THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 4523/23

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD Plaintiff / Applicant

And

TERTIUS JOHANNES FRANZSEN Defendant / Respondent

Coram: **YAKE AJ**
Argument: **23 February 2026**
Delivered: **Electronically on 19 March 2026**

Summary: Summary Judgment – Rule 32 (3) of the Uniform Rules – defendant must disclose a bona fide defence which raises triable issues.
Rule 28 (4) – Non-compliance with the prescribed time periods in the Rules of Court is not an excuse and cannot be tolerated without good cause - defendant failed to lodge an application for leave to amend plea after receiving objection in terms of subrule (3).

JUDGMENT

YAKE AJ

INTRODUCTION

[1] This is an opposed application for summary judgment. For convenience, I will refer to the applicant and respondent as the plaintiff and defendant, respectively. The plaintiff seeks summary judgment for the return of a 2015 Volkswagen Touran 2.0 Trendline ("the Touran"), alleging that the defendant breached the written instalment sale agreement by failing to make the required monthly payments. The defendant denies being in default and raised several defences.

BACKGROUND

[2] It is common cause that the plaintiff instituted action against the defendant pursuant to a written instalment sale agreement ("instalment sale agreement") concluded on 31 May 2018, for the purchase of a 2015 Volkswagen Touran 2.0 Trendline motor vehicle.

[3] The material terms of the instalment sale agreement as set out in the particulars of claim are as follows:

a) The plaintiff sold a 2015 Volkswagen Touran to the defendant for a
b) principal debt of R292 2777.68.
c) The total cost of the sale agreement, inclusive of interest, costs and charges was R415 563.84, payable in seventy-two consecutive monthly instalments, with the final instalment due on 30 May 2024.
d) Ownership of the vehicle would remain with the plaintiff until the full instalment sale amount has been paid, after which ownership would transfer to the defendant.

[4] The plaintiff asserts that it fulfilled its obligations by delivering the vehicle to the defendant. The defendant, however, breached the instalment sale agreement by failing to meet his monthly payment obligations and fell into arrears. As at 13 March 2023, the arrears amounted to R34 297.20 and the defendant was indebted to the plaintiff in the amount of R182 908.47, plus interest at 12.54 from 6 January 2023 until final date settlement, both dates inclusive.

[5] As a result of the defendant's breach, the plaintiff issued a section 129 (1) read with section 130 of the National Credit Act 34 of 2005 ("NCA") default notice on 9 January 2023. The notice informed the defendant of his default and afforded him an opportunity to remedy it, failing which the plaintiff would cancel the agreement and claim the full outstanding balance. Notwithstanding the default notice, the defendant failed to remedy the breach. The plaintiff accordingly cancelled the agreement, as it was entitled to do, and demanded return of the Touran. Thereafter issued Summons, which were served on the defendant on 27 March 2023.

[6] Pursuant to service of Summons, the defendant filed a Notice of Intention to Defend on 12 April 2023, after which he was served with a Notice of Bar on 11 January 2024. Notwithstanding the Notice of Bar, the defendant delivered his Plea on 14 March 2024, admitting the conclusion of the instalment sale agreement but denying being in default. In his Plea, he raised various defences *inter alia force majeure*, a dispute regarding arrear amount and an alleged referral of the matter to the Ombudsman.

<u>THE SUMMARY JUDGMENT APPLICATION</u>

[7] Upon receipt of the defendant's Plea, the plaintiff launched a summary judgment application dated 8 April 2024, supported by an affidavit in compliance with Rule 32 (2) (a) and (b) of the Uniform Rules. In the application, the plaintiff seeks confirmation of cancellation of the agreement, an order directing the defendant to return the 2015 Volkswagen Touran 2.0 Trendline with engine number [C.....] and chassis number [W...], retention of all monies paid by the defendant to the plaintiff, leave to pursue damages if any, as well as interest and costs. The supporting affidavit comprehensively addressed each of the defences raised in the Plea and contended that none of them disclose a triable issue.

