An application for summary judgment was served on 30 March 2016, on the corporation, by the sheriff of this Court. This resulted in the service by the defendants of a "Notice of Non-Response and Dishonour" dated 30 March 2016. The relief sought by Nedbank is confined to its claims against the corporation, qua principal debtor. Nevertheless, Toerien chose to associate himself with the corporation in the various allegations made in the papers before Court, and therefore, for convenience, I have referred to both parties collectively as "the defendants".

7. Both of the aforementioned documents were signed before one Karla Strydom,

who describes herself as an "ex officio practising attorney", and a Notary Public and Commissioner of Oaths. The notice replying to the summary judgment application does not contain the prescribed oath nor does it conform with the requirements of an affidavit.

8. On 19 April 2016, shortly before the hearing of the application, a further document styled "Claim in Reconvention" was served. It merits mention that the purported "counterclaim" relates to nothing more than a demand for the discovery of additional documents by Nedbank.

9. On 21 April 2016, Toerien appeared before Court to oppose the application on behalf of the corporation. He confirmed that the defence to the claims of Nedbank was contained in the above documents.

10. In limine, Toerien asserted that the provisions of Rule 7 of the Uniform Rules should be invoked against the attorneys for Nedbank, to prove their authority to act for it, and he also called for an order to compel Nedbank to produce a detailed list of documents which he considered to be relevant to the claim. These documents were identified in his "Claim in Reconvention."

11. I resolved that, for purposes of argument, I would subordinate form to substance and have regard to the contents of the above documents in determining whether a bona fide defence had been raised by the corporation. This primarily because it was patent to me that the defendants were genuine in their intention to defend the action. In resolving to do so, I was mindful of the fact that the corporation was not legally represented and that a modicum of latitude should be extended to it in regard to its failure to adhere strictly to the formal requirements of Rule 32 of the Uniform Rules of Court. At the same time, I remained cognisant of the duty to satisfy the Court that it had a bona fide defence on the merits.

12. At the hearing, Nedbank's Counsel indicated that Nedbank had chosen to confine its claim to the repossession of the vehicle, and forfeiture of monies paid, and that the claim for summary judgment was solely against the corporation.

13. After hearing argument for both parties, I gave an order against the corporation

for the repossession of the vehicle, forfeiture of monies paid, and costs on the attorney and client scale. In due course, following the appraisal of the market value of the vehicle, Nedbank will be in a position to quantify the extent of its damages, if any, and, if warranted, to take further steps for the recovery of any damages incurred. What appears below are the reasons for my judgment.

14. Rule 32(3)(b) of the Uniform Rules obliges a respondent in summary judgment proceedings to adduce a bona fide defence to the action by way of an affidavit which discloses *"fully the nature and grounds of the defence and the material facts relied upon therefor."*

15. At page 81-223 of Erasmus, Superior Court Practice, the author states:

> *"If, however, the defence is averred in* a *manner which appears in al/ the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides.* •

16. This much was stated in the case of **Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T).** At p228 the Court held as follows:

> *"It must be accepted that the subrule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the bona fides of his defence. It wil/ suffice . .....if the defendant swears to* a *defence, valid in law, in* a *manner which* is *not inherently and seriously unconvincing."*

17. The contents of the documents produced by the corporation and Toerien are long on submission and short on fact. For the most part, they are incoherent and irrelevant. This does not necessarily mean that they lack points of substance, the Court being duty bound, under the given circumstances, to separate the wheat from the chaff in determining whether a bona fide defence has been advanced.

18. On a conspectus of the three documents produced by the defendants, only one potential defence emerges. This is that, when the agreement was executed, the

corporation had offered up a promissory note to Nedbank in settlement of the full debt at some stage in the future, and that this note was "monetised" by Nedbank and therefore, the debt was discharged in this manner. It is argued that, in the result, the Bills of Exchange Act 34 of 1964 applies.

19. I quote from the only document which comprehensively addresses the claims in casu, namely, the "Response to Combined Summons - Acceptance":

> *"There is no dispute with any of the facts in the instant matter. When I signed the (Note), I signed* a *promissory note that payment will be made at some time in the future. The Bank took my note and monetised it. However, the note has not been redeemed by the labour of the Defendant who made the note. So whatever numbers the bank put on its books was simply money of account. In other words its bookkeeping entries. So it is the responsibility as the purchaser of the car to redeem that note, but what the bank did is redeem the title of the car, so that the defendant can take possession of the car and this was all done with money of account. Then the bank has the audacity to come to the maker of the note (the defendant) and say that the bank wants the defendant to redeem all of this money of account (bookkeeping ledge entries) with money of exchange (reserve bank notes or cash) THAT IS FRAUD. The bank has leveraged the whole process in such a manner that they create interest.*
>
> *So the facts of this case and all charges, offers, dishonours are accepted for value and returned in exchange for fair settlement and closure, by exercising the rights as provided for in the Bills of Exchange act, act 34 of 1964 as amended by act 56 of 2000. Accepting the full amount allegedly outstanding, due, owed and payable specifically in terms of section* 9 *of act 56 of 2000, which substituted section 25 of the principal act: Holder for value "A holder takes a bill for value if he takes it under onerous title."*

20. Attached to this document is the defendants' version of the agreement, on the face of which the following note is stamped in blue ink print, diagonally across the entire document:

> *"Accepted for Value*
>
> *and*
>
> *Returned for Fair Settlement*

Apply the Bills of Exchange Act
Act 34 of 1964 as *amended by*
Act 5 of 2000."

