IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: 5476/2022

In the matter between:

VLEISSENTRAAL BLOEMFONTEIN (PTY) LTD Applicant/Plaintiff

and

CECILIA GYSIA JANSEN Respondent/Defendant

(ID NO: 7[...])

CORAM: OPPERMAN, J

HEARD ON: 11 May 2023

DELIVERED ON: 16 May 2023. The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 16 May 2023. The date and time for hand-down is deemed to be 16 May 2023 at 15h00

JUDGMENT BY: OPPERMAN, J

SUMMARY: Opposed motion – application for summary judgment based on acknowledgment of debt contract (AOD) – whether the application for summary judgment must be based on the preliminary contract and not the acknowledgment of debt contract – does the National Credit Act, 34 of 2005 (NCA) find application on the facts of the case

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JUDGMENT

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[1] This is an opposed application for summary judgment. There is also an unopposed application for condonation of the late filing of the defendant's opposing affidavit. Condonation was granted.

[2] There is a clear misconception about the issue(s) in dispute between the parties.

1. Counsel for the applicant states in his heads of argument that:

   4.1 The crisp issue to be adjudicated is whether the NCA applies to the AOD. If the NCA does not apply, there would be no *bona fide* defence in law prohibiting the granting of the summary judgment.

2. Counsel for the respondent states in his heads of argument that:

   2.3 Defendant has not alleged or pleaded that the AOD falls within the ambit of the NCA, but however that the initial agreement, the credit agreement to the amount claimed by the parties, falls within the ambit of the NCA as the client was given credit for the livestock.

   2.4 Defendant is aware that the AOD is not a credit agreement and has never pleaded otherwise. The agreement referred to herein applies

   to the AOD but cannot be extended to the underlying agreement preceding the AOD, being the credit agreement.

[3] The respondent did plead as follows in "the plea to the plaintiff's declaration":[1]

5.1 The contents of this paragraph are admitted. The legitimacy of the credit agreement herein is in question. The Defendant would like to draw the courts attention to the fact that Plaintiff is not

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[1] Page 21 of the Index Pleadings (18 April 2023) - Bundle.

authorized to make a credit agreement of this nature as he is not registered in terms of the National Credit Act. A simple credit assessment from the Plaintiff will have shown that defendant has no financial means to pay the monies back.

5.2 The contents of this paragraph are admitted. It however became clear to the Defendant that they could not make payments as their financial situation does not allow them. An offer was subsequently made by the Defendant and was rejected by the Plaintiff.

[4] The respondent went forth and admitted the contents of paragraphs 5.3 to 5.9 of the then plaintiff's declaration; the terms of the AOD.

[5] The facts alleged in the declaration to the simple summons by the applicant and admitted by the respondent in her plea to the declaration, are:[2]

1. In January 2022 the respondent and the applicant entered into a written "skulderkenings ooreenkoms" (AOD). The AOD was attached to the declaration.
2. The terms of the AOD admitted to are that:
   2.1 The respondent acknowledged that she is indebted to the applicant in the amount of R480 885,71 together with interest at the rate of 15,5% per annum from date of purchase until date of final payment as well as costs on an attorney and client scale;
   2.2 The respondent undertook to pay the amount due by the end of February 2022. In the event that the respondent fails to make timeous payment, the full outstanding amount will immediately become due and payable.
   2.3 The respondent consented that judgment being granted against her in favour of the applicant should she not comply with the terms of the AOD.
   2.4 The respondent breached the terms of the AOD in that she failed to make the payment on the due date.
   2.5 Notwithstanding demand, alternatively summons served as demanded, the respondent has failed and neglected to pay the amount due. (The summons was delivered in December 2022. The applicant granted the respondent some grace to remedy her conduct and for ten months.)

[2] Page 21 of the Index Pleadings (18 April 2023) - Bundle.

[6] In paragraph 10.8 of the AOD the respondent declared that she entered into the agreement freely and with full knowledge and understanding of the terms thereof.

