

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2024/143345

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
27 October 2025

In the matter between:

ABSA BANK LIMITED	Plaintiff/Applicant
and	
BUSISIWE EUTRICIA BALOYI	Defendant/Respondent

JUDGMENT

DOMINGO, AJ

Introduction

- [1] This is an application for summary judgment brought by the plaintiff against the defendant for the cancellation of a credit agreement and the return of a motor vehicle and that the quantum claim (subsequent to the sale of the motor vehicle and quantification of the damages claim) be postponed *sine die*.
- [2] The defendant opposed the summary judgement application and filed her plea herself without legal representation. On the day of the hearing the defendant appeared in person and informed the court that she had elected to represent herself.

Background

- [3] It is common cause that the defendant entered into a vehicle finance agreement with the defendant to purchase a vehicle from the motor dealership, CHM Group, Midrand. The terms of the Instalment Sale Agreement are common cause between the parties; it was entered into between the plaintiff and defendant on 1 August 2023, with monthly instalments being in the amount of R6 827.49, the first instalment being payable on 30 September 2023 and the final instalment being payable on 30 August 2029.
- [4] It is common cause between the parties that the defendant has made no payment of the debt since its inception. The detailed bank statement provided by the plaintiff shows that as from the inception, that is from the first payment due on 30 September 2023, the defendant had failed to make payment of the monthly instalments. To date, all instalment debit orders have been rejected.
- [5] At the time of the institution of the action in January 2025, the defendant was in arrears in the amount of R127 195.05 and the total outstanding balance is in the amount of R597 344.53 according to the certificate of balance.

Relief sought

- [6] In or about December 2024 the plaintiff instituted action against the defendant, whereafter the Defendant in March 2025 filed a plea.
- [7] The plaintiff averred that the plea does not comply with the prescripts of Rule 22 of the Uniform Rules of Court, as it does not concisely address the material allegations contained in the plaintiff's particulars of claim and does not explicitly admit or deny or confess and avoid. Thus, Rule 22(3) of the Uniform Rules of Court becomes operative, which provides that "every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted shall be deemed to be admitted."
- [8] The plaintiff subsequently applied for summary judgement in terms of Rule 32 of the Uniform Court rules and seeks the following relief:

8.1 Confirmation of cancellation of the agreement.

- 8.2 An order for the return of the motor vehicle, 2021 Nisan Magnite 1.0 T Acentia Plus CVT.
- 8.3 An order whereby payment of the sum of R599 083.00, together with interest thereon at the rate of 13.45%, less the salvage value in terms of the aforementioned order, be postponed *sine die*.
- 8.4 Costs of the suit.

Defendant's defence

[9] The crux of the defendant's defence is found in the introduction of her plea which states as follows:

"1.2 The Defendant pleads that she is not responsible for the outstanding payments due to fraudulent misrepresentation, breach of contract, and failure to disclose material facts by the dealership, CMH Group Midrand, which directly resulted in the return of the financed vehicle within 3 (three) days of purchase."

[10] Furthermore, flowing from the above the defendant raises the following issues as defences to the plaintiff's claim for summary judgment:

- 10.1 The dealership, CMH Group violated multiple provisions of the Consumer Protection Act 68 of 2006 (the "CPA").
- 10.2 The defendant returned the vehicle to the dealership, CMH Group within 3 (three) days of the purchase and the dealership refused to refund the plaintiff.
- 10.3 The dealership had been unjustly enriched by keeping both the vehicle and loan funds that the plaintiff paid for the vehicle.
- 10.4 That the plaintiff had a duty to mitigate its losses and should have taken steps to recover the funds from the dealership. The defendant here uses the *exceptio non adimpleti contractus* defence and states that payment may be withheld where the supplier's performance is

defective; here it is averred by the plaintiff that the vehicle was unfit/defective and misrepresentation occurred.

