

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: 11517/2021P

In the matter between:

NEDBANK LIMITED

Applicant

and

EUPINA MAGADLA

Respondent

ORDER

The following order is granted:

1. Summary judgment is granted in favour of the plaintiff against the defendant as follows:

1.1. The plaintiff's cancelation of the agreement relating to the vehicle described in paragraph 1.2 of this order is confirmed.

1.2. The defendant is ordered to return the vehicle described as a 2014 Land Rover Discovery 4 3.0 TD/SD V6 SE, with engine number 0[...], and with chassis number S[...], to the plaintiff

1.3 The defendant is directed to pay the costs of suit

2. The plaintiff is granted leave to apply to this court on the same papers, duly supplemented, in so far as it may be necessary, for an order for any damages which it is entitled to, which will be quantified once the vehicle has been located and sold.

3. The plaintiff shall allege and prove, in its action for any outstanding damages, that it has complied with the requirements set out in para 20.3 of the substituted order granted in *FirstRand Bank Limited t/a Wesbank v Davel* [2019] ZASCA 168.

JUDGMENT

Delivered: 24 May

2023

Mathenjwa AJ

Introduction

[1] The plaintiff, Nedbank Limited, instituted action against the defendant, Ms Eupina Magadla, claiming inter alia confirmation of the cancellation of the credit agreement, return of a motor vehicle and further related relief. The defendant defended the matter and filed her plea on 28 February 2022. The plaintiff filed an application for summary judgment on 22 March 2022, and the defendant filed an opposing affidavit resisting summary judgment on 24 May 2022. Consequently, the matter came before me as an opposed motion.

Condonation

[2] At the commencement of the hearing of this application the plaintiff sought condonation for the delivery of their short heads of argument consisting of six (6) pages and its non-compliance with practice directive 9.4.1.¹ The defendant's legal representative opposed the application.

¹ See the Practice Manual of the KwaZulu-Natal Division of the High Courts.

[3] A brief background to the application for condonation is that on 6 September 2022 the matter came before Khalill AJ. The defendant asked for an order striking off the matter from the roll for no condonation for noncompliance with practice directive 9.4.1. Consequently, Khalill AJ issued an order striking the matter off the roll.

[4] When the application for condonation was argued before me, Mr Templett, for the plaintiff, contended that the matter was struck off the roll with no order as to costs, because both the plaintiff's and defendant's' practice note did not comply with practice directive 9.4.1(f) in that the defendant also did not state whether any material dispute of facts existed. Both parties have not rectified their strict noncompliance with the practice directive. The plaintiff contended that due to the vast number of technical and other points raised by the defendant in their summary judgment opposing affidavit, it was not possible for the plaintiff, to adequately address every issue in their heads of argument without delivering one additional page.

[5] Mr Havemann, for the defendant, contended that the plaintiff failed to explain the delay in seeking condonation from September 2022 when the matter was struck off the roll. The longer heads of argument, had increased the defendant's costs.

[6] It is appropriate to point out that it is not in dispute that both parties' heads of argument did not and still do not comply with the practice directive. The plaintiff has applied for condonation for noncompliance with the directive and the defendant has not applied for condonation. If one has regard to the number of issues raised by the defendant in their summary judgment opposing affidavit, the plaintiff had to respond adequately to the issues raised by the defendant. The defendant was not prejudiced by the plaintiff exceeding the prescribed number of pages of the heads by supplementing with one additional page. Regarding the contention that the plaintiff failed to explain the delay for the condonation, I consider that the matter was struck off the role by order of the court for not requesting condonation for the noncompliance with the practice directive, and the plaintiff has complied with the court order and filed a condonation

application. In the application for condonation the plaintiff has adequately explained the reasons for their failure to strictly comply with the directive.

[7] In my view, the plaintiff's explanation is reasonable. Therefore, condonation for noncompliance with the practice manual is granted and there is no order as to costs. This brings me to the main application for summary judgment.

Background

[9] On 12 October 2020, in Durban, the plaintiff and the defendant entered into an agreement of sale, in terms of which the plaintiff sold and delivered to the defendant a Land Rover Discovery vehicle (the vehicle). The total costs for the vehicle were R467 677. 32(four hundred and sixty-seven thousand, six hundred and seventy-seven rand, and thirty-two cents). The amount was payable by way of monthly instalment of R6 539.42 (six thousand, five hundred and thirty-nine rand, and forty-two cents) with the first instalment commencing on 25 November 2020.

[10] The plaintiff alleged that in breach of the agreement the defendant failed to make due and punctual monthly payments to the plaintiff, and on 7 October 2021 they were in arrears in respect of the agreement in the amount of R80 297. 58 (eighty thousand, two hundred and ninety-seven rand, and fifty-eight cents).

