

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	<u>NOT</u> REPORTABLE
(2)	<u>NOT</u> OF INTEREST TO OTHER JUDGES

CASE NO: 2020-5463

DATE: 7th OCTOBER 2024

In the matter between:

FIRSTRAND BANK LIMITED t/a WESBANK

Plaintiff

and

JUSTIN DAVID McCALLUM

Defendant

Coram: Adams J

Heard: 3 September 2024

Delivered: 7 October 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 7 October 2024.

Summary: Summary judgment – application for – *bona fide* defence raised – defendant given leave to defend action

Application for summary judgment dismissed – defendant granted leave to defend main action.

ORDER

- (1) The plaintiff's application for summary judgment is dismissed.
 - (2) The defendant is granted leave to defend the action.
 - (3) The cost of the application for summary judgment shall be in the course of the main action.
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JUDGMENT

Adams J:

[1]. This is an opposed application by the plaintiff for summary judgment against the defendant. The plaintiff's cause of action is based on an electronic instalment sale agreement ('the credit agreement') concluded between the parties on 31 January 2018, in terms of which the plaintiff sold to the defendant a 2018 Ford Roush Mustang 5.0 GT Automatic motor vehicle ('the motor vehicle') at an agreed purchase price of R2 298 263.86, inclusive of R652 009.53 finance charges and R201 563.69 value added tax ('VAT'). The cash price of the motor vehicle, inclusive of accessories and other extras, was the sum of R1 646 254.33. The said gross purchase price was to be paid over a period of seventy-one months, the first instalment of R28 354.20 being payable on 29 March 2018, with a final balloon payment of R285 022.60 payable on 29 February 2024.

[2]. During or about February 2019, the defendant was in breach of the credit agreement in that he had fallen into arrears with his monthly instalments. The plaintiff 'called up' the agreement and took repossession of the motor vehicle as it was entitled to do in terms of the agreement. During March 2019 the plaintiff, after having formally cancelled the agreement, sold the vehicle for R371 090 (excluding VAT), which amount was credited to the account of the defendant together with an amount of R184 667.24, being in respect of input VAT credit received. In the main action the plaintiff accordingly claimed from the defendant

the nett amount of R1 012 673.41, calculated as follows: R1 568 430.65 (settlement value of the credit agreement), less R371 090 (proceeds of the sale of the vehicle) = R1 197 340.65, less R184 667.24 (input VAT Credit received) = R1 012 673.41. This is also the amount claimed by the plaintiff in the summary judgment application which came before me in the opposed motion court on 3 September 2024.

[3]. The defendant resists the application for summary judgment on the basis that he did not sign the agreement relied upon by the plaintiff in its particulars of claim. It is, as alleged by the defendant, that the copy of the agreement attached to the particulars of claim does not contain the defendant's signature and therefore, so it is contended by the defendant, the plaintiff is precluded from relying on its terms.

[4]. Insofar as the plaintiff alleges that the agreement was concluded electronically, it is the case of the defendant that the plaintiff does not allege that the agreement was signed as contemplated by the Electronic Communications Act 36 of 2005 ('ECA'), neither is there any evidence of such signature. In that regard, the defendant rejects the plaintiff's contention that a so-called 'watermark signature' on each of the pages of the agreement constitutes an electronic signature of the agreement.

[5]. The defendant also raises as a defence that the agreement was entered into recklessly. Whilst he provides little evidence in support of this defence, the defendant maintains that the plaintiff did not satisfy itself that he, as the consumer, would be able to satisfy at the time of the loan in a timely manner all his or her obligations under all his or her credit agreements, including the prospective credit agreement, before the credit provider will be able to validly conclude the credit agreement with him.

[6]. Furthermore, and importantly, the defendant opposes the application for summary judgment on the basis that the plaintiff's claim is one for contractual damages and is therefore not a claim for a liquidated amount susceptible to an

application for summary judgment. Moreover, so the defendant contends, the plaintiff was obliged by the credit agreement, as well as by the provisions of the National Credit Act 34 of 2005 ('NCA'), to sell the vehicle at its market value or as close thereto as reasonably possible. Section 127(4)(b) of the NCA, so the defendant points out, required the plaintiff to sell the goods 'for the best price reasonably obtainable'.

[7]. There appears to be merit in this contention on behalf of the defendant. The fact that the vehicle was sold for far less than half of what the defendant paid for it a few months prior to the resale thereof, affords support for the defendant's contention that the vehicle was not resold for the best price reasonably obtainable. The point about this defence is that, according to the defendant, the quantum of the damages claimed is wholly unreasonable and unrealistic. It is indeed, as contended by the defendant, that the plaintiff is obliged to produce evidence to show that the price received was the best price reasonably obtainable in the circumstances, lest it fall afoul of section 127(4)(b) of the NCA. I am not convinced that in the application for summary judgment such evidence was produced on behalf of the plaintiff.

[8]. The issue which I have to adjudicate is whether the defendant is entitled to be granted leave to defend in view of the foregoing defences raised by the defendant.

[9]. The defendant alleges that the defence relating to the quantum of the claim is without merit as the claim was quantified in terms of the provisions of the agreement. I am not persuaded. The simple point is that the provisions of s 127(4)(b) finds application and the defendant has made out a case at least on paper based on the aforesaid provision,

[10]. As pointed out by the author, Erasmus: Superior Court Practice, Uniform Rule of Court 32(3)(b) requires the defendant to satisfy the court by affidavit that he has a *bona fide* defence to the plaintiff's claim. 'Satisfy' does not mean 'prove'. What the rule requires is that the defendant sets out in his affidavit facts which, if

proved at the trial, will constitute an answer to the plaintiff's claim. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

[11]. In terms of subrule (5): 'The court may enter summary judgment.' The word 'may' in this subrule confers a discretion on the court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)(b), the court may nevertheless refuse to grant summary judgment if it thinks fit. The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief.

[12]. Applying these principles *in casu*, I am satisfied that in his resisting affidavit the defendant has demonstrated a *bona fide* defence on the merits of the plaintiff's claim, and he is accordingly entitled to leave to defend.

[13]. As regards costs, I am of the view that costs should be ordered to be in the course of the main action.

Order

[14]. In the result, the order which I grant is as follows: -

- (1) The plaintiff's application for summary judgment is dismissed.
- (2) The defendant is granted leave to defend the action.
- (3) The cost of the application for summary judgment shall be in the course of the main action.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	3 rd September 2024
JUDGMENT DATE:	7 th October 2024
FOR THE PLAINTIFF:	K Meyer
INSTRUCTED BY:	C F Van Coller Incorporated, Lambton, Germiston
FOR THE DEFENDANT:	W Isaaks
INSTRUCTED BY:	Van Hulsteyns Attorneys, Sandown, Sandton