

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

CASE NUMBER: 6836/2022

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between:

BMW FINANCIAL SERVICES (SA) PTY LIMITED

PLAINTIFF

and

PETER MARTHINUS HEYDENREICH

DEFENDANT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

- [1] This is an opposed application for summary judgment in which the plaintiff's claim is for the amount outstanding pursuant to a written credit instalment sale agreement in regard to the acquisition and financing of a motor vehicle.

Background of relevant facts and Chronology

- [2] The facts are largely common cause and can be summarised as following. On 2 June 2017 the parties entered into a written instalment sale agreement ("the agreement") in terms of which the plaintiff financed a 2017 model BMW 118i to the defendant. The vehicle was duly delivered to the defendant on said date.

- [3] Prior to the conclusion of the agreement, the defendant met with Mr Riaan Smit (“Smit”), a director of QSG Consult (“QSG”), a purported international oil company offering investment opportunities for South Africans in Dubai. Following the discussions, the defendant invested an amount of R 70 000.00 in QSG. The defendant was under the impression that he would receive a return of 8.5% monthly on his investment.
- [4] In addition of the aforesaid transaction, the defendant mentioned that he was in the market to buy a vehicle, whereafter he was informed of a structured finance deal offered by BMW Melrose Arch (“the dealership”) in terms of which the latter offered its qualifying clients, dealer assistance to purchase brand-new BMW vehicles. It was explained to the defendant that through the investment (dealer assistance) there would be a reduced monthly instalment to be paid and the instalment would be offset on the return received on the investment.
- [5] Smit introduced the defendant to Mr Danie Delport (“Delport”), a marketing manager/employee of QSG. Following further discussions, Delport and Mr Lineveldt (“Lineveldt”) employed as a sales person at the dealership, assisted the defendant in obtaining the dealer assistance investment.
- [6] Lineveldt indicated to the defendant that he qualified for the purchase of a BMW 1 series on the QSG investment scheme and they agreed to the following terms:
- 6.1. That the defendant would obtain a factory rebate on the vehicle in the amount of R 150 000.00, which amount would be paid from the dealership into the bank account of QSG on behalf of the defendant. The defendant would receive a higher return on the investment.
- 6.2. The vehicle’s price would be inflated with an amount of R 200 000.00 in order to qualify for a so-called factory rebate to be invested in the QSG investment scheme.

6.3. The amounts/return on the investment received from the QSG would enable the defendant to purchase and afford the instalments on the vehicle. The return on investment from QSG would be utilised to service the monthly instalment of the vehicle.

[7] It is common cause that on 1 November 2018 the defendant voluntarily surrendered the vehicle to the plaintiff as contemplated in section 127(1)(a) and (b) of the National Credit Act, Act 34 of 2005.¹ (“the NCA”).

[8] On 13 November 2018, TUD SUD, did a valuation of the vehicle and valued the vehicle for the amount of R 266 780.00. On 1 December 2018 the vehicle was sold for the amount valued and after deduction of allowed charges, the amount was credited to the defendant’s account.

[9] On 13 September 2019 the defendant and his wife proceeded with an application for debt review. The plaintiff’s details as a main credit provider were included in the NCR Form 17.1.²

¹ Section 127 grants to a consumer who has purchased goods pursuant to an instalment sale agreement, a right to unilaterally terminate a credit agreement by deciding to return the goods to the credit provider so that the credit provider may sell the goods so returned in order to settle the account of the consumer. The section provides as follows:

“(1) A consumer under an instalment agreement, secured loan or lease –

(a) may give written notice to the credit provider to terminate the agreement; and

(b) if –

(i) the goods are in the credit providers position, require the credit provider to sell the goods; or

(ii) otherwise, return the goods that are the subject of that agreement to the credit provider’s place of business during ordinary business hours within five business days after the date of the notice or with in such other period or at such other time or place as may be agreed with the credit provider.

(2) Within 10 business days after the later of –

(a) receiving a notice in terms of subsection (1) (b) (i); or

(b) receiving goods tendered in terms of subsection (1) (b) (ii), a credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information.”

² Notification to all Credit Providers and all Registered Credit Bureaus in terms of section 84(4)(b)(i)(ii) of the NCA.

[10] On 3 August 2021 a notice in terms of section 127(5) of the NCA was sent to the defendant by pre-paid registered mail at the nominated address by the defendant in terms of the agreement as the chosen *domicillium*.³ In terms of the notice the defendant was informed of a shortfall in the amount of R 490 157.44 on his account.

[11] The said notice was received at the Dalview post office on 6 September 2021 and on the same date a notification for collection was sent to the defendant.

