

SOUTH AFRICA / JUDGMENT

Technofin (Pty) Ltd v Standard Bank of South Africa (A183/2018) [2020] ZAGPPHC 683 (23 October 2020) [2020] ZAGPPHC 683

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis, M A Makume, M J Teffo

CASE / FILE NUMBER

A183/2018

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: NO.
- (2) OF INTEREST TO OTHER JUDGES: NO.
- (3) REVISED.

DATE 23/10/2020

CASE NO: A183/2018

In the matter between:

TECHNOFIN (PTY) LTD

Appellant

and

THE STANDARD BANK OF SOUTH AFRICA

Respondent

J U D G M E N T

This appeal has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1]

Introduction

1.1 This is an appeal against a judgment of Keighly, J (the court a quo) delivered in favour of the current respondent, The Standard Bank of South Africa Ltd (Standard Bank) on 21 September 2017. The appeal is with the leave of the Supreme Court of Appeal.

1.2 The judgment was in respect of the merits portion of a claim by Standard Bank against the current appellant, Technofin (Pty) Ltd (Technofin), whereby Standard Bank successfully obtained an order directing Technofin to re-purchase 118 rental agreements which it had previously ceded to Standard Bank. The value of the claim is in the region of R18 million. There is also an issue of prescription involved.

[2]

Background

The facts have been extensively set out in the judgment a quo by Keighly, J with customary lucidity. Most of the facts are common cause and is it therefore only necessary to refer to those which are crucial to the determination of this appeal. They are briefly, the following:

2.1 Technofin is an asset based rental finance company. As such, it is involved in “partnerships” (in the loose sense of the word) with various suppliers and dealers in logistical and earthmoving equipment. When customers of these suppliers or dealers require access to financing in order to finance the acquisition of such equipment, their information is supplied to Technofin who in turn determines whether it will provide finance to such a customer under a rental agreement. Upon approval of the financing, Technofin pays the suppliers of the equipment, acquires and retains ownership of the equipment until paid in full by the customer who is in turn liable to Technofin for the monthly payments in accordance with an agreed payment schedule.

2.2 Technofin then offers these rental agreements with its customers to Standard Bank at discounted prices as additions to two main cession agreements already in existence between Technofin and Standard Bank dated 2001 and 2008 respectively (also referred to in the papers as the “MCA”s). Upon acceptance of these offers, Standard Bank then acquires all Technofin’s rights under the rental agreements in exchange for an agreed monetary consideration.

2.3 The practical effect is therefore that a customer, once having sourced equipment from a supplier, after cession having taken place, rents the equipment from Standard Bank, who had paid Technofin the agreed value of the agreement and who has in turn paid the supplier the initial purchase price. More often than not, the cession between Technofin and Standard Bank takes place so close in time to the initial agreement between Technofin and the customer, that the price paid by Standard Bank is the actual source from which Technofin pays the supplier. Also, more often than not, Technofin forwards the particulars of its intended agreements with its

customers to Standard Bank, even prior to the offers and subsequent cessions.

2.4 Prior to the cessions, no direct contactual or other relationships exist between Standard Bank and the customers and never does any relationship come into existence between Standard Bank and the suppliers of the equipment. Standard Bank is dependent and reliant on Technofin for the titles that it receives in the equipment and in the validity and value of the agreements that it purchases by way of cession from Technofin.

2.5 Technofin however, furnished Standard Bank with a number of warranties in respect of the ceded agreements. These were provided in the MCA's . The contents of those warranties, contained in clause 5.1 of the first MCA (and clause 5.2 of the second MCA), provided that "in respect of each and every" rental agreement ceded, Technofin undertook and represented that the agreements ceded by Technofin to Standard Bank would be valid, binding and enforceable in accordance with its terms and that Technofin will pass good, valid, free and unencumbered transferable right, title and interest in the equipment to Standard Bank. The warranties further provided that the agreements delivered to Standard Bank will correctly reflect the intention of the parties thereto and be factually correct in every respect. The contents of the warranties contained in these clauses were not in dispute.

