

SUMMONS

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 29495/19

In the matter between:

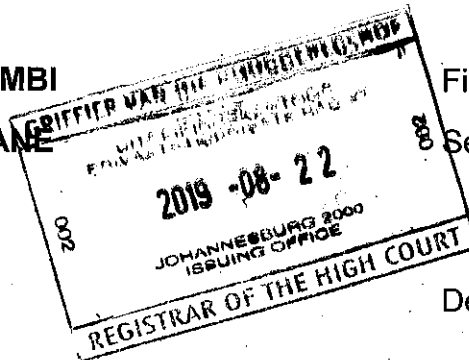
THANDILE SONWABO JWAMBI
NICOLAS TATOLO KUTUMANE

First Plaintiff
Second Plaintiff

and

NEDBANK LIMITED

Defendant



INFORM

NEDBANK LIMITED, a company with limited liability, incorporated in accordance with the laws of the Republic of South Africa, having its registered office and main place of business at **135 RIVONIA ROAD, SANDOWN, SANDTON, GAUTENG PROVINCE**, which address falls within the jurisdiction of the above Honourable Court (hereinafter referred to as "the Defendant")

THAT

THANDILE SONWABO JWAMBI, an adult male computer programmer residing at
**NO. 10 JZ NDALISO STREET, SECTION 3, GUGULETHU, WESTERN CAPE
PROVINCE**

(hereinafter referred to as the "First Plaintiff")

and

NICOLAS TATOLO KUTUMANE, an adult male computer programmer residing at
**NO. 9 ULUNTU DRIVE, MALUNGA PARK, GUGULETHU, WESTERN CAPE
PROVINCE.**

(hereinafter referred to as the "Second Plaintiff")

(hereinafter collectively referred to as the "Plaintiffs"), hereby institute action against the Defendant in which action the Plaintiffs claim the relief, and on the grounds set out in the Particulars of Claim annexed to this Summons.

INFORM the Defendant further that if the Defendant disputes the claim and wishes to defend the action, the Defendant shall:

- (i) Within 10 (ten) days of the service upon the Defendant of this Summons file with the Registrar of this Court at HIGH COURT BUILDING, CORNER PRITCHARD & VON BRANDIS STREETS, JOHANNESBURG, notice of the Defendant's intention to defend and serve a copy thereof on the Plaintiffs' attorneys, which notice shall give an address (not being a post office box or *poste restante*) referred to in Rule 19(3) for the service upon the Defendant of all notices and documents in the action.

- (ii) Thereafter and within 20 (twenty) days after serving and filing notice of intention to defend as aforesaid, file with the Registrar, and serve upon the Plaintiffs a Plea, Exception, Notice to strike out, with or without a Counterclaim.

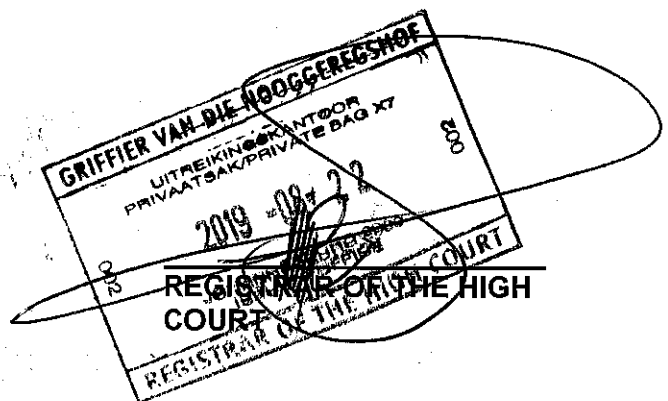
INFORM the Defendant further that if the Defendant fails to serve notice as aforesaid, Judgement as claimed may be given against the Defendant without further notice to the Defendant, or if having filed and served such notice, the Defendant fails to plead, except, make application to strike out or counter-claim, judgement may be given against the Defendant.

AND immediately thereafter serve on the Defendants a copy of this Summons and return the same to the Registrar with whatsoever you have done thereupon.

DATED at JOHANNESBURG on this 20 day of AUGUST 2019.



