REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 38510/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO

_____ _____

DATE SIGNATURE

In the matter between:

WESBANK, A DIVISION OF FIRSTRAND BANK LTD Applicant

and

PSG HAULERS CC Respondent

JUDGMENT

NOCHUMSOHN AJ

1. This is an opposed application for summary judgment wherein the relief sought is for the return to the Applicant of certain 2018 Scania motor vehicle.

2. On 7 June 2018, the parties entered into an Agreement under which the said Scania motor vehicle was purchased by the Respondent from the Applicant for R1 932 000.00. The Respondent would pay an initial deposit of R193 200.00. The remaining capital balance and finance charges were payable in monthly instalments over a period of sixty months. The Applicant would remain the owner of the Scania until the Respondent had paid all of the amounts due under the Agreement.

3. The Scania was delivered to the Respondent, who failed to maintain payments. At time of issue of the summons, Respondent was in arrears in the amount of R198 616.48. On 16 November 2020, the full outstanding balance amounted to R1 186 915.04.

4. Arising out of the Respondent's breach, the Applicant cancelled the Agreement in the summons.

5. The Applicant pleaded that under section 4(1)(a)(i) of the National Credit Act, the act was not applicable inasmuch as the Respondent is a juristic person with a turnover in excess of R1 000 000.00, coupled with the Agreement being "*a large agreement*" as contemplated in the act. In response, the Respondent pleaded that these allegations raise arguable points of law and challenged the

Applicant to prove such allegations. Pertinent to note, the Respondent failed to deny in the Plea that its turnover did not exceed R1 000 000.00 or that the Agreement was not a large agreement as foreshadowed in the National Credit Act. The Plea is no more than a bald denial of liability and puts the Applicant to the proof of the allegations made in the summons.

6. In the Affidavit resisting Summary Judgment, the Respondent avers that "*it attempted"* to pay the arrears and begged the indulgence of the court to pay off the arrears. Barring the attachment of proofs of payment, there is no evidence of the attempts. No facts are set out as to what amounts were paid, when, on account of the arrears. Disturbing to note, Counsel for the applicant, Adv Leon Peter, pointed out in argument that the same proofs of payment attached to the answering affidavit have been attached by the same respondent in some six other cases before this court. My response to this was that such evidence is not before me, but I suggested that these cases all be collated and presented to the Deputy Judge President for the allocation of case management or the taking of any other further steps.

7. Other than to allege in its opposing Affidavit that the Respondent was severely afflicted by the Disaster Management Act and unable to trade as a result of the lockdown, no other defences are raised. Whilst the Respondent set out at great lengths its position, and cash flow hardships arising out of the non-payment of a deposit (which would have alleviated its problems) from the sale of its gold dump mine, it does not take the court into its confidence by explaining how its precarious financial position has been or will be alleviated so as to enable it to pay the Applicant. There is a mere bland allegation to the

effect that the Respondent has *"turned the tide and will be able to honour its contractual obligations going forward".* One would have at least expected the Respondent to set out its business plan, its projected cash flows in a manner sufficiently persuasive to lead this Honourable Court to the conclusion that the Respondent would indeed be in a position to meet the debt. In this sense, the Affidavit resisting Summary Judgment is equally bland and lacking in substance to that of the Plea.

8. In raising a defence of *vis major* arising out of the national lockdown, the Respondent does not take the court into its confidence by offering any evidence as to the contracts which it had on hand immediately preceding the lockdown, its ability to trade immediately preceding the lockdown, its income and expenditure immediately preceding the lockdown, what arrangements it was able to make with its creditors arising out of the lockdown. There is no evidence of its budget immediately preceding the lockdown, the revision of its budget as a result of the lockdown, its plans for future trading at a time after the lockdown. Neither is there any evidence of when the Respondent recommenced trading, what transactions it undertook, how its income and expenditure improved or deteriorated, all of which was to be expected in an Affidavit resisting Summary Judgment. It is simply insufficient for a debtor to baldly allege that it was incapable of trading arising out of the lockdown. Full particularity of its financial position, before, during and after the lockdown ought to have been disclosed.

9. Absent such evidence, it is not competent for a court to find that performance had become objectively impossible, with the result that the principles raised both in argument and in the Respondent's Heads of Argument pertaining to impossibility of performance, find no application. In order to apply such principles, there must at least be a semblance of evidence placed before a court beyond a bald allegation that an entity was incapable of trading as a product of lockdown.