2.6 The first set of disputed clauses pertaining to warranties which are relevant to this appeal appear in clause 5.2 of the first MCA and its counterpart, clause 5.3 of the second MCA. Both these clauses were, at the instance of Technofin, rectified during the trial in the court a quo without opposition by Standard Bank. These two clauses, after rectification, read as follows:

"5.2 If any Customer legally proves that it has any claim as referred to in 5.1 and withholds payments of any amount owing under a contract [Standard Bank] shall have the right to require [Technofin] to repurchase the contract upon the terms and conditions provided for in 6.2 hereunder.

5.3 If any Customer alleges that it has any claim or defence as referred to in clause 5.1 and /or 5.2 above and /or withholds payments of any amount owing under a contract and/or credit agreement and legally proves such claim or fails to prove such defence within 90 (ninety) days of allegation, [Standard Bank] shall have the right to require [Technofin] to repurchase the contract and/or credit agreement upon the terms and conditions provided in 6.2 hereunder".

2.7 The more substantive warranties or indemnities provided by Technofin, are to be found in clause 6.2 of both the MCA's (they read identical) which, together with clause 6.1 to which it refers, read as follows:

"6 Indemnities by the Cedent

6.1 [Technofin] hereby indemnifies [Standard Bank] and holds it harmless against any claim, loss or expense (including consequential damages, loss of revenue and profits, legal costs on the scale as between an attorney and his own client, and any other costs) arising out of or in connection with or which may be sustained or incurred by [Standard Bank] as a direct or indirect consequence of any breach by [Technofin] of any of the terms, conditions, warranties, representations or undertakings of [Technofin] in terms of this agreement or any cession

pursuant hereto including but not limited to any innocent or negligent misrepresentation by [Technofin] to [Standard Bank];

6.2 As an alternative, at [Standard Bank's] election, or in addition to claiming under the indemnity referred to in 6.1, in the event of any breach by [Technofin] of any of the provisions of this agreement, [Standard Bank] shall be entitled to require [Technofin] to repurchase the contract in respect of which the breach was committed and any other contracts designated by (the Bank) which were ceded by [Technofin] to [Standard Bank] pursuant to this agreement upon the following terms and conditions –

6.2.1 The consideration payable by [Technofin] to [Standard Bank] on any such repurchase shall be the present value of the collectible under the contract/s repurchased as at the date of receipt of that consideration by [Standard Bank] plus all costs and expenses which [Standard Bank] may have incurred including (but not limited to) costs of storage, repairs repossession, refurbishing, sale and legal costs on the scale as between an attorney and his own client;

6.2.2 Upon receipt of the consideration referred to in 6.2.1, [Standard Bank] shall deliver the contract's in question to [Technofin] and the contract together with ownership in the goods shall be deemed to have ben ceded back to [Technofin] upon such delivery”.

2.8 All went well with the implementation of the MCA's for many years over the period from 2004 to 2009 and in total, agreements to the value of some R 200 million were ceded by Technofin to Standard Bank. Save for a single isolated instance, (the “Inelek case”) the warranties furnished by Technofin were not breached and it was not called upon by Standard Bank to make good any indemnity.

2.9 In 2011 a debt recovery company called Matuson Associates furnished Standard Bank with reports containing suspicions regarding the validity of some of the agreements ceded by Technofin to Standard Bank. A forensic investigation was commissioned which was completed in September 2011 by a certain Mr Louw. Thirteen agreements were found to be “tainted”. Four of the “tainted” agreements involved a supplier called Vaalharts Tegnise Dienste (of which a Mr Streak later became a witness) and nine of the “tainted” agreements were in respect of a supplier called OTT or On Target Trust, which also traded as Solo Sand (of which a Mr Marais became a witness). The “taintedness” of these agreements ranged from aspects such as including therein a CAT extractor as purportedly the equipment purchased which was never purchased, the sourcing of finance for the repair of an Iveco Truck clothed in as a rental agreement, hugely inflated prices recorded for actual equipment purchased, a re-financing of CAT equipment and “Dumper” already owned by the customer, to the purported purchase of

second-hand equipment as if new equipment. The agreements were therefore not what they purported to be and in many, if not all of the instances, clearly amounted to fraud. The further details of these shortcomings, which all constituted breaches of Technofin's warranties, are not relevant for purposes of this judgment. The uncontested evidence of the witnesses Marais and Streak established the breaches in respect of at least 5 of the 13 tainted agreements. Counsel for Technofin at the conclusion of the trial, conceded the breaches in respect of these agreements

having been established.