AJ RABIE ATTORNEYS INC
Attorney for Plaintiffs
2nd Floor, 339 Hilda Street, Hatfield, Pretoria
C/O N G CONSTANTINIDES ATTORNEYS
Office Unit, 15A Plantation Road
Oriël, Bedfordview, Johannesburg
P O Box 751304, Gardenview, 2047
Tel: (011) 616-1007
Fax: (086) 471-6717
E-mail: constant@iafrica.com
Ref: NGC/msc/R044



PARTICULARS OF CLAIM

1. The first plaintiff is **THANDILE SONWABO JWAMBI**, an adult male computer programmer residing at No. 10 JZ Ndaliso Street, Section 3, Gugulethu, Western Cape Province.
2. The second plaintiff is **NICOLAS TATOLO KUTUMANE**, an adult male computer internet engineer residing at No. 9 Uluntu Drive, Malunga Park, Gugulethu, Western Cape Province.
3. The defendant is **NEDBANK LIMITED**, a company with limited liability, incorporated in accordance with the laws of the Republic of South Africa, having its registered office and main place of business at 135 Rivonia Road, Sandown, Sandton, Gauteng Province. The defendant is registered as a bank in accordance with the Banks Act, 94 of 1990.

A. THE PLAINTIFFS' PERFORMANCE/INVENTION

4. During or about 2013 the plaintiffs identified a need amongst consumers to protect themselves against banking and card fraud. Consequent upon that identification, and over the period 2013 to approximately mid – 2015, the plaintiffs investigated methods of so protecting customers and consumers and devised, developed and implemented a method of and system for activating and/or deactivating and/or blocking financial transaction cards as well as cheques [referred to as 'the Invention' or 'the Plaintiffs' Invention'].
5. The Invention enables a user to activate or deactivate (whether temporarily or permanently) and/or block financial transaction cards as well as cheques via an electronic mobile device or on another electronic device or at an ATM. The Invention, in addition, provides a

particular sequence of data inputs, thereby to further enhance the secure operation of the invention. The system wireframe of the invention is evident from a document entitled RASFFI (Risk Avoiding System for Financial Institutions), a copy of which is at A.

6. In making the Invention, the plaintiffs applied inventive skill, insight and effort; expended valuable time and resources and produced a banking security solution not previously available in South Africa. At the time that the plaintiffs made the Invention, it was not available to customers of banking institutions in South Africa.
7. Shortly after their making of the Invention, the plaintiffs received two significant awards for the Invention, the first at the My Business Expo held on 14 September 2015 at the Cape Town International Convention Centre and the second at a competition and exposure held by LaunchLab on 17 November 2015 in Stellenbosch.

B. THE DEFENDANT'S KNOWLEDGE OF THE PLAINTIFFS' INVENTION

8. The defendant acquired knowledge of the Plaintiffs' Invention in the following circumstances.
9. During September 2015 an event known as My Business Expo was held at the Cape Town International Convention Centre. The My Business Expo is an annual event during which aspiring entrepreneurs are encouraged, by entities such as the defendant, to disclose new and innovative ideas, such as the Invention. The defendant is a partner of the NSBC (National Small Business Chamber) who presents the My Business Expo in co – operation with World Famous Events. Members of the defendant's board (the identities of which are not known to the plaintiffs) served on the panel of judges which adjudicated the various business proposals and ideas presented at the 2015 My Business Expo in Cape Town.

10. The defendant had, by way of advertisements and the involvement of its representatives, a prominent presence at the My Business Expo in question. Through its strong presence at and involvement in an exposition, held with the stated aim of encouraging the disclosure of innovative ideas by emerging entrepreneurs, as well as representations made by its representatives, the defendant created the impression, and caused the plaintiffs to believe, that it had the *bona fide* intention of supporting persons such as themselves in the development of a business, based on their Invention. Encouraged by this representation, the plaintiffs were induced to disclose the exact details of the Invention to the defendant and its representatives. Had the plaintiffs known or apprehended that the defendant would appropriate the Invention for itself, they would not have made disclosure of the Invention

