

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 220527/2025

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
28/8/2026	
DATE	SIGNATURE

In the matter between:

**BMW FINANCIAL SERVICES (SOUTH AFRICA)
(PTY)LTD T/A ALPHERA FINANCIAL SERVICES**

Applicant

and

SEMITSİ FRANS MAILULA

First Respondent

JUDGMENT

WENTZEL -THOMPSON J

Introduction

- [1] This is an application for summary judgment arising from an instalment sale agreement concluded between the plaintiff, BMW Financial Services (South Africa) (Pty) Ltd trading as Alphera Financial Services ("BMW Finance"), and the defendant, Mr Semitsi Frans Mailula. The agreement concerns a Jaguar XF 2.0

D R Sport motor vehicle. BMW Finance seeks cancellation of the agreement, return of the vehicle, postponement *sine die* of the determination of its damages pending repossession, valuation and sale of the vehicle, interest on the damages eventually established and costs on the attorney-and-client scale.

- [2] The application is opposed by the defendant, who appeared in person. His affidavit resisting summary judgment was delivered late and is accompanied by an application for condonation.
- [3] The defendant has raised a number of defences, but the primary defence that in my view establishes that he has disclosed a bona fide defence and that raises a triable issue is that the vehicle financed by the plaintiff was not of the year model that the dealership represented it to be, and the agreement ought properly to have been cancelled by the BMW Financial Services once he drew this to their attention to this.

Condonation

- [4] The defendant explains that he is a lay litigant, that the summary judgment papers were transmitted electronically in circumstances in which he did not appreciate their procedural significance, and that there was confusion concerning service and enrolment. The delay was approximately 22 days.
- [5] It is now trite that in considering an application for condonation, regard must be had to the degree of lateness, the explanation for the delay, the prospects of success, the importance of the matter and prejudice, viewed cumulatively.¹ In circumstances where the defendant faces cancellation of a substantial credit agreement and repossession of a motor vehicle, has provided an explanation consistent with his unrepresented status, and raises an issue which, for reasons that follow, cannot be characterised as fanciful, condonation should be granted. This is particularly so as the delay was relatively short and has caused no prejudice.

The legal position under amended Rule 32

¹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532B-E.

- [6] The object of summary judgment is not to deprive a defendant who has a genuine defence of a trial. Rule 32 requires that the defendant must disclose the nature and grounds of his defence and the material facts upon which it rests with sufficient particularity to demonstrate that the defence is both *bona fide* and good in law. He is not required at this stage to prove the defence or to persuade the Court upon a balance of probabilities that it will ultimately succeed at a trial in due course.²
- [7] The amendment to Rule 32 has not substantively changed that substantive enquiry.
- [8] The opposing affidavit and the new Rule, however, must in terms of rule 32(3)(b) disclose fully the nature and grounds of the defence and the material facts relied upon therefor with reference to the defence as set out in the plea.
- [9] The legal position under Uniform Rule 32 in its amended form has been set out in *Raumix Aggregates (Pty) Ltd v Richter Sand CC GJ*³ as follows

"[16] The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under section 34 of the Constitution." (own emphasis).

- [10] In their report the Superior Court's Task Team of the Rules Board for the Courts of Law which were tasked with the amendments to rule 32 identified certain shortcomings in the former rule 32 and reported the following in regard to the addressing of the shortcomings:

"8.2 The best way of addressing these shortcomings would seem to be to require the founding affidavit in support of summary judgment to be filed at a time when the defendant's defence to the action is apparent, by

² *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A), as subsequently explained in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA)

³ Case number 2109/8153, a decision of the full court dated 4 October 2019.

virtue of having been set out in a plea. This course is better than allowing a replying affidavit to be filed (as was suggested by a report prepared a few decades ago by the Galgut Commission). Merely including provision for a replying affidavit would not address the problems with the formulaic nature of the founding affidavit, and the speculation inevitably contained therein.

8.3 *In the event of a plaintiff applying for summary judgment after the delivery of a defendant's plea, the plaintiff would be able to explain briefly in its founding affidavit why the defences proffered by the defendant do not raise a triable issue; and should indeed be required to do so in order that the question of whether there is a bona fide defence which is capable of being sustained could be considered by the Court in a meaningful way. Requiring the plaintiff to set out why, in its view, it has a valid claim and why the defendant's defence is unsustainable, would also remove the criticism that the defendant is being required to commit itself to a version when the plaintiff is not similarly burdened. Obliging the plaintiff to engage meaningfully with the case in its founding affidavit would moreover have the added benefit of reducing the temptation for a plaintiff to seek summary judgment as a tactical move (and as a way of forcing the defendant to commit to a version on oath, which can be subsequently used in cross-examination to discredit a witness of the defendant).*