[8] In turn, the defendant filed a Notice of Intention to Oppose the summary judgment, accompanied by an affidavit dated 3 June 2024. In it, he introduced additional defences. These include the existence of an alleged Counterclaim, a purported amendment of the original agreement through subsequent agreements, and a denial of having received the section 129 notice. He further asserts that he has a

bona fide defence and sought dismissal of the application with costs. The matter was thereafter set down for hearing on 23 February 2026.

[9] Pursuant thereto, on 8 January 2026, the defendant delivered a notice in terms of Rule 28 (1) indicating his intention to amend his Plea and file a Counterclaim, stating that a full draft amended Plea and Counterclaim would follow together with any application for leave to amend, should the plaintiff object. The plaintiff duly objected to the proposed amendments, arguing that the defendant's Rule 28 (1) notice did not provide the required particulars of the amendment. Thereafter, the plaintiff filed its heads of argument on 9 February 2026. The defendant subsequently filed a supplementary opposing affidavit on 16 February 2026, followed by his heads of argument on 17 February 2026.

[10] The Plaintiff naturally objected to the late filing of the supplementary affidavit, noting that it was filed without obtaining the leave of the Court. The defendant contended that the supplementary affidavit merely reiterated the contents of his Plea and opposing affidavit, with the addition of damages, *in duplum* rule and further provisions of the NCA. As the supplementary affidavit introduced new facts, the Court declined to grant leave for its filing due to non-compliance with the rules.

SUBMISSION BY PARTIES

[11] In support of the application, the plaintiff's counsel submitted that the requirements of Rule 32 (2) were fully complied with. Counsel argued that the defendant's opposition constitutes an attempt to delay the proceedings, noting that although the defendant filed his Plea on 14 March 2024 and his opposing affidavit on 3 June 2024, he only sought to amend his Plea nearly two years later, without presenting new information, and despite having been aware of the hearing date since 10 June 2025. This conduct, the plaintiff contends, demonstrates a deliberate attempt to delay the matter and constitutes an abuse of process warranting punitive costs.

[12] The plaintiff submitted that the defences advanced in both the Plea and the opposing affidavit are neither *bona fide* nor indicative of raising any triable issue.

Relying on ***Belrex 95 CC v Barday***[1], counsel argued that the Court must assess only the defences pleaded, not those introduced for the first time in an opposing affidavit. On this basis, the plaintiff contended that the defences are merely dilatory, and that summary judgment should be granted with costs.

[13] In opposing the summary judgment application, the defendant contends that his opposing affidavit is not merely ancillary to the Plea, but a mechanism contemplated in Rule 32 (3) (b) through which the Court must determine whether any triable issues exist. He contends that limiting the enquiry to the Plea alone would undermine the purpose of the amended Rule 32 and improperly elevate pleadings above substantive enquiry. He maintains that both his opposing and supplementary affidavits set out *bona fide* statutory and factual defences, rendering the matter unsuitable for summary determination.

[14] The defendant further submits that the plaintiff's reliance on section 129 and 130 notices is flawed, noting that the notice is dated 3 January 2023 despite the alleged default dating back to March 2020. In his view, he contends, this discrepancy undermines the statutory objective of section 129, which is to afford a consumer with a genuine opportunity to remedy the breach or pursue alternative dispute-resolution mechanisms prior to litigation being instituted. He additionally described that the notice is vague and inconsistent, alleging that it simultaneously sought cancellation of the agreement and repossession of the vehicle.

[15] The defendant maintains that he has been engaging with the Ombudsman since 11 October 2022, prior to the issuing of summons, and therefore denies that this referral is an afterthought as the plaintiff wants this court to believe. He further alleges that his non-payment was not solely due to *force majeure* but was exacerbated by the plaintiff's conduct in unilaterally uplifting his overdraft facility. On this basis, he contends that he has raised *bona fide* defences requiring ventilation at trial and the application for summary judgment should be dismissed with costs.

[1] 2021 (3) SA 178 WCC

ISSUES FOR DETERMINATION

[16] On a proper conspectus of facts outlined above, the issues for determination are: (a) whether, under the amended Rule 32, the defendant may amend his Plea and introduce a Counterclaim, after summary judgment application has been launched; (b) whether the proposed amendment, if allowed, would result in prejudice and injustice to the plaintiff; (c) whether the defendant may rely on defences advanced for the first time in his opposing affidavit; and (d) whether the defences advanced are *bona fide* and disclose any triable issue.

