Reportable: Yes / No
Circulate to Judges: Yes / No
Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGH COURT, KIMBERLEY

CASE NO: 161/2011

HEARD: 19/08/2011

DELIVERED: 26/08/2011

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED APPLICANT

and

B P STROPERS CLOSE CORPORATION RESPONDENT

JUDGMENT

HUGHES-MADONDO, AJ

1] This is an application for summary judgment which was argued on the 19 August 2011. The applicant seeks the following order:

"1. An order directing the confirmation of termination of the agreement;

2. An order directing the return of the CASE IH1010 KORING TAFEL ASSET, with serial number JJC0308218 (herein referred to as "the Asset") to the Plaintiff;

3. Forfeiture of all amounts paid by the Defendant in terms of the agreement;

4. Attorney and own client costs;

5. Further and/or alternative relief."

The application proceeded as an opposed application. Advocate S. L. Erasmus appeared on behalf of the applicant and Ms. S. Jordaan appeared on behalf of the respondent.

2] It is trite that in terms of Rule 32 of the Rules of court a court might grant summary judgment in respect of claims based on a liquid document, for a liquidated amount, for delivery of specified movable property and for ejectment together with interest and costs.

3] The respondent when opposing an application for summary judgment is required to satisfy the court that he or she has a '*bona fide*' defence to the action. In the respondent's papers it must disclose fully the nature and grounds of its defence and the material facts that it relies upon. See **MAHARAJ V BARCLAYS NATIONAL BANK Ltd 1976 (1) SA 418 (A) AT 426.** In essences the set of facts set out must be such that if proven at trial they would constitute a defence to the claim of the plaintiff. See **BREITENBACH V FIAT SA (Edms) Bpk 1975 (2) SA 226 (T) at 228B-D and D-E; TESVEN CC AND ANOTHER V SA BAMK OF ATHENS 2000(1) SA 268 (SCA)**

4] If the defendant fails to set out a bona fide defence or to raise a triable and arguable issue and the plaintiff can establish its case clearly, then summary judgment should be granted. On the other hand if the plaintiff has an unanswerable case and it's reasonably possible that the defendant has a good defence, then the defendant must be granted leave to defend. See **MARSH AND ANOTHER V STANDARD BANK 2000 (4) SA 947 (W) at 949-950.**

5] The applicant entered into an instalment sales agreement (the "agreement") with the respondent on 15 April 2008. In terms of the agreement the applicant sold to the respondent a CASE IH1010 KORING TAFEL ("the Asset").

6] In the plaintiff's particulars of claim, the plaintiff alleges that the defendant failed to pay the instalment and or failed to satisfy its obligation in terms of the agreement and as such the plaintiff seeks; cancellation of the agreement, return of the Asset, retention of the monies already paid, the difference between outstanding balance and the value of the asset or re-sale value whichever is greater, interest and costs.

7] In the applicant's heads of argument the applicant stated that its cause of action as set out in its summons and particulars of claim is based on the delivery of the specified movable property, being the Asset.

8] In opposing the application for summary judgment, the respondent raises the following defences:

8.1 that the applicant's cause of action is based on a liquid document and as such in terms of Rule 32(2) the said document was required to be annexed to the applicant's summary judgment application papers. The applicant's failure to do so amounts to non compliance with the aforesaid Rule;

8.2 the application was instituted prematurely in that the applicant failed to comply with Sections 129 and 130 of the National Credit Act, 34 of 2005 ("the NCA"). In that, the notification in terms of section 129 delivered by the applicant via registered mail had not been received by the respondent. The respondent states that at the time the notice was delivered, its member was abroad and as such the said notice would have been returned to the sender;

8.3 there is no provision in the agreement for cancellation, as the copy of the agreement is illegible and not a clear copy;

8.4 that during August and September 2010 the applicant removed the Asset from the respondent premises; and

8.5 lastly, according to the respondent's last statement of account from the applicant, the amount owing thereon indicates that the applicant sold the Asset after it removing it from the respondent's property.

9] The issue that I am required to decide is whether or not the defences raised by the respondent are sufficient to resist summary judgment and are they defences envisaged in terms of Rule 32(3) (a).

