IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Not Reportable
Case no. 5612/2022

In the matter between:

NEDBANK LIMITED Plaintiff/Applicant[1]

and

THOMAS EDWARD TSOEU Defendant/Respondent[2]

Coram: Opperman, J
Heard: 15 June 2023

Delivered: 30 June 2023. This judgment was handed down electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 30 June 2023. The date and time of hand-down is deemed to be 15h00 on 30 June 2023

Summary: Summary judgment - National Credit Act 34 of 2005 - section 92(2)(b) - Form 20(1)

[1] "Also, Nedbank".
[2] "Also, Mr Tsoeu".

ORDER

1. Summary judgment is granted against the defendant/respondent for the immediate return of a MERCEDES-BENZ ML 320 CDI motor vehicle with engine/series number: 64[…] and chassis number: WDC[…].

2. The defendant/respondent to pay the costs of this application.

JUDGMENT

INTRODUCTION

[1] Constitutional economic integrity is vital in a democratic dispensation. Honesty, transparency and honour in contracts immutable.

[2] In *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 762H Eksteen, JA referred to: "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 when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.

[3] 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.

[4] Moseneke J, (as he then was) pointed out 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.

[5] At the heart of the jurisprudence above is the basic premise that commercial transactions, freely and fairly entered into, and not vitiated by fraud, misrepresentation, duress or public policy; should be respected and enforced. The proclamation of the National Credit Act did not alter these core values of contracts in South Africa.

THE CLAIM

[6] The plaintiff's/applicant's claim is based on a written instalment sale agreement involving a vehicle and entered into between the parties in September 2017. The claim relies on breach of the agreement by defendant/respondent in that he failed to make proper payment of the instalments and are in arrears. The contractually agreed remedy of the return of the vehicle was elected by plaintiff/applicant to address the issue. Nedbank was forced by the conduct of the Mr Tsoeu into an application for summary judgment.

THE PARTIES

[7] The plaintiff/applicant is Nedbank Limited, a public company with limited liability that trades as a registered deposit taking institution in terms of the Bank Act, No 94 of 1990. Nedbank, that does business as a commercial bank and that is so registered in terms of the Bank's Act 94 of 1990, also conducts business as MFC, a division of Nedbank Limited. Nedbank is also duly registered as a credit provider in terms of National Credit Act 34 of 2005 (NCA).

[8] The defendant/respondent is Mr TE Tsoeu a major male person with *domicilium citandi et executandi* at an address stipulated in the agreement situated in the Free State Province. He is also a legal practitioner. His practise is situated in Bloemfontein. He conducted his own case.

THE DEFENSE

[9] The defense of Mr Tsoeu against the application for summary judgment is mere bare denials that were pleaded and that:

> 2.
>
> The alleged contract is a nullity in that
>
> 2.1 it (sic) does not comply with the provisions of section 92(2) of the National Credit Act 34 of 2005 read with Form 20.1 as prescribed in the Regulations promulgated in terms thereof in that the Pre-Agreement Statement and Quotation attached thereto is not signed on behalf (sic) the Credit Provider.[3]

COMMON CAUSE AND PROVEN ASPECTS

[10] It is common cause and proven that:

[3] Pages 65 and 66 of the Bundle: "INDEX SUMMARY JUDGMENT APPLICATION" ("The Bundle").

1. On 21 September 2017 the parties entered into a written instalment sale agreement for the purchase of a vehicle in terms whereof the first monthly instalment of R 6 953.29 was due on 15 November 2017; followed by a further 58 instalments of R 6 862.09 per month due and payable from 15 December 2017 with subsequent instalments on the 15th of each succeeding month and one last final instalment of R 6 862.09 on 15 October 2022.

2. Mr Tsoeu did not and does not, honour the terms of the contract that he entered into with Nedbank. Nedbank relies on breach of the agreement in that Mr Tsoeu failed to make proper payments of the instalments.

3. *The contract expired on 15 October 2022.*

4. Mr Tsoeu had full possession and unobstructed use of the vehicle since September 2017. This continues notwithstanding that he failed to comply with the provisions of the aforesaid agreement and claim the contract to be a nullity.

5. It is clear that Nedbank complied with the provisions and procedures of the NCA and delivered the peremptory notices to alert of the default to Mr Tsoeu.

6. Mr Tsoeu has a history of being in default. On several occasions so-called section 129 – letters were sent to him. After receipt Mr Tsoeu made promises to pay the arrears. He will then proceed to make partial payments; never settling the arrears in full.

