REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 02662/2013

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

12/8/2013
DATE

SIGNATURE

In the matter between:

BEQFIN (PROPRIETARY) LIMITED **APPLICANT**

and

NTANE: EDDY **RESPONDENT**

J U D G M E N T

DOSIO, AJ:

INTRODUCTION

[1] The Applicant seeks the return of two trailers[1] from the Respondent in terms of the *rei vindicatio.*

[2] The Respondent opposes the application on the basis that the *rei vindicatio* is not the appropriate remedy in the light of the existence of

[1], A second hand 1983 Henred Fruehauf 12 meter tri-axle trailer with registration number RYN 427 GP ("the first trailer") and a second hand 1989 Poole 12 meter flat deck tri-axle semi-trailer with registration number CY321616 ("the second trailer")

an alleged credit agreement between the parties relating to these two trucks.

[3] The questions the court must consider are firstly, whether the Applicant's choice of cause of action, namely, the *rei vindicatio* is appropriate in the light of the existence of a credit agreement regulating the relationship between the parties, and secondly whether the motion procedure for such relief is appropriate in view of the existence of certain disputes of fact between the parties.

BACKGROUND

[4] During 2002, 2004 and 2005, the Applicant and the Respondent entered into four credit agreements for the sale of various trucks and trailers. As a result of the Respondent allegedly being in arrears with these credit agreements the Applicant alleges that the four credit agreements were novated with a single agreement dated the 18th of April 2011 ("the alleged novated agreement").

[5] The Applicant states that the alleged novated agreement records the purchase price as being the sum of R 997 587.68 (nine hundred and ninety seven thousand, five hundred and eighty seven rands and sixty eight cents).

[6] In terms of the alleged novated agreement ownership of the goods would remain vested in the Applicant until the purchase price, finance charges and arrear amounts were paid in full.

[7] In terms of the alleged novated agreement the Applicant would be entitled, subject to a notice being issued in terms of section 129 of the National Credit Act 34 of 2005 ("the National Credit Act"), to immediately claim payment of the arrear amounts in terms of the agreement if the Respondent defaulted with his payments, or to immediately terminate the agreement and to take repossession of the goods and to retain all payments already made in terms of the agreement.

[8] The Applicant alleges that the Respondent was in arrears with his repayments in the amount of R259 809-57 (two hundred and fifty nine thousand, eight hundred and nine rands and fifty seven cents).

[9] Despite the Applicant's delivery of a notice to the Respondent in terms of section 129 of the National Credit Act the Respondent failed to pay the arrears or to surrender the items. Consequently on the 9th of November 2012 the Applicant cancelled the alleged novated agreement by written notice to the Respondent.

LEGAL PRINCIPLES

Rei Vindicatio

[10] The *rei vindicatio* is a remedy available to the owner to reclaim his property from whomever is in possession of it. The remedy is available to the owner in respect to both moveable and immoveable property. The remedy merely restores proprietary interest, it does not award damages.

[11] An Applicant must prove that he or she was the owner of the thing and that the defendant was in possession of the property when the action was instituted.[2]

[12] In *Chetty v Naidoo* 1974 (3) All SA 304 (AD) at page 309 Jansen JA set out additional rules to be considered when proceeding by way of the *rei vindicatio* action namely, that if the owner

> "... concedes in his particulars of claim that the defendant has an existing right to hold (e.g., by conceding a lease or a hire-purchase agreement, without also alleging that it has been terminated...) his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then *ex facie* the statement of claim he must at least prove the termination"

[13] The latter case suggests that if the Respondent has an existing right arising from any agreement the Applicant in addition to proving its

[2] LTC Harms- Amler's Precedents of Pleadings, page 392-393

ownership and the fact of the Respondent's possession of the goods, must prove that the rights the Respondent enjoyed in terms of the agreement have terminated.

[14] In light of the fact that the Applicant submits that the alleged novated agreement is a novation of the previous credit agreements and the Respondent disputes the validity thereof, one of the issues that this court has to consider is whether the agreements were indeed novated.