Parties' contention

[11] The defendant, in their plea, admits that they and the plaintiff entered into an instalment agreement for the sale of the vehicle, but avers that the defendant does not have a copy of the signed contract and cannot confirm whether the contract agreement is a true copy of the agreement. Furthermore, the total calculation of the credit by the plaintiff is incorrect because the plaintiff charged VAT and interest separately, notwithstanding that both charges were agreed to be included in the mentioned value of vatable goods. The defendant contended that after they had referred the matter for debt review the plaintiff did not negotiate in good faith and abandoned the debt review without giving the defendant notice of termination in terms of section 86(10) of National

Credit Act 34 of 2005 (the NCA). In their affidavit opposing summary judgment, the defendant contended that the deponent to the plaintiffs' founding affidavit, Mr Mmanni Motau, did not have personal knowledge of the facts deposed to in the affidavit, because he said that he is a manager at the department in 'MFC' which seems to be one of the departments at a lender who is not the plaintiff.

[12] The plaintiff contended that the defence pleaded by the defendant does not raise any triable issue. There is no merit, the plaintiff argued, on the defendant's contention regarding the calculation of VAT and interest, because in terms of section 102(1)(e) of the NCA, VAT is calculated and charged separately on the sale price, and in terms of section 101(1)(d)(i) and (ii) of NCA, interest is calculated separately from VAT. Regarding the contention that the defendant did not receive a copy of the agreement the plaintiff averred that the defendant had sight of and had signed the agreement. The plaintiff contended that for purposes of this application for return of the vehicle the balance certificate is not material because the defendant had not made any payments on the account. The plaintiff attached proof of termination notices in terms of section 86(10) of the NCA that were sent to the defendant and the debt counsellor. Finally, the plaintiff contended that the defendant is not entitled to an order for debt review whilst retaining possession of the motor vehicle where the instalment sale agreement has been cancelled.

Legal principles

[13] It is apposite at this stage to consider the principles governing the grant or refusal of summary judgment. The purpose of summary judgment was explained in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*,² where Harms DP stated as follows:

'So too in South Africa, the summary judgment procedure was not intended to "shut (a defendant) out from defending", unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties

² *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 31.

by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.’ (fooonote omitted)

A defendant resisting summary judgment is required to disclose fully the nature and grounds of his defence in his opposing affidavit. *Maharaj v Barclays National Bank*³ spelt out the legal principles applicable in summary judgment applications and stated as follows:

‘[One] of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be.’

[14] The meaning of the phrase ‘bona fide defence’ was explained In *Nedbank v Maredi*,⁴ which held as follows: that ‘a *bona fide* defence, which means a defence set up *bona fide* or honestly, which if proved at the trial, would constitute a defence to the plaintiff’s claim’. In *Tumeleng Trading CC v National Security and Fire (Pty) Ltd*⁵ the court explained the effect of the amendment to Uniform rule 32(b) with regard to the requirement that the plaintiff should explain briefly why the pleaded defence does not raise an issue for trial. Binns-Ward J stated as follows:

³ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-C.

⁴ *Nedbank v Maredi* [2014] ZAGPPHC 43 para 14.

⁵ *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd* [2020] ZAWCHC 28, 2020 (6) SA 624 (WCC) para 22.

‘What the amended rule does seem to do is to require of a plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a bona fide defence. This is because the plaintiff’s supporting affidavit now falls to be made in the context of the deponent’s knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of something more than a “formulaic” supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely for the purposes of delay.’

[15] The defendant’s defence to the plaintiff’s claim is mainly based on the plaintiff’s alleged failure to comply with the requirements of the NCA, more particularly section 86(10) which provides that:

‘(a) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may, at any time at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review in the prescribed manner to-

- (i) the consumer;
- (ii) the debt counsellor; and
- (iii) the National Credit Regulator . . .’

And section 130(1) which provides that:

‘Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-

- (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10), or section 129 (1), as the case may be;
- (b) in the case of a notice contemplated in section 129 (1), the consumer has-
 - (i) not responded to that notice; or
 - (ii) responded to the notice by rejecting the credit provider's proposals; and
- (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127'.