- 10.5 The defendant claims that the Gauteng Consumer Protection Authority informed her that the bank recovered the vehicle from the dealership on the 27 February 2025, yet she claims that the plaintiff still persists to demand full payment as if the vehicle was lost or retained by the defendant.
- 10.6 The defendant lodged a complaint with the Motor Industry Ombudsman of South Africa (“MOISA”) and the National Consumer Commission (“NCC”). The defendant wants these proceedings to stay pending an outcome from those bodies.
- 10.7 The defendant also claims that she was not served with the NCA s129 Notice and states that the plaintiff must give proper notice and act fairly.
- 10.8 The defendant averred that the bank, as a credit provider financing used vehicles, had a duty to conduct due diligence into the vehicle history. Thus, failure to do so amounts to negligence, particularly for pre-owned vehicles where undisclosed defects are common.

Plaintiff's arguments for summary judgment

- [11] Counsel for the plaintiff in argument emphasised that the defendant pleaded that the dealership, CMH Group Midrand violated multiple provisions of the CPA. Thus, a breach of the statutory provisions of the CPA is not alleged to have been done by the plaintiff, but the dealership.
- [12] The defendant in her affidavit resisting summary judgment, asserted that there was fraudulent misrepresentation by the dealership in that the vehicle was allegedly involved in a motor vehicle collision and that there was a violation of sections 41, 25 and 48 of the CPA.
- [13] Counsel for the plaintiff averred that section 40 of the CPA deals with unconscionable conduct and *inter alia*, provides that:

"[A] supplier or agent of the supplier must not use physical force against the consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any-

- (a) marketing of any goods or services,
- (b) supply of goods or services to a consumer,
- (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer,..."

[14] Counsel for the plaintiff further averred that section 41 of the CPA, continues to deal with false, misleading or deceptive representations and provides that:

"(1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct –

- (a) directly or indirectly, express or imply a false, misleading or deceptive representation concerning a material fact to a consumer commitment; and
- (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
- (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation;
- (d) or permit or require any other person to do so on behalf of of the supplier.

(2) A person acting on behalf of the supplier of any goods or services must not:

- (a) be falsely represented that the person has any sponsorship, approval or affiliation; or
- (b) engage in any conduct that the supplier is prohibited from engaging in under subsection 1..."

[15] The CPA defines “supplier” to mean a person who markets any goods or services and “market” is defined in the CPA and means to promote or supply any goods or services. The CPA defines “consumer” to include “a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business.” In the present case, it is averred by the plaintiff that the plaintiff did not market the vehicle but merely financed it.

[16] Counsel for the plaintiff directed the court to the case of *MFC (a division of Nedbank Ltd) v Botha* (“the MFC judgment”)¹ where the court stated (my own emphasis):

“The applicant had purchased the vehicle in question from a car dealership at the instance of the respondent for the purpose of being able to sell it on to the respondent in terms of the instalment sale agreement. The instalment sale agreement is a credit agreement within the meaning of the NCA. **The applicant’s real role in the sale of the vehicle was thus one of credit provider, and not one of supplier of the goods in question.** It is therefore unsurprising that the agreement between the applicant and respondent expressly excluded any warranty by the applicant as to the condition of the vehicle selected by the respondent. The respondent had nevertheless returned the vehicle to the applicant on or about 20 August 2012 because he had become dissatisfied with it on account of its allegedly defective condition.”

[17] The facts in the *MFC* judgment are therefore similar as to those in the present matter. In dealing with both of the defendant’s defences, as to the “fraudulent misrepresentation by the dealership, CMH Group Midrand” and the “violation of implied warranty of quality” counsel for the plaintiff directed the court to the *MFC* judgement where the court succinctly summarised the position and held that (my own emphasis):²

“Section 56(2) of the CPA provides:

Within six months, after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fails to satisfy the requirements and

¹ 2013 (JDR 1975) (WCC); 6981/13 [2013] ZAWCHC 107 (15 August 2013) at para 2.