[15] The learned authors RH Christie and GB Bradfield in *Christie's The law of contract in South Africa* state;

> "The novating contract must be a valid and enforceable one if it is to have the effect of novating the old contract...If the parties have the common intention of replacing their old contract with a new one and the new one turns out to be invalid it would not only be contrary to their common intention but inaccurate to say there has been a novation."[3]

[16] If the novation is not valid then the second contract would be impossible of performance and therefore null and void *ab initio* resulting in the first contract/s being unaffected and remaining valid and enforceable[4].

[17] The learned author J.W Wessels, *Law of Contract*[5] para. 2383, stated;

> 'The creditor of an obligation who consents to a novation does not intend to renounce the debt due to him unless a new debt is substituted in the place of the old one. If the negotiations do not result in a legally valid new debt, there is no novation. Hence, if the new contract is physically or legally impossible, the old obligation is not extinguished.'

Appropriateness of motion proceedings when disputes of fact arise

[18] The decision to proceed by way of application instead of an action has been utilised more frequently due to it being less expensive and more favourable in obtaining an expeditious order.

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[3] Christie's The law of contract in South Africa 6th edition, LexisNexis, page 468
[4] Beyers JA at page 336 in *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (A)
[5] 2nd ed vol 2, Butterworths

[19] The party suing is *dominus litis* as he chooses the procedure to be used.

[20] In the case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd* 1949 (3) SA 1155 (T), it was decided, as a general rule, that the choice between the procedures depends on whether a *bona fide* material dispute of fact should have been anticipated by the party launching the proceedings. When such a dispute is anticipated, a trial action should be instituted. At page 1161 Murray AJP stated;

> "...There are certain types of proceeding (e.g., in connection with insolvency) in which by Statute motion proceedings are specially authorised or directed... There are on the other hand certain classes of case (the instances given...are matrimonial causes and illiquid claims for damages) in which motion proceedings are not permissible at all. But between these two extremes there is an area in which...according to recognised practice a choice between motion proceedings and trial action is given according to whether there is or is not an absence of a real dispute between the parties on any material question of fact"

[21] Accordingly, a court will be less inclined, when there are genuine disputes of fact on material issues, to decide the matter on motion on a mere balance of probabilities, as would be ordinarily done in an action.

[22] If, during an application, a dispute of facts arises, the court must exercise a discretion as determined in terms of Rule 6(g) of the Uniform rules, to dismiss the application or to refer the disputes to oral evidence or to trial. This discretion must be exercised judiciously.

[23] In the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (2) All SA 366 (A) at page 368 Corbett JA stated;

> "...where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

[24] In the case of *Room Hire supra* at page 1162, it was stated that an

"...application may be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into the disputed facts not capable of easy ascertainment...what is essentially the subject of an ordinary trail action."

[25] This was supported in the case of *Lombaard v Droprop CC and Others* 2010 (5) SA 1 (SCA). At page 11 Heher JA *et* Shongwe JA stated;

"...Therefore, if a party has knowledge of a material and *bona fide* dispute, or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed."

EVALUATION

The first enquiry – whether the *rei vindicatio* is the appropriate remedy

[26] The Applicant's counsel has argued that it has established a case for the *rei vindicatio* as it has proved that the Applicant is the owner of the truck trailers and that the Respondent is in possession thereof. The Applicant's counsel relied on the case of *Krugersdorp Town Council v Fortuin* 1965 (2) SA 335 (T) where, at page 337, Hiemstra J stated that:

"The mere fact that a plaintiff is owner entitles him to possession and he need not state that the defendant is in wrongful possession. It is for the defendant to plead on what basis he claims to retain possession"

[27] The Applicant's counsel argued that this application is only in respect of the return of the goods and that the Respondent has no defence to such a claim.

[28] In the light of the case of *Chetty v Naidoo supra* the Applicant would still bear the onus to prove that the right that the Respondent enjoyed has been terminated.

[29] The Applicant's counsel argued that the cancellation letter forwarded to the Respondent is sufficient to show that the alleged novated agreement was cancelled. He relied on clause 13.1 of the agreement

for support that the Applicant should be placed in possession of the goods.