2.10 After having established these breaches, Standard Bank designated some other agreements as provided for in clause 6.2 of the MCA's which it required Technofin to also repurchase. In total, 118 agreements were identified. These are the agreements which formed the subject matter of the trial in the court a quo and consequently form the subject matter of this appeal.

[3] The findings of the court a quo

3.1 In respect of the special plea, the court a quo found that Technofin had not discharged the onus of proving that Standard bank could and should have discovered the breaches of warranty and thereby established the existence of all elements of its cause of action prior to September 2011. The plea of prescription against the action which was only instituted on 24 January 2014, despite the contracts in question having expired in 2009 already, was accordingly dismissed.

3.2 In respect of the interpretation of the clauses reflecting the warranties furnished by Technofin, the court distinguished between two parallel but separate legal relationships existing between Standard Bank and Technofin on the one hand and Standard Bank as cessionary of Technofin and the customers on the other hand. These two relationships were regulated by two different sets of agreements, being the cession agreements and the rental agreements respectively. Applying these distinctions, the court a quo found that different purposes were served by clauses 5.2 (and 5.3) and 6.2 respectively.

3.3 In respect of clauses 5.2 and 5.3, the learned judge in the court a quo, having conducted an extensive interpretive exercise in accordance with the state of our law^[1], declined to follow Technofin's interpretation of these clauses. Technofin sought to limit Standard Bank's right to require Technofin to repurchase agreements to those instances where a customer raises and proves as a defence to a claim instituted by the Bank that Technofin had breached its warranties and where the customer then, as a result of this defence, withholds or is entitled to withhold payment under its rental agreement. Technofin's interpretation is further that these pre-requisites originated from clauses 5.2 and 5.3 which should be read with clause 6.2, thereby limiting the ambit thereof.

3.4 The court a quo found that clauses 5.2 and 5.3 are not grouped under the indemnities expressly provided for in clause 6 and that the only reference in these clauses to clause 6 is to determine the terms upon which Technofin may be required to repurchase the contracts. The plain language used in the two sets of clauses was also found to differ markedly from each other. This lead the court a quo to determine that "considering the plain wording of the provisions, there is simply nothing in the language to even suggest that clause 5.2 (or 5.3) was intended to limit the circumstances in which the Bank could exercise its rights under clause 6.2. In fact all the language pointers are strongly in the opposite direction".

3.5 After extending the interpretive enquiry beyond the plain meaning of the language used in the two clauses, the court a quo examined the content and purpose of the clauses and the "commercially sourced" reasons for their formulation. Having done so, the court a quo

concluded that “... against this commercial background [being the lack of control or even presence during the conclusion of the contracts by Technofin with the customers prior to the cession to Standard Bank], it stands to reason that the Bank must have available to it a remedy in circumstances where it (rather than a customer) avers that Technofin is in breach of its warranties”.

3.6 The court a quo concluded that Standard Bank’s interpretation of clause 6.2 as a “stand-alone” remedy, legally divorced from the situations contemplated in clauses 5.2 and 5.3, is the correct interpretation. This also included the right to designate other “non-tainted” contracts to be repurchased by Technofin.

[4] Evaluation of the “interpretive issue”

4.1 At the end of the trial it was common cause that two main cession agreements were in existence between Standard Bank and Technofin, that, in terms of these agreements, 118 rental agreements between Technofin and its customers had been ceded to Standard Bank and that the Bank had proven breaches of warranties by Technofin in respect of at least five of those rental agreements. It was based on these established facts, that Standard Bank had successfully obtained an order for specific performance of a remedy provided for in clause 6.2 of the main cession agreements. The first question to be determined is therefore not a factual question but whether, on an interpretation of that clause, Standard Bank had been entitled to the relief granted by the court a quo.