LEGAL PRINCIPLES

[17] Rule 32 governs the applications for summary judgment, while Rule 28 regulates the amendments to pleadings and documents. The relevant provisions of the amended Rule 32, which set out the procedural requirements to be followed for such applications, are Rule 32 (1) to 32 (4), which provide as follows:

> *'1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only-*
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> *(a) on a liquid document;*
>
> *(b) for a liquidated amount in money;*
>
> *(c) for delivery of specified movable property; or*
>
> *(d) for ejectment;*
>
> *together with any claim for interest and costs.*
>
> *(2)(a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.*
>
> *(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a) verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.*
>
> *(c) ...*
>
> *(3) The defendant may— (a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or (b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be*

heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence orally or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.' (My underlining and further sections omitted.)

[18] Following amendments that took effect on 1 July 2019, the summary judgment procedure was revised. Under the amended Rule 32 (2) (a), the plaintiff may now apply for summary judgment only after the defendant has delivered a Plea. This promotes procedural fairness by enabling the plaintiff to assess the defence before deciding whether to proceed with summary judgment or not. However, Rule 32 (4) confines the plaintiff to the affidavit filed in terms of subrule (2), no replying affidavit or further evidence is to be adduced, nor is cross-examination permitted. Accordingly, the plaintiff must present their best case in the initial application and, as required by Rule 32 (2) (b), briefly explain why the defences as pleaded do not raise any triable issue.

[19] Rule 28 provides that a party desiring to amend any pleadings may do so at any stage before the judgment, provided that notice of intended amendment is given to all other parties. The rule regulates the amendment of pleadings and documents, and provides as follows:

'(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

(5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule.

6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.

(7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.

(8) ……….

(9) ……….

(10) <u>The court may</u>, notwithstanding anything to the contrary in this rule, at <u>any stage before judgment grant leave to amend any pleading or document</u> on such other terms as to costs or other matters as it deems fit.' (My underlining and some sections omitted)

[20] It is evident that Rule 28 establishes a clear, sequential procedure for amending pleadings and documents. An amendment may only be effected through a notice process prescribed in subrules (1) and (2), followed, where applicable, by the objection mechanism in subrules (3) and (4). If no objection is lodged, sub-rule (5) permits the amendment to proceed, after which it must be implemented in accordance with sub-rules (6) and (7). In addition, subrule (10) empowers the Court, in its discretion, to grant leave to amend at any stage before judgment.

<u>APPLICATION TO THE FACTS</u>

[21] The defendant filed his Plea on 14 March 2024, whereafter the plaintiff in compliance with subrule (2)(a) and (b) of Rule 32 filed its affidavit in support of summary judgment application on 8 April 2024, where he extensively addresses the defendant's Plea together with the defences raised thereto, explaining that they are not *bona fide* and disclose no triable issues. On 3 June 2024, the defendant then filed an opposing affidavit introducing for the first time a purported Counterclaim not pleaded in his Plea. Despite this allegation, no Counterclaim was filed, nor was there any Notice of Intention to Amend delivered before the matter was set down for hearing

on 10 June 2025. It is only six weeks before the date of hearing, that the defendant indicated for the first time that he wished to amend his Plea.

[22] Allowing amendment after filing of summary judgment application would clearly be disadvantageous and prejudicial to the plaintiff, as the plaintiff is not permitted to deliver a replying affidavit or adduce further evidence. This would therefore deprive the plaintiff of the opportunity, as required in terms of Rule 32 (2) (b), to address why the newly introduced defences in the amended Plea or Counterclaim raise no triable issue. Nevertheless, the mere launching of a summary judgment application does not bar a defendant from seeking to amend his Plea. The defendant may still lodge an application for leave to amend in terms of Rule 28 (4). The Court will then exercise its discretion under Rule 28 (10) which permits it to grant leave to amend the pleading or document at any stage before judgment. Of course, that discretion must be exercised judicially, having due regard to all relevant circumstances of the case. However, as articulated by Henny J in ***Belrex 95 CC v Barday***[2] that "this is a *lacuna,* which can be used as a stratagem by a defendant wishing to frustrate a plaintiff from proceeding with summary judgment. It is also clearly something which the task team of the Rules Board may not have considered." Put differently this *lacuna,* in the procedural framework creates the potential abuse of the rules, enabling the defendant to employ late amendment as a tactic to frustrate or delay summary judgment proceedings.