10]The respondent does not deny that it failed to pay the instalment and is therefore in default

11]On an examination of the summons and the particulars of claim I cannot comprehend why the respondent is of the view that the cause of action of the applicant is based on a liquid document. The particulars of claim set out clearly that the Asset was sold to the respondent subject to the agreement and in term of the later it seeks return of the specified Asset. The defence that the applicants claim is based on a liquid document and its failure to comply with Rule 32(2) must therefore fail.

[12] The respondent argued that section 129 requires of the applicant to “draw the default to the notice” of the respondent. In this case the respondent submitted that the applicant failed to draw the default to its notice, as the section 129 was returned to the applicant.

[13] The applicant argued that it has complied with section 129, in that, the notice was sent by registered mail to the respondents chosen domicilium as appears in the agreement. It did not have to do anything further but deliver the notice to the respondent, which it did.

[14] The giving of notice in terms of Section 129(1) (a) has been held to be peremptory. This is in keeping with the Act, in order to strike a balance between the interest of the credit grantor and the credit receiver. The Act requires that the notice in terms of Section 129 be delivered to the address nominated in the instalment agreement by the credit receiver. It does not require that the credit grantor prove receipt of such notice. See **ROSSOUW V FIRST RAND BANK Ltd. 2010 (6) SA 439 (SCA)**

[15] Further, in my view the failure of the respondent to receive the notification lies squarely upon the respondent’s shoulder, as paragraph 16.3 of the agreement clearly sets out, that it is the duty of the respondent to advise the applicant of any change of address, in respect of notices, during the duration of the

contract. In this instance the respondent failed to do so.

[16] The respondent concedes that the agreement would encompass a cancellation. However, because the copy annexed by the applicant was illegible, the respondent submits that there is in fact no cancellation clause in the agreement. The respondent argued that in the circumstances the principles in **ABSA BANK LIMITED V HAVENGA 2010 (5) SA 533 (GPN)** are applicable. In this case the court held that before embarking on cancelling an agreement the credit provider must show a vested right to do so.

[17] The applicant argued that paragraph 12.3 of the agreement indicated their "vested right" to cancel. This paragraph makes provision for the applicant to approach a court for an order to enforce the agreement.

[18] I have looked at both the agreement and the particulars of claim and agree with the applicant that **ABSA BANK LIMITED** is distinguishable to the present case as, there is provision for cancellation in the agreement and these provisions have also been set out in the particulars of claim paragraph 7 .

19]The allegation made by the respondent that the Asset was attached, removed and sold by the applicant, whilst the respondent's member was abroad, in my view is based on mere assumptions and has not been corroborated. In the respondents papers it alleged that a friend of the member was present when the applicant removed the Asset. What is strange is that the respondent does not put up a confirmatory affidavit of this friend in support these allegations.

20]Based purely on the say so of the friend the respondent assumes that it was the applicant who removed the Asset. Even though in the respondent's papers, it states that the Asset was attached to a "stroper" that was financed by ABSA bank and that both the Asset and the "stroper" were removed.

21]In the face of these allegations it cannot be concluded that the applicant removed the Asset. Why then would the applicant be seeking return of the Asset, if it was already in possession of it? This defence must also fail.

22]Lastly, as the respondents defence is based on assumptions, these assumptions in my view cannot amount to a *bona fide* defence in law.

23]Accordingly the defences raised by the respondent cannot succeed.

24]In the circumstances I find that the applicant has made out a case in terms of Rule 32. Further, that they have complied with sections 129 and 130 of the NCA and that the respondent has failed to show that it has a *bona fide* defence in law.

<u>In the result summary judgment is granted and the following order is made:</u>

1. **That the cancellation of the agreement is confirmed;**
2. **That summary judgment is granted for the return of the CASE IH1010 Koring Tafel, with serial number JJC0308218 to the plaintiff;**
3. **That the defendant is ordered to pay the costs of the application for summary judgment on a scale between attorney and client;**
4. **That the plaintiff is granted leave to approach this court on the same papers for the relief set out in paragraphs c, d, e, f, and g of the particulars of claim; and**
5. **The defendant is granted leave to defend on the remaining issues.**

W HUGHES-MADONDO

ACTING JUDGE

Northern Cape High Court, Kimberley

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(ii)

APPEARANCE

On behalf of the Applicant:	**Adv. S.L ERASMUS**
	Instructed by DUNCAN & ROTHMAN INC
On behalf of the Respondent:	**Ms. S JORDAAN**
	JORDAAN ATTORNEYS