<u>**FREE STATE HIGH COURT, BLOEMFONTEIN**</u>
<u>**REPUBLIC OF SOUTH AFRICA**</u>

CASE NO. 3813/2011

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **PLAINTIFF**

And

NTAU LUCAS MOKOENA **DEFENDANT**

CORAM: NAIDOO, AJ

HEARD ON: 2 FEBRUARY 2012

DELIVERED ON: 9 FEBRUARY 2012

NAIDOO AJ

[1] This is an application for Summary Judgment. The plaintiff issued summons against the defendants for payment of the sum of R571 590.27, together with interest thereon and costs. The said amount is allegedly due to the plaintiff as a result of the defendant's current account being overdrawn. The defendant also applies for condonation for the late filing of his opposing

affidavit. The plaintiff was represented by Mr WJ Groenewald and the defendant was represented by Mr DZ Kela.

[2] The defendant held two accounts with the plaintiff at its Brandwag branch in Bloemfontein, the first being an Achiever Plus Current Account (the current account), bearing account number 240303867 and the second being an Electronic 32 Day Notice Deposit Account (the 32 day account), bearing account number 248472496. It is not in dispute that on 1 March 2011 and at the plaintiff's Loch Logan branch in Bloemfontein, an amount of R690 000.00 was transferred from the defendant's 32 day account into his current account. It is also not in dispute that on the same day and at the plaintiff's Preller Square Service Centre branch in Bloemfontein, the defendant requested payment of the monies in his 32 day account, without giving the requisite 32 day notice. As a result of this request, an amount of R693 526. 93 was transferred from the 32 day account into his current account on that day.

[3] On 1 March 2011, an amount of R600 00.00 was

transferred to Liberty Life for the purchase of an investment policy by the defendant, and the amount of R693 526.93 was transferred into another account which he held at Absa Bank. While no indication has been given of what capital amount was held in the 32 day notice account and it has not been specifically pleaded that there were insufficient funds in that account to sustain both transactions, it would appear that this is in fact the case. When the plaintiff discovered that the defendant's current account was credited twice, it reversed the second amount of R693 526. 93. This effectively caused the current account to become overdrawn in the amount of R571 590.27. It is on this basis that the plaintiff claims that the defendant is indebted to it in that amount.

[4] The defendant does not dispute that the two amounts I have mentioned were credited to his current account, or that the amounts referred to in paragraph 3 were transferred out of the current account. The defendant alleges that on 15 February 2011, he handed an amount of R600 00.00 in cash to an employee of the plaintiff at

its Loch Logan branch, for the purpose of purchasing an investment policy from Liberty Life. She required him to sign numerous documents, which he did. Thereafter he received a number of calls and messages from this employee for him to call at the plaintiff's Loch Logan branch which he did on 28 February 2011. This same employee presented more documentation for him to sign, which he once more signed.

[5] On 2 March 2011, he discovered that his bank balance was unusually large and went into a branch of the plaintiff to enquire about this, but received no satisfactory explanation. He also noticed that an amount of R600 000.00 was transferred to Liberty Life, which caused him concern as he was under the impression that the amount was paid in cash on 15 February 2011. He returned to the bank (presumably a branch of the plaintiff) but was told to speak to the manager on another day and again left the bank without a satisfactory explanation. He noticed shortly thereafter that the amount of R693 526.93 was debited to his current account as the previous deposit of that amount

was reversed.

[6] The defendant contends that he did not authorise the deposit of R690 000.00 into his current account at the plaintiff's Loch Logan branch nor the payment by the plaintiff of the amount of R600 00.00 to Liberty Life from his current account. He contends that the plaintiff granted him an overdraft facility without a proper agreement between them and without his consent for the plaintiff to do so. As such, the provisions of the National Credit Act 34 of 2005 are applicable, and that the conduct of the plaintiff, in essence, amounts to the reckless grant of credit.

In addition, he was advised that his policy with Liberty Life was cancelled, and he was requested to give directions regarding the refund of his money. He denied cancelling the policy and arranged for the reinstatement of the policy.

