**IN THE HIGH COURT OF SOUTH AFRICA,**
**FREE STATE DIVISION, BLOEMFONTEIN**

**Case number: 4155/2023**

In the matter between:

| | |
|---|---|
| **NEDBANK LTD** | Plaintiff |
| And | |
| **LEON LAMPRECHT** | Respondent |

| | |
|---|---|
| **CORAM:** | **M.T JORDAAN, AJ** |
| **HEARD ON:** | **26 OCTOBER 2023** |
| **ORDER GRANTED ON:** | **26 OCTOBER 2023** |
| **JUDGMENT DELIVERED ON:** | **27 OCTOBER 2023** |

This judgment was handed down in open court and on even date circulated to the parties' representatives by electronic mail communication.

## INTRODUCTION

[1] This is an opposed application for summary judgment brought in terms of Rule 32 of the Uniform Rules of Court, as amended. The Applicant in this summary judgment application, is the Plaintiff in the action instituted against the Defendant, who in turn, is the Respondent in this application. For ease of reference I shall refer to the parties as in the main action.

[2] The Defendant was legally represented at the time when papers were filed. From the file it appears that the Defendant attorney withdrew and notified the Defendant of the date of set down of the application. In order to establish whether the Defendant was at court, the matter stood down while the register book at the entrance was checked and the Defendant name was called outside court F, but he was in default. The court proceeded in terms of Rule 39(1) having had the benefit of the Respondent's papers and determined the matter considering same.

**BACKGROUND**

**PLAINTIFF'S CASE**

[3] On the 01st of July 2020 the Plaintiff and Defendant entered into a written instalment sale agreement in terms of which the plaintiff sold to the Defendant a 2020 Mahindra Thar 2.5 motor vehicle with engine number BUL[…] and chassis number MA1[…] (hereinafter referred to as "the goods").[1] The total cash price for the goods amount to R381 906.48 with the finance charges etc., the total purchase price amounted to R553 603.93, payable as following:

3.1 1 instalment of R6 269.49 payable on 28/08/2020;

3.2 70 instalments of R6 200.49 payable on 28/09/2020 with subsequent instalments payable on the 28th day of each succeeding month;

3.3 1 instalment of R6 200.49 payable on 28/07/2026

3.4 1 final balloon payment of R107 168.65 payable on 28/07/2026[2]

[4] The Defendant failed to comply with the provisions of the aforesaid agreement in that he failed to make punctual payments of the instalments in terms thereof and

[1] Paginated Bundle Particulars of Claim paragraph 3 page 22
[2] Paginated Bundle Particulars of Claim paragraph 5 page 22 to 23

as a consequence was on the 27th of February 2023 in arrears in the amount of R62 620.86.[3]

[5] As a consequence the Plaintiff issued summons claiming inter alia:

5.1 Confirmation of cancellation of the instalment sale agreement

5.2 Return of the 2020 Mahindra Thar 2.5 motor vehicle with engine-/series number BUL[…] and chassis number MA1[…]

5.3 Damages to be proved in terms of the provisions of the instalment sale agreement.

5.4 Payment of interest in terms of the provisions of the instalment sale agreement on such damages as may be granted.

5.5 Payment of cost of suit together with VAT thereon

**DEFENDANT'S CASE**

[6] The Defendant in his plea admitted to having entered into the agreement with the Plaintiff and that he was in default.[4]

[7] The Defendant raised inter alia the following defences in his plea:

7.1 A special plea of reckless credit in contravention of section 80 of the National Credit Act 34 of 2005 (NCA), in that at the time the agreement was entered into, the Plaintiff failed to conduct an assessment as required by section81(2), alternatively, if it is found that the plaintiff had conducted an assessment, Plaintiff entered into the credit agreement with Defendant despite the fact that the preponderance of information available to Plaintiff

[3] Paginated Bundle Particulars of Claim paragraph 7 page 25
[4] Paginated Bundle page 46 paragraph 1

indicated that the Defendant did not generally understand or appreciate his risks, costs or obligations under the proposed credit agreement.[5]

7.2 The Defendant admits the allegations in the Plaintiff particulars of claim, but pleads that he is not obliged to the Plaintiff because the credit agreement was reckless.[6]

7.3 That the Defendant was convicted of Fraud in 2011 was sentenced to 12years imprisonment, paroled in May 2017 and employed at Momentum Realty as an estate agent being paid on a commission basis, he had a stroke in 2018 and was unable to work until 2021.[7]

7.4 His son was the salesman that sold the vehicle to him at Kia Motors and he also completed the forms on behalf of the Defendant.

7.5 The representative of the Plaintiff present at Kia Motors did not participate in the application and did not conduct an assessment as is required by the NCA.

7.6 The Defendant had no guaranteed income.

[8] Having received the Defendant's plea, the Plaintiff in accordance with rule 32, filed an application for summary judgment on the basis of the Defendant's plea.

## APPLICABLE LEGAL PRINCIPLES

[9] Summary judgement enables a plaintiff to obtain judgment against a defendant without resorting to trial when a defendant has no defence to a claim based on a liquid document, for a liquidated amount of money, for delivery of movable property, and for ejectment. The instant application for summary judgment is for delivery of movable property.

[5] Paginated Bundle page 46 paragraphs 2 and 3
[6] Paginated Bundle paragraph 1 page 47
[7] Paginated Bundle paragraphs 2 to 5 page 47

[10] With effect from the 01st of July 2019 an application for summary judgment can only be brought after a defendant has filed its plea, and in doing so the plaintiff must not only verify the cause of action and the amount claimed but must, in addition, also identify any point of law which it relies upon and the facts upon which its claim is based, and must also briefly explain why the defence which has been pleaded by the defendant does not 'raise any issue' for trial.