8.4 *A stipulation that a plaintiff can only apply for summary judgment after delivery of a plea (rather than a notice of intention to defend) would also mean that the summary judgment application would be adjudicated on the basis of the defendant's pleaded defence and thus hopefully avoid a situation (such as not infrequently occurs under the current rule) where a defendant's version in its opposing summary judgment application diverges materially from its subsequently-delivered plea. The summary judgment debate will thus hopefully be a more informed, and less, artificial, one, and engage with the real issues in the matter."*

[11] In the matter of *Tumileng Trading CC*⁴, that was recently decided by the Hon. Mr Justice Binns-Ward the court considered the nature of the amended rule and the test to be applied when deciding a summary judgment application under the amended rule and held that the test remain that of a bona fide defence:

"[24] As to (ii), rule 32(3)(b), which provides for what is required in a Respondent's opposing affidavit, remains as it was before, save that the affidavit must now be delivered at least five days before the hearing of the application, instead of by noon on the day but one before the hearing, as had previously been the case. As has always been the position, the opposing affidavit must 'disclose fully the nature and grounds of the defence and the

⁴ *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire(Pty) Ltd* (3670/2019) [2020] ZAWCHC 28; 2020 (6) SA 624 (WCC) (30 April 2020).

material facts relied upon therefor'. The purpose of the opposing affidavit also remains, as historically the case, to demonstrate that the Respondent 'has a bona fide defence to the action'. There is thus no substantive change in the nature of the 'burden', if that is what it is, placed on a Respondent in terms of the procedure. However, the broader form of supporting affidavit that is contemplated in terms of the amended rule 32(2)(b), will in some cases require more of a Respondent in respect of the content of its opposing affidavit than was the case in the pre-amendment regime, for the Respondent will be expected to engage with the Applicant's averments concerning the pleaded defence."

...

[48] To borrow from Navsa JA's characterisation of the Respondent's position in Joob Joob Investments, 'such defences as were proffered [were] cast in the most dubious terms'. The most probable inference in the circumstances is that no particularity has been furnished because the defences and supposed counterclaim are not genuinely advanced. This is especially so because the Respondent not only failed, quite dismally, to satisfy the requirements of rule 32(3)(b). It also failed to respond to the challenge to it in the Applicant's supporting affidavit to back up its bald plea with substantiating particularity. If a Respondent fails to put up the facts that it obviously should have been able to do were it advancing a genuine defence, it cannot complain if the court is left in a position in which it is unable to find a reasonable basis to doubt that it does not have a bona fide defence. There is, moreover, nothing in the papers to justify the court exercising its overriding discretion in favour of the Respondent."

- [12] Meritless denials and allegations are merely intended to delay the matters and is ultimately infringing on the applicant's right to summary judgment as stated by the Supreme Court of Appeal in NPGS Protection & Security Services CC. v Firstrand Bank Ltd:⁵

"[14] Indeed, the court would be remiss in its duties of such defences, clearly devoid of any bona fides, stand in the way of Applicants who are entitled to relief. The ever-increasing perception that bald averments and sketchy propositions are sufficient to stave off summary judgment is misplaced and not supported by the trite principles developed over many decades by our courts. See for example, the well-known judgment of this court in Maharaj v Barclays National Bank Ltd. 1976 (1) SA 418 (A) where the proper approach to applications for summary judgment is stated."

- [13] In terms of rule 32(3), the defendant may satisfy the court by affidavit or, with leave of the court, by oral evidence that he has a bona fide defence to the action.

⁵ 2020 (1) SA 494 (SCA)

- [1] In terms of rule 32(3)(b), the word “satisfy” does not mean “prove”. What the rule requires is that the defendant set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff’s claim.
- [14] *Tumileng Trading CC* confirms that a defendant defeats summary judgment by disclosing fully the nature and grounds of a bona fide defence and the material facts relied upon.
- [15] BMW Finance relies upon *Cellsecure Monitoring and Response (Pty) Ltd and Others v South African Securitisation Programme (RF) Ltd*⁶ for the proposition that bare denials and defences materially inconsistent with a plea do not suffice. That proposition is uncontroversial. *Cellsecure*, however, concerned defendants who failed meaningfully to engage with the material allegations supporting the plaintiff’s case. The present case must be considered on its own pleadings. The question is whether the defendant’s complaint concerning the identity and model year of the vehicle is a defence manufactured for the first time in opposition to summary judgment, or whether the material facts relating to this defence appears in his plea.

The terms of the instalment sale agreement

- [16] The juridical structure of the agreement is of some relevance: The first page identifies “*Alphera Financial Services, a division of BMW Financial Services (South Africa) (Pty) Ltd*” (the applicant), as the credit provider and the defendant as the consumer. The document is expressly headed “*Instalment Sale Agreement*”. The goods are identified as a Jaguar XF 2.0 D R Sport and the “*Year of First Registration*” is reflected as 2020.
- [17] It is important to note that the agreement is not framed as an independent loan in which BMW Finance merely advances money to enable the defendant to conclude an unrelated sale with the dealer. Its standard terms describe BMW Finance throughout as the “Seller”.