4.2 The starting point of the interpretation of the clause in question is, based on the case law listed in footnote 1 above, the actual words used in the clause to express the parties’ intention. In plain and express terms, clause 6.2 allows Standard Bank to require Technofin to repurchase rental agreements ceded to the Bank “in the event of any breach by [Technofin] of any of the provisions of this agreement or of any cession ...”.

4.3 The precondition of the Bank’s entitlement is therefore a breach of a term of the main cession agreements, which include a breach of any of the warranties contained therein.

4.4 These warranties have been pleaded in paragraph 2.3.4 of Standard Bank’s particulars of claim. They are in short those referred to in paragraph 2.5 above, namely that Technofin warranted that the ceded rental agreements were valid, binding and enforceable, that, by cession, Standard Bank would acquire valid and absolute title to the goods or equipment reflected in those agreements and that the agreements correctly reflected the true facts. These warranties were extracted from clauses 5.1 and 5.1.1. to 5.1.13 of the main cession agreements, the contents and wording of which had been admitted by Technofin. It must immediately be clear that, in instances where no goods or equipment were actually purchased or where the financing obtained related to goods or equipment already owned by a customer, no valid title could be given by Technofin to Standard Bank. Similarly, where the financing related to repair of goods and not their purchase or where the agreements did not reflect the true facts, no valid title could have been given to Standard Bank.

4.5 In addition to the clear and unambiguous language used to express the intention of Standard Bank and Technofin in clause 6.2, the glaring consequence of the examples given above, illustrate the commercial sense of Standard Bank having insisted on the warranties referred to, for without it, the Bank would pay good money for agreements which would potentially be worthless, unenforceable or without any underlying security.

4.6 In addition to the wording of the clause, the context within which the need for warranties arose must also be considered as an aid to its interpretation: the different relationships between the various parties as already described in paragraphs 2.1 to 2.3 above, indicate that Standard Bank would, during the conclusion of the rental agreements by Technofin and prior to cession thereof, not be in any legal relationship with either the suppliers or the customers. Although Standard Bank may have perused the applications for finance and may have assessed the financial information contained therein, it was not yet a contracting party and was reliant on Technofin to ensure that the agreements were valid, had underlying security and reflected the true facts. Standard Bank's

only protection against purchasing worthless agreements was the warranties and its only recourse was the right to require repurchase

in case of failure of this protection. Technofin's interpretation to the contrary, namely that Standard Bank should

carry this risk and that the cessions were "without recourse", relegates Technofin's own position to that of a mere facilitator and not a cedent. This was not its case and neither was there any claim for rectification of clause 6.2. to reflect this.

4.7 It is against this contextual backdrop that Technofin's further contentions must be considered. These are the contentions that clauses 5.2 and 5.3 must be "read with" clause 6.2, almost as if incorporated therein. Not only is this not provided in the express wording of the clauses, as already indicated, but clauses 5.2 and 5.3 cater for an altogether different scenario than a breach of a warranty by Technofin. These clauses provide that, where Standard Bank has stepped into the shoes of Technofin as initial credit provider, a right of recourse would not accrue when a customer simply defaults (as might have happened had Standard Bank had itself been the credit provider right from the start), but only where the customer is able to prove a legal ground for resisting recovery of payment or a legal ground to withhold payment under the rental agreements. Technofin contends that it is only when such a risk materializes, that the right to repurchase arises. There is, however no basis for Technofin's contention that such a risk, which is the customary risk which attaches to the provision of credit to customers, should be equated with the scenario which occurs when one credit provider seeks to acquire a valid title in respect of the provision of credit which has been provided by another credit provider. The first scenario relates to the risks attendant upon the relationship between a credit provider and its customer and the second scenario relates to the risks attendant upon becoming a cessionary of "a book"

of credit agreements (as Technofin's CEO described it in his evidence) from another credit provider.

