FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 43/2012

In the matter between:-

FIRSTRAND BANK LIMITED t/a WESBANK	Plaintiff
and	
STEYL GAME CC	1st Defendant
M P STEYL	2nd Defendant
E STEYL	3rd Defendant
M P STEYN N.O.	4th Defendant
C P STEYL N.O.	5th Defendant
M M THOMPSON N.O.	6th Defendant

HEARD ON: 8 MARCH 2012

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 22 MARCH 2012

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[1] This is an application for summary judgment. The plaintiff sued the defendant in terms of the so-called Master Instalment Sale Agreement entered into by the parties on 29 March 2008, as well as Schedule-Instalment Sale Agreement, incorporating the terms and conditions of the Master Instalment Sale Agreement, also dated 29 March

2008.

[2] In terms of the said Schedule-Instalment Sale Agreement, the plaintiff sold and delivered to the first defendant a 2003 Robinson R22 Beta 11 Helicopter.

[3] The plaintiff made the following allegations in its particulars of claim in support of the fact that the defendant breached the agreement;

3.1 That the defendant failed to insure the helicopter, as it was obliged to do in terms of the agreement. The plaintiff then insured the helicopter on behalf of the first defendant and it added the premiums to the principal debt, as it was entitled to do, in terms of the agreement. The payment of the insurance premiums had an effect of increasing the principal debt, and consequently, the monthly instalments also increased.

3.2 That the defendant failed to pay any amounts in terms of the agreements as from 29 August 2011.

3.3 As at 2 December 2011, the defendant was in arrears in the amount of R286 539-29. Of this amount, R81 148-00 represented the shortfall on the instalments caused by the increase brought about by the insurance premiums and R205 391-29 represented the arrear instalments.

[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, among others, return of the helicopter forthwith and costs. I do not mention the other prayers because Mr Becker, on behalf of the plaintiff, said those are the only orders that he will move for, and that is only in respect of the first defendant.

[5] 5.1 In the affidavit resisting summary judgment, the second defendant states that he is duly authorised to make the affidavit on behalf of the second to fifth defendants. This meant that no affidavit was filed on behalf of the first defendant. Mr. Van Rhyn stated that he appeared on behalf of the first defendant and confirmed that what is stated in the affidavit is a true reflection of the first defendant's case.

5.2 In addition to the said point, the parties had taken a number of technical objections against each other. I adjourned the proceedings for the parties to discuss and agree on how the matter should be dealt with further, as I was of the view that the matter could not be argued on the merits, before preliminary points are dealt with.

5.3 When the case resumed, I was informed that all technical objections and preliminary points were withdrawn by the parties and the matter could be proceeded with on the merits.

5.4 The plaintiff had also prayed for recertification of the credit amount as Value Added Tax was erroneously added to the cash price, whereas the cash price of R1 400 000-00 already included Value Added Tax. I am not going to deal with this issue, in the light of what I said earlier, that the only prayers being moved for are delivery of the helicopter and costs. I, however, specifically mention this point, as it also has a bearing on the merits, as I will show later.

[6] It was contended on behalf of the defendant that the deponent to the affidavit in support of an application for summary judgment, Margaret Klee, cannot be said to have personal knowledge of the facts, as she was not personally involved during the negotiations that led to the conclusion of the contract. This argument was raised in respect of the prayer for rectification of the contract and since this is no more in issue, I do not find it necessary to deal therewith.

[7] It is now trite that the defendant who wishes to resist an application for summary judgment, must show that he has a *bona fide* defence and he must fully set out the nature and grounds of such defence. In **MAHARAJ v BARCLAYS NATIONAL BANK LTD** 1976 (1) SA 418 (A) at 426 C the court, per Corbett JA, said the following in respect of this requirement:

> "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."

In **BREITENBACH v FIAT SA (EDMS) BPK** 1976 (2) SA 226 (T) **t**he court held that the bald statement by the defendant that he or she has paid, is not enough to resist an application for summary judgment.

[8] The first defendant denies that it is in arrears and to this end, it has raised three defences.

8.1 The first defence is that the first defendant is not obliged to pay for the insurance premiums, as the insurance policy is useless to the second defendant, as it does not insure him as the pilot of the helicopter. Although this defence was argued at length during the hearing, it has no bearing on whether the first defendant is in arrears or not. Even if it can be accepted that the first defendant is not obliged to pay the insurance premiums, it is clear that the fist defendant would still be in arrears, as is apparent from paragraph 3.3 above. I therefore find it not necessary to deal with this defence, as it has no bearing on the outcome of the case.

8.2 The second defence is that since the plaintiff admits that the first defendant had been paying instalments in higher amount that it was obliged to, it (first defendant) cannot be said to be in arrears. In terms of the credit agreement, the first defendant was paying monthly instalments of R32 694.21 from 1 May 2008, and in the particulars of claim, the plaintiff concedes that the correct amount should have been R27 970-59 from 1 May 2008. No calculations have been made by the first defendant to show that the amount by which it had been overcharged covered the amount of the arrears. It is, however, clear that even if the first defendant is credited with the difference of the two amounts for 40 Months, being form 1 May 2008 to 29 August 2011, the total amount thereof is still less that the amount of arrears as at 2 December 20011, as pleaded by the plaintiff. I therefore find that this defence does not show that the first defendant was not in arrears, and consequently not in breach of the contract, entitling the plaintiff to cancel same.

8.3 In response to the averment by the plantiff that first defendant failed to pay any amounts in terms of the credit agreement as from 29 August 2011, the first defendant says the following in the affidavit resisting summary judgment:

"Eeste Verweerder het nooit versuim om 'n paaiement te betaal nie".

No attempt is made by the first defendant to attach any documents in support of this argument, which is a classical example of a bare denial. I therefore find that this "defence" falls short of a defendant's duty in an affidavit resisting summary judgment, as set out in the **BREITENBACH** and **MAHARAJ**-cases, quoted above, and it stands to be rejected.

8.4 It was further argued on behalf of the first defendant that summary judgment is a drastic procedure, which shuts the door for the defendant and which should therefore not be easily granted. Perhaps this is an opportune moment in this regard, to quote the following to passages by Navsa JA, in the matter of **JOOB JOOB INVESTMENTS (PTY) LTD v STOCKS MAVUNDLA ZEK JOINT VENTURE** 2009 (5) SA 1 (SCA) at 11 and 12 par. [32] and [33], with which I concur.

"[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a

> defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out."
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> "[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G - 426E."

Indeed, the first defendant's affidavit resisting summary judgment is fraught with bald statements that lack in both detail and particularity, in a futile attempt to create triable issues.

[9] In the light of these findings, I am satisfied that the first defendant has not succeeded in showing that it is not in arrears, nor that it has a *bona fide* defence to the plaintiff's claim and the plaintiff is consequently entitled to be granted

summary judgment in its favour.

[10] I therefore make the following order:

10.1 The first defendant is directed to forthwith return to the plaintiff 1 x 2003 Robinson R22 Beta 11 Helicopter with serial number 3518, engine number L-39345-36A and registration number ZS-PZJ, failing which, the sheriff is authorised to attach the helicopter wherever he may find same and to hand the said helicopter to the plaintiff;

10.2 The fist defendant to pay the plaintiff's costs on attorney and client scale.

N.W. PHALATSI, AJ

On behalf of plaintiff: Adv. F.J. Becker
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of defendants: Adv. A.J.R. van Rhyn SC
Instructed by:
Webbers
BLOEMFONTEIN

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