11. On 14 September 2015 the plaintiffs presented the Invention to the panel of judges presiding at the My Business Expo. Members of the defendant's board (the details of which are not presently known to the plaintiffs) were included in this panel. The plaintiffs were requested to make further and more detailed disclosures of the Invention to another employee of the defendant, Mr. Dave Schickerling, whereupon the plaintiffs did make a detailed disclosure of the Invention to Mr Schickerling. The plaintiffs exchanged contact details with Mr Schickerling to enable them to send a copy of the wireframe of the Invention to him and to enable the respective parties to arrive at a business arrangement. Mr. Schickerling, acting at all relevant times on behalf of the defendant, induced the plaintiffs to make a full disclosure of the invention to him with the promise that the defendant would enter into a commercial arrangement with the plaintiffs to secure rights to the use of the Invention. At all relevant times the plaintiffs informed both the members of the panel as well as Mr Schickerling that they would only make the Invention available through the conclusion of a licence agreement and the payment of a reasonable royalty for the use

thereof to them and that the defendant was not to use or advertise the Invention in the absence thereof.

12. Having made a full disclosure to him and despite the undertakings of Mr. Schickerling to revert to the plaintiffs, they received no further meaningful communication from him.
13. During or about October 2015, and in a further effort to enable them to establish a business, based on the Invention, the plaintiffs entered a competition hosted by LaunchLab. LaunchLab is an initiative of Innovus, the industry interaction and innovation company of Stellenbosch University, in partnership with the defendant. The defendant was the primary sponsor of the competition. The plaintiffs were selected as the overall winners of the competition. Mr. Waseem Hassim, acting at all relevant times for and on behalf of the defendant, and who was one of the judges at the competition, induced the plaintiffs to make a full disclosure of the Invention to him. In doing so, Mr. Hassim communicated to the plaintiffs that he was an executive of the defendant, that he was mandated to seek new talent and creative ideas useful to the defendant, that the defendant did not have the kind of functionality or technology embodied in the Invention and that he was interested in presenting the system to relevant persons at the head office of the defendant in Johannesburg to enable its implementation by the defendant.
14. The plaintiffs emphasised to Mr Hassim that they would only permit the defendant to use the Invention upon payment of a suitable royalty to them. They rejected a suggestion by him that they should enter the employ of the defendant, but indicated to him that they would be open to concluding a licence agreement with the defendant in terms of which the defendant would pay them a reasonable royalty for the use of the Invention. One of the

judges (the identity of which is unknown to the plaintiffs) on the panel at the My Business Expo had mentioned 4% of banking service charges as being a reasonable royalty.

15. At the specific instance and request of Mr. Hassim, the plaintiffs made a full disclosure of the invention to him, amongst others by providing him with the complete sequential diagrams of the manner in which the Invention functions.
16. Once in possession of all the information relevant to enable the defendant to implement the Invention, and despite advices from representatives of LaunchLab that the defendant was interested in the Invention, the defendant did not make any further effort to contact the plaintiffs.
17. During the latter part of 2016/early 2017, the plaintiffs discovered that the defendant had made the Invention, or a product substantially similar to the Invention, available to their clients.

C. THE AGREEMENT

18. In the period from about 15 September 2015 to the end of November 2015 and at Cape Town, alternatively Stellenbosch, alternatively Johannesburg, the plaintiffs and the defendant concluded an agreement of which the terms were partly oral, partly tacit and partly implied (“the agreement”).
19. In concluding the agreement, the plaintiffs acted in person and the defendant was represented by Mr Schickerling and/or Mr Hassim.

20. Mr Schickerling and/or Mr Hassim was each authorised to represent the defendant in concluding the agreement, *in the alternative* Mr Schickerling and/or Mr Hassim had the ostensible authority to represent the defendant in concluding the agreement.

21. The agreement had the following material express, alternatively implied, alternatively tacit terms:

21.1.the defendant would not make use of the Invention without paying a royalty to the plaintiffs for such use (“the royalty”);

21.2.the defendant would pay the plaintiffs a reasonable royalty for using the Invention.

