

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 133/2023

In the matter between:

TOYOTA FINANCIAL SERVICES (SA) LTD PLAINTIFF

and

JXL TRADING SERVICES (PTY) LTD DEFENDANT

JUDGMENT

Rugunanan J

[1] This is an application for summary judgment.

[2] The plaintiff's claim arises from an instalment sale agreement concluded with the defendant on 19 September 2019.

[3] A copy of the agreement is attached to the particulars of claim as annexure 'B'.

[4] The agreement is not subordinated to the provisions of the National Credit Act for the reason that it is a large agreement with a monetary threshold exceeding R250 000.00.

[5] The subject matter of the agreement concerns the sale by the plaintiff to the defendant of a Toyota Hilux motor vehicle. It is alleged in the particulars of claim that the defendant is in default of his obligations under and in terms of the agreement and is in breach by having defaulted on his payment of the arrears amounting to some R79 245.00.

[6] In its notice of application for summary judgment filed on 7 July 2023, the plaintiff seeks an order (all sic):

- ‘(a) Cancellation of the agreement.
- (b) Return of the 2019 Toyota Hilux 2.8 GD-6 RB Raider A/T P/U motor vehicle with engine number 1GD[...], Chassis number AHT[...]
- (c) Costs of suit.’

[7] The action is defended.

[8] Under the present amended formulation of uniform rule 32, summary judgement proceedings are competent once a defendant has delivered a plea. The plaintiff’s supporting affidavit now falls to be made in the context of the deponent’s knowledge of the content of the delivered plea. A plaintiff must 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 as a delaying tactic.¹

¹ *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 paras 21-22.

[9] Although the amended rule has raised the bar and onus on a plaintiff for securing summary judgment², some of the well-known and settled requirements that have to be established by a defendant to avoid summary judgment remain intact.

[10] A defendant is still obliged to show that it has a defence which is *bona fide* and good in law³. A *bona fide* defence requires full disclosure of the nature and grounds of the defence and the material facts relied upon in support thereof.⁴ To satisfy these requirements a defendant will have to engage meaningfully with the additional material now required to be contained in a plaintiff's affidavit in support of summary judgment.⁵

The issues

[11] To begin with, the agreement and its material terms are admitted, save that the defendant avers that the copy of the agreement attached to the particulars of claim is unsigned and does 'not comply with the law'.

[12] In its particulars of claim the plaintiff makes the following allegation:

'9. The Defendant is in default and has up to date of the commencement of the enforcement proceedings, remained in breach and was in arrears with the amount of R79 245.00 with its obligations in terms of [the agreement] for a period of at least 20 business days.'

[13] To this, the defendant pleads (all sic):

'Contents of this paragraph are denied, the defendant does not owe this amount our client was owing an amount of R56 015.51 per letter of plaintiff but now the amount is R42 015.51 as defendant paid R14,000...'

² *Standard Bank of SA Ltd v Rahme and Another* [2019] ZAGPJHC 287 para 8.

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

⁴ *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* [2020] ZAGPPHC 808 para 48.

⁵ *Standard Bank of SA Ltd and Another v Five Strand Media (Pty) Ltd and Others* [2020] ZAECPHC 33 para 12.

[14] To sum up, what can be discerned from the plea – though not very elegantly expressed – is that it purports to bear emphasis on two issues: First, the defendant alleges that the agreement attached to the particulars of claim is unsigned and does not comply with the law; and second, it disputes being indebted to the plaintiff.

[15] The plaintiff's affidavit in support of the application for summary judgment gives a succinct and to the point response to these issues.

[16] Dealing with the issue of the unsigned agreement, the plaintiff's deponent states:

‘7.3. [T]he defendant, through its representative, Xolile Lunque, signed the agreement electronically on 19 September 2019 as can be seen from the face of the watermark appended to the face of the agreement...

7.4 Further thereto, and in terms of section 13(3)(a) and (b) of the Electronic Communications and Transactions Act [Act 25 of 2002], where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if a method is used to identify the person and to indicate the person's approval of the information communicated, and having regard to all relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

7.5. The aforementioned requirement was met by the placing of a watermark on each page of the agreement ...’

[17] Despite the brevity and simplicity of the plaintiff's response, which can be taken no higher, Mr Lunque, who deposes in answer for the defendant merely contends himself by averring:

‘Contents of these paragraphs are admitted and I still maintain that this agreement does not comply with law.’

[18] In its formulation, the manifest inconsistency and contradiction of the extract is self-evident, and does not raise a triable issue for adjudication.

[19] In addressing the defendant's avowed denial of its indebtedness, the plaintiff's case, once again is elucidated in the following terms:

- '8.2 At the time the summons under the aforementioned case number was issued on the 25th of January 2023, the defendant was in arrears in the amount of R79 245.00.
- 8.3 The defendant, subsequent to service of the summons, made payment to the plaintiff in the amount of R14,000 on the 11th of May 2023, as stated at paragraph 4 of its plea.
- 8.4 However, the defendant had previously undertaken to settle the contractual arrears by the end of April 2023, while still proceeding with monthly instalments as per the agreement. The defendant failed to adhere to his undertaking and at the end of April 2023 the amount owed by the defendant to the plaintiff was R67 250 22.
- 8.5 The defendant was again afforded another opportunity in which to settle the arrears owed to the plaintiff, and in this regard was granted until the close of business on the 29th of May 2023 by which to settle the contractual arrears. A copy of the correspondence from the plaintiff's attorneys of record confirming same is annexed...
- 8.6 The defendant again failed to adhere to the terms by settling the contractual arrears by the 29 May 2023 and accordingly the plaintiff was entitled to continue with the matter. A copy of the detailed customer statement is annexed hereto...'

[20] The gist of the plaintiff's case is that the defendant defaulted on his arrear payments. In argument I was referred to the customer statement which sets out the appropriation of payments. It is evident that the contractual arrears were not made good.

[21] Despite the version put up by the plaintiff in its affidavit aforementioned, the defendant made no attempt to engage with the averments made by the deponent nor with the annexures to which she makes reference.

[22] In the circumstances, the defendant's denial of its indebtedness does not raise a triable issue.

[23] The plea does not set up a *bona fide* defence good in law.

[24] In the event, the following order issues:

The plaintiff is granted summary judgment in accordance with prayers 1 and 2 of its Notice of Application for Summary Judgment filed on 7 July 2023.

M S RUGUNANAN

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: *S Sephton*, Instructed by Huxtable Attorneys, Makhanda.

For the Defendant: *T Qina*, T Qina and Sons Attorneys c/o Yokwana Attorneys, Makhanda.

Date heard: 1 August 2023

Date delivered: 24 October 2023