[12] On 10 January 2022 the plaintiff sent a letter to the defendant's Debt Counsellor informing him that a period of more than 60 days has lapsed, and that the debt review was terminated in terms of section 86(10) of the NCA due to non-performance.

[13] The defendant failed to adhere to his obligations under the agreement, and as a result, on 4 November 2021, the arrears amounted to R 490 157.44.

Summons issued and application for Summary Judgment

[14] The plaintiff issued summons in this matter on 18 February 2022, wherein it seeks an order in terms of the following:

1. Payment in the amount of R 490 157.44;
2. Interest on the amount of R 490 157.44 referred to in the prayer above at a variable rate of prime plus 1.000% per annum as from 4 November 2021 to date of final payment, such interest to be capitalised monthly in advance.
3. Costs of suit on an attorney and client scale.

³ Unit 13 Wilds Villas, 23 Gloucester Street, Kenleaf, Kenleaf, 1541

[15] The summons was served on the defendant on 28 February 2022 by the Sheriff at his chosen *domicillium*, whereafter the defendant filed a notice to oppose as well as his plea.

[16] The plaintiff applied for summary judgment on 13 May 2022.

[17] The defendant opposes the application for summary judgment and raises the following issues;

17.1. First point *in limine* – defective summons in accordance with rule 17(3)(c), as well as non-compliance with the regulations governing the affirmation of an oath,

17.2. Second point *in limine*-special plea of prescription of the plaintiff's claim,

17.3. The plaintiff is not a registered credit provider in terms of the NCA,

17.4. The defendant has a *bona fide* and triable defence,

17.5. Non-compliance of section 127 of the NCA,

17.6. Reckless lending and failure to conduct a true and actual credit assessment in terms of the NCA, and

17.7. Material misrepresentation.

First Point *in limine*- Defective summons rule 17(3)(c) of the Uniform Rules of Court and non-compliance with section 10 of the Justices of the Peace and Commissioners of Oath Act⁴ read with the regulations governing the affirmation of an oath

⁴ Act 16 of 1963.

- [18] Counsel for the defendant submitted that the affidavit filed in support of the summary judgment application was defective in that the Commissioner of Oath stated in the certificate that the deponent was a male person whereas the deponent described herself as a female. It was contended that this suggested that the deponent did not depose to the affidavit in the presence of the Commissioner of Oaths and therefore there was no affidavit before Court in support of the summary judgment application. The defendant further argued that the Court has no discretion to condone the defect and the application for summary judgment should be dismissed.
- [19] Furthermore, the defendant contended that the plaintiff's summons is defective because the copy which was served on the defendant was not issued in terms of Rule 17(3)(c), in that the summons was not signed by the Registrar.
- [20] Counsel for the plaintiff argued that the defendant raised technical defences which do not address the merits of the case and the Court has a discretion to condone any matter where there is sufficient compliance with the regulations or rules.
- [21] In *Trans-African Insurance Co Ltd v Maluleka*⁵ which was quoted with approval in *Life Healthcare Group (Pty) Ltd v Mdladla and Another*⁶ the court stated the following:

“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

⁵ 1956 (2) SA 273 (A).

⁶ [2014] ZAGPJHC 20.

[22] It is important to note that in a wealth of cases it was held that the provisions of regulation 4 of the Justice of the Peace and Commissioners Oath Act are directory and not peremptory.⁷

[23] In *Motloung v Sheriff, Pretoria East*⁸ the Supreme Court of Appeal, after an analysis of subrule (3)(c) and the case law, unanimously held that the absence of the registrar's signature on a summons, as required by the subrule, does not visit the summons with nullity but may be condoned by the High Court under rule 27(3).

[24] I agree with counsel for the plaintiff that the defendant raised only technical defences and has not answered the case of the plaintiff. There is no merit in the argument that the certificate by the Commissioner describes the deponent as a male instead of female. The regulation prescribes that an affidavit must be commissioned by a Commissioner of Oath and this has been done.

[25] Furthermore, the argument raised that the summons issued was defective due to not being signed by the Registrar does not visit the summons to be null and void. Be that as it may, the original summons was attached and clearly indicated that the Registrar signed the summons in accordance with the rules.

[26] What's more, the defendant did not establish any prejudice meted against him in this regard and therefore I am inclined to allow the affidavit and the summons to stand.

[27] I therefore dismiss the first point *in limine*.

Second Point *in limine* - Special plea of prescription of the plaintiff's claim

⁷ *Mndiyata and Others v Umgungundlovu CPA and Others* (1606/20) delivered 28 January 2021; *Adriaan Jurgens Basson and Another v On-Point Engineers (Pty) Ltd and Others* dated 7 November 2012, *S v Munn* 1973 (3) SA 734 (NC).