22. In the alternative to the preceding paragraph, the agreement had the following material express, alternatively implied, alternatively tacit terms:

22.1.the defendant would not make use of the Invention without paying a royalty to the plaintiffs for such use (“the royalty”);

22.2.the amount of the royalty would be agreed between the parties by means of *bona fide* negotiations;

22.3.in the event of the parties not reaching agreement by means of *bona fide* negotiations, the defendant would pay the plaintiffs a reasonable royalty for using the Invention.

23. Pursuant to the agreement the plaintiffs made full disclosure of the Invention to the defendant.

24. In breach of the agreement and during or about the latter part of 2016/early 2017, the defendant made use of the Invention by making it, or a product substantially similar to the Invention, available to their clients without paying the plaintiffs the royalty or any royalty whatsoever.
25. Despite demand, the defendant has refused to refrain from making the Invention, alternatively a product substantially similar to the Invention, available to its clients, it has refused to make payment of a reasonable royalty to the plaintiffs and it has refused to enter into negotiations with the plaintiffs in order for the amount of the royalty to be agreed.
26. In these circumstances the defendant :
- 26.1. has no right to the use of the Invention in the absence of its payment of the royalty to the plaintiffs;
 - 26.2. is obliged to pay to the plaintiffs a reasonable royalty for its use thus far of the Invention;
 - 26.3. is, in the event of this Honourable Court finding that it was obliged to negotiate with the plaintiffs to determine the royalty, obliged to enter into such negotiations forthwith.

In the alternative to section C above and in the event of the plaintiffs not succeeding with their claim in terms of the licensing agreement, the plaintiffs plead as follows.

D. THE DEFENDANT'S COURSE OF UNLAWFUL COMPETITION

27. In acting in the manner described in section B of these particulars of claim, the defendant has conducted itself unlawfully.

28. More particularly, the defendant, acting through its employees and members of its board as identified in section **B** above,

28.1. by associating itself with competitions and events designed to attract entrepreneurs to disclose their innovations and by encouraging such entrepreneurs to disclose their innovations by creating the impression that the defendant would assist them in developing a business aimed at developing their ideas and innovations;

28.2. induced the plaintiffs into the belief that

28.2.1. they could safely disclose the Invention without it being appropriated by the corporate sponsors and adjudicators of the competitions;

28.2.2. the defendant had a *bona fide* intention of using the Invention and that it would do so only upon remunerating them fairly by paying to them a reasonable royalty;

28.3. having thus induced the plaintiffs to believe in its *bona fides*, the defendant obtained detailed knowledge of the Invention, sufficient to enable the defendant to replicate the Invention, or substantially to replicate it, as it then did and without any compensation to the plaintiffs.

29. Having induced the plaintiffs to disclose the full details of the Invention to its representatives in circumstances where the defendant caused the plaintiffs to believe that it would act fairly towards them and that it had a *bona fide* and sincere intention of making reasonable payment to them for the use of their Invention when that was not the case, the

defendant acted reprehensively and contrary to the *boni mores* of the community. As such, its use and continuing use of the Invention, *alternatively* a substantial reproduction of the Invention,

29.1. offends the *boni mores* of the community, having resulted and is resulting in the defendant's presence in the market being enabled by a course of unlawful competition;

29.2. has undermined and/or destroyed the plaintiffs' opportunities of establishing a goodwill in the Invention and, in so doing, from profiting from the Invention.

30. In addition, the defendant, in adopting and replicating *alternatively* substantially adopting and replicating the Invention:

30.1. availed itself of the Invention, being the performance of the plaintiffs. As such, the defendant is competing on the basis, not of its own skill, effort and merit, but on the basis of that of the plaintiffs, which the defendant appropriated for itself, in circumstances where it induced disclosure of the Invention under false pretences and where it knew that the plaintiffs made disclosure to them in the circumstances of the competitions in question, where they were entitled to believe that the corporate entities sponsoring the competitions would not appropriate their ideas, inventions and efforts, and that they required the payment of a royalty before it would permit the defendant to use their performance.

30.2. has undermined and/or destroyed the plaintiffs' opportunities of establishing a goodwill in the Invention and, in so doing, from profiting from the Invention.

