


**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
11/02/2011 DATE	 SIGNATURE

11/02/2011
CASE NO: 51412/2010

In the matter between:

**BUSINESS ZONE 679 (PTY) LTD
LAURENCE STEPHEN BIRD**

1st Excipient/ 1st Defendant
2nd Excipient/ 2nd Defendant

and

NEDBANK LIMITED

Respondent/Plaintiff

J U D G M E N T

MNGQIBISA-THUSI J

[1] The defendants have noted an exception to the Plaintiff's particulars of claim on the ground that they lack the necessary averments to sustain a valid cause of action and that they should be struck out and the Plaintiff pay the costs thereof.

[2] The plaintiff has issued summons on the defendants claiming payment of an amount of R 107 691.08 for goods delivered but not paid for by the first defendant. The plaintiff is also claiming interest on the capital amount and costs.

[3] The claim arises out of a written agreement, termed the 'Master Rental Agreement' ("the agreement") entered into between the first defendant and

CentraFin (Pty) Ltd ("CentraFin") for the hire of certain goods. Further, the second defendant had bound himself as surety and co-principal debtor under the agreement.

[4] In terms of clause 9.1 of the agreement, CentraFin ceded its rights under the agreement to the plaintiff. The plaintiff is therefore suing in its position as a cessionary.

[5] In its Notice of exception in terms of Rule 23 of the Rules of Court, the defendants plead, inter alia, as follows:

"5.

5.1

5.2 It appears from annexure "A" that a reference to the "hirer" is a reference to CentraFin (Pty) Ltd and a reference to "the user" is a reference to Business Zone 679 (Pty) Ltd.

5.3 The fulfilment of a suspensive condition must be alleged and proved by the party relying upon the agreement, ie the Plaintiff in the present action.

5.4 Nowhere within the present Particulars of Claim is any allegation to the effect that the aforementioned suspensive condition has been complied with or not alternatively waived by the parties.

5.5 Non-compliance with a suspensive condition does not give rise to a binding agreement.

6.

In the premises the Plaintiff's Particulars of Claim lacks the necessary averments in order to sustain a valid cause of action against the First and/or Second Defendant."

[6] The agreement which was annexed to the plaintiff's particulars of claim as Annexure "A", provides, inter alia, in clause 23 that:

"This agreement is subject to the fulfilment of the following suspensive condition to the satisfaction by the hirer that the user has furnished to the hirer with proof to its satisfaction that the provisions of the Public Finance Management Act 1 of 1999, the Schedules and Regulations thereto as

amended (the PFMA) in relation to the hire of goods and any security referred to in this agreement have been complied with.”

[7] The defendants’ argument is that since the agreement contains a suspensive clause, the common intention of the parties is clear from the language in the agreement, namely, that the validity of the agreement is dependent on the fulfilment of the condition being that the defendant must provide the plaintiff with proof to its satisfaction that it has complied with the provisions of the PFMA and the Schedules and Regulations thereto in relation to the hire of goods and any security referred to in the agreement.

[8] It was submitted on behalf of the defendants that the plaintiff has not pleaded the suspensive condition or the fact that the condition has been fulfilled. It is the defendants’ contention that since the Plaintiff has not pleaded that the suspensive condition has been fulfilled, no agreement came into being between the Plaintiff and the defendants and therefore the plaintiff does not have a cause of action against the defendants.

[9] The submission of the plaintiff is that the agreement has to be looked at as a whole in order to determine what the intention of the parties was at the time it was concluded. It was submitted on behalf of the plaintiff that the clause (23) upon which the defendants are basing their exception should be read with clause 24 of the agreement which would render its particulars of claim not excipeable as contended by the defendants.

[10] It was argued on behalf of the defendants that if one were to read the agreement as a whole, in particular clause 23 and 24, one would come to the conclusion that the agreement became valid from the time that the first defendant attached his signature to the agreement.

[11] Clause 24 of the agreement reads as follows:

“The User by its signature hereto, warrants to the Hirer that it has complied with all the provisions of the PFMA, the Schedules and Regulations thereto, as amended in relation to the agreement and any security referred to, and undertakes that it will continue to do so for the duration of the Agreement.”

[12] It was further submitted that consequently since the suspensive condition was fulfilled by the signature of the first defendant, a valid and enforceable agreement came into being. It was further argued on behalf of the plaintiff that since clause 23 related to public entities which were governed by the PFMA, the agreement with the first defendant could not be interpreted in a way in which it would be expected that the first defendant being a private entity would have to comply with the PFMA and its regulations.

[13] I tend to agree with the argument of the plaintiff. Since both the plaintiff and the first defendant are private entities, it could never have been contemplated by the parties at the time the agreement was entered into that the first defendant would have to comply with the PFMA and its regulations. The fact that the clauses formed part of the agreement must have been an oversight on the side of both parties to the agreement. It is my view further that it was not necessary for the plaintiff to have pleaded compliance with the suspensive condition since a valid agreement existed when the action was launched.

[14] Accordingly the following order is made:

‘The exception is dismissed with costs.’



MNGQIBISA-THUSI
Judge of the North Gauteng High Court