[7] The parties agreed in paragraph 10.9 that the NCA is excluded due to sections 4(1)(a)(i) and 4(1)(b).[3]

[8] The case for the respondent is literally all over the place and can be described as nothing but fake. This caused the misconceptions on the issue(s) the court has to adjudicate. There is a difference between the defences in the pleading to the declaration of the then plaintiff, the opposing affidavit to the application for summary judgment and the heads of argument. There are numerous defences or defences that may be inferred due to the confusing wording and presentation of the issues; these are:

1. That the AOD or initial contract is a credit agreement and that the agreement is illegal because the applicant is not a registered credit provider;
2. the cause of action is not the AOD. There is an underlying agreement that falls within the ambit of the NCA that is the cause of action;
3. it is alleged, in so many words, that the credit was recklessly granted: "A simple credit assessment from the Plaintiff will have shown that Defendant has no financial means to pay the monies back.";
4. the claim is not a liquidated amount. The applicant has not produced a liquid document and cannot rely on the AOD because this agreement arises from a preliminary or initial contract that is a credit agreement. "The amount in the Acknowledgment of Debt, does not specify how the amount has been calculated, nor does it indicate what the indebted amount is for, and thus cannot be seen as a

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[3] 4. Application of Act. — (1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except—

(a) a credit agreement in terms of which the consumer is—

(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);

(b) a large agreement, as described in section 9 (4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7 (1);

valid liquidated document."[4] During the hearing of the case counsel for the respondent argued that certificate of balance should have been delivered;

5. there is a serious dispute of facts that can only be ventilated at trial when proper evidence is led;[5]

6. the applicant did not state the cause of action clearly;[6] and

7. the respondent denies a sale agreement to be the initial contract but to be a "credit agreement to the amount claimed by the parties."[7] At paragraph 5.4 in the opposing affidavit she in effect declares that: "*The only reason the Defendant signed the acknowledgement of debt was in fact to secure further credit for livestock to be purchased by the Defendant and her husband*." This must be read with the quote *supra* at paragraph [3] that a simple credit assessment from the plaintiff will have shown that defendant has no financial means to pay the monies back. *<u>The respondent on her own version and explicitly so; knew and realised when she entered into the preliminary contract as well as the AOD that she does not have the means to honour the contracts.</u>*

[9] Not one of the above defences is in any manner whatsoever supported with facts or detail; they remain mere allegations. In *Toyota Financial Services (South Africa) Limited v Waste Partners Investment (PTY) Limited* (9578/2020) [2022] ZAGPJHC 771 (29 August 2022) the Supreme Court of Appeal describes similar conduct by a litigant in an application for summary judgment aptly in paragraph [25] as:

> This is the baldest of bald denials. The Defendant admits to nothing, and disputes everything. However, the Defendant offers no facts in support of its denials.

One can also add, *in casu*, that the pleadings differ from the opposing affidavit, that differs from the heads of argument.

[10] In the same *Toyota Financial Services (South Africa) Limited v Waste Partners Investment (PTY) Limited* (9578/2020) [2022] ZAGPJHC 771 (29 August 2022) the

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[4] Paragraph 5.5 at page 17 of the Index – Application for Summary Judgment (18 April 2023) - Bundle.
[5] Heads of argument for the respondent at paragraph 2.13 page 5.
[6] Heads of argument for the respondent at paragraph 2.5 on page 3.
[7] Paragraph 5.3 at page 17 of the Index – Application for Summary Judgment (18 April 2023) - Bundle.

Supreme Court of Appeal concluded from paragraphs [10] to [14] that summary judgment proceedings are:

1. Regulated by Rule 32 of the Uniform Rules of Court.
2. It was designed to prevent a plaintiff's claim, based upon certain circumstances, from being delayed by what amounts to an abuse of the process of the court.
3. The law allows a plaintiff to apply to the court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial.
4. However, a defendant can escape a summary judgment by showing that there exists a *bona fide* defence to the action.
5. The defendant must disclose fully the nature and grounds of the defence, and the material facts on which it is based.
6. A defendant may successfully resist summary judgment where the opposing affidavit shows that there is a reasonable possibility that the defence advanced may succeed on trial.
7. The court must determine whether on the facts disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is also good in law.
8. The defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, but must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness.
9. In summary; the law 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 *bona fide*, and the defence must be good in law. The facts provided must be such that if proven at trial, it will constitute an answer to the plaintiff's claim.
10. Lastly; considering the extraordinary and drastic nature of summary judgment, if the court has any doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should accordingly be refused.