[23] Based on Rule 28 (10), it is clear that the defendant was entitled to amend his Plea as the matter had not yet been heard, and no judgment had been delivered. However, even if such amendment was permissible after the launch of the summary judgment application, the defendant was still required to comply with Rule 28 (4). Although the defendant delivered his Notice of Intention to Amend the plea and to file a Counterclaim, the plaintiff objected. Once the objection was raised, the defendant was obliged, within ten days, to bring an application in terms of Rule 28 (4) for leave to amend, which he failed to do. No amended Plea or Counterclaim was filed. Instead, he irregularly delivered a supplementary opposing affidavit without first obtaining leave of the court.

[24] The defendant's explanation that he was engaged in other litigation matters is unpersuasive. He had been aware since 3 June 2024 of his stated intention to pursue

[2] See footnote one above

a Counterclaim, yet he took no steps until January 2026. Even then, he attempted to introduce the proposed amendment through a supplementary affidavit rather than following the prescribed procedure. This was clearly not in accordance with the rules. Rule 28 is designed to prevent precisely such unilateral and irregular amendments and to ensure that amendments address a genuine triable issue rather than being employed in bad faith or at the last moment. In my view, the defendant's conduct was both dilatory and *mala fide*. As no formal application for amendment was filed, save for Notice of Intention, the Court had no proper basis on which to adjudicate the matter. The supplementary affidavit was irregular for non-compliance with the rules and permitting its admission would prejudice the plaintiff. Given the defendant's non-compliance with Rule 28(4), the remaining question is whether the plaintiff has established a proper case or the defendant's stated defences are *bona fide* and raised triable issues.

DISCUSSION OF DEFENCES

[25] It is well established that the granting or refusal of summary judgment falls within the court's discretion. In exercising this discretion, the court must ensure that the procedure is not used to deprive a defendant of the opportunity to defend the action where he has a genuine defence. This principle was reaffirmed in ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture***[3], where the Supreme Court of Appeal emphasised that summary judgment should not be used to bar the defendant from presenting a bona fide defence. At paragraph 31, *Joob Joob* stated:

> *'So too in South Africa, the summary judgement procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defenses from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavoring to enforce their rights.'*

[26] The defendant may, however, resist summary judgment by filing an affidavit that discloses a *bona fide* defence capable of satisfying the Court. Such defence must be set out with sufficient particularity to demonstrate substance; a mere or bald denials

[3] 2009 (5) SA 1 (SCA) at para 31

are inadequate. In terms of Rule 32(3), a defendant must fully disclose the nature and grounds of the defence as well as the material facts relied upon. To successfully oppose summary judgment, he must show that a *bona fide* defence exists which raises a triable issue and not merely allege such in his affidavit. As it was held in ***Breitenbach v Fiat SA (Edms) Bpk***[4], that bald, vague and sketchy defences should not be tolerated. Similarly in ***Maharaj v Barclays National Bank Ltd***[5], the Court emphasised that a defendant must provide a clear and complete disclosure of the defence and the material facts supporting it. The Court went further to state that:

> *"[O]ne of the ways in which a defendant may successfully oppose a claim for summary judgement is by satisfying the court 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 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,*
>
> *(b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, and*
>
> *(c) a defence which is bona fide and good in law. If satisfied on these matters the Court must refuse summary judgement, either wholly or in part, as the case may be".*

[27] It is common cause that the parties concluded an instalment sale agreement in terms of which the defendant was required to make payments upon delivery of the vehicle. From the outset, the defendant does not dispute his failure to make payments or that he is in arrears. Upon careful consideration of the papers filed and oral submissions, it is evident that the defendant is in breach of the agreement. This position is supported by the certificate of balance marked SJ2 of the bundle and the bank statements marked SJ3 in the bundle, notwithstanding his denial of being in default.