² *Supra* at paras 5, 6, 7, 8 and 9.

standards contemplated in section 55, and the supplier must, at the direction of the consumer, either –

(a) repair or replace the failed, unsafe or defective goods; or

(b) refund to the consumer the price paid by the consumer, for the goods.

The term “supplier” is defined in s1 of the CPA. It means ‘a person who markets any goods or services.’ The word ‘market’ is also defined in s1 of the CPA. When used as a verb, it means ‘to promote or supply any goods or services.’ **In the current case it is clear that the applicant did not market the vehicle; it merely financed it. Keitzman Finance is the entity identified in the contract documentation as the ‘supplier’ or ‘dealer’ in respect of the vehicle** and it is apparent from the “Acknowledgement of Delivery” document signed by the respondent that he took delivery of the vehicle from Keitzman Finance. The word ‘consumer’ is also defined in the CPA. It includes ‘a person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business.’ **By reason of the defined meanings of the words ‘promote’ and ‘supply’, the applicant and the respondent both qualify as ‘consumers’ under the CPA in respect of the motor vehicle concerned.**

Section 5(2) of the CPA provides that the **Act does not apply to any transaction ‘that constitutes a credit agreement under the National Credit Act, but the goods or services that are subject of the credit agreement are not excluded from the ambit of this Act.’** However, the practical import of s5(2)(d) of the CPA in the context of a case like the current matter is far from clear. **While it is plain that the instalment sale agreement between the applicant and the respondent is excluded from the operation of the CPA, the effect of the qualification retaining the subject matter of the contract (i.e. the vehicle) within the ambit of the Act is far from obvious.**

The apparent object of s5(2)(d) of the CPA is to distinguish the position of a credit provider from that of a supplier and to protect the contractual rights of a credit provider which has financed the supply of goods by a supplier to a consumer, while seeking at the same time to preserve the consumer’s statutory protection against the supplier. However, I have been unable to identify (an nor could counsel) any provision in the Act that facilitates the achievement of the second of the aforementioned apparent objectives in the readily conceivable context of the facts of the current case.

It is not plainly evident how a consumer in the position of the respondent would be able to avail of the protection offered to consumers in terms of s56(2) of the CPA. **He could not return the vehicle to the supplier against a refund of the purchase price because ownership of the car vested in the credit provider; and it was the credit provider, and not he, that had paid the purchase price.** Counsel appeared agreed in the circumstances that **the only practical manner in which effect could be given to the evident legislative object would be either for the bank to cede its rights as ‘consumer’ against the supplier in terms of the CPA to the respondent, thus permitting the latter to return the vehicle to the dealer against a refund of the purchase price, or for the bank, at the instance and request of the respondent, to exercise its rights as ‘consumer’ directly against the supplier and to give the respondent the benefit of the refund of the purchase price in satisfaction or reduction of the latter’s liability to it under the instalment sale agreement.”**

[18] Attached to the plaintiff’s particulars of claim, and forming part of the instalment sale agreement, is “release note and acknowledgment of deliver” whereby the defendant took delivery of the vehicle from the dealership, which was also signed by the defendant. An invoice is also attached to the plaintiff’s particulars of claim issued by the dealership confirming delivery of the vehicle to the defendant.

[19] It is averred by the plaintiff that similarly to the *MFC* judgment³, the common cause sale agreement excluded any warranty by the plaintiff as to the condition of the vehicle selected by the defendant. The instalment sale agreement states that:

“4 Delivery and acceptance

Before you accept delivery of the asset from the supplier you will check that it is:

- what you want, or ordered
- fit for purposes for which you intend to use it; and
- in good working order.

³ *Supra*.

We will pay the supplier for the asset when you have accepted delivery of it and ownership of the asset will pass to us. Any claims or potential claims that you may have in relation to the asset including but not limited to, claims for:

- Defects;
- Incompleteness;
- Fitness for purpose;
- Late delivery or non-delivery;

are for you to pursue against the supplier and we shall have no liability whatsoever.