[30] Clause 13.1 of the agreement FA1 states;

"13.1 If the consumer fails to effect payment of any instalment(s) on due date or commits any other breach of this agreement the Consumer undertakes to, and shall forthwith, restore the goods to the Credit provider pending the institution of an action against him for payment of the balance of the purchase price, alternatively the Credit Provider shall have the right to terminate this agreement and claim return of the goods, (whether or not in conjunction with any other claims which the Credit Provider may be entitled to): The Consumer further agrees that in such event, the Credit Provider shall have the right of obtaining an attachment order in any Court of competent jurisdiction, to place the goods and the documents aforesaid in the custody of the Credit Provider, pending on the conclusion of any such action institution or to be instituted against the Consumer."

[31] The Respondent's counsel argued that the alleged novated agreement is void, for reasons that will be expressed below.

[32] The Applicant's counsel argued that if the Respondent contends that the alleged novated agreement is void, then it should place the Applicant in possession of its trailers, as in terms of the previous credit agreements, the Applicant was in any event entitled to be repossessed of the goods. The Applicant's counsel referred the court to the contents of paragraph 7.1 of the credit agreements which state;

"Nothwithstanding delivery of the Goods to the Credit Receiver, the ownership of the Goods sold in terms of this agreement remains vested in the Credit Grantor until the full purchase price, additional finance charges on arrear amounts and all amounts payable under and in terms of this agreement have been paid in full"

[33] The Respondent's counsel argued that if its rights in terms of the alleged novated agreement had been terminated, the Applicant had failed to prove that the four previous credit agreements had been terminated. The Respondent would, accordingly, still enjoy a right to retain the trailers in terms of the previous credit agreements.

[34] The Respondent's counsel contended that the Applicant made no mention in its founding affidavit that the previous credit agreements

had been terminated. The Applicant would first have to cancel those previous credit agreements.

[35] The Respondent's counsel argued that the Applicant's application should be dismissed as all that he is able to show is an unjustified enrichment claim.

[36] The Respondent submits that as the goods were neither sold nor delivered pursuant to the alleged novated agreement, the Applicant may not reclaim possession. He, accordingly, believes that he cannot be in breach of a void agreement and neither can the Applicant cancel an agreement that was void.

[37] The Applicant in its replying affidavit states that the Respondent's only defence to the current repossession claim would be that he made the monthly payments in respect to the alleged novated agreement and that he was, accordingly, not in breach.

[38] This court finds the Respondent has a valid defence.

[39] The Applicant may not rely on the alleged novated agreement as that is not the basis on which he had initially approached the court.

[40] Having approached the court on a pure *rei vindicatio* he seems to have opportunistically adjusted his case to rely on the terms of the alleged novated agreement in response to the Respondent's answering papers.

[41] The Applicant may not do so.

[42] Even if this court is incorrect on this finding the validity of the alleged novated agreement is strenuously disputed and ought to form the subject matter of a trial.

[43] The Applicant's reliance on the previous credit agreement was also misplaced as the Respondent's right to retain the trailers in terms of the previous credit agreements has not been terminated. The onus, therefore, shifts to the Applicant to prove that the previous credit

agreements have been terminated. The Applicant has not proved the termination of these previous credit agreements and accordingly the *rei vindicatio* is not the correct remedy to use. On this basis alone the application should be dismissed.

The second enquiry – whether the process by way of motion is appropriate

[44] Even if the *rei vindicatio* is a competent remedy on these facts, the court would still have had to consider whether the motion procedure in obtaining such relief would be appropriate.

[45] The Respondent submitted that there are numerous *bona fide* factual disputes prevalent on the papers. The Respondent's counsel argued that the Applicant should have elected at the outset and in limine, to have the matter referred to trial or oral evidence.

[46] The factual disputes which the Respondent contends for are (i) whether the alleged novated agreement was signed under duress, (ii) whether the agreement was in a blank state when signed, (iii) whether the Respondent's initial on the second page of the agreement was forged, (iv) whether the Respondent was afforded the opportunity to read the agreement before signing it, (v) whether the agreement in question is simulated, and (vi) whether the National Credit Act applies to the agreement.

[47] The Applicant's counsel contends that there are no factual disputes and that the Respondent is dishonest when he alleges that there are. In its replying affidavit the Applicant denies that the Respondent entered into the alleged novated agreement under duress or that it was in a blank state when he signed it. The Applicant disputed the agreement was void, simulated or that it fell foul of the National Credit Act.