⁸ 2020 (5) SA 123 (SCA) para [29].

[28] Counsel for the defendant argued that the plaintiff's claim against the defendant has prescribed in terms of section 11 of Act 68 of 1969. The argument is based on the following, the instalment sale agreement was concluded on 2 June 2017 for the purchase of the vehicle, the defendant voluntarily surrendered the vehicle on 1 November 2018 after becoming aware of misrepresentations made by the plaintiff relating to the conclusion of the agreement. The defendant contended that summons was only served on 28 February 2022, three years after the date upon which the claim/debt arose.

[29] Alternatively, the defendant argued that in event the Court finds there was no misrepresentation on part of the plaintiff, then the defendant relies on the fact that he surrendered the vehicle on 1 November 2018 after which it was sold on 1 December 2018 and on the latter date the claim/debt became due. Due to the summons being served on 28 February 2018, three years later the claim is prescribed and therefore, the claim must be dismissed.

[30] Counsel for the plaintiff argued that the plea of prescription is unmeritorious because on 13 September 2019 the defendant through his Debt Counsellor, notified the plaintiff in terms of section 84(4)(i)(ii) of the NCA, that the defendant applied for debt review. The plaintiff contended that in terms of section 14 of the Prescription Act, the running of prescription was interrupted due to the expressed and/or tacit acknowledgment of liability by the defendant. This argument was based on the fact that the debt counsellor listed the plaintiff's details as part of the defendant's creditors, see the Form 17.1.

[31] The plaintiff further contended that an acknowledgment of liability for purposes of section 14 of the Prescription Act is a matter of fact, and not a matter of law.⁹

[32] Section 14 of the Prescription Act, which is of application in the present case, allows for interruption of prescription. It provides:

“(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

⁹ Road Accident Fund v Mothupi 2000 (4) SA 38 38 (SCA) para [37].

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.”

[33] The reason for rules relating to prescription was discussed by Marais AJ in *Cape Town Municipality v Allie NO*¹⁰ where the following was said:

“Over the years the Courts and the writers on the law have sought to provide a rationale for the doctrine of prescription or the limitation of actions. It is unnecessary to burden this judgment with a discussion of the plausibility of the explanations which have been suggested. Whatever the true rationale may be, it cannot be denied that society is intolerant of stale claims. The consequence is that a creditor is required to be vigilant in enforcing his rights. If he fails to enforce them timeously, he may not enforce them at all. But that does not mean that the law positively encourages precipitate and needless law suits. It is quite plain that both at common law, and in terms of the Prescription Acts of 1943 and 1969, a creditor may safely forbear to institute action against his debtor if the debtor has acknowledged liability for the debt. *Lubbers and Canisius v Lazarus* 1907 TS 901; *De Beer v Gedye and Gedye* 1916 WLD 133. And it seems right that it should be so. Why should the law compel a creditor to sue a debtor who does not dispute, but acknowledges, his liability?”

[34] The policy underlying prescription in general, as well as the exception that is created by section 14, was explained in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality*,¹¹ as follows:

“Although many philosophical explanations have been suggested for the principles of extinctive prescription . . . its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubts may exist as to whether a

¹⁰ 1981 (2) SA 1 (C) at 5G-H.

¹¹ 1984 (1) SA 571 (A).

valid debt ever arose, or, if it did, whether it has been discharged . . . The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost, etc. These sources of uncertainty are reduced by imposing a time limit on the existence of a debt, and the relevant time limits reflect, to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject (s 11 of the Act).

The same considerations which provide a justification for extinctive prescription also suggest that the time limits should not be immutable. Where the creditor takes judicial steps to recover the debt, and thereby to remove all uncertainty about its existence, prescription should obviously not continue running while the law takes its course (s 15 of the Act). Moreover, s 14 of the Act provides that the running of prescription is interrupted by an express or tacit acknowledgement of liability by the debtor. The reason is clear – if the debtor acknowledges liability there is no uncertainty about the debt. No purpose would accordingly be served by requiring the creditor to interrupt prescription by instituting legal proceedings for the recovery of the debt.”