[20] Thus, the plaintiff averred that any potential claim that the defendant may have lies against the dealership and not against the plaintiff. The common cause instalment agreement specifically records that the plaintiff remains the owner of the vehicle until such time that the defendant has paid all the instalments under the agreement, provided that the defendant is not in default.

[21] In regard to the defendant's defence that she had lodged a complaint with MOISA, counsel for the plaintiff pointed out that MOISA dismissed the complaints of the defendant on two occasions. In a MOISA letter dated, 9 November 2023, MOISA found *inter alia* that the vehicle met the standard of the CPA and the Standards Act 29 of 1993 and that the sale was not conditional on the vehicle being "accident or collision free."

[22] The defendant suggested that National Consumer Commission's investigation of the matter is tantamount to the legal merit thereof. The plaintiff in response asserted that this is patently incorrect as the governing jurisprudence establishes the correct legal position. The plaintiff averred that by virtue of the current application the plaintiff seeks return of the motor vehicle, as owner of the vehicle. The complaints lodged by the defendant with MOISA or the NCC are irrelevant to the adjudication of the present proceedings. Furthermore, the plaintiff is not in possession of the vehicle and has no knowledge of the alleged information provided to the defendant by the Gauteng Consumer Protection

Authority, that the plaintiff recovered the vehicle from the dealership on 27 February 2025.

- [23] It is also averred by the plaintiff that the defendant's suggestion that the plaintiff mitigate its losses, loses sight of the factual and legal position that the contractual *nexus* lies as between the plaintiff and defendant, as per the *MFC* judgment⁴ and that any conceivable claim that the defendant might have lies against the dealership.

Legal considerations

- [24] The Supreme Court of Appeal in *Majola v Nitro Securitisation 1 (Pty) Ltd*⁵ held the following in regard to the purpose of summary judgments:

"The purpose of summary judgment is to 'enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim.' It is a procedure that is intended 'to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiff's who were endeavouring to enforce their rights.' If a court hearing an application for summary judgment is satisfied that a defendant has no *bona fide* defence to a plaintiff's claim and grants summary judgment as a consequence, it should be slow thereafter to grant leave to appeal, lest it undermine the very purpose of the procedure."

- [25] It is trite law that the well-know judgment of *Maharaj v Barclays National Bank Ltd*⁶ succinctly summarises the position relating to the defendant's *onus* in summary judgment proceedings as follows:

"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 the 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 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

⁴ *Supra*.

⁵ 2012 (1) SA 226 (SCA) at para 25. See also *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at paras 31, 32 and 33.

⁶ (151/75) [1975] ZASCA 102 (18 November 1975) at pages 18 and 19.

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 *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 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...At the same time the defendant is not expected to formulate his opposition to the claim with precision that would be required of a plea; nor does the Court examine it by the standards of pleading.”

- [26] Counsel for the plaintiff also directed the court’s attention to the *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E & D Security Systems CC v National Security and Fire (Pty) Ltd*⁷ wherein the court dealt with the amended Rule 32 and the current test to be applied as follows:

“However, does the fact that the *bones* of a triable defence have been made out in the plea mean that summary judgment must be refused? The answer is clearly ‘no’! The reason for the negative answer is that the enquiry is not whether the plea discloses ‘an issue for trial’ in the literal sense of those words, it is whether the ostensible defence that has been pleaded is *bona fide* or not. As discussed earlier, that is the relevant enquiry in a summary application follows from the rule maker’s decision to leave sub rule 32(3) substantively unamended. If one were to apply the amended rule differently, it would be impossible to marry the requirement of a plaintiff apparently posited by sub rule 32(2)(b) (*viz.* showing that the ‘defence as pleaded does not raise any issue for trial’) with what is demanded of a defendant in terms of subrule 32(3)(b) (*viz.* showing that its defence to the action is *bona fide*; i.e that its ostensible defence is not a sham). The respective supporting and opposing affidavits would pass each other like ships in the night if one were to understand the notion of ‘issue for trial’ in sub rule 32(2)(b) as denoting something different from a ‘*bona fidelity*’ within the meaning of sub rule 32(3)(b).”