⁶ *Cellsecure Monitoring and Response (Pty) Ltd and Others v South African Securitisation Programme (RF) Limited* (A201_2023; 21647_2021) [2025] ZAGPPHC 98 (31 January 2025)

- [18] Clause 2 is headed "*The Goods and Delivery*". Clause 2.1 records that the consumer selected the goods from the supplier and that the Seller has no knowledge of the purpose for which the goods are required. Clause 2.2 requires the consumer to procure and take delivery from the Seller or supplier and thereafter to hold the goods on behalf of the Seller for the duration of the agreement. Clause 2.3 requires the consumer, before taking delivery, to inspect the goods on behalf of the Seller and to accept them on the Seller's behalf so that ownership passes to the Seller.
- [19] Clause 3.1 provides, in substance, that ownership of the goods remains with the Seller until the expiry of the agreement and until the consumer has paid all amounts due and complied with his contractual obligations. The proprietary structure is therefore not incidental to the financing: BMW Finance acquires and retains ownership of the very goods which are the subject of the instalment sale.
- [20] The enforcement provisions follow the same structure. Clause 11 identifies events of default and provides for the Seller's remedies following default. In the circumstances contemplated by the National Credit Act ("NCA"), the Seller may cancel the agreement, recover possession of the goods and claim damages. Clause 25 is itself headed "*The Seller's Right to Terminate the Agreement*".
- [21] Clause 17.1 furthermore provides for a certificate signed by a manager of the Seller to serve as *prima facie* proof of amounts owing. BMW Finance relies on this clause in relation to its certificate of balance and indebtedness.
- [22] Of some significance is clause 2.4. The exclusionary wording concerning warranties and representations as to the state, condition or fitness of the goods is expressly framed to operate if the agreement is not subject to the NCA. The present agreement plainly is an NCA credit agreement. Whatever other contractual protection BMW Finance may possess, clause 2.4 cannot without more be read as a comprehensive exclusion of all the Seller's responsibility in this transaction.

The defendant's plea

[23] The plea is plainly the work of a lay person. It is presented in affidavit form, responds *ad seriatim* to the particulars of claim, and does not articulate the defendant's defences with the legalese or finesse that might be expected of counsel. However, it discloses several material facts sufficient to enable the court to discern the legal basis of the defence that he has postulated, albeit not expressly formulated.

[24] From what I have been able to discern from his plea, the defendant has raised a number of defences that are dealt with in turn:

[2] First, the defendant disputes BMW Finance's reliance upon the unsigned version of the instalment sale agreement (ie. the electronic agreement) and insists that an agreement was signed manually by him. During the course of argument it occurred to me that what the defendant might have physically signed at his offices in the presence of a representative from the dealership was an application for finance that was then forwarded to BMW Finance for approval. Be that as it may, what is important is that the defendant links the absence of the agreement that he says he signed to the fact that the incorrect year model of the vehicle is reflected in the agreement. He expresses his suspicions as to why the agreement he signed has not been presented. This brings me to the defendant's second, and what I would term, his main defence. In his plea, the defendant explains that BMW Finance had, in January 2022, represented to him that the vehicle information had been checked and that the registered year model, contract, invoice and registration papers corresponded. However, after taking delivery of the vehicle, he realised that it was an earlier model and that the newer model that he believed he had bought, was of a different shape to the one he had purchased.⁷ On determining this, he repeatedly communicated with BMW Finance to bring the model discrepancy to their attention, impressing upon them to take this up with the dealership and cancel the contract that BMW Finance had concluded with them.

⁷ This is an issue that had been expanded upon by the defendant during argument, the defendant not quite appreciating the difference between argument and tendering evidence from the bar that was not under oath. This background nevertheless serves to elucidate his pleaded version and is not relied upon me in reaching my ultimate conclusion regarding the defendant's pleaded defence in this judgment.

