REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 5430/2019

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
06 JULY 2021 DJP SEMENYA M.V

DATE:

In the matter between:

STANDARD BANK OF SOUTH AFRICA **: APPLICANT/PLAINTIFF**

And

MATOME PATRICK PHEEHA **: RESPONDENT/DEFENDANT**

JUDGMENT

SEMENYA DJP:

[1] The applicant/plaintiff (the plaintiff) in this matter issued summons against the respondent/defendant (the defendant) in which the following relief was sought:

1. Confirmation of cancellation of the Agreement;

2. An order directing the Defendant to restore to the Plaintiff possession of the goods, being a **2018 NISSAN NP200 1.6 A/C P/U S/C, ENGINE NO: K7M[...] and CHASSIS NUMBER: AND[…]**

3. Retention of all monies paid to the Plaintiff by the defendant:

4. Leave is granted to the Plaintiff to apply for:

4.1 Damages, if any, in the amount to be calculated by subtracting the current market value of the goods (as well as a rebate on unearned finance charges from the balance outstanding if applicable);

4.2 Interest on the said damages at the rate of **13.160%** per annum from **5th June 2019**; and

4.3 Costs on an attorney client scale calculated on the Magistrate court tariff.

[2] The defendant has admitted that he has entered into a credit agreement with the plaintiff. He has however raised raised three special pleas and a counter-claim. In the first special plea the defendant pleads that the agreement is unlawful and therefore void as envisaged in section 89(5)(a) of the National Credit Act, 34 of 2005 (the Act). In the second special plea, the defendant pleads that this court should declare the entire credit has been recklessly granted within the meaning of section 81 of the Act. The third special plea is that the plaintiff failed to provide him with notice of his default before summons were issued as envisaged in section 129 of the Act. The defendant further raised defences in which he denies that the plaintiff was represented during the signing of the pre-agreement stage and that the lending was reckless.

[3] Subsequent to the delivery of a plea, the plaintiff invoked the provisions of Rule 32 by applying for summary judgment. The defendant filed affidavit resisting the application. This judgment therefore pertains to the application for summary judgment. The defendant places reliance on section 89 (5) (a) read with section 92(3) of the Act in support of his special plea of unlawfulness of the credit agreement. The defendant argues that the plaintiff caused him to sign the pre-agreement on the very same date as the date on which he approached that plaintiff for credit.

[4] Section 92(3) provides as follows:

> ***"Pre- agreement disclosure –***
>
> *(3) Subject only to subsection (4), sections 81 and 101 (1)(d)(ii), for a period of five business days after the date on which a quotation is presented in terms of subsection (2)(b) –*
>
> *(a) with regard to small agreement, the credit provider must, at the request of the consumer, enter into the contemplated credit agreement at or below the interest rate or credit cost quoted, subject only to sections 81 and 101 (1)(d)(ii);*
>
> *(b) with respect to an intermediate or large agreement, the credit provider must, at the request of the consumer, enter into the contemplated credit agreement at an interest rate or credit cost that –*
>
> *(i) is at or below the interest rate or credit cost quoted; or*
>
> *(ii) is higher than the interest rate or credit cost quoted by a margin no greater than the difference between the respective*

prevailing bank rates on the date of the quote, and the date the agreement is made."

[5] The defendant argued that the plaintiff, as the credit provider, caused him to sign the pre-agreement on the same date on which he applied for credit. The defendant argued that the plaintiff was required to wait for a period of five business days before he could cause him to sign the agreement. It is evident that the defendant's interpretation of section 92(3) is clearly wrong. Correctly interpreted, the period of five business days in the section refers to the period within which the consumer may demand that the credit agreement be entered into at the rate referred to in subsection (3) (b) (i) or (ii) above. There is therefore nothing unlawful in the agreement based on the defendant's contention. The first special plea is therefore without merit. The defendant's submission that this special plea raises triable issue is therefore rejected. In any event I fail to find the applicability of any of the provisions in section 89 of the Act to the facts of this case.

[6] The defendant contended that the whole agreement must be declared a reckless agreement as contemplated in section 81(2) of the Act. In support of this argument the defendant attached Annexure P-A to his plea and counter-claim. It is the defendant's argument that the plaintiff failed to comply with section 81(1) and (2) which provides as follows:

Prevention of reckless credit

81. (1) When applying for a credit agreement, and while that is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section.

(2) A credit provider must not enter into a credit agreement without first taking reasonable steps to assess-

" (a) the proposed consumer's-

(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) debt re-payment history as a consumer under credit agreements;

(iii) existing financial means, prospects and obligations; and

(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement."

[7] The defendant contends that the plaintiff conducted an affordability assessment on the **16 January 2018** which was 6 days after the agreement was entered into. It was contended that this contravenes the provisions of section 81(2) in that the section requires such assessment to be conducted prior to the agreement. The plaintiff sought to invoke the defence made available to the credit provider in section 81 (4) of the Act. In terms of this section, it is a complete defence to an allegation of reckless credit if the credit provider establishes that the consumer failed to fully and truthfully answer any request for information made by the credit provider as part of the assessment required by section 81.

[8] The defendant contended that the second special plea raises a triable defence. He argues that the plaintiff entered into a credit agreement with him without first

taking reasonable steps to assess his general understanding and of risks and costs of the proposed credit, and of his rights and obligations, in particular, without first obtaining his debt-repayment history under credit agreements. The plaintiff contends that Annexure P-A annexed to the defendant’s plea and counter-claim was intended to be credit assessment. The defendant on the other hand refers to the document as affordability test. My understanding of the special plea is that the credit assessment, if any, was not properly done according to the letter of the Act.

