IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION: MTHATHA)

CASE NO: 1623/11

In the matter between:

SA TAXI SECURITISATION (PTY) LTD	**PLAINTIFF**
And	
WILI XOLILE	**DEFENDANT**

JUDGMENT

PAKADE ADJP.:

[1] This is an application for summary judgment in terms whereof the plaintiff seeks relief provided for by Rule 32 of the Uniform Rules of the High Court.

[2] In terms of rule 32 (1), a plaintiff may apply for summary judgment where the defendant has delivered a notice of intention to defend on a claim based on a liquid document, for a liquidated amount in money, for delivery of movable property or for ejectment together with interest and costs.

[3] Rule 32(2) provides that in a summary judgment application there must be a notice of application filed together with an affidavit deposed to by a person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no *bona fide* defence to the action and that the notice of intention to defend has been delivered for the purpose of delay.

[4] In terms of rule 32(3), a defendant may either furnish security for any judgment that may be given or satisfy the court by affidavit or with the leave of the court, by oral evidence given by himself or by any other person who can swear positively to the facts that he has a *bona fide* defence to the action. The affidavit or oral evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon by him.

[5] The drastic procedure of summary judgment provides the plaintiff with a quick remedy against the defendant who has entered notice of intention to defend when he has no *bona fide* defence but having entered notice of intention to defend for the purposes of delay. The approach of the court in deciding an opposition to a summary judgment application is set out by **Corbett JA** in Maharaj vs Barclays National Bank[1]:

> "*Accordingly, 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 defence to that 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*

1 1976(1) SA 418 (A) at 426 A-D;

new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether of 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 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 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."

[6] The relief sought by the plaintiff is for an order:

(a) Confirming the termination of the agreement;

(b) Return of the motor vehicle, a 2008 model VW Crafter 50 80KW, 23 seater with engine number BJK026362 and chassis number WVZZZ2EZ86016676;

(c) Forfeiture by the defendant of all the amounts paid to date in terms of the agreement and;

(d) Costs.

[7] The relief sought is supported by an affidavit deposed by a certain Phyllis Lombard, a manager of the Legal Section of the plaintiff, who was duly authorized to depose to this affidavit on behalf of the plaintiff. Phyllis Lombard's affidavit is to the effect that his position as a legal manager gives him possession and control of all the files and records of the plaintiff concerning the agreement between the plaintiff and the defendant as well as the plaintiff's dealings with the defendant in this matter. He states that by virtue of having familiarized himself with the contents of these records and files, he has personal knowledge of the facts he has deposed to in his affidavit in this matter.

[8] His states that he has read the summons, particulars of claim and summary judgment application issued by the plaintiff. He says that he can and do swear positively to the claim set out in the summons and verify the cause of action. He verily believes that the defendant has no *bona fide* defence and has entered an appearance to defend solely for the purpose of delay.

[9] I am satisfied that the affidavit of Phyllis Lombard sets out the essential elements of rule 32 (2).

[10] The particulars of claim in the summons contains allegations to which the defendant did not plead. The plaintiff is the credit provider duly registered and as defined in the National Credit Act, 34 of 2005. During February 2008 the plaintiff entered into a written lease agreement with the defendant in terms whereof the plaintiff leased to the defendant a motor vehicle referred to in paragraph [6] above on a monthly rental of R10 887.55

payable on 7 April 2008 as a first installment and monthly thereafter. The agreement further stipulated that should the defendant fail to pay the rental on due date or fail to satisfy any of his other obligations in terms of the agreement , the plaintiff shall, without prejudicing any of its other rights in law, be justified in:

1. Cancelling the agreement and claim return and possession of the vehicle;
2. Be entitled to retain all payments already made by the defendant;
3. Claim interest on the outstanding amount;
4. Costs on attorney and client scale.

[11] The defendant has breached the agreement in that he has failed to pay the rental and as at the 3rd January 2011 he was in arrears with his payment in the sum of R25 971. 85.

[12] The plaintiff further avers that in compliance with the provisions of section 129 read with section 130 of the National Credit Act, a letter was sent by the plaintiff to the defendant by registered post but the defendant failed to pay the arrears within twenty business days; failed , within the period prescribed by the Act, to refer the agreement to a Debt Counselor, Alternative Dispute Resolution Agent, Consumer Court or Ombud with jurisdiction to resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.

[13] On 15 June 2011 the debt counselor delivered to the plaintiff the notice contemplated in section 86(4)(b)(i) of the Act (Form 17.1) which notice was declined by the plaintiff on 29 June 2011.

[14] Notwithstanding all this, the defendant has not returned the vehicle to the plaintiff. The plaintiff further makes the point that it has terminated the agreement because of its breach by the defendant.

[15] The defendant has raised some defences in terms of the National Credit Act. He contends that in terms of those defences he has a bona fide defence to the action. He states that he applied for debt review on 13 June 2011. Thereafter his Debt Counselor made a determination that he was over indebted and that therefore his financial obligations should be re-arranged by extending the period of the credit agreement and by reducing the amount of each payment due. A form 17.2 with a payment proposal was sent to all the affected credit providers. He states that the applicant had, upon receipt of form 17.1, refused to negotiate with his Debt Counselor and sent a letter declining his debt review application. Further the applicant unequivocally declined his Debt Counselor's request for a certificate of balance thus placing him in a predicament of not being in a position to properly conduct a restructure to the credit agreement. Upon assessing his over indebteness, his Debt Counselor determined that his monthly debt repayment exceeded the balance derived at by deducting his minimum living expense from the nett income.