[35] In dealing with section 14 of the Act, in *Cape Town Municipality v Allie NO supra*, Marias AJ identified what he described as a number of self-evident aspects of the section, namely:

“Secondly, full weight must be given to the Legislature's use of the word “tacit” in s 14(1) of the Act. In other words, one must have regard not only to the debtor's words, but also to his conduct, in one's quest for an acknowledgment of liability. That, in turn, opens the door to various possibilities. One may have a case in which the act of the debtor which is said to be an acknowledgment of liability, is plain and unambiguous. His prior conduct would then be academic. On the other hand, one may have a case where the particular act or conduct which is said to be an acknowledgment of liability is not as plain and unambiguous. In that event, I see no reason why it should be regarded in vacuo and without taking into account the conduct of the debtor which preceded it. If the preceding conduct throws light upon the interpretation which should be accorded to the later act or conduct which is

said to be an acknowledgment of liability, it would be wrong to insist upon the later act or conduct being viewed in isolation. In the end, of course, one must also be able to say when the acknowledgment of liability was made, for otherwise it would not be possible to say from what day prescription commenced to run afresh . . .

Thirdly, the test is objective. What did the debtor's conduct convey outwardly? I think that this must be so because the concept of a tacit acknowledgment of liability is irreconcilable with the debtor being permitted to negate or nullify the impression which his outward conduct conveyed, by claiming ex post facto to have had a subjective intent which is at odds with his outward conduct . . .

Fourthly, while silence or mere passivity on the part of the debtor will not ordinarily amount to an acknowledgment of liability, this will not always be so. If the circumstances create a duty to speak and the debtor remains silent, I think that a tacit acknowledgment of liability may rightly be said to arise ..."

[36] The NCA aims to introduce by way of section 86A a special "debt intervention" mechanism applicable to certain consumers under certain circumstances. One of the consequences of debt intervention is that a credit agreement may be suspended for a fixed period of time. To deal with the running of prescription regarding a debt arising from such a credit agreement during the time of its suspension, the NCA introduced section 87A(4)(b) to interrupt/delay prescription. Section 87A(4)(b) provides that:

"... if the period of prescription in respect of a suspended credit agreement would be completed before or on, or within one year after the day on which the suspension ended, the period of prescription shall not be completed before a year has elapsed after the day on which the suspension ended."

[37] In determining whether the defendant acknowledged liability either expressly or tacitly, and when, it is necessary to consider not only what the defendant

informed the debt review counsellor but also his actions prior to the debt review.

[38] After discussions with Lineveldt, the sales person at the dealership, the agreement was concluded in June 2017, whereafter the vehicle was delivered to the defendant. A year later, in July 2018 the vehicle was surrendered voluntarily to the plaintiff. The plaintiff followed all necessary procedures and the vehicle was sold at an auction for an amount less than the outstanding balance on the account. On 3 August 2021, the defendant was informed of the shortfall in terms of section 127(5) of the NCA. Important to note, at time of the notice, the defendant already applied for debt review on 13 September 2019, and the plaintiff's details were provided to the debt counsellor.

[39] It is evident that two months after the defendant surrendered the vehicle to the plaintiff, he applied for debt review, the vehicle was only sold on 1 December 2018 and undoubtedly, the defendant had been aware of the fact that the possibility does exist that he would be liable for any shortfall that might present itself after the auction of the vehicle. The defendant also signed a voluntary surrender notice, which includes these facts. It is evident that with this knowledge in mind, the defendant included the plaintiff's details in his application for debt review.

[40] The defendant argued that the details of the plaintiff as indicated on the debt review application were incorrect, he stated that the account number referred to was his wife's identity number. The defendant provided no further explanation in this regard and contended that he never acknowledged the amount owed to the plaintiff.

[41] The plaintiff, however, argued that the defendant included and notified the debt counsellor of the fact that the plaintiff was a creditor and therefore the notification was sent to the plaintiff as a creditor, furthermore, defendant has no other account with the plaintiff other than the present, it can be accepted that the notice referred to the present matter.

[42] Since the application for debt review in September 2019 until the notice in terms of section 86(10) was delivered to the debt counsellor on 10 January 2022 there was no indication that the plaintiff's claim in this matter was not part of the debt review process. In his answering affidavit opposing the summary judgment application the defendant provided no details regarding the incorrect details listed in the notice to the plaintiff by the debt counsellor. It is evident, on the papers before me, that the main creditor, BMW Financial Services-Bank vehicle, as referred to in the debt review application can only be reference to the account in question *in casu*.

[43] I am of the view that the defendant in the present matter acknowledged his liability at least during September 2019 when he applied for debt review, which caused his debt counsellor to issue a notification in terms of section 84(4)(i)(ii) in terms of the NCA to all his creditors, including the plaintiff. Clearly prescription was interrupted by his acknowledgement of the debt. Accordingly, prescription commenced afresh on the said date.

[44] Therefore, the special plea of prescription has no merit and is dismissed.