Analysis of the facts

[16] This brings me to the question of whether the defendant has disclosed a bona fide defence to the plaintiff's claim. The contention that the deponent to the affidavit for summary judgment did not have personal knowledge of the facts is not correct, because Mr Motau have stated in the affidavit that 'MFC' is a division within the plaintiff. Furthermore, the agreement of sale was signed between the defendant and the 'MFC' as the relevant division within the plaintiff. I am in agreement with the plaintiff's contention that the issue relating to the failure by the plaintiff to attach a balance sheet, is not material in the present matter, because the defendant does not deny that she has not paid even a single instalment since taking possession of the vehicle in October 2020. Likewise, in my view, the contention about incorrect calculation of VAT and interests is not material in the present matter where the plaintiff claims the return of the vehicle, not damages, and in the circumstances where the defendant has not paid any instalment for the vehicle. With regard to the defendant's contention that the plaintiff's affidavit does not comply with Uniform rule 32(4) because the plaintiff has attached evidence to the affidavit, I align myself with the judgment of *Tumeleng Trading CC v National Security and Fire (Pty) Ltd*, where the court held that the amended rule required something more than a 'formulaic' supporting affidavit from the plaintiff in that

the plaintiff should engage and respond to the plea in showing that the defendant's defence is not bona fide.

[17] In assessing whether the defendant's defence of noncompliance with the provisions of NCA raises a triable issue, regard should be had to the pleadings as well as the documents attached and marked as annexures SJ 3 to SJ 9 to the plaintiff's affidavit. On 15 December 2020 the defendant applied for a debt review in terms of section 86 of NCA. On 12 February 2021 the debt counsellor submitted a repayment proposal to the plaintiff in the amount of R4 179.19 (four thousand, one hundred and seventy-nine rand, and nineteen cents) over an additional extended term of 110 months. On 16 February 2021 the plaintiff informed the debt counsellor that the debt re-arrangement proposal has not been accepted because the proposal was not reasonable and would not result in the resolution of the debt as required by the plaintiff. The plaintiff made a counter proposal of R5 154.43 (five thousand, one hundred and fifty-four rand, and forty-three cents) at a rate of 11.50%. On 9 March 2021 the plaintiff informed the debt counsellor that they have not received reply to the plaintiff's counter offer and requested the debt counsellor to submit a revised proposal. Having not heard from the debt counsellor, on 16 March 2021 the plaintiff sent a notice of termination in terms of section 86(10) of the NCA to the debt counsellor, and the defendant. On 19 March 2021 the debt counsellor addressed a letter to the plaintiff informing them that they have received the notice of intending to terminate the account, but advised the plaintiff that the defendant is not able to increase the payment. On 26 March 2021 the plaintiff addressed a letter to the debt counsellor informing them that their request for reinstatement of the account was rejected because, since the defendant had taken possession of the vehicle they have not made any payment to the plaintiff, and that the 60 business days provided for in the NCA has lapsed without the parties reaching agreement on the debt restructuring. On 13 April 2021 the debt counsellor issued a debt review application to Durban Magistrates' Court. On 27 September 2022 the debt counsellor withdrew the debt review application from the magistrates' court.

[18] It is apparent from the attached correspondence that the defendant referred the debt to a debt counsellor, therefore the plaintiff was not required to send the defendant the requisite notice in terms of section 129 of NCA. It is apparent that the plaintiff participated in the negotiations for debt review and offered a counter offer to the debt counsellor. The plaintiff gave notice to terminate the debt review to the defendant and debt counsellor by registered mail before the debt counsellor applied to court for review of the debt. Considering the correspondence between the debt counsellor and the plaintiff regarding the offer, the counter-offer and notice of termination of debt review, it is apparent that the defendant's defence is bogus and the plaintiff's claim is unimpeachable.

[19] Considering that the defendant applied for debt review a mere two months after purchasing the vehicle and they are in possession of the vehicle, whilst they have not paid a single instalment for the vehicle, I agree that the defendant has no bona fide defence to the plaintiff's claim.

Order

[20] The following order is granted:

1. Summary judgment is granted in favour of the plaintiff against the defendant as follows:

1.1. The plaintiff's cancellation of the agreement relating to the vehicle described in paragraph 1.2 of this order is confirmed.

1.2. The defendant is ordered to return the vehicle described as a 2014 Land Rover Discovery 4 3.0 TD/SD V6 SE, with engine number 0[...], and with chassis number S[...], to the plaintiff

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3. The plaintiff shall allege and prove, in its action for any outstanding damages, that it has complied with the requirements set out in para 20.3 of the substituted order granted in *FirstRand Bank Limited t/a Wesbank v Davel* [2019] ZASCA 168.

MATHENJWA AJ

Date of hearing: 18 April 2023

Date of judgment: 24 May 2023

Appearances:

Plaintiff's counsel: Adv J W Temlett

Instructed by: Hainsworth Koopman Inc
Pietermaritzburg

Defendant's counsel: Mr C W Havemann

Instructed by: CWH Attorneys
Pietermaritzburg