
FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. 3878/2011

In the matter between:

S A TAXI SECURITISATION (PTY) LTD

Plaintiff

and

MASILONYANE JONAS MOKOENA

Defendant

JUDGMENT:

PHALATSI, AJ

HEARD ON:

1 MARCH 2012

DELIVERED ON:

8 MARCH 2012

[1] This is an application for summary judgment. The plaintiff sued the defendant in terms of a lease agreement entered into by the parties on the 23rd of February 2010, read with an addendum to the said agreement dated 8th March 2010.

[2] In terms of the agreement, the plaintiff leased a vehicle, namely, a 2010 CMC AMANDLA, to the defendant.

[3] The plaintiff avers in its particulars of claim that the defendant has breached the agreement in that he has failed to pay the instalments in terms of the agreement and the addendum, and on 18 July 2011, he was in arrears with his payments in the sum of R13 672.49. A section 129 notice was sent to defendant, but he did not respond thereto.

[4] As a result of the breach, the plaintiff cancelled the agreement, as it is entitled to do in terms of the agreement, and claimed the following relief:

- 4.1 confirmation of termination of the agreement;
- 4.2 return of the vehicle;
- 4.3 forfeiture of all amounts paid by the defendant in terms of the agreement;
- 4.4 expenses incurred for removal, valuation, storage and sale of the vehicle;
- 4.5 leave to apply for damages and interest at the rate of

30.40% per annum, from date of demand, to date of payment; and

4.6 attorney and client costs.

- [5] These prayers are all catered for in the agreement.
- [6] In order to resist the granting of summary judgment, the defendant must show that he has a *bona fide* defence, and to that he must set out the nature and grounds of his defence fully. (See **MAHARAJ v BARCLAYS NATIONAL BANK LTD** 1976 (1) SA 418 (A) and **JOOB JOOB INVESTMENTS (PTA) LTD v STOCKS MAVUNDLA ZEK JOINT VENTURE** 2009 (5) SA 1 (SCA).) In this case, the defendant has raised four defences, with which I deal below.
- [7] The defendant disputes that he is in arrears, for reasons that I will deal with later. In his opposing affidavit resisting summary judgment, the defendant raised the following defences. The

first is that the plaintiff has not complied with the requirements of Rule 32(2), in that the deponent to the affidavit in support of an application for summary judgment is described as Legal Manager of the plaintiff, which entitled her to have possession and control of the files and records of the plaintiff relating to this matter. This does not mean, so the argument goes, that the deponent has personal knowledge of the facts that could enable her to swear positively to the facts. . This argument is difficult to comprehend as, the deponent to plaintiff's affidavit says that the respondent's file is under her control and she has personal knowledge thereof and counsel for the defendant, correctly, in my view, abandoned it during the hearing.

- [8] The second defence raised by the defendant was that this court does not have jurisdiction to hear this matter, in that the total amount repayable in terms of the agreement is R297 689.92, which amount falls within the jurisdiction of the Regional civil courts. Clause 9.1 of the agreement provides, *inter alia*, as follows, "The Lessor shall be entitled to institute

all or any proceedings against the Lessee in connection with this agreement in the High Court and any costs awarded against the Lessee shall be awarded and paid in accordance with the terms of this agreement on the High Court scale". In the light of this clause, Counsel for the defendant again wisely abandoned this argument. The high court has not been deprived of its jurisdiction.

- [9] The next basis of the defendant's defence was that of misrepresentation, in that the defendant was under the impression that he was entering into an instalment sale agreement, which would entitle him to become the owner upon paying all his instalments in full, and not a lease agreement, where he would never become the owner. It would seem that the submission was that in terms of the present agreement, the defendant would under no circumstances become the owner of the vehicle. This defence cannot, in the light of the fact that the written document contains all the terms of the agreement, be raised. Apart from that, contrary to the said submission, the agreement stipulates

that upon payment of all amounts due to the plaintiff in terms of the agreement, the purchaser would be entitled to purchase the vehicle from the Lessor for a purchase price of R100-00. The effect hereof was that, regardless of the nature of the agreement, the defendant would ultimately become the owner of the vehicle, upon discharge of all his obligations in terms of the agreement. This argument is therefore devoid of any merit and I reject it. In any event, counsel for the defendant did not pursue this argument during the hearing.

[10] The defendant later filed a supplementary affidavit, to which the plaintiff did not object, raising a further defence that the agreement, inclusive of the addendum, is null and void, in that it was concluded at a fixed interest rate of 30.40% per annum, in contravention of the National Credit Act 34 of 2005, ("the Act"). The defendant avers that he is therefore not in arrears because the plaintiff charged excessive interest.

[11] The maximum interest rate that a credit provider may charge a

consumer for a credit agreement must not exceed the applicable maximum prescribed rate determined in terms of Section 105 of the Act. The formula is as provided for in Regulation 42, as set out in Government Gazette No. 28864 dated 31 May 2006. The said maximum interest rate is calculated according to a formula where the reference rate is the ruling Reserve Bank repurchase rate (commonly called the repo rate) as at the time that the credit agreement is entered into.

- [12] Different maximum rates apply to different credit agreements. The plaintiff attached a certificate to its particulars of claim, certifying that it is registered with the National Credit Regulator as both a credit provider and also registered to provide development credit. The repo rate as at 23 February 2010 was 7% per annum. The maximum interest rate that a credit provider may charge if it is a development credit agreement is, according to the formula “Repo rate x 2.2 + 20%”; accordingly the maximum interest rate was $7\% \times 2.2 + 20\% = 35.40\%$. In terms of Section 10 of the Act, a credit

agreement, irrespective of its form, type or category, is a developmental credit agreement if, at the time the agreement is entered into, the credit provider holds a supplementary certificate certifying that it is registered to provide development credit AND that the credit agreement is entered into for the purpose of development of a small business.

- [13] The defendant argued that the agreement *in casu*, is not a developmental credit agreement as it is not so alleged in the particulars of claim and further that the agreement itself is not labelled as such. It is, however, common cause that the plaintiff leased a vehicle to the defendant for the purpose of running a taxi business (which is a small business) and that the plaintiff is registered to provide developmental credit, in compliance with Section 10 of the Act. I therefore find that the said credit agreement is nothing else than a developmental credit agreement. The plaintiff did, therefore, not contravene Section 105 of the Act, as the interest rate of 30.40% is less than the maximum permissible interest rate, which is 35.40%.

[14] In the premises, I am satisfied that the defendant has failed to demonstrate a *bona fide* defence to the plaintiff's claim and that the plaintiff is entitled to be granted summary judgment in its favour. Counsel for the plaintiff only moved for prayers 1, 2, 4 and 6 of the notice of motion.

[15] I therefore make the following order:

Summary judgment is granted in favour of the plaintiff, against the defendant for:

1. Confirmation of the cancellation of the agreement and addendum, between the plaintiff and the defendant;
2. Return of the **2010 CMC AMANDDLA** vehicle with engine number **E26413** and chassis number **LA61BAS329B503855** to the Plaintiff, forthwith;
3. Expenses incurred for the removal, valuation, storage and sale of the vehicle;
4. Attorney and client costs to be taxed.

N. W. PHALATSI, AJ

On behalf of the applicant:

Adv J H Mollentze
Instructed by:
Bezuidenhouts Inc
BLOEMFONTEIN

On behalf of the respondent:

Mr M C Mokulubete
Instructed by:
Mabalane Seobe Inc.
BLOEMFONTEIN

/eb