The Law-Summary Judgment

[45] Summary judgment procedure provides for a speedy judgment in favour of a deserving plaintiff where it can be shown that the defendant does not have a triable defence. It is important to note that summary judgment was never intended to close the door upon a defendant who could, at the very least, show that there was a triable issue or issues, applicable to the claim.

[46] Rule 32 (2) provides:

“(a) within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) the plaintiff shall in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff’s claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not less than 15 days from the date of the delivery thereof.”

[47] The defendant is required to set out facts which proven at trial, will constitute an answer to the plaintiff’s claim. The extraordinary and drastic nature of summary judgment was confirmed in the *Maharaj v Barclays National Bank Ltd*,¹² where Corbett JA stated the following;

“The grant of the remedy is based on the supposition that the plaintiff’s claim is unimpeachable and that the defendant’s defence is bogus and bad in law.”¹³

[48] Furthermore, a court seized with a summary judgment application is not required to determine the substantive merits of a defence raised or its prospects of success, and must focus only on the question whether the defence raised is genuine as opposed to a sham that is put up for the purposes of delay.¹⁴

[49] The exposition of the relevant principles shows that the defendant must meet four requirements: he must disclose the nature of grounds of his defence, he must disclose the facts on which he bases his defence, the defence must be

¹² 1976 (1) SA 418 (A)

¹³ Ibid footnote 12 at 424G.

¹⁴ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at para [23].

bona fide, and the defence must be good in law. The facts that he provides must be such that if proven at trial, will constitute an answer to the plaintiff's claim.

[50] I will now turn to the other defences raised by the defendant in opposing the summary judgment application.

Is the plaintiff a registered credit provider in terms of the NCA

[51] A credit agreement is present when the repayment of an amount paid by a credit provider to a consumer or payment for goods and services is deferred and interest or other charges is payable in respect of such deferment.¹⁵ Section 40(1) of the NCA sets out the conditions when a person must register as credit provider. A person must register as a credit provider if the total of the principal debt owed to the credit provider under all outstanding credit agreements exceeds the prescribed threshold. The Minister is empowered by the NCA to determine such threshold by way of notice in the Government Gazette, which he has set at R0.00.¹⁶

[52] In terms of section 89(5) of the NCA, if a credit agreement is unlawful, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that it is *void ab initio*. It is also essential that the credit provider is registered as such with the NCR at the time of granting of the credit/entering into the credit agreement.

[53] The defendant argued that the NCR certificate attached to the application for summary judgment should not be considered based on the provisions of Rule 32(4) which reads as follows;

“No evidence may be adduced by the Plaintiff otherwise than by affidavit referred to in subrule (2) ...”

¹⁵ Section 8 of the NCA.

¹⁶ Government Gazette dated 11 May 2016.

[54] Furthermore, the defendant contended that the NCA certificate attached referred to 2007, and as such it was argued that the plaintiff was not a registered credit provider in 2017 when the agreement was concluded.

[55] The relevant NCA certificates were attached to the plaintiff's particulars of claim as well as the founding affidavit in support of the summary judgment application. I see no reason for further discussion on the point raised, the contention by the defendant is clearly incorrect and an attempt delay the matter on an unfounded technical issue.

Compliance section 127 of the NCA

[56] The defendant does not deny that on 3 August 2021 the plaintiff dispatched a Notice in terms of section 127(5) of the NCA to the defendant by registered post to the address which appears as his chosen *domicilium*. He merely denies that he received it. Furthermore, the defendant does not deny that the Dalview post office received the parcel in terms of the "track and trace" report attached to the particular of claim and that it was the correct branch of the Post Office for the chosen *domicilium* nor does he deny that a notification was sent to him informing him that the registered item was ready for collection.

[57] Whilst the majority of the judgments in which the provision of notice in terms of the NCA have been considered in respect of Section 129, the principles established in such matters would apply equally to notifications to be provided in terms of Section 127 of the NCA, provided that such notification must be by registered mail, as may be required by the credit agreement applicable.

[58] In *Kubyana v Standard Bank of SA Ltd*¹⁷ it is stated as follows:

"[53] Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post

¹⁷ 2014 (4) BCLR 400 at para [53].

Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour."

[59] As regards the defendant's denial that he received a section 127 notice, he fails in this regard too, to set out any factual basis for a conclusion that he did not receive the notice. His affidavit again constitutes no more than a bare denial.

[60] *In casu* the plaintiff has shown that the section 127(5) notice has reached the correct post office on 6 September 2021 and that the notification was forwarded to the defendant that the registered item was available for collection. The defendant has failed to give any explanation why, in the circumstances, the notice would not have come to his attention. He has therefore failed to discharge the burden of rebutting the inference of delivery.

