IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 753/2014

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED t/a Applicant

STANDARD BANK VEHICLE & ASSET FINANCE

and

LEGOALE: PATIENCE OAGENG Respondent

(Id. 7[…])

HEARD ON: 15 MAY 2014

JUDGMENT BY: JAJI, AJ

DELIVERED ON: 5 JUNE 2014

INTRODUCTION

[1] The matter came before me as an application for summary judgment opposed by the respondent. The respondent raises issues of public policy militating against the application for summary judgment. She avers that when it fell into arrears, applicant did not act and thereby waivering its right to act. The respondent admits to be in arrears. She admits the date of the last instalment being March 2013. She however argued that she had tried to negotiate settlement with the applicant but to no avail. She was instead sent from pillar to post. She further claimed to have made

two payments of R10 000,00 each in March 2014. Therefore, she contended that the applicant could not act when respondent has tried to settle the arrears. It argued that the cancellation was not valid. It further raised from the bar that it did not receive the S129 notice as per the National Credit Act.

BACKGROUND

[2] The applicant (standard Bank) and the respondent (Patience Oageng Legoale) entered into an agreement regulated by the National Credit Act, 34 of 2005. The respondent purchased a motor vehicle for which she paid a deposit of R20 000,00 (twenty thousand) and the balance purchase price would be settled in 60 (sixty) instalments of R5 581,57 each per month, the last payment to be paid on the 1st of March 2013. Contract commenced on1 March 2008 (effective date).

[3] She chose an address as her *domicilium citandi et executandi* for purposes of all notices and correspondence sent by Standard Bank in relation to the instalment sale agreement.

[4] In breach of the agreement, the respondent failed to make regular payments of the instalments payable in terms of the agreement to the applicant. As a result of her failure she fell in arrears. On 17 December 2013, respondent was in arrears of R261 864,04 and on the said date the outstanding amount payable in terms of the agreement, amounted to R263 637,68. The agreement had already expired on 1 March 2013, which was the last payment date.

[5] A notice in terms of section 129 of the National Credit Act, 34 of 2005, dated 27 January 2014 was sent to the chosen address by registered mail to the respondent's chosen address. The said notice full tracking and tracing and parcel tracking results are all annexed in the papers as annexures "B1 – B3".

[6] The applicant as a result of the respondent's breach of the agreement cancelled the agreement. A letter of cancellation dated 14 February 2014 was sent to her per registered mail, annexed to the papers as annexure "C".

[7] A certificate of balance marked annexure "D" was also attached to the papers. The agreement stipulates that mere production of the certificate would be sufficient proof of any amount due.

[8] The agreement stipulated that default will *inter alia* occur if respondent fails to make payment in full or breaches any term of the agreement.

[9] In the event of default, the applicant may approach the court for an order to enforce the agreement.

[10] The applicant issued summons. The respondent entered appearance to defend. The applicant brought this application for summary judgment. Upon receipt of same, respondent filed a notice of

opposition of the application.

SUBMISSION IN COURT

[11] The applicant submitted that for the court to decide whether a *bona fide* defence has been displayed, it should be satisfied regarding

(a) whether the defendant has disclosed the nature and grounds of her defence;

(b) whether the facts so disclosed, the defendant appears to have as either the whole or part of the claim, a defence which is *bona fide* and good in law.

[12] The applicant argued that if allegations in respondent's affidavit, relative to the facts, are equivocal, incomplete or open to conjecture, then the requirements of High Court Rule 32 have not been met. The rule stipulates what the plaintiff's affidavit, in support of application for summary judgment, should entail.

[13] In the respondent's opposing affidavit:

(a) The applicant contends that the respondent admits that she bought the vehicle in terms of the agreement attached to the summons and that she fell in arrears:

(b) Does not disclose a *bona fide* defence as regards to the merits of the application;

(c) Alleges that she had paid an amount of R10 000,00 as an offer for the first three (3) months towards settlement. She claims this offer was unreasonably refused. She proceeded to pay in spite of the refusal to accept the offer by the applicant.

[14] The respondent admitted that she bought the vehicle in question. She fell in arrears. She took initiative when her finances improved in December 2013 to settle the obligation. She was sent from pillar to post.

She contended that she was surprised when she received summons, because she had initiated a process which was thwarted or frustrated by the applicant. She carried on paying as per her offer. She maintained that she has a *bona fide* defence to the main action.

[15] The respondent further contended that the applicant did not take action when respondent fell in arrears. It claimed that it had dealt with and disclosed the nature and grounds of defence.

[16] From the bar, the respondent's counsel raised the issue of non-receipt of S129 notice in terms of the National Credit Act. This is so in spite of the respondent not dealing with this in her

papers. The applicant has raised compliance with the S129 notice in the papers (see pages 21 – 24). The respondent has not responded in its opposition regarding this. I will deal with this at a later stage.

[17] The respondent further argued that public policy dictates that the application be dismissed in the circumstances. It argued that the applicant cannot be allowed to get judgment after the respondent has tried to negotiate settlement.

THE LAW

Credit Agreement (between applicant and respondent)

· It stipulates the notice address, which the respondent gave as 18 P[....], J[...] F[...] Street, P[...], Bloemfontein.

· Paragraph 16.4.1 deals with the manner of service of notices.

· Paragraph 18.9 deals with concessions which do no amount to waiver.

· Paragraph 18.6, 18.7 and 18.15 (deal with the English version signed by both applicant and respondent. It clearly state that the agreement constitutes the entire agreement. (The contention by the respondent that the proper interpretation of the word "deemed" in clause 16.4.1 means "or the absence of contrary" evidence is incorrect.)