11. In *Ratlou v Man Financial Services SA (Pty) Ltd* (1309/17) [2019] ZASCA 49; 2019 (5) SA 117 (SCA) (1 April 2019)[8] the Supreme Court of Appeal ruled that if the underlying causa did not fall within the parameters of the NCA, then its compromise in terms of the settlement agreement, cannot logically result in the agreement being converted to one that does. *The compromise therefore remained linked to the underlying causa*, being the rental agreements in that case. It will be artificial to ignore this.

12. But, Dambuza JA (Lewis ADP, Swain JA and Carelse and Matojane AJJA concurring) went on to state in no uncertain terms that a purposive interpretation and not a literal interpretation of section 8(4)(f) of the NCA is required because it is quite clear that the NCA was not aimed at settlement agreements. *Its application to them will have devastating effect on the efficacy and the willingness of parties to conclude settlement agreements and thereby curtail litigation.*

13. Further, that the purposes of the NCA are set out in section 3. Section 2 thereof provides that the NCA must be interpreted in a manner that gives effect to such purposes. Under section 3 the purposes are "*to promote and advance the social and economic welfare of South Africans, to promote fair, transparent, competitive, sustainable, responsible, efficient effective and accessible credit market and industry and to protect consumers."* Therefore, the NCA is concerned with the advancement of money or granting of credit in the main, to individual consumers.

14. From the above and the nature of the disputes that often presents in our courts, it is clear that there is a tug-of-war between commercial certainty and prompt remedies in law for non-compliance with contracts on the one hand; and the right to access to courts on the other hand. In *Basson v Chilwan and others* 1993 (3) SA 742 (A) at 762H Eksteen JA referred to contractual freedom as:

> "The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible …"

Further,

> "If there is one thing that is more than public policy requires, *it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts*

[8] At paragraphs [19] to [27].

> *when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.* Therefore, you have this para-mount public policy to consider - that you are not lightly to interfere with this freedom of contract." (Accentuation added)

Justice Ackermann in *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at paragraph 26 described it as "a central consideration in a constitutional state". These statements aim for reasonable certainty, so that parties can go about their business knowing the rules of the game; *constitutional economic integrity is vital*.

Moseneke J (as he then was) pointed out in his dissent in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paragraph 98 that:

> "Public policy cannot be determined at the behest of the *idiosyncrasies of individual contracting parties*. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties." (Accentuation added)

[11] At the heart of the above is the basic principle that commercial transactions, freely and honestly entered into, and not vitiated by fraud, misrepresentation, duress or public policy, should be respected and enforced. It is the case here. The truth may not be warped into a confusion of facts and law.

[12] The truth is that the applicant met the onus stipulated above in that it was proven, in no uncertain terms, that the underlying transaction was a transaction for goods sold and delivered, which goods the respondent failed to pay for timeously and at all. The goods were livestock that were sold for a once - off payment and delivered to the respondent. The livestock remained the property of the applicant until payment was effected and did not become the property of the respondent on delivery. This did not make the agreement to fall under the realms of the NCA. Further to this:

1. The respondent admits the AOD as well as the salient terms thereof;
2. the claim is for a liquidated amount of money acknowledged and agreed to be R480 885.71 with the interest at a rate of 15% per annum from date of purchase until date of final payment as well as the costs on an attorney and client scale;
3. the respondent did not make the payment timeously and at all;

4. the full amount became payable;
5. the NCA is also not applicable to the AOD;
6. "The defence epitomises one set out in inherently and seriously unconvincing manner and displays a patent lack of *bona fides* on the part of the respondent.";[9] and
7. the respondent failed to show that she is entitled to leave to defend the action.

[13] **ORDER**

1. Condonation is granted for the late filing of the respondent's opposing affidavit to the application for summary judgment and the costs to follow the cause in the application for summary judgment.
2. The relief sought in the notice of application for summary judgment is granted and as follow:
   - 2.1 Payment of the amount R480 885.71.
   - 2.2 Interest on the aforesaid amount at a rate of 15% per annum calculated from 2 December 2021 until date of final payment.
   - 2.3 Costs on an attorney – and – client scale.

M OPPERMAN, J

APPEARANCES

On behalf of the applicant **ADVOCATE H.J. VAN DER MERWE**
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BLOEMFONTEIN

On behalf of the respondent **ADVOCATE F. JACOBS**
Chambers, Bloemfontein

[9] Heads of argument of the applicant at paragraph 2.4.

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