

SOUTH AFRICA / JUDGMENT

Binder v Nedbank Ltd (2011/1010483) [2013] ZAGPJHC 60 (3 April 2013)

[2013] ZAGPJHC 60

COURT

South Gauteng High Court, Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

2011/1010483

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/1010483

In the matter between -

BINDER JOSEPH FREDERICK KARL Applicant and NEDBANK LIMITED Respondent

Hearing: 04 March 2013

Delivered: 03 April 2013

Summary: Interlocutory application. Summons not disclosing cause of action- pleadings based on contract but not pleading the relevant provisions of the contract.

JUDGMENT

MOLAHLEHI AJ

[1] This is an interlocutory application in terms of which the applicant (the defendant in the main case) contends that the respondent's

(plaintiff in the main action) claim does not disclose a cause of action in terms of the Uniform Rules of the Court. The parties are for convenience referred in this judgment as cited in the main action.

[2] The plaintiff instituted the action against the respondent, the surety of the principal debtor who breached the instalment sale concluded with the plaintiff. In terms of the instalment sale the plaintiff sold to the principal debtor certain machinery. The principal debtor had to pay for the machinery on monthly instalments. It is common cause that the principal debtor failed to make instalments payments timeously. It seems also common cause that the

principal debtor has been liquidated and at the stage of the liquidation the principal debtor was in arrears in the amount of R916 526.89.

- [3] It was following the above that the plaintiff claimed that it was entitled to:
- a. claim immediate payment of the full amount outstanding;
 - b. cancel the agreement and take possession of the goods, together with all payments already made in terms of the agreement between it and the principal debtor and to claim damages including payment of the difference between the balance outstanding and the market value of the goods.
- [4] The plaintiff's claim is essentially based on the provision of clause 19 of the contract which deals with the various situations in which the principal debtor could be regarded as having breached the contract.
- [5] The respondent contends that the plaintiff has not properly pleaded its case in terms of the provision of the contract in that it does not indicate in the particulars of claim whether it had made an election with regard to the two options set out in the contract in the event of breach.
- [6] The respondent further contends that in the absence of the averment setting out the election as to the two options set out in the

contract, the plaintiff has not properly pleaded its case and accordingly no cause of action has been disclosed by the plaintiff.

- [7] Another point raised by the defendant is that the plaintiff failed to plead in its particulars of claim the appointment of the appraiser as required by the contract.
- [8] In compliance with the order made by Willis J on 19th February 2013, the plaintiff telefaxed to the respondent further and better particulars, wherein it indicates that it relies on clause 19.2 of the contract and further that the agreement between the parties was cancelled. The respondent contends that the further and better particulars were not served on it and therefore does not constitute pleadings.
- [9] The other problem raised by the defendant concerning the plaintiff's pleadings is that the cancellation of the contract occurred when the summons was issued or when it was amended. It is contended in this respect that if that is the case then it means, on the plaintiff's own version, that at that point the goods had already been repossessed.
- [10] The problem against the pleadings of the plaintiff does not improve even if it was to be inferred or assumed that the cause of action is based on the Insolvency Act. In this respect the plaintiff states in its papers that the repossession of the goods was done 'shortly after the principal debtor was placed in winding up.' However, this notwithstanding, the Insolvency Act has not been pleaded in the particulars of claim.

- [11] In terms of the contract cancellation has either to take place prior to or simultaneously with the repossession of the goods. This means that the dates of the cancellation of the contract and repossession are critical. There is no indication in the plaintiff's pleadings as to the dates regarding the repossession and cancellation of the contract.
- [12] It was argued on behalf of the plaintiff that the agreement has been cancelled and that the issue of the evaluation of the goods is irrelevant. In the further particulars the plaintiff states at paragraph 3.7 that:

"3.7.1 The Plaintiff repossessed the goods and retained all payments already made in terms of the agreement;

3.7.2 The Plaintiff determine the value of the goods to be R302 000. 00 excluding VAT ;

3.7.3 As at 10 January 2011 the balance outstanding amount to R916 526,89 together with interest thereon;

3.7.4 The difference between the aforesaid balance outstanding as at 10 January 2011 and the aforesaid market value is R614 526, 89;

3.7.5 The principal debtor, and accordingly the Defendant are indebted to the Plaintiff in the amount of R 614 526, 89 in addition to the under mentioned amount."

- [13] The above discussion indicates very clearly that the plaintiff relies on the provisions of the contract but however, there is no indication in its pleadings that there has been full compliance with the provisions of clauses 9.2 and 9.3 of the contract. It is clear from the reading of the contract that once there is a breach the contract, the plaintiff in asserting its contractual rights arising from such a breach has to plead all the relevant clauses of the contract. The two relevant clauses in this matter read as follows:

"19.2 Upon the happening of any of the event set out above, the bank, to the extent limited in the Act, shall be entitled at its election and without prejudice to any other rights which the bank may have to:

19.2.1 claim immediate payment of the Loan Amount together with the interest and all amounts owing or claimable by the bank in terms of the Agreement, irrespective of whether or not such amounts are due at that stage; or

19.2.2 take repossession of the Goods in terms of an attachment order, retain all payments already made in terms hereof by the Client and to claim as liquidated damages, payment of the difference between the balance outstanding and the market value of the Goods determine in accordance with clause 19.3 which amount shall be due and payable forthwith.

19.3 Whenever it is necessary in terms of this Agreement to determine the market value of the Goods, such value shall be determined by an appraiser appointed by the bank, whose evaluation shall be final and binding on the Client. Should the bank thereafter sell or lease the Goods at an amount exceeding value determined, the price at which the Goods are so sold or leased shall be deemed to be the Goods at an amount exceeding the value determined, the price at which the Goods are so sold or leased shall be deemed to be the market value.”

[14] The same applies to the issue of the evaluation of the repossessed goods. As appears from the quoted portions of the particulars of claim above, the plaintiff simply states that the determined market value of goods is R302 000,00. It is apparently on the basis of this that the plaintiff determines the quantum of its claim. There is nothing in the particulars of claim indicating that the evaluation of the goods was determined by an appraiser as provided for in the contract. The response given by the plaintiff that the amount of R302 000.00 was determined by Mr Clive Lazarus, is not good enough in terms of the requirements of the contract. There is no averment that Mr Clive Lazarus, is an appraiser.

[15] In light of the above discussions, I find that the plaintiff's particulars of claim do not disclose the cause of action.

[16] In the premises of the following order is made:

1. The plaintiff's particulars of claim do not disclose the cause of action.
2. The plaintiff is granted leave to amend its particulars of claim within 14 days of date of this order.
3. The plaintiff is to pay the costs of this application.

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ACTING JUDGE OF THE SOUTH GAUTENG

JOHANNESBURG

Appearances:

For the Plaintiff: Baloyi Swart and Associates

For the Respondent: Tony Webbstock Attorneys

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