7. As on 26 September 2022, Mr Tsoeu was liable for arrears in the amount of R 142 657.91. He refused that the court accept the latest record of payments and certificate of balance as on the date of this hearing on 15 June 2023 into evidence.

8. Nedbank also contacted and informed Mr Tsoeu of the arrears telephonically and *via* SMS messages.

9. <u>It is imperative to note that never since he took delivery of the vehicle in 2017 and had the use thereof, did he at any stage raise any complaint or made any averments that the instalment sale agreement was defect or irregular or a nullity. That is from 2017 to 2022.</u>

10. The conduct of Mr Tsoeu forced Nedbank to issue summons against him. He defended the matter and only after a Notice of Bar was filed, did he react by filing an incomplete Plea. On receipt of the Plea Nedbank's attorneys suspected that it might not be the full or complete document and enquired from Mr Tsoeu if he inadvertently omitted some pages. The enquiry was made on 10 March 2023, being the last day of Bar. He, on the same day, responded and confirmed that the plea is not correct. Nedbank's attorneys on 10 and 13 March requested Mr Tsoeu to correct the mistake. No response was received. Nedbank's attorneys inquired at the registrar on 15 March 2023 and confirmed that the Plea in the file corresponds with the SJ1 - document in the Bundle at page 13. On 16 March 2023, Mr Tsoeu filed a Notice to Amend the Plea. Nedbank from hereon for the sake of expediency dealt with the Plea as if it has been amended in accordance with a Rule 28-notice.

11. The amended plea and opposing affidavit were filed on 12 April 2023; the matter was already set down on the unopposed motion court roll for 20 April 2023. On 20 April 2023 the matter was postponed to the 15th of June 2023 as an opposed motion.

EVALUATION OF THE EVIDENCE & THE LAW

[11] The calamity of the case for Mr Tsoeu is that perusal of the documents that he relies upon, shows that it does comply, substantively and fundamentally so, with section 92(2) of the NCA and the form required in the regulations thereto.

92. Pre-agreement disclosure. —

(1) A credit provider must not enter into a small credit agreement unless the credit provider has given the consumer a pre-agreement statement and quotation in the prescribed form.

(2) A credit provider must not enter into an intermediate or large credit agreement unless the credit provider has given the consumer—

(a) a pre-agreement statement—

(i) in the form of the proposed agreement; or

(ii) in another form addressing all matters required in terms of section 93; and

(b) a quotation in the prescribed form, setting out the principal debt, the proposed distribution of that amount, the interest rate and other credit costs, the total cost of the proposed agreement, and the basis of any costs that may be assessed under section 121 (3) if the consumer rescinds the contract.

[12] He, himself signed the quotation and pre-agreement statement. Section 92(2) does not require signing of the quotation separately from the pre-agreement statement. The agreement, was in the end, signed by Mr Douw Ledley on behalf of the credit provider and Mr Tsoeu as the credit receiver.

[13] Form 20(1) under the regulations of the NCA is clearly misread by Mr Tsoeu. It may include the quotation and the pre-agreement statement as one document and then wants for signatures at the end of the whole document on the circumstances of this case. The quotation and pre-agreement statement may be contained in one or two documents. It also does not preclude the quotation and the pre-agreement statement to include the whole of the information of the Terms and Conditions Contract. Part I stipulates that: "{add further information on material features or attributes of the credit products <u>or proposed credit agreement</u>, as required}" (Emphasis added). This is the form directly copied from the regulation and on 25 June 2023:

Form 20.1

Quotation for intermediate and large agreements in terms of section 92 (2)

[THIS QUOTE IS BINDING FOR 5 DAYS]

QUOTATION FOR INTERMEDIATE & LARGE CREDIT AGREEMENTS

in terms of section 92 (2) of the National Credit Act 34 of 2005

— page 1 —

NCR number: FORM 20.1

Name of credit provider:	Name of consumer:
Physical address:	Physical address:
Contact number of credit provider:	Contact number of consumer
Date:	Id No/CIPRO/ registration number:

PART A: Amount advanced

Credit advanced or value of goods or services provided on credit	R
Initiation fee, *if the consumer declined the offer to make payment separately*	R
Total of additional charges (Part E)	R
Deduct deposit required minus	R
Total amount deferred per credit agreement	R

PART B: Instalment payable

Instalment in respect of total amount deferred	R
Monthly service fee	R
Monthly premium for credit life insurance	R