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[4] 1976 (2) SA 226 (T) at 229F-H
[5] 1976 (1) SA 418 (A) at 426

[28] The defendant's contention, which relates to his uncertainty regarding the precise arrear amount and his assertion that non-payment was due to circumstances beyond his control, is without merit. These proceedings concern the return of the vehicle, not the recovery of arrear instalments. Any dispute about the arrear balance is a matter for determination in a different and appropriate forum, as this Court is not seized with such issues. Accordingly, the defendant cannot rely on arrear-related issues to resist summary judgment. With that being said, I turn to the defences raised, starting with the defence of *force majeure*.

Force majeure

[29] In relying on *force majeure*, the defendant contends that his non-compliance with the instalment sale agreement was due to circumstances beyond his control, attributing his default to the Covid-19 pandemic. He further alleges that the plaintiff's unilateral decision to uplift his overdraft facility amid this period worsened his financial difficulties. On this basis, he seeks to indirectly rely on *force majeure* to suspend his contractual obligations. The plaintiff disputes this defence, submitting that the defendant failed to demonstrate how the pandemic impacted on his ability to meet his monthly instalments and that he provided no financial records or supporting documentation. Accordingly, the plaintiff submits that the alleged *force majeure* amounts to a bare denial and an unsubstantiated allegation.

[30] It is well established that a party invoking *force majeure* bears the onus of proving that the impossibility was not self-created. As such, it is upon the defendant to show the Court that circumstances beyond his control rendered performance objectively impossible. In this matter, the defendant asserts that the Covid- 19 pandemic prevented him from fulfilling his obligation, yet he provides no explanation of how the pandemic specifically impacted his ability to pay, nor does he identify any clause in the agreement entitling him to rely on *force majeure*. If such a clause exists, it was not placed before Court. While not denying that Covid-19 may have some impact on his finances, the bank statement shows that he remained able to make payments, *albeit* not in full. By his own admission, he elected to stop paying upon receipt of summons in 2023 and redirected the funds earmarked for this vehicle towards his bond repayments. This demonstrate that his non-payment was therefore a matter of

choice rather than incapacity. He therefore cannot rely on *force majeure* to justify a deliberate decision not to honour his contractual obligations.

[31] Accepting that the agreement contains no *force majeure* clause, the defendant may nevertheless invoke the common law doctrine of supervening impossibility. This doctrine suspends contractual obligations only where performance has become objectively impossible due to an unforeseeable or unavoidable event. Importantly, not every circumstance labelled as *force majeure* excuse performance. A party's personal financial difficulties or deterioration in financial position does not constitute a *force majeure* and does not relieve a party form his contractual obligations. *(My Underlining)*

[32] In ***MV Snow Crystal Transnet t/a National Ports Authority v Owner of MV Snow Crystal*** [6] the Court said the following:

> *"As a general rule impossibility of performance brought about by vis major or casus fortuitus will excuse performance of a contract. But it will not always do so. In each case it is necessary to "look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied". The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant." (Emphasis added)*

[33] In the present matter, the defendant cannot successfully rely on supervening impossibility. Although the bank statements may suggest some financial strain during the Covid-19 period, no factual facts were placed before the Court to substantiate this defence. The established facts further show that the defendant contributed to his own predicament by deliberately electing to stop payments under the instalment sale agreement in order to prioritise his bond obligations.

> *'Applying these principles to the facts, it cannot be concluded that the defendant has established impossibility of performance as a legally cognizable defense. First, the defendant put up no cogent documentary evidence in support of its contentions. Second*

[6] 2008 (4) SA 111 (SCA) para 28

and more importantly, the impossibility on which the defendant relies is subjective and specific to itself. The change in the defendant's financial position is not, as required by law, absolute. The obligation to render performance even during lockdown can, in general, be performed by parties in the position of the defendant. The defendant's personal incapability does not render the instalment sale agreement void.'[7]

Ombudsman and Counterclaim

[34] The defendant asserts that the matter was referred to the Ombudsman on 11 October 2022, prior to the issuing of summons, and he is still awaiting an outcome. Similarly to the *force majeure*, the plaintiff disputes this, noting that the defendant has produced no evidence confirming that such a referral was made. The plaintiff further submits that, given that nearly four years have passed without any reported progress, the alleged referral appears to be a dilatory tactic. I agree with the plaintiff's submission that, in the absence of any supporting documents that the matter was in fact, referred to the Ombudsman, this defence cannot be sustained. A mere reference to a case number is inadequate. The defendant was aware that this formed part of his defence, yet he failed to place sufficient evidence before the Court. The actions of the defendant mirror what the court in ***Breitenbach v Fiat SA (Edms) Bpk***[8]**,** referred to as bald, vague and sketchy defences which the court warned must not be tolerated.