[48] The Applicant's counsel argued that the Respondent's allegations are fabrications, far-fetched and clearly untenable.

[49] The Applicant's counsel referred the court to the case of *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) where Cameron JA stated at paragraph [55];

> "...an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984 (3) SA 623 (A) at 634-5] this court extended the ambit of uncreditworthy denials. They now encompass not merely those that fail to raise a real dispute, genuine or *bona fide* dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers"

[50] The Applicant's counsel argued that it is unlikely that the Respondent signed the alleged novated agreement in a blank state, because two weeks later, the amount agreed upon to be paid by the Respondent had in fact been paid. The Applicant's counsel argued that the allegations made by the Respondent that he is a truck driver and not in the business of concluding numerous credit agreements is far-fetched as he signed four similar instalment credit agreements with the Applicant in earlier years.

[51] The Respondent states that he was compelled to sign the alleged novated agreement at the Applicant's offices where after he was told to leave the premises. He was threatened with repossession of the goods if he did not sign.

[52] In support of the Respondent's contention that the alleged novated agreement was in a blank state when he signed it, it was argued that pertinent clauses pertaining to the cash price, the vat, insurance, stamp duties, and license fees are still blank. In addition, no reference was made to the individual purchase price of the trucks and trailers concerned. A consolidated amount of R745 643-09 (Seven hundred and forty five thousand, six hundred and forty three rands and nine cents) was recorded on the agreement which, according to the Respondent, was a mere "thumb sucked" figure. The cross inserted in the space where it is indicated that he received a copy of the instalment sale agreement is not initialled. The last entry on the first

page of the agreement where reference is made to the first trailer, the registration number and the year model was inserted around the existing signature. According to the Respondent this is indicative of it being inserted afterwards. The replying affidavit of the Applicant concedes that paragraphs 1.1 to 1.9 of the agreement were left blank because the latter is a novation. Finally, the Respondent submits he would never have signed an agreement to purchase goods which he had already purchased in 2004 and neither would he have agreed to an interest rate of 20% (twenty percent) per annum for goods that he had already purchased eight years before.

[53] In support of the Respondent's submission that his signature was forged it was argued that he had initialled all of the pages of the agreement except for the second page. His purported initials on the second page indicated as "N.E" is disputed as being his as his initials are "K.E.N".

[54] In support of the Respondent's contention that the alleged novated agreement falls foul of the National Credit Act, it was argued that because he is a truck driver, who barely passed matric that an analysis of his financial means should have been concluded prior to his signing the agreement. He, accordingly, alleges that there has been non-compliance with section 81 of the National Credit Act which constitutes reckless credit. The Respondent also submitted that the agreement falls foul of section 90(2)(c)(ii), 90(2)(h)(ii) and section 92 of the National Credit Act.

[55] The Applicant denied that section 90(2)(c)(ii) may be relied upon by the Respondent or that the agreement falls foul of section 92 of the National Credit Act. The Applicant submitted that the National Credit Act does not apply to the agreement because the credit was granted in 2004. This agreement was a novation of previous agreements entered into between the parties. Therefore any credit vetting that was done was effected before the National Credit Act came into operation.

[56] The Respondent's counsel argued that the National Credit Act is applicable. Reference was made to the case of *Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (ECP). In that case the defendant had, on 23rd December 2008, signed an acknowledgment of debt in respect of goods purchased from the plaintiff in terms of which he undertook to pay the outstanding amount on the 24th of December 2008. Van der Byl AJ at page 52 stated;

> "[25] ...the acknowledgement of debt in this matter is not a novation of the obligations of the defendant under the agreement in respect of the goods sold and delivered. It rather appears that the acknowledgment of debt has been intended to be a confirmation that creates a further obligation relating to the same performance and not as a replacement of the obligation which existed under the agreement in respect of the goods sold and delivered (see *Adams v SA Motor Industry Employers Association* 1981 (3) SA 1189 (A) at 1199H).
>
> [26] In my opinion, the acknowledgment of debt is indeed a credit agreement as envisaged in the Act..."