31. In these circumstances the defendant has achieved a benefit in the market to which it is not entitled. Its competition in the market place through the adoption and use of the Invention, *alternatively* the substantial use and adoption of the Invention, is unlawful and is to be interdicted.
32. The plaintiffs apprehend on reasonable grounds that the defendant shall not refrain from continuing its unlawful use of the Invention in the absence of being interdicted from doing so.

WHEREFORE the plaintiffs claim:

1. an interdict restraining the defendant from using, making available in any format, or disclosing, the Invention in the absence of the payment of the reasonable royalty contemplated in paragraph 2 below;
2. that an enquiry be held to determine the amount of a reasonable royalty to be paid (in respect of past and future use) to the plaintiffs and that this Court prescribe the procedures and terms applicable to this enquiry;
 - 2.1. that the defendant pay the amount of the reasonable royalty within 30 days of such amount having been determined;
 - 2.2. that the defendant pay to the plaintiffs interest on the sum of the reasonable royalty at the prescribed legal rate from date of demand to date of payment;
3. *alternatively* to paragraph 2, that the defendant be ordered to commence, within 30 days of the date of this order, negotiations in good faith with the plaintiffs to determine the amount payable to the plaintiffs;

- 3.1. that the defendant pay the amount of the reasonable royalty within 30 days of such amount having been agreed between the parties;
- 3.2. that the defendant pay to the plaintiffs interest on the sum of the reasonable royalty at the prescribed legal rate from date of demand to date of payment;
- 3.3. that, in the event of an agreement not being reached between the parties within 30 days of negotiations having commenced, that an enquiry be held to determine amount of a reasonable royalty upon such terms as ordered by this Court;
4. that the defendant be ordered to pay the costs of this action on a punitive scale;
5. that the plaintiffs be granted such further and/or alternative relief as this Court may deem fit.

Dated at Sandton this 14th day of August 2019.



R M ROBINSON SC



A J RABIE
A J RABIE ATTORNEYS INC.
Attorney for the plaintiffs
c/o N G Constantinides Attorneys
15a Plantation Road, Oriel, Bedfordview
P O Box 751304, Gardenview, 2047.
Tel: (011) 616-1007
Fax: (086) 471-6717

RASFFI

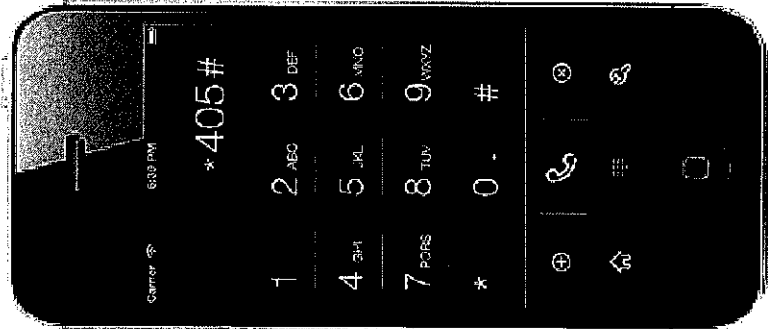
RISK AVOIDING SYSTEM FOR FINANCIAL INSTITUTIONS

SYSTEM WIREFRAME

RASFFI allows you to block your bank card in just 5 easy steps, anytime and anywhere in the country. **NO** need to phone call centers, **NO** airtime required, use **ANY** mobile phone to utilize the service...

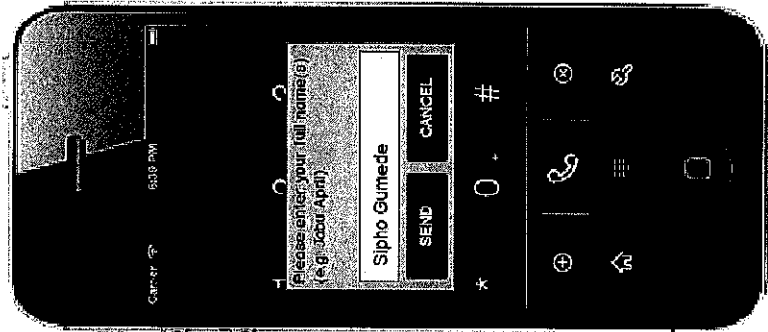
STEP 1

You dial the unique bank USSD/MMI code on any mobile phone.