4.8 I find no fault in the following reasoning of the court a quo in finding that these two scenarios are separate and distinct from each other and that clause 6.2 is a "stand-alone" remedy:

"Technofin's interpretation is also at odds with the commercial reality underpinning the MCA's. It is the Bank, by and large, that provides Technofin with the financial resources to finance Technofin's customers' acquisition of equipment. The Bank advances this money up-front to Technofin when the cessions take place. It would be irrational for the Bank to be prepared to do this without ensuring that its rights are properly protected under the MCA's. One of the risks it must factor into account is that the contracts entered into between Technofin and its customers (in which the Bank plays no direct role) may be inaccurate, irregular or invalid or otherwise unenforceable due to the conduct on the part of Technofin...In this context, it simply makes no sense at all that Standard Bank would permit its legal remedy under clause 6.2 to be restricted to circumstances where a customer withholds payment and which would render the Bank utterly dependent on non-payment and litigation decisions taken by a customer".

4.9 It is further trite that, although the parties' conduct may be of assistance in interpreting the true meaning of a contractual clause (See: Unica Iron and Steel at footnote 1 above), their conduct is of no assistance here: Standard Bank and Technofin are at loggerheads as to whether clause 6.2 constitutes a stand-alone remedy or not. Hence, not only the litigation, but also the appeal. They therefore do not display uniform conduct from which a common interpretation can be derived. The interpretation of the clause is furthermore a function of a court and a decision which it must make and not a determination to be made by the witnesses. Insofar as Technofin sought to rely on its witnesses' unilateral interpretation of the clause(s), that reliance is therefore misplaced. In argument, much was also made of the view of Technofin's attorney at the time of the drafting of the MCA's and his insistence on the inclusion in clauses 5.2 and 5.3 of the requirement of proof of the defences referred to in those clauses as a precondition for the obligation to repurchase ceded agreements. That argument however, does not detract from the fact that such supposed insistence does not appear in clause 6.2. which clause does not make any reference to clauses 5.2 and 5.3 (despite whatever conditions Technofin's attorney may have insisted on). Counsel was constrained to concede this, particularly as there was no claim by Technofin that clause 6.2 should have been rectified in any way (as Technofin had rectified clauses 5.2 and 5.3). The wording of clause 6.2 was left intact which inescapably leads one to the conclusion that clauses 5.2 and 5.3 cater for the first scenario referred to above (the credit provider/customer relationship) and that clause 6.2 caters for the second scenario (the cedent/cessionary relationship). The first set of clauses find no application in the second clause and cannot limit the ambit of the latter. The result is simply that Technofin's suggested interpretation finds no foundation in either the language or the context of the provisions. Clause 6.2 has correctly been found to be a "stand-alone" remedy without limitation.

4.10 As to the issue whether Standard Bank had been entitled to designate other agreements than those found to be “tainted”, the unambiguous wording of clause 6.2 allows it to do so.

Presumably, such designated agreements would only be those in respect of which Standard Bank would determine that it is either at risk or which constitute a breach of trust. In argument it was mentioned that such a designation would presumably only be exercised *arbitrio boni viri* (in the fashion that a reasonable man would do). Again, this aspect did not form part of Technofin’s case. Technofin advanced another argument that to allow Standard Bank to notionally be able to designate all of the ceded contracts would place Technofin at risk of possible immediate bankruptcy or at least, severe and unforeseen cash-flow difficulties. Again, in the absence of a plea of rectification or limitation of the ambit of the clause, this was not part of Technofin’s case in the court a quo. Factually in any event, Standard Bank had not designated all the ceded agreements, but only about 10% thereof (wherein the “tainted” agreements were included).

4.11 In conclusion, I find that the interpretation of clause 6.2 by the court a quo was correct. Clause 6.2 is a “stand-alone” warranty, providing for an option for the repurchase of designated agreements by Standard bank, at its discretion once it has been proven that Technofin had breached the warranties it had furnished in the MCA’s. In this case this option had been exercised, entitling Standard Bank to the relief it sought and had obtained.