[35] Similarly, the reliance on a purported Counterclaim is without merit. The defendant provided no documentary proof that any Counterclaim was filed in the George Circuit Court, despite being aware that these proceedings are before this Court in Cape Town. Moreover, it emerged that the alleged Counterclaim, was not a Counterclaim at all, but new set of Summons, which explains why no documents were transferred to this file. As the matter stands, no Counterclaim exists in relation to these proceedings. In my view, the defences concerning the Ombudsman referral and the alleged Counterclaim are neither *bona fide* nor substantive; they serve only to delay the matter and constitute abuse of process.

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[7] Wesbank, a Division of FirstRand Bank Limited v PSG Haulers CC [2022] ZAGPJHC 603 (25 August 2022) para 21.

[8] Supra – See fn 2 above

Section 129 notice

[36] The defendant initially alleged that he never received the section 129 notice, he then shifted to claiming that the notice was vague and contradictory, noting that it is dated 9 January 2023 while the plaintiff alleges that the default occurred in March 2020. He contends that this discrepancy creates uncertainty regarding the basis of enforcement. In response, the plaintiff asserted that the notice was sent by registered mail and personally served by sheriff on 10 January 2023. Proof of postage and track and trace report were filed on record. Clearly the defendant assertion that he was never served with section 129 is therefore incorrect and misleading.

[37] Upon consideration of section 129 notice, it is clear that, the notice adequately informed the defendant of his default and the remedies that are available to him. The mere fact that the default arose in March 2020 while the notice was issued in January 2023 does not create any inconsistency. Instead, the delay demonstrates the plaintiff's willingness to afford the defendant ample opportunity to remedy the breach, as evidenced by the reduced payments he made during Covid-19 period. The defendant's contention that these indulgences constituted an amendment of the original agreement is unfounded and without merit. There is no vagueness or contradiction in the section 129 notice. I agree with the plaintiff, that the defences advanced by the defendant are merely dilatory and fail to disclose any *bona fide* defence or triable issue.

[38] Rule 32 is designed to prevent delays caused by abuse of court process and enables the plaintiff to obtain judgment swiftly, thereby avoiding unnecessary costs of a trial. In considering the now amended Rule 32, the Court in *Tumileng Trading CC v National Security and Fire (Pty) Ltd*[9] held that

> *'... Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has*

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[9] [2020] ZAWCHC 28 (30 April 2020).

changed. The classical formulations in Maharaj and Breitenbach v Fiat SA as to what is expected of a defendant seeking to successfully oppose an application for summary judgment, therefore remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognizable defense on the face of it, and that the defense is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant'.

CONCLUSION

[39] I am satisfied that the defences advanced by the defendant fell short in meeting the requirements of Rule 32 (3) read with Rule 28 (4), in that they are not *bona fide* and disclosed no triable issues. The plaintiff has made out a proper case, the application for a summary judgment must accordingly succeed. Regarding costs, I find no basis to depart from the general rule that costs follow the successful party.

ORDER

1. The application for summary judgment is granted.
2. The instalment sale agreement concluded by the parties is cancelled.
3. The 2015 Volkswagen Touran 2.0 Trendline with engine number C [.....] and chassis number W [....] be returned to the plaintiff forthwith.
4. Retention of all monies paid by the defendant to the plaintiff.
5. Plaintiff is granted leave to apply to the Court for damages, if any, against the defendant in the amount to be calculated by subtracting the current market value of the vehicle.
6. The defendant is ordered to pay costs of the application.

[redacted]

YAKE S.

Acting Judge of the High Court

Western Cape

APPEARANCES

For the Plaintiff: Adv C. Francis

Instructed by: T. Du Toit & Co Inc.

For the Defendant: Mr T. Franzsen