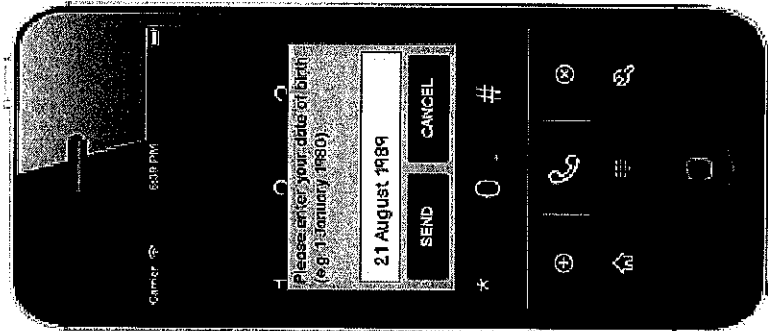
STEP 2

You type in your full names in the text box below.



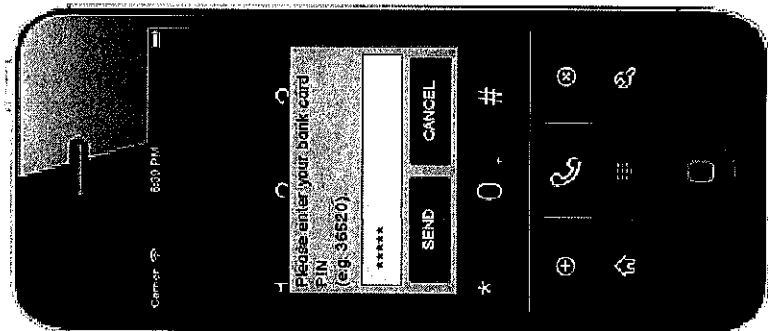
STEP 3

You type in your date of birth in the text box below.



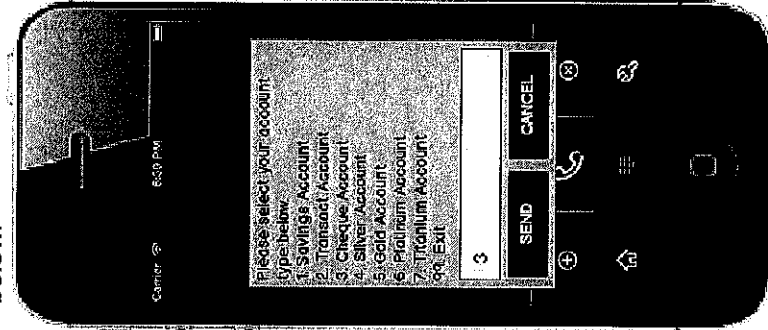
STEP 4

You type in your bank card PIN in the text box below.



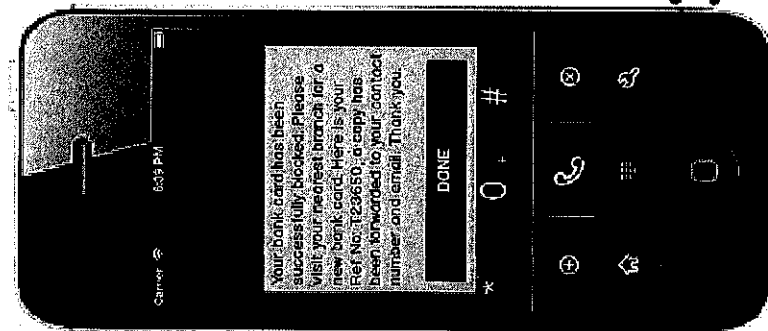
STEP 5

You select the type of account your card is linked to in the text box below.



STEP 6

You are done. Then you go to your nearest branch for a new bank card.



INVENTORS:
THANDILE JWAMBI & TATOLO KUTUMANE
078 986 4612
LIQUIDAPPLE@YMAIL.COM

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