[61] In my view, there was compliance with section 127(5), and the plaintiff complied with its obligations in terms of the NCA in a manner consistent with the approach of the Constitutional Court in *Kubanya v Standard Bank of South Africa Ltd supra*.

Reckless lending and failure to conduct a credit assessment in terms of the NCA

- [62] The defendant contended that the plaintiff failed to comply with its statutory obligations in terms of the NCA in that the plaintiff did not conduct a due diligence and background check when entering into the instalment agreement with him and as such it amounts to reckless credit lending.
- [63] The defendant contended that he did not complete the amounts contained in the finance application, and that the sales person employed at the dealership completed the amounts relating to his financial position. He asserted that the R 9000.00, additional amount earned was included in the finance application due to the fraudulent presentations made by the dealership and or the plaintiff. The additional amount was included by the sales person on the assumption that the amount would be earned resultant of investment of the R 150 000.00, the inflated amount, investment in QSG. On this basis the defendant submitted that he has a triable case against the plaintiff.
- [64] The defendant argued that if an actual and true credit assessment was done by the plaintiff, it would have been abundantly clear the he was not able to afford the vehicle, thus the failure amounted to reckless credit.
- [65] On the contrary the plaintiff argued that it conducted a credit assessment on the documents provided by the defendant and if the defendant misled the plaintiff with the information supplied, it would be an absolute defence against the allegation of reckless credit. The plaintiff asserted that the defendant's *male fides* come to the fore in raising the argument.
- [66] Counsel for the plaintiff argued that it was apparent that this was an attempt to frustrate the plaintiff's lawful claim and furthermore to delay the process.
- [67] When making a determination as to the reckless credit in terms of section 80(1) of the NCA stipulates that a period when the consumer applied for credit is of utmost importance. Section 80(2) enjoins the credit provider to conduct an

assessment. Should the credit provider proceed to grant credit under circumstances which points to consumer's over-indebtedness, such credit agreement will be regarded as reckless lending. A credit provider is therefore under an obligation in assessing the consumer, to consider the consumer's state of mind relating to his understanding of the risks and costs of the proposed credit and the disclosure of the consumer's finances to ensure affordability in terms of the credit agreement.¹⁸

[68] It is so that the defendant bears the burden of proof to his defence of reckless credit.

[69] It is not disputed that the plaintiff is a separate legal entity to BMW Melrose Arch dealership. It is further not disputed that the defendant's individual signed finance application together with his bank statements and salary advice were submitted to the plaintiff. The defendant stated that his gross remuneration was in the amount of R 43 000.00 and his nett income was in the amount of R 29 096.00. He also included an additional income in the amount of R 9000.00 and on the defendant's version his monthly expenses amounted to R22 085.00, which clearly indicated that the monthly instalment could be afforded.

[70] The defendant disputed the signature on the release note issued by the plaintiff to dealership on 2 June 2017. After considering the signature of the defendant appended to the following documents, namely, the credit agreement, the finance application, the release note, the voluntary surrender notice and the answering affidavit pertaining to the present application, I am of the view that the signature on all the documents are identical.

[71] In terms of the release note the defendant confirmed receipt of the vehicle, in stating the following;

"I, Mr PETER MARTHINUS HEYDENREICH, hereby acknowledge having received in good order and condition the goods described above which have

¹⁸ See *Absa Bank Limited v Kganakga* 2016 JDR 0064 (GJ) (unreported case no 26467/2012, 18 March 2016).

been delivered to me on your behalf. In addition, I acknowledge that it is my responsibility to roadworthy and licence the goods described above should the goods be purchased privately and not from a BMW Financial Services approved motor dealer.”

[72] It is evident that the defendant had more than enough opportunity not to proceed with the transaction, more so in the circumstances where he was fully aware of the fact that his financial position was incorrectly depicted in the finance application and furthermore, that the purchase price of the vehicle was inflated with an amount of R 200 000.00. Notwithstanding these facts, the defendant proceeded with the transaction.

[73] The defendant complied with his obligations in terms of the agreement for a period of twelve (12) months, however following the surrender of the vehicle in November 2018, the defendant cries foul and alleged reckless credit. For more than a year the defendant was satisfied with the terms of the agreement only after it came to the fore that QSG was a Ponzi scheme he then took issue with the agreement, which in itself is contentious when deciding on whether the defendant has a *bona fide* defence.

[74] In *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases*¹⁹ the Judge commented that there is a tendency for defendants to make a bland allegation that they are over-indebted or that there has been reckless credit. A bald allegation that there was reckless credit will not suffice.