[5] The prescription issue

5.1 Technofin has (correctly) accepted that it bears the onus in respect of its special plea. Technofin’s case in respect of its special plea, is this: the debts forming the subject matter of Standard Bank’s claims against Technofin are substantially the same as the claims Technofin would have had against the customers in the event of their non-payment or default of the rental agreements. Technofin further contends that, with the exercise of reasonable care, Standard Bank could have completed its investigations within six months of each default (the six month period has been equated with how long it had taken Louw to complete his forensic report). Thus, says Technofin, since in all instances but one, the defaults had taken place prior to the end of 2009, the three year prescription period provided for debts of this nature in the Prescription Act 68 of 1969, had run out prior to the institution of Standard Bank’s claim in January 2013.

5.2 The first flaw in this reasoning is that Technofin again conflates the rights and obligations contained in the rental agreements with those contained in the MCA’s. Technofin’s reasoning ignores the two sets of parallel rights

and obligations referred to above. This is not legally permissible, as already explained earlier in this judgment.

5.3 The second fatal flaw, which flows from the first, is that Technofin sees the defaults of customers, including those in the “tainted” agreements, as the trigger events for the commencing of the running of the prescription period. This is not so. Those trigger events would constitute the commencement of the running of prescription against those individual customers in respect of

their rental agreements. Should those customers successfully prove the defences against recovery of claims under the rental agreements contemplated in clauses 5.2 and 5.3 of the MCA's then that might constitute the dates of commencement of claims for repurchasing of agreements under those clauses.

5.4 The dates of commencement of the running of prescription of the claims by Standard Bank against Technofin in terms of clause 6.2 of the MCA's in respect of Technifin's own breaches of warranties, commence from the date that Standard Bank acquired knowledge of the facts from which those claims arose. In the present instance, that was when it received

Louw's forensic report in September 2011.

5.5 Insofar as section 12(3) of the Prescription Act requires a creditor to exercise reasonable care in acquiring knowledge of all the elements of his claim, I agree with the court a quo that Technofin has not discharged its onus in this regard. No evidence was lead other than the incorrect reliance on the aforementioned trigger events that Standard Bank could have acquired knowledge of all the elements of its claim and particulars of Technofin's breaches of its warranties prior to the receipt of Louw's forensic report. It was suggested, although somewhat faintly, that the previous discovery of defects in the rental agreement with a customer called "Inelek" who had also "acquired" equipment via OTT should have alerted Standard Bank to the possibility of fraud in respect of agreements relating to that specific supplier. However, Technofin's own witness, Lyons, sank this suggestion with his evidence to the effect that the Inelek-agreement was an isolated incident which the parties at the time chose to treat as such without having to resort to litigation. I am satisfied that the special plea has correctly been dismissed in the circumstances.

[6]

Conclusion

In the premises, I am of the view that the appeal should be refused with costs, including the costs of senior and junior counsel where so employed.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

I agree.

M A MAKUME

M J TEFFO

It is so ordered.

Date of Hearing: 9 September 2020

Judgment

delivered: ...23.. October 2020

APPEARANCES:

For the Appellant:

Adv. J G Cilliers SC together with

Adv. M M W van Zyl SC

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For the Respondent: Adv. J C Viljoen (Heads of argument by Adv A

Gantchi SC and Adv. JC Viljoen)

Attorney for Respondent: Thomas Minnie Attorneys, Pretoria

[1] As set out in *Natal Joint Municipal Pension Fund v Eudumeni Municipality* 2012 (4) SA 593 (SCA) at para [18] – [19] and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms)* 2014 (2) SA 494, at para 12; *KPMG Chartered Accountants (SA) v Securefin Ltd & Another* 2009 (4) SA 399 (SCA); *North East Finance (Pty) Ltd v Standard Bank of South Africa Limited* 2013 (5) SA 1 (SCA) at para 24-5; *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at para 24-6; *Unica Iron and Steel (Pty) Ltd & Another v Mirchandani* 2016 (2) SA 307 (SCA) at para 91

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