RULE 32(3)(b)

Contents of the respondent's affidavit

[18] "….. that she has a *bona fide* defence to the action, such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon".

The respondent has not raised the nature and grounds of her defence on merits.

CASE LAW

Rule 32 – Contents of affidavit

[19] **Jacobsen van den Berg SA (Pty) Ltd v Tritton Yachting Supplies** 1974 (2) SA 584 (O) at p. 585.

The rule 32(3)(b) requires the opposing affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon, so that the court is satisfied that the defendant has a *bona fide* defence, not merely that he "appears" to have a *bona fide* defence. Every cause of action has a peculiar characteristic as to its background, time, value, make-up, knowledge, conduct and attitude of the parties and so forth and every defence thereto must have corresponding features of its own. The defendant failed to allege a proper defence in terms of Rule 32(3)(b). The court declined to exercise its discretion and granted summary judgment.

[20] **Tesven CC and Another v South African Bank of Athens** 2000 (1) SA 268 (SCA). Where defence based on facts (i.e. where defendant disputing facts alleged by plaintiff in summons or raising new facts in defence) the court is not to determine the balance of probabilities, the court will only determine

> (a) whether defendant fully disclosed nature and grounds of defence and material facts upon which founded; and
>
> (b) whether, on facts disclosed, defendant having *bona fide* defence good in law. The word "fully" requiring the defendant to disclose defence and material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether affidavit discloses *bona fide* defence.

[21] The court further held that if there was doubt as to whether the plaintiff's claim might be unanswerable, the court will exercise its discretion in favour of the defendant. In the case at hand there is no doubt that the plaintiff's claim is unanswerable. The respondent concedes that she was in arrears of the contract as alleged by the applicant. In my view therefore, the respondent has no defence. Her financial difficulties constituted no defence. Its opposing affidavit fell short of what is required by Rule 32(3) to enable the court to assess the defendant's *bona fides*.

[22] In **Muller and Others v Botswana Development Corporation Ltd** 2003 (1) SA 651 (SCA) it was held in a summary judgment application, that the issue was not whether the defence to be raised was likely to succeed or fail, but merely whether it was *bona fide*. As such the opposing affidavit had to disclose fully the nature and grounds of defence and the material facts relied upon therefor (Rule 32(3)(b)). It was held that the appellants on facts failed to set up a *bona fide* defence to the respondent's claim so as to avoid summary judgment.

[23] *In casu* the respondent simply avers that the applicant did not act immediately when the respondent started to be in default. She claimed that she had raised some amounts when her financial

situation changed in March 2014 long after the applicant cancelled the credit agreement in February 2014.

[24] She strangely averred that the applicant cannot cancel when the respondent was trying to negotiate settlement. It claims that this was against public policy.

[25] When asked by the court whether public policy takes precedence over the terms of contract, the respondent's attorney answered in the affirmative despite terms of the contract clearly pointing to the contrary.

[26] **Arend and Another v Astra Furnishers (Pty) Ltd** 1974 (1) SA 298 (C) at p. 304. Courts retain discretion to refuse summary judgment even if requirements of the rule are not met. Only when there is no reasonable doubt about the plaintiff's claim that the application should be acceded to. In this case, I do not have any doubt whatsoever as regards the strength of the applicant's case.

[27] In the case at hand, there is no doubt about the applicant's application. The respondent in effect admitted that she was in breach of the terms of the contract. The amount in arrears is substantial. She has made no acceptable offer to the applicant. All these justify the granting of the relief sought.

[28] The question remains, should the applicant elects to cancel as it is entitled to do as a result of admitted breach, can a respondent unilaterally insists to revive the contract by paying amounts to the applicant's account. If the agreement avails the applicant to cancel as a result of breach of whatever type as stipulated in the agreement, the respondent cannot refuse a proper and lawful cancellation.

[29] The contract or credit agreement spells clearly that no concession must be taken as waiver of applicant's rights.

[30] **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) at 426. If the defence is based on facts, 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 either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these, the court must refuse summary judgment.

[31] In the case at hand, the court cannot be satisfied that there was any semblance of defence disclosed, whether *bona fide* or otherwise. Defendant's affidavit does not show that there is reasonable possibility that the purported defence may succeed on trial.

[32] **Nedperm Bank Ltd v Verbri Projects CC** 1993 (3) SA 214 (W) at 224. The court's discretion to refuse summary judgment should be exercised only where there is some factual basis or some belief set out in the affidavit resisting summary judgment which enables the court to say that there is a reasonable possibility of a defence emerging at trial.

In the circumstances, as a whole, I am persuaded that the respondent has failed to show a *bona fide* defence to the applicant's claim. There was no substance in the respondent's contention that the applicant's failure to take immediate legal steps against her amounted to waiver of the applicant's right in terms of the contract. Moreover, the respondent failed to make out a case that public policy considerations dictated that the applicant be denied the relief of a summary judgment. Consequently, I have come to the conclusion that this is a proper case where an application for summary judgment should succeed.

[33] Accordingly, I make the following order:

1. The applicant's application for summary judgment is granted.
2. The respondent is ordered to pay the costs of the application.

N.P. JAJI, AJ

On behalf of applicant: Adv D. de Kock

Instructed by:

McIntyre & Van der Post

Bloemfontein

On behalf of respondent: Mr M. Khang

Instructed by:

Mphafi Khang Inc.

Bloemfontein