[11] The Defendant opposing summary judgment is required to set out a *bona fide* defence by affidavit disclosing fully the nature and grounds of the defence and the material facts relied upon. The Defendant need not deal exhaustively with all the facts and evidence relied on to substantiate a defence, but the essential material facts on which the defence is based must be disclosed with sufficient completeness and particularly to enable the court to decide whether or not the affidavit discloses a *bona fide* defence.[8] However a *bona fide* defence is not scrutinised according to the strict standards of pleadings. In summary judgment it is the material and factual defence and not the Defendant which must be *bona fide.*

[12] The rationale and requirements for the grant or refusal of summary judgment are trite and are summarised in the Supreme Court of Appeal judgment of Joob Joob Investments[9] as follows:

> "The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G–426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded.

[8] Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426C-E

[9] 2009 (5) 1 (SCA) at 11G–12D

> The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.
>
> Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G–426E."

[13] The test for the granting of a summary judgment is whether the Defendant has satisfied the Court that he has a *bona fide* defence to the action.[10] What this entails is whether the facts put up by the Defendant raised a triable issue and a sustainable defence in law deserving of their day in court. The defense must not be bald, vague or sketchy.

## **ISSUE FOR DETERMINATION**

[14] Having regard to the test for summary judgment, the issue for determination by this Court, is whether the Defendant has set out a bona fide defense to the Plaintiff's claim.

> In order to establish if the Defendant has a triable issue or a sustainable defence, I have regard to the evidence as set out in the respective affidavits and the plea that was filed.

## **APPLICATION OF LEGAL PRINCIPLES TO THE EVIDENCE**

[10] Rule 32(3) of the Uniform Rules of Court

[15] The Plaintiff claim is based on the breach of an Instalment Sale Agreement, referred to as the Agreement, which was entered into between the Plaintiff and the Defendant on the 01st of July 2020, in terms of which the Defendant purchased a motor vehicle, referred to as the goods.

[16] The Defendant contend that the assessment conducted by the Plaintiff did not amount to an assessment as envisaged by the NCA. The Plaintiff submit that it complied with all its obligations in terms of the NCA, that the Defendant had a monthly surplus of R6 439.00 after deducting the instalment sale agreement payment. The Plaintiff, notwithstanding the Defendant's debt disclosure, discovered further debt through verification with the credit bureau and brought those debts into calculation, when it conducted the assessment. In countering the Defendant's contentions, the Plaintiff attached a report supporting its submission of compliance with the NCA.[11]

[17] The Plaintiff further refuted the Defendant's reckless credit defence, in submitting that the Defendant applied for debt review in October 2022 and the Defendant's debt counsellor was specifically instructed to investigate reckless credit. The Plaintiff provided all the information required by the debt counsellor during the investigation. The reckless credit issue was not pursued any further and the Defendant did not proceed with his debt review application.

[18] The Defendant submits that the Plaintiff failed to reasonable steps to assess the Defendants general understanding of the risks and costs involved in the proposed credit and of the rights and obligations of a consumer under a credit agreement. The Plaintiff submitted that the Defendant fails to provide sufficient details why he would not generally understand and appreciate the risk of an instalment sale agreement.

[19] In my view the Defendant did not sufficiently disclose the nature and grounds of his defence and the facts upon which it is founded, in pleading reckless credit. There is no evidence indicating that the Defendant was indeed unemployed and not

[11] Paginated Bundle page 10 to 13

receiving any income at the time of entering into the agreement. Having regard to this lack of substantiation, it calls into question the bona fides of the defence. In the case of Breitenbach v Fiat SA (Edms) Bpk[12] the court stated as follows:

> "One of the things clearly required of a defendant by Rule 32 (3)(b) is that he set out in his affidavit facts, which, if proved at the trial, will constitute an answer to the plaintiff's claim. If he does not do that, he can hardly satisfy the Court that he has a defence. **...**There is no magic whereby the veracity of an honest deponent can be made to shine out of his affidavit. It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the *bona fides* of his defence. It will suffice, if the defendant swears to a defence, valid in law, in a manner in which is not inherently and seriously unconvincing." (my emphasis)

> It does not translate that on his own version the Defendant provides sufficient facts to establish that the Applicant failed to conduct a full and proper credit risk evaluation as required in terms of the NCA, but rather that the Defendant is clutching at straws.

[20] Having had regard to the Defendant's papers filed, the Defendant has failed to show that he has a *bona fide* defense to the Plaintiff's claim that is good in law. Accordingly, summary judgment must be granted in favor of the Plaintiff.

[21] The plaintiff is accordingly entitled to cancel the Agreement, claim the return of the motor vehicle, including payment of damages consequent to the breach of the contract, interest and costs. Accordingly, I granted the following order:

**ORDER**

[22] In the result the following order is made:

[12] 1976 (2) SA 226(T) at 227G-228B

22.1 Confirmation of the cancellation of the Instalment Sale Agreement;

22.2 Return of the 2020 MAHINDRA THAR 2.5 motor vehicle with engine/series number: BUL[…] and chassis number: MA1[…];

22.3 Damages shall be proved in terms of the provisions of the Instalment Sale Agreement.

22.4 Payment of interest in terms of the provisions of the instalment sale agreement on such damages as may be granted.

22.5 Payment of costs of suit with VAT thereon.

**MT JORDAAN, AJ**

| | |
|---|---|
| Counsel for Applicant: | Adv. I Macakati |
| Instructed by: | MCV GERDENER |
| | MCINTYRE VAN DER POST |
| | **BLOEMFONTEIN** |