21. Ex facie the document, the signature and identity number of Toerien appears, with the date noted as 8 March 2016.

22. In reply to the summary judgment application, in the document styled "Notice of Non Response and Dishonour", the following allegation is made:

"On the 11th day of March 2016 the Affiant (sic) delivered to the Respondent VHI Attorneys by hand an Accepted, Endorsed and Taken for Value Negotiable Instrument for Set -Off together with a *Cover Letter."*

23. The dispute, raised at the hearing of the application, concerning the authority of VHI attorneys to act for Nedbank was, with respect, an expedient and disingenuous afterthought. This denial is belied by the affidavit deposed to by Nicolean Ferreira, the Manager, Specialised Support and Litigation at MFC, a division of Nedbank, in support of summary judgment, who confirmed having examined all information and records of relevance to the case and who, by necessary implication, confirmed the authority of VHI Attorneys to act for Nedbank.

24. The counterclaim to compel the production of further documents did nothing to advance any defence on the merits. In any event, all documents germane to the claim were already annexed to Nedbank's Summons. Had Nedbank omitted to attach a material document, there may have been justification for a request for further discovery, but this was not the case, and no prejudice was caused to the corporation. The copy of the agreement produced by Nedbank and attached to its Summons bore no alterations or variations along the lines averred by it.

25. It is plain from the "Response to Combined Summons" that the corporation admits the liability but avers that payment of same was tendered by way of the promissory note. A copy of the alleged promissory note which, according to the defendants, was given at the time that the agreement was signed, was not produced,

nor was any detail given of its nature.

26. There is a total paucity of detail given on a matter peculiarly within the knowledge of the corporation. There is no suggestion made that it was redeemable when the full debt became due or instead, redeemable in instalments as and when same were due. In the absence hereof, it would not have constituted a proper tender of payment in settlement of the debt as it arose.

27. Shortly before the hearing of this application, the defendants attempted to hand over a copy of the agreement itself to Nedbank's attorneys and to proffer this as a further "negotiable instrument". In doing so, they appear to have been "pleading over" in the sense that, should the Court find that the promissory note was not given, then Nedbank was instead obliged to accept the agreement in lieu thereof. This serves to water down the probative value, if any, of the assertion that a promissory note was given in the first place. This aside, not by any stretch of the imagination can the agreement itself be construed as a negotiable instrument. It is nothing more nor less than objective documentary evidence of the debt owed by the corporation to Nedbank.

28. In any event, the agreement expressly provides that payment is required to be made by direct transfer into Nedbank's nominated bank account, free from deduction. The agreement also contains a clause which prohibits any variation unless same has been reduced to writing and signed by both parties.

29. Reference to the application of the Bills of Exchange Act to the issues in casu is a nonsensical red herring.

30. Finally, there is no suggestion on the papers that the corporation is not in arrears with the instalments, nor that there was non-compliance with the NCA, nor that the agreement was not validly cancelled, nor, on any other conceivable basis, that there are no legal grounds for the claims made. The corporation's general denial of liability on the basis of the above assertions is wholly unsatisfactory, cannot be justified on any logical basis, and is inherently unconvincing.

31. Due cognisance has been taken of the fact that the corporation was not legally

represented in these proceedings. A measure of leniency was afforded to it regarding the form in which it raised what it understood to be a defence. At all times, however, I remained obliged to establish, in terms of Rule 32, whether a credible, bona fide defence was advanced. For the reasons adumbrated above, no sustainable defence was adduced by the corporation, in particular, to Nedbank's claims against it. With no suggestion that there was no choice on the subject, Toerien, acting for the corporation, elected of his own accord not to secure legal representation, this in the face of a High Gour! action which, of necessity, entailed an appreciation of, and respect for, the Rules of Court. It is the corporation, and not Nedbank, which must bear the consequences of this decision.

32. I refer in this regard to the case of **Magistrate M Pangarker v Arnold Botha and Christina Botha 2014 ZASCA. SCA 78** at paragraph 34:

> *"The right to legal representation is a corollary of the right of access to justice. The denial of this right has wide-ranging consequences for the nature and experience of justice. Nevertheless, a litigant may not benefit from his own misconduct or otherwise careless approach to legal proceedings."*

33. For the reasons advanced above, I confirm having made the following order on 21 April 2016.

34. Summary judgment is granted against the first defendant as follows:

a. Confirmation of cancellation of the credit agreement attached to the · particulars of claim as annexure "A";

b. The first defendant is ordered to forthwith return to the plaintiff the following asset and to hand it over to the plaintiff and/or the Sheriff:

1 x HYUNDAI SANTE FE R 2.2 CRD I GLS A/T 7 SEAT 2012 MODEL ENGINE NO [...]

CHASSIS NO: KMH[...]8519

c. The Sheriff of the High Court is authorised and requested to attach, seize and hand over to the plaintiff, wherever it may be found:

1 x HYUNDAI SANTE FE R 2.2 CRD I GLS A/T 7 SEAT 2012 MODEL ENGINE NO [...]

CHASSIS NO: KMH[...]B519

b. Forfeiture of all monies paid by the first defendant to the plaintiff in terms of the agreement annexed to the plaintiff's particulars of claim as annexure "A";

d. Costs of suit on the scale as between attorney and client;

e. The postponement of prayer 6 of the particulars of claim, sine die.

_____

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

6 June 2016

Appearances

Counsel for Applicant/Plaintiff:	Adv J P van den Berg
Instructed by:	VHI Attorneys
For the Respondents/Defendants:	Mr T K Toerien
Instructed by:	No legal representation