[75] The defendant is an adult, educated person, he must have known that providing incorrect information regarding his financial position and inflating the credit amount were suspicious, even more so, to invest the inflated amount in QSR to earn interest. He had the opportunity to decline the pre-approved credit sale agreement, which he did not elect to do.

¹⁹ 2011 (1) SA 310 (GSJ) para [26].

[76] The defendant alleged that the purchase price was highly inflated and that the agreement between himself and the plaintiff was founded on a fraud committed by the dealership. I have to mention that the defendant knew exactly that the inflated value of the vehicle would secure his return on the QSR investment. The defendant was cahoots with the dealership, and he has only himself to blame for the position he founded himself in.

The defendant's defence and Fraud/Misrepresentation

[77] The defendant argued that he has a *bona fide* defence in the present application based on the fact the Lineveldt made various false and/or fraudulent misrepresentation, which lead to the conclusion of the agreement on 2 June 2017.

[78] The defendant asserted that Lineveldt was a duly authorised employee acting on behalf of the dealership and the plaintiff. Therefore, the plaintiff could not distance itself from an employee acting on its behalf.

[79] The plaintiff denied any sort of misrepresentation or fraudulent activities at the time of the conclusion of the agreement. The basis for the argument was that the defendant initialled and sign the agreement with the terms and conditions agreed between the plaintiff and himself. It was argued that there was no addendum or any amendments to the agreement relating to a separate agreement between the defendant, the dealership and QSG. It further contended that the agreement contained the whole agreement and that there were no further representations between the parties.

[80] It is evident that the application for finance was assessed by the plaintiff and based on the information provided in the application and after an assessment of the defendant's financial position the agreement was concluded between the parties.

- [81] Furthermore, the price of the vehicle was determined during negotiations between the dealership, BMW Melrose Arch and the defendant, the customer. The plaintiff was never involved in the negotiations in this regard. Undoubtedly so, the defendant and Lineveldt agreed to the vehicle price being inflated with an amount of R 200 000.00, of which R 150 000.00 would be transferred to QSG as an investment, which would cater for the shortfall on the agreed instalment amount.
- [82] In essence, the defendant entered into an agreement with a different party in respect of returns on an oil project in Dubai, namely the QSG, and as such the investment agreement involved the payment of his monthly instalments on the returns on the investment. The plaintiff was not party to this arrangement.
- [83] The defendant was silent about the terms of the said investment agreement, no documentary proof was place before me to sustain the finding that the plaintiff was involved in the so-called QSG investment scheme. On the facts before me, it is clear that the defendant would have received a benefit in terms of the investment, which was due to the inflated purchase price of the vehicle. The defendant clearly connived with Lineveldt to provide false information in order to finance his QSG investment.
- [84] The defendant surrendered the vehicle in November 2018, after receiving the benefit of the investment scheme for nearly a year.
- [85] Concerning issues raised in regard to the valuation of the vehicle in the heads of argument, the defendant argued that the vehicle was undervalued prior to being auctioned. This clearly amounted to speculation and that there was no “substantiation” of the allegations pertaining to the valuation.
- [86] One has to keep in mind that the defendant surrendered the vehicle on 1 November 2018 and he signed a notice in terms of section 127(1)(a) and (b) wherein he stated;

“Kindly be advised that I hereby furnish your company with written notification of my intention to tender the return of the vehicle and to terminate the Agreement as envisaged in Section 127 (1)(a) & (b) of the National Credit Act. I understand that the vehicle is to be delivered to BMW Financial Services within 5 days from signing this notice and I hereby tender return of the vehicle. I understand that in the event that I am in default of the agreement, the vehicle will be sold and the procedure to enforce the agreement will be effected within 10 days hereof.

I understand that I will be notified by BMW Financial Services of any further steps taken in respect of the enforcement of the agreement.”

[87] The plaintiff accepted the cancellation of the agreement and therefore it was not required to inform the defendant of the valuation of the vehicle in terms of section 127(2) of the NCA. This was confirmed by the Supreme Court of Appeal in *Edwards v Firststrand Bank Ltd t/a Wesbank*²⁰ where Shongwe JA held the following:

“[16] Whilst generally I am inclined to agree with the proposition that ss 127(2)-127(9) of the Act are applicable, I however consider that they are not applicable in the present case because the agreement had already been cancelled. Section 131 of the Act squarely answers the question whether s 127(2) is applicable at all in the positive. The purposes of the NCA are set out in s 3 of the Act and are, inter alia, to promote and advance the socio-economic welfare of South Africans, to protect the consumer’s rights most of all, and to harmonise the system of debt enforcement.” (*my emphasis*)

[88] In a separate concurring judgment, Cachalia JA²¹ took the point further by holding that:

“[41] The first thing to be observed is that s 129(3), as it read at the time of these proceedings, permitted a consumer, before the credit provider has cancelled agreement, to reinstate it by paying the overdue amount and

²⁰ 2017 (1) SA 316 (SCA) para [16].