N
u
m
b

frequency

Total instalment

er of in st al m e nt s

PART C: Total cost and interest rate

Total amount deferred per credit agreement	**R**
Total interest, fees & credit life insurance	**R**
Total amount repayable = total of all instalments (excluding optional insurance)	
Annual Interest Rate	

Part D: Optional items

OPTIONAL ITEMS, WHICH WILL BE ADDED TO INSTALMENT		OTHER OPTIONAL ITEMS
Additional monthly	**R**	

premium for optional insurance Description of optional insurance:		

PART E: Additional charges added to credit agreement

The following additional charges will be added to the amount of credit (S102 (*b*) – (*f*))

		R
		R
		R
{list items that arc applicable, and amount per item}	Total of charges added to the agreement (per Part A)	**R**

PART F: Security provided

{Description of security required & of conditions under which possession would occur}

PART G: Repayment arrangements

{Insert information regarding the frequency of payments, including method of payment, date of the payment}

[THIS QUOTE IS BINDING FOR 5 DAYS]

PRE-AGREEMENT STATEMENT & QOTATION FOR INTERMEDIATE AND LARGE CREDIT AGREE

in terms of section 92 (2) of the National Credit Act 34 of 2005

— page 2 —

PART H: Further information on rights and obligations

{Add further information on material aspects of the rights and obligations of the consumer and cr proposed credit agreement, as required; Where a transaction fee is charged, indicate 'transaction describe fees and basis for levying such fees in this section; Include further disclosure required by le above, -where applicable. Consider in particular disclosure requirements of section 106 and 121 (3)}

PART I: Further information on features of credit product

{add further information on material features or attributes of the credit products or proposed credit agre

— add further pages if required —

Signature:

Credit Provider Representative	**Consumer**

[14] The above notwithstanding; Mr Tsoeu placed his signature on pages 1, 2,[4] 3[5] and 13[6] of the agreement. On pages 3 and 13 of the agreement he co-signed with the credit provider and he pledged his commitment to the contract. To now and suddenly, claim the contract to be a nullity on the basis that the credit provider did not co-sign the first page of fourteen pages of one document is a desperate technicality.[7]

SUMMARY JUDGMENT

[15] 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 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* defense to the action.

5. The defendant must disclose fully the nature and grounds of the defense, and the material facts on which it is based.

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[4] Pages 40 and 41 of the Bundle.

[5] Page 19 of the Bundle: the "Acknowledgement of Delivery and Acceptance of the Terms and Conditions".

[6] Page 46 of the Bundle.

[7] See *Standard Bank of South Africa v Pheeha* (5430/2019) [2021] ZALMPPHC 54 (6 July 2021), *Cherangani Trade and Invest 50 (Pty) Ltd v Razzmatazz (Pty) Ltd and Another* (2795/2018) [2020] ZAFSHC 100 (28 May 2020) at paragraph [20] and *Basson v Remini and another* 1992 (2) SA 322 (N).

6. A defendant may successfully resist summary judgment where the opposing affidavit shows that there is a reasonable possibility that the defense 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 defense 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 defense 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 the grounds of his defense, he must disclose the facts on which he bases his defense, the defense must be *bona fide* and the defense 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 addition to the above: "Unnecessary technicality should be avoided during litigation as reliance thereon by a litigant is often aimed at trying to evade a judgment on the merits and more often than not, the party relying on a technicality knows full well that he/she does not have a proper defense on the merits."[8]

CONCLUSION

[8] *Cherangani Trade and Invest 50 (Pty) Ltd v Razzmatazz (Pty) Ltd and Another* (2795/2018) [2020] ZAFSHC 100 (28 May 2020) at paragraph [20].

[16] The defense of the defendant/respondent is bad in law, not *bona fide* and there exist no possibility at all that it will succeed should the matter be referred for hearing. His conduct throughout the contract and the litigation speaks of bad faith and wrongdoing. He will have to carry the costs for the application.

[17] **ORDER**

1. Summary judgment is granted against the defendant/respondent for the immediate return of a MERCEDES-BENZ ML 320 CDI motor vehicle with engine/series number: 64[…] and chassis number: WDC[…].

2. The respondent/defendant to pay the costs of this application.

M OPPERMAN, J

APPEARANCES:

For the plaintiff/applicant: **ADV. D.C. HATTINGH-BOONZAAIER**
Instructed by: McIntyre Van Der Post Attorneys,
Bloemfontein

For defendant/respondent: **MR. T.E. TSOEU**
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