[16] The Debt Counselor further made an assessment of the credit agreement and came to the conclusion that it was a reckless credit. The grounds for such a finding are:

1. The applicant failed to conduct a proper assessment as required by section 81(2) in that the defendant did not understand and appreciate

the risks and costs of the acquired credit and of the rights and obligations of the consumer under the credit agreement,

2. There was a lack of demonstration by the consumer of an understanding of what his taxi income would be in relation to the operational costs of running the business and the costs of his living expenses.

3. He was not aware that there would be no ownership of the vehicle he had purchased. His intention was to enter into a purchase and sale agreement and not a lease.

4. His debt repayment history on other credit agreements was not available or did not warrant the credit granted to him at the time.

5. The defendant was unemployed at the time and had no sufficient income to timeously satisfy the debt obligations under the agreement.

The defendant further avers that the plaintiff's assessment was not fair and objective in that it did not take into account the following:

1. Verification of the information he supplied to them and/or verification of their own experience and projections against the actual income earned for the particular taxi route.
2. A business plan.
3. Costs of wear and tear, for example tyres.
4. Variation in-service based on kilometers travelled.
5. Unexpected mechanical breakdown.
6. Contingency plan for installments in the case of an accident.
7. Number of taxis for the route finance he sought visa vi the position in the area and the segments of the mode of transport used.
8. The number of trips the taxi will complete per day.

9. Realistic fuel consumption on the number of trips per route.

[17] The defendant also complains that the agreement contains unlawful provisions such as insurance and tracker.

[18] In a nutshell the defendant's defence to the summary judgment application is that he had applied for a debt review which was unfairly declined by the plaintiff. The second defence is that of over indebtedness, and the third defence is that of reckless credit.

[19] I will consider, herein below each of the defences raised by the defendant under the National Credit Act.

Debt review unfairly declined

[20] Section 86 provides a mechanism for a debt review. It provides:

> "(1). A consumer may apply to a Debt Counselor in the prescribed manner and form to have the consumer declared over-indebted.
>
> (2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement, if , at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement."

[21] The respondent applied for debt review on 13 June 2011 which was declined by the applicant on 29 June 2011. After the section 29 notice had been issued and served on the defendant, it was not possible for the defendant to invoke the section 86 remedy for a debt review because the

applicant had already taken steps to enforce the agreement. Section 129 provides:

> "(1) if the consumer is in default under a credit agreement, the credit provider-
>
> a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the debt to a Debt Counselor, Alternative Dispute Resolution Agent, Consumer Court, or Ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> b) Subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-
>
>   (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
>
>   (ii) meeting any further requirements set out in section 130."

[23] On 08 July 2011 the applicant approached the Court for an order to enforce the credit agreement as the defendant was still in default and has been in default for at least 20 days of business and 10 days have elapsed since the plaintiff had delivered notice to him on the 04 January 2011. So, by the time the defendant applied for debt review, the plaintiff had already taken steps to enforce the agreement and was correct, in my view, in declining the debt review application (**Nedbank Ltd and others v The**

National Credit Regulator and another [2])

[25] Further the defendant did not respond to the section 29 notice nor did he apply for debt review within ten days after the section 29 notice was given.

Reckless credit

[26] The plaintiff is not claiming damages but for the return of the motor vehicle after the cancellation of the agreement under which the defendant possessed the motor vehicle. The National Credit Act does not cater for a situation in which the consumer can retain goods and the money. If he retains the money, he must return the goods and this is exactly what the plaintiff seeks in this summary judgment application upon the defendant's breach of contract to pay for the goods (**SA Securitisation_(Pty)Ltd v T. Booi** and three other similar matters case nos 5065;4021 and 5069/2009 unreported ECG judgment).

Over indebtedness

[27] Section 86 (2) provides that an application by a consumer to be declared over indebted may not be made in respect of , and does not apply to, a particular credit agreement , if at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement. This section has been interpreted as follows in **Starita vs ABSA Bank Ltd and another** unreported case no 745/09 GSJ 26 March 2010, which interpretation was followed by Plasket J in SA Securitisation Pty) Ltd v Booi and other similar matters, (supra) with which I agree:

2 2011(3) SA581(SCA) paragraph 14

"*Section 86 (2) therefore prohibits the application for a debt review in respect of a particular credit agreement where the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce the agreement . On a plain reading of these words, steps taken under section 129 would include the giving of a notice under that section. However, section 129 (1) requires a credit provider in the notice inter alia, to propose that the consumer refer the credit agreement to the Debt Counselor (clearly in terms of section 86). If the consumer does so, the credit provider may argue that section 86(2) prohibits this. In order to avoid the resulting circuitous absurdity, it seems to me that the proper construction of section 86(2) is that the steps taken under section 129 as referred to in section 86(2) are the steps taken after the notice has been given, starting with the issue of summons.*"

[26] The defendant made the application to be declared over indebted long after the expiry of the prescribed period from the date section 29 notice was given hence it was declined by the plaintiff.

<u>ORDER</u>

[27] The following order is therefore made:

That summary judgment is granted infavour of the plaintiff against the defendant for:

1. The confirmation of the termination of the credit agreement between the plaintiff and the defendant;
2. The return of the motor vehicle described as 2008 Model VW Crafter 50 80KW 23 seater with engine number BJKO26362 and

chassis number WVIZZZ2EZ86016676 to the plaintiff forthwith;

3. The forfeiture by the defendant of all the amounts paid by him on the agreement and;

4. Costs of suit.

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LP Pakade

ACTING DEPUTY JUDGE PRESIDENT

For the Plaintiff	:	**Mr Botma**
Instructed by	:	**Keightley Incorporated**
For the Respondent	:	**Mr Zilwa**
Instructed by	:	**Jolwana Mgidlana Inc**
Date Heard	:	**29 September 2011**
Date Delivered	:	**26 January 2012**