10. There is no evidence relating to either the possession or use of the Scania during the lockdown. The court is thus left in a vacuum, not knowing whether or not the Scania had been used, for what purpose it had been used, or what benefit had been derived by the Respondent from its use. Again, such evidence could and should have been tendered in the affidavit opposing summary judgement.

11. In its Heads of Argument, the Respondent placed much reliance upon a term in the contract to the effect that should a deterioration in the buyer's financial circumstances occur, the seller **would have the right** {*my emphasis*} to propose varied terms for the remaining duration. In the event of the buyer refusing such terms within thirty days of the proposal, all amounts unpaid would fall due.

12. The argument presented was that the aforesaid term was peremptory. This was a reason advanced by the Respondent, to the effect that the Applicant was not entitled to cancel the Agreement. Whilst such point, is one of law, which need not have been pleaded or raised in the Affidavit resisting

Summary Judgment (and it was not), one would have at least expected evidence in the opposing Affidavit of all attempts on the Respondent's part to negotiate meaningfully, or at all with the Applicant.

13. There is not a single shred of evidence indicating that any form of negotiation took place under which the Respondent explained its financial position, in detail to the Applicant, met with the Applicant or requested the Applicant to exercise its rights under the clause in question to make a proposal for varied terms. It is to be borne in mind that the clause in question is not peremptory in nature.

14. From the plain language used, the clause confers a right upon the Applicant to propose varied terms and not an obligation upon the Applicant to propose varied terms. Thus, this argument cannot pass muster.

15. In its defence, the Respondent placed reliance upon *Barkhuizen v Napier 2007 (5) SA323 (CC).*

16. Barkhuizen sheds light on substantive fairness of a contract, or contractual clauses and approaches the issue out of considerations of public policy. In order to meaningfully engage with such constitutional principles, to ascertain whether they ought to be applied to the facts *in casu,* there must at least be evidence of some steps on the part of the Respondent to having engaged with the Applicant, and have requested the Applicant to invoke the very clause

which the Respondent now, in argument, accuses the Applicant of violating. No such evidence exists.

17. Whilst the Respondent correctly raised in its Heads of Argument that a contractual party must act in good faith, as foreshadowed in *Everfresh Market Virgina (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) (SA) 256 (CC),* there is no evidence to support its contention that the Applicant acted in bad faith.

18. Finally, the Respondent emphasised in its Heads of Argument that the cancellation should have been referred to the National Credit Regulator in accordance with sections 139, 140 and 141 of the National Credit Act. Such submission was based upon the court having insufficient information to rule upon whether or not the National Credit Act was applicable to the Agreement.

19. I have already mentioned that there was a failure on the part of the Respondent to have denied the allegation in the summons to the effect that the National Credit Act did not find application. More importantly, no such denial is made in the Affidavit resisting summary judgment. Again, the court cannot place any reliance upon submissions made, absent any evidence to support such submissions. Generally, counsel should be constrained not to make submissions which are incapable of being substantiated against the evidence presented.

20. It is not competent to call upon the court to find that the Agreement is governed by the National Credit Act in an environment where there is an

allegation in the summons that the act is inapplicable. Such allegation is not denied in the Plea, nor in the Affidavit resisting Summary Judgment. Absent such denials, the conclusion to draw is that the pleaded facts that the Respondent's turnover exceeds R1 000 000.00, and that the Agreement is "*a large agreement",* as foreshadowed under the National Credit Act, must be accepted to be the prevailing position. Thus, there is no scope for a referral to the National Credit Regulator for investigation.

21. Having regard to the aforegoing, I find that there is no defence to the claim and the Applicant is entitled to Summary Judgment, as sought. Thus, I make the following Order:

21.1. The Respondent is to return to the Applicant the 2018 Scania G460 CA6X4MSZ T/T C/C with engine number 9BSG6X40003924205 and chassis number DC13106L018313864;

21.2. The Respondent is to pay the Applicant's costs of the action, including the costs of this opposed application for summary judgment, on the scale between party and party.

21.3. The application is postponed *sine die* for purposes of the Applicant pursuing its claim for damages, and for the filing of supplemented papers in respect of the quantification thereof.

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NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:	Advocate Leon Peter (leonpeterc@gmail.com)
Instructed by:	Rossouws Lesie Inc (phelisaj@rossouws.co.za)
On behalf of the Respondent:	
Instructed by:	Matthews Siyeko (matthews@mabuzas.co.za)
Date of Hearing:	3 August 2022
Date of Judgment:	3 August 2022

This judgment was Authored by Nochumsohn AJ and is handed down electronically by circulation to the parties/their Legal representatives by email and uploading to the electronic file of this matter on caselines. The date of this Judgment is deemed to be 3 August 2022.