[9] The plaintiff argues that it is placing reliance on section 81(4) on the basis that the information provided by the respondent was incomplete. In other words, that the defendant failed to truthfully and fully the request that was made to the defendant in annexure “P-A”. That it is for this reason that it obtained consent from the defendant to approach third parties so as to enquire about his full obligations. According to the plaintiff, the defendant failed to truthfully and accurately provide the applicant with his financial position as at the date of the application for a loan. It is indeed so that Annexure “P-A” has a question that requires the consumer to state his other loans. It is evident- that the defendant omitted to furnish such information. The plaintiff stated that it established after a diligent process that the actual surplus of the defendant is less than the one he had furnished in Annexure “P-A” but that he nonetheless remained with sufficient surplus to allow for the granting of the requested loan. This allegation is not disputed.

[10] In **SA Taxi Securitisation v Mbatha 2011 (1) SA 310** it was held that if a consumer has a valid complaint that, but for the recklessness of the credit provider, the consumer would never have entered into the credit agreement, it might be reasonable to set aside the agreement. In this matter there is nowhere in the defendant’s plea or affidavit resisting summary judgment where it is stated that the

defendant would not have entered into the credit agreement had the plaintiff assessed his debt-repayment history. Put differently, it is not the defendant's case that, had the applicant done the debt-repayment history assessment, it would have realised that it is reckless to extend credit to the him but has proceeded to so irrespective. The defendant's submission that summary judgment should be refused in that the second special plea raises a triable issue is found to be without merit. There is no reason to set aside the credit agreement on account of reckless lending.

[11] In the third special plea, the defendant stated that there is no evidence to prove the plaintiff's compliance with section 129 of the Act. In support of this plea the defendant referred the court to Annexure "P-C" which is the post office Parcel Tracing Result document. The defendant contends that Annexure "P-C" clearly shows that he has never received the parcel. He argues the parcel was received by one Thabo Nkadimeng at Hatfield. It would appear that the defendant does not know the correct way of identifying parcels from the post office. The registered letter which is attached to the summons as Annexure "C", has a reference number **PE 895 941 003 ZA** on it. It shows that the parcel was for M Pheeha of 5[…] Olive Grove Village Thornhill Bendor, Polokwane. It is not disputed that the address is that of the defendant. The track and trace document that is relied upon by the plaintiff as proof that the section 129 letter was sent to the defendant is marked with a similar item number **PE 895 941 003 ZA**. The track and trace document shows that the letter was sent from Hatfield post office, hence the words "in transit and out of office" which are appearing on it. First notification of the letter to the addressee was sent from Bendor Park on the **15 July 2019**.

[12] Annexure "P-B" which the defendant is relying upon to prove that he has not received a section 129 notice is clearly unrelated to the matter before this court. The

item number on Annexure “P-B” is not the same as that in Annexure “C”. The track and trace is for a parcel that was sent to Thabo Nkadimeng. I am satisfied that there is compliance with section 129 of the Act in this case. The third special plea does not raise a bona fide defence.

[13] With regard to the defendant’s plea, I do not intend to repeat what I have already stated with regard to the allegations of reckless lending. The defendant admitted that he signed the agreement. He however denies that the plaintiff was represented during the pre-agreement procedures. The plaintiff argues that the defendant’s plea constitutes a bare denial of the allegations, which is not permitted. I further find that there is no factual basis for the defendant’s counter-claim on the basis that the special plea of reckless credit was found to be without merit.

[14] In resisting application for summary judgment the defendant is required to satisfy the court by an affidavit that he has a bona fide defence to the claim. In **South African Land Arrangement CC & Others v Nedbank Ltd (20063/2014) ZASCA 88 (29 May 2015)** it was stated that:

> *[13] The legal principles governing summary judgment proceedings are well-established. In* ***Maharaj v Barclays National Bank Ltd****, 3Corbett JA outlined the principles and what is required from a defendant in order to successfully oppose a claim for summary judgment 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 3* ***Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426 A-D.7*** *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 had "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. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence".

[15] The technical defences raised by the defendant are found to be *mala fide* and bad in law. There is no reason this court should refuse summary judgment as applied for by the plaintiff.

[16] In the result I make the following order:

1. Summary judgment is granted;

2. cancellation of the Agreement is confirmed;

3. The defendant is directed to restore to the plaintiff possession of the goods, being a 2018 NISSAN NP200 1.6 A/C P/U S/C; ENGINE NO: K7M[…], and CHASSIS NO: AND[…];

4. Retention of all monies paid to the plaintiff by the defendant;

5. The plaintiff is granted leave to apply for:

5.1 Damages, if any, in an amount to be calculated by subtracting the current market value of the goods (as well as rebate on unearned finance charges from the balance outstanding if applicable);

5.2 Interest on the said damages at the rate of **13.160%** per annum from the **5th June 2019** to date of payment;

6. The defendant is ordered to pay the taxed costs of the suit at magistrates' court tariff.

M V SEMENYA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA; LIMPOPO DIVISION

APPEARANCES

FOR THE APPLICANT	**: ADV. M NAUDE`**
INSTRUCTED BY	**: VEZI DE BEER INC.**
FOR THE RESPONDANTS	**: MR. M CHIDI**

INSTRUCTED BY : CHIDI ATTORNEYS

DATE OF HEARING : 15 JUNE 2021

DATE OF JUDGEMENT : 06 JULY 2021