[57] Reliance was placed on this case but this court cannot find that it has sufficient significance to the present facts.

[58] The court would first need to determine whether the alleged novated agreement is a legally binding agreement. Only after the court has made a finding that the disputed agreement is a legally binding agreement will the court need to determine whether it is regulated by the provisions of the National Credit Act.

[59] This court is unable to make a determination on the first of these questions, as the evidence relating to this question will need to be tested. Accordingly, the matter ought to correctly be adjudicated at a trial.

[60] In addition to the above mentioned factual disputes, there are further factual disputes on the papers in respect to the outstanding amounts.

[61] The respondent disputes the principal debt reflected in clause 10.1 of the alleged novated agreement as being R745 643-09 (seven hundred and forty five thousand, six hundred and forty three rands and nine

cents). He also disputes the amounts outstanding in respect to the first and second trailer. The Respondent supplied statements in support of what he believes the outstanding balances in respect to the two trailers ought to be.

[62] The Respondent's counsel contended that the factual disputes were foreseen by the Applicant prior to launching the application as the evidence shows that the Respondent had informed the Applicant approximately a month after the alleged novated agreement was signed that the agreement was false, simulated and that he had signed it under duress.

CONCLUSION

[63] Even if the Applicant had succeeded in showing that the *rei vindicatio* remedy that he had relied upon was the correct remedy, then this court would still have been unable, on the papers, to determine the following factual disputes, namely, (i) what the exact amounts owing in respect to the two trailers were, (ii) whether the alleged novated agreement was signed under duress, (iii) whether the initial on page two of the alleged novated agreement was forged, (iv) whether the Respondent understood all the terms and conditions of the alleged novated agreement.

[64] There are two conflicting versions in respect to the last dispute, namely, that of Mr de Jager (the general manager of the Applicant) and that of the Respondent. In the absence of an affidavit from the missing witness Ms Joy, this court is unable to determine whether the minutes of the meeting between the parties of the 2nd of July 2010 were a true reflection of what had transpired between the parties. This court is also unable to determine whether the agreement was in a blank state when the Respondent had signed it as there were, again, two conflicting versions namely that of Mr de Jager and that of the Respondent.

[65] All the factual disputes referred to above cannot be determined on the papers alone and ought to be referred to trial in order to test the credibility of the prospective witnesses and the evidence as a whole.

[66] In light of the application of the *Plascon-Evans* rule and despite facing the alleged disputes of fact, the Applicant failed to seek the referral of the matter to oral evidence or for trial. It is this failure and the fact that the Applicant ought to have foreseen the probability of the factual disputes arising that the court would have dismissed the application even if the Applicant had proven that the *rei vindicatio* was the appropriate remedy.

[67] Not only would it be inappropriate to expect a reasonable court to adjudicate over such disputed facts merely on motion papers, but it would also not be consistent with the proper administration of justice to do so.

[68] Litigants must realise that the motion court procedures for final judgments ought to be used sparingly and only in the most appropriate of cases. This is not one of them.

COSTS

[69] The Applicant in its notice of motion requested that the Respondent pay the costs of this application on the scale as between attorney and client.

[70] The Respondent's council argued that they are seeking punitive costs against the Applicant as it foresaw the factual disputes long before the application was launched. In addition, the factual disputes were further enhanced by the delivery of the Respondent's answering affidavit to which the Applicant elected to file a reply. The Respondent's counsel argued that the Applicant proceeded to set the matter down for argument when it could have referred the matter to trial. It was argued the Applicant also failed to set out its case in the founding affidavit and tried to cure same in its replying affidavit.

[71] The Applicant's counsel argued that even if there is a dispute of fact a punitive cost order is not correct as the order should follow the event.

[72] Despite the submissions made by counsel, this court considers the cost order that follows to be appropriate in the circumstances.

ORDER

In the premises the application is dismissed with costs.

D. DOSIO
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

APPEARANCES:

COUNSEL FOR THE APPLICANT:	ADV. VAN RHYN FOUCHE
INSTRUCTED BY:	HOOKER ATTORNEYS
COUNSEL FOR THE RESPONDENT:	ADV. C VAN DER MERWE
INSTRUCTED BY:	CHRIS FOURIE ATTORNEY