⁷ (3670/2019) [2020] ZAWCHC 28; 2020 (6) SA 624 (WCC) (30 April 2020) at para 40.

[27] In the present matter, simply put the legal question is whether the defendant's defence is *bona fide* and good in law.⁸

Discussion

[28] In this matter as in the *MFC* judgment⁹ cited extensively above it is clear from the evidence that the applicant did not market the vehicle to the defendant, it merely financed it. The plaintiff in this matter is not the supplier of the vehicle and together with defendant the plaintiff is also regarded as a consumer. Thus, the defence raised by the defendant of the non-disclosure of the vehicle being in a motor vehicle collision and the fraudulent misrepresentation by the dealership thereof are issues which lie between the defendant and the dealership and not the plaintiff. Furthermore, the instalment agreement contract between the parties clearly sets out that the agreement excludes any warranty by the plaintiff as to the condition of the vehicle selected by the defendant. Thus, any claims or potential claims that the defendant may have in relation to the vehicle are for the defendant to pursue against the supplier as the plaintiff will have no liability whatsoever.

[29] The defendant is not precluded from pursuing legal action against the dealership for the alleged misrepresentation she claims that took place, as the triggering of the CPA remedies fall within the ambit of the relationship between the defendant the dealership.

[30] In addressing the question whether the defendant lawfully returned the vehicle, I draw on the *MFC* judgment¹⁰ where in terms of s52 of the CPA, the only way in which the return of the vehicle would have been lawful would be where either the the plaintiff ceded its rights as "consumer" against the supplier in terms of the CPA to the defendant, thus permitting the defendant to return the vehicle to the dealer against a refund of the purchase price or for the plaintiff at the instance and request of the defendant to exercise its rights as "consumer" directly against the supplier and give the defendant the benefit of the refund of

⁸ See *supra* note 5.

⁹ *Supra* note 1.

¹⁰ *Supra*.

the purchase price in satisfaction or reduction of the defendant's liability to the plaintiff under the Instalment Sale Agreement.

[31] In regard to the NCA s129 Notice, counsel for the plaintiff directed the court to the summons where evidence is provided that the defendant was served with a NCA s129 Notice and she was duly advised of all her rights.

Conclusion

[32] I am of the view that the plaintiff has demonstrated a clear and enforceable claim founded on a written credit agreement between the plaintiff and the defendant. The defendant's plea is void of any legal foundation and *bona fide* defence capable of sustaining a triable defence. Furthermore, the defendant's defence is not good in law against the plaintiff because the crux of the defendant's defence lay against the dealership and not the plaintiff. It therefore follows that the plaintiff is entitled to summary judgment against the defendant.

Order

[33] In the premises, having heard counsel for the plaintiff and having heard the defendant; and having considered the matter, I hereby make the following order:

33.1 The application for summary judgment is granted against the respondent.

33.2 The agreement concluded between the applicant and the respondent is declared cancelled.

33.3 The applicant is authorised to retake possession and ownership of the following goods, wheresoever it may be located:

33.3.1 2021 Nissan Magnite 1.0.T Acenta Plus CVT; Engine number: H[...]; Chassis number: M[...].

- 33.4 The applicant's claim for payment of the sum R599 083.00 together with interest thereon at a rate of 13,45%, less the salvage value in terms of the aforementioned order, is postponed *sine die*.
- 33.5 Costs of the application for summary judgment on the attorney client scale.

W DOMINGO
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: The judgment was prepared and authored by the Judge whose name reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. This matter was heard in open court on the 12 August 2025. The date of hand-down is deemed to be 27 October 2025.

APPEARANCES

For the Plaintiff/Applicant: ADVOCATE Z KHAN instructed by BHAM & DAHYA ATTORNEYS

For the Defendant/Respondent: BUSISIWE EUTRICIA BALOYI in person/self-represented