²¹ Para [41]-[43].

resume possession of the property. In its judgment refusing leave to appeal against the summary judgment ruling, the court held that Wesbank had cancelled the agreement. This means that Mr Edwards was not entitled to reinstate the agreement and resume possession of the car, which is what the s 127(2) notice sent to him on 12 June 2012 invited him to consider doing. Mr Edwards was of course also in default under the agreement before the cancellation, which meant that he could not take repossession of the goods after having received the estimated value of the goods in terms of ss 127(3) and 127(4) either. Counsel for Mr Edwards was constrained to concede this during the hearing. Counsel for Wesbank argued that the section does not apply in these circumstances, precisely because Mr Edwards was not entitled to reinstate the agreement and resume possession of the goods.

[42] However, counsel for Mr Edwards maintained that s 127(2)(b) nevertheless applied in the present circumstances. He argued that before the attached car was sold, Mr Edwards should still have been given notice so that he had the opportunity to consider whether or not he wished to object to the estimated valuation of the car. The contention does not withstand scrutiny.

[43] Section 127(4) imposes an obligation on the credit provider to sell the goods at the best price reasonably obtainable if the consumer has not responded to the s 127(2) notice. The credit provider's estimated value of the goods plays no part in determining whether or not the best price was obtained, as is evident from this matter, where the estimated value of the car in the s 127(2) notice was R500 000 but it was sold for considerably more, i.e. R763 800. The clear purpose of a s 127(2) notice, as I have mentioned, is to place the consumer in a position to consider whether to withdraw the termination notice and resume possession of the goods, which is what the s 127(2) notice invited Mr Edwards to do. But this option was simply not available to Mr Edwards once the agreement had been cancelled and the court had ordered the attachment of the car. So, in this case, no purpose was served by sending the notice to him. Section 127(2) simply did not apply. (*my emphasis*)

[89] Furthermore, section 127 of the NCA does not require that goods be sold for a “fair market price or retail value”, but instead uses the term “the best reasonable price obtainable”.²² In terms of the terminology used, it appears that there are no general obligation on a credit provider to engage with dealers who specialises in selling goods at the highest price, a credit provider is not expected to obtain various prices for repossessed goods, I am of the view in such cases there would be a normal “willing buyer” and “willing seller” situation.

[90] The defendant argued that the valuer did not state his expertise and the method he adopted in concluding his valuation. It is important to note that the sale of the vehicle in the present matter could not be construed as normal market circumstances, therefore it would be unreasonable to expect a credit provider to obtain prices matching values in that regard.

[91] There was no evidence from the defendant to suggest the amount the vehicle could have been sold for. His arguments in this regard, are therefore purely speculative and of little value.

[92] The defendant's *bona fides* in resisting the application is seriously doubted.

[93] However, trying to unravel the conduct by the dealership, the defendant and QSG falls beyond the scope of this application.

[94] After considering all the facts and defences raised by the defendant, I am of the view that no real and *bona fide* defences have been raised and therefore the plaintiff has succeeded in establishing a case for summary judgment.

²² Section 127(4) provides:

(4) If the consumer-

(a) responds to a notice as contemplated in subsection (3), the credit provider must return the goods to the consumer unless the consumer is in default under the credit agreement; or

(b) does not respond to a notice as contemplated in subsection (3), the credit provider must sell the goods as soon as practicable for the best price reasonably obtainable.

Cost

[95] The costs of the application, which is a discretionary matter, should follow the result, and be on the scale as between attorney and client as provided for in the agreement.

Order

[96] I make the following order:

1. The application for summary judgment is hereby granted against the defendant.
2. The defendant shall pay to the plaintiff the amount of R 490 157.44 (four hundred and ninety thousand one hundred and fifty-seven rand and forty-four cents);
3. Interest on the amount of R 490 157.44 (four hundred and ninety thousand one hundred and fifty-seven rand and forty-four cents) referred to in the prayer above at a variable rate of PRIME plus 1.000% per annum as from 4 November 2021 to date of final payment, such interest to be capitalised monthly in advance.
4. Cost of the suit on an attorney and client scale

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 16 March 2023.

DATE OF HEARING: 2 March 2023

DATE JUDGMENT DELIVERED: 16 March 2023

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