[7] Rule 32 (3) of the Uniform Rules of Court requires the defendant to have a defence that is bona fide and good in law. In the matter of **Breitenbach v Fiat SA (Edms) Bpk 1976(2) SA 226 (TPD), Colman J stated at p227 G**

"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".

In order for the court to assess whether the defence raised by a defendant is bona fide he/she must provide adequate information about such defence, which amounts to a full disclosure of his/her defence. While the sub-rule requires the defendant to *"disclose fully the nature and grounds of the defence and material facts relied upon",* it does not, however, demand the impossible and it will suffice ***" if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing". (See Breitenbach above)***

[6] As I have indicated, the defendant does not deny that the various transactions were processed on his account. He alleges that he did not authorise the transfer of the amount of R690 000.00 to his current account nor the payment of R600 00.00 from his current account to Liberty Life. He appears to suggest in his opposing affidavit that there may well be fraud on the part of the plaintiff's employee which resulted in its

loss.

[7] The next issue to consider is whether the plaintiff is entitled to summary judgment. It is well settled in our law that summary judgment should only be granted where the plaintiff has established his claim clearly and the defendant has failed to establish a bona fide defence. This means that the plaintiff must show not only that it has a claim which falls within the ambit of Rule 32 of the Uniform Rules but that it has taken all steps to perfect its claim and make it unanswerable. Mr Groenewald conceded that the plaintiff's operating systems are electronic and that in the ordinary course of business, the system would not allow the withdrawal or transfer of funds that are not physically available in an account. However, no explanation was forthcoming as to how the plaintiff's Preller Square branch authorised the transfer of such a large amount of money when funds were clearly not available in the 32 day account by the time the defendant requested payment as he did. No documentation or other evidence has been placed before this court to indicate who applied for and

authorised the transfer of R690 000, from the defendant's 32 day account into his current account, or who authorised the payment of R600 000.00 to Liberty Life on 1 March 2011. In view of the defendant's denial that he authorised these transactions, it may well be established that he did not indeed authorise these transactions, and consequently that he does not owe the plaintiff the amount that it claims.

[8]. On the evidence before me, it seems to me that the plaintiff's claim is not clearly established.

Section 32(5) gives the court a discretion to grant or refuse summary judgment. In this matter it is reasonably possible that the defendant has a good defence in that he will be able to establish that he does not owe the plaintiff the amount that it claims. (**Mowshenson & Mowshenson v Mercantile Corporation of SA Ltd 1959 (3) SA 362 (W) at 366F-G).** The granting of summary judgment is based upon the supposition that the plaintiff's claim is unimpeachable and also that the defendant's defence is bogus or bad in law – per **Corbett JA in Maharaj v Barclays National Bank Ltd**

1976(1) SA 418 (A) at 423G-H.

[9] The defendant also contended that the National Credit Act applies in this matter, and that the plaintiff's non compliance with the provisions thereof militates against the granting of summary judgment. In view of what I have outlined above, this, if proved at the trial, may well amount to a good defence. I do not, however, deem it necessary for this court to analyse or consider this aspect in greater detail. As regards the defendant's application for condonation for the late filing of his opposing affidavit, no opposition was offered by the plaintiff and, in my view, the plaintiff suffered no prejudice thereby. The application for condonation, therefore, is granted.

[10] In this case, I am unable to hold that the defences put forward by the defendant are bogus or bad in law, and I am, consequently, of the view that granting summary judgment at this point would amount to closing the doors to the defendant and would be unduly prejudicial to him. In my view, therefore, summary judgment ought not to

be granted.

[10] I, accordingly, make the following order:

a) The application for Summary Judgement is dismissed;

b) The defendant is given leave to defend the action;

c) The costs are to be costs in the cause.

NAIDOO, AJ

Counsel for Plaintiff:	Adv WJ Groenewald
Instructed by	Liezel David Attorneys
	13 Wolfgang Avenue
	Johannesburg
	C/O Goodrick & Franklin
	95A Aliwal Street
	Arboretum
	Bloemfontein

Counsel for the Defendant:	Adv DZ Kela
Instructed by:	T Hadebe Attorneys
	2nd Elizabeth Street
	NBS Building
	1st Floor Room 101
	Bloemfontein