- [25] After repeatedly bringing the model-year issue to BMW Finance's attention from December 2021 through January and March 2022, he approached Jaguar Land Rover South Africa, which, according to him, confirmed from the tenth character of the VIN number that the vehicle was in fact a 2019 model and not a 2020 model. This he had done after trying to engage with the dealership on several occasions to no avail.
- [26] It is thus readily apparent that the defence raised by the defendant is not an afterthought concocted to avoid summary judgment; whatever the legal significance of his contentions, what is clear is that they are *bona fide* raised by the defendant and are genuine.
- [27] In fact, in BBW Finance's counsel's chronology of events, confirms the defendant's version that this dispute was an issue that had been raised by the defendant from September 2021 through to March 2022, as well as in further communications from November 2021 to February 2022.
- [28] Apart from the question of the incorrect year model being sold to him as a later model, the defendant also disputes the amount of the arrears alleged by BMW Finance. He insists that he has paid approximately R1 million under the agreement, says that the true arrears were approximately R54 905.51 rather than the higher amount of R81 0008.11 alleged by BMW Finance, and says that he continued paying and increased instalment amount of R16 524.35 (above his stipulated instalment amount of approximately R15 000) monthly in order to pay off the arrears while attempting to resolve the model number dispute. The certificate of balance dated 23 September 2025 records the outstanding balance to be R620 785.38. However, it is apparent that after BMW Finance's cancellation of the agreement during August 2025, the defendant continued to pay his instalments. Thus the certificate of balance in December 2025 reflected a balance of R557 448.04.
- [29] I also pause to mention when considering the defendant's main defence that he has not pleaded with any clarity that he sought to cancel the instalment sale agreement upon discovering the misdescription of the model number of the vehicle sold to him. His plea rather conveys a desire that the finance agreement

be corrected or adjusted to reflect the lower value of the vehicle actually purchased by him, thereby reducing his overall indebtedness) on the basis that he would continue performing under the agreement until the dispute regarding the market value that had been sold to him and that which had been misrepresented had been sold to him had been resolved. The significance of this will become more apparent when I deal with the recent Supreme Court of Appeal authority relied upon by the defendant and the election, if any, made by the defendant.

[30] But it does bear mentioning at this stage that in his communications with BMW Financial Services, what he sought was that they, as the Sellers, cancel the purchase agreement between them and the dealership, that he insists he was not party to. It was on this basis that he rejected BMW Finance's disavowment of any responsibility for the incorrect model number sold to him and their insistence that this is a matter that he should take up with the dealership. This appears from the correspondence attached to the defendant's plea.

[31] The last defence raised is the least convincing: This concerns the unilateral debt review by BMW Finance and the breach of the Consumer Protection Act. BMW Finance has placed before the Court documentation relevant to the debt review under section 86(1) of the CPA as well as its termination of that process by way of a section 86(10) notice.

The defendant's opposing affidavit

[32] In his opposing affidavit, the defendant considerably developed his argument regarding the incorrect description of the model-year. It includes reliance upon consumer-protection principles and the contention that BMW Finance cannot simply distance itself from the dealer as say it merely financed whatever vehicle the defendant selected.

Assessment of the defences raised

a. The electronic signature defence

- [33] Mailula does not deny that he entered into an instalment sale transaction with BMW, took delivery of the Jaguar and thereafter performed under the agreement for years. His case is instead that he physically signed another version and BMW should produce it.
- [34] Both section 2(3) of the National Credit Act 34 of 2005 (NCA) and section 13 of the Electronic Communications Transactions Act 25 of 2002 (ECTA) makes provision for the use of an electronic signature.
- [35] BMW relies upon *FirstRand Bank Ltd t/a WesBank and Suzuki Mobility Finance v Farrar*,⁸ where an electronic instalment agreement was upheld by reference to the ECTA and where it was found that the defendant's bare denial of the electronic signature was insufficient. BMW accordingly submits that, absent production by Mailula of the supposedly different manually signed agreement, the electronic document constitutes the best available evidence of the transaction.
- [36] Standing alone, I do not think the assertion that the defendant had manually signed the agreement establishes a defence to BMW's substantive claim. Mailula would need to identify what material contractual term in the physically signed agreement differs from BMW's electronic version. He does not appear to do so.
- [37] The significance of the point is therefore evidential rather than dispositive. It becomes relevant only insofar as the alleged original agreement might bear upon the description of the vehicle.

b. The arrears defence

- [38] The mere difference between R81 008.11 and R54 905.51 probably does not, by itself, constitute a defence to cancellation if the contractual entitlement to cancel arises upon material arrears in the defendant's account and the requisite NCA processes having been complied with.

⁸ *FirstRand Bank Limited t/a Wesbank and Suzuki Mobility Finance v Farrar* (19950/2022) [2023] ZAGPJHC 954 (25 August 2023),

[39] The defendant concedes substantial arrears. His assertion that he was paying R16 524.35 per month-more than the contractual monthly instalment-does not establish that the account had been brought up to date. In his opposing affidavit, the defendant expresses his willingness to pay the corrected balance and continue with his contractual obligations.

[40] BMW relies upon the contractual certificate-of-balance provision in the instalment sale agreement and *Cellsecure Monitoring and Response (Pty) Ltd v South African Securitisation Programme (RF) Ltd*,⁹ contending that the certificate constitutes *prima facie* evidence and that Mailula has not produced a proper accounting demonstrating why it is wrong.

[3] I therefore regard the quantum dispute as weak as a defence to cancellation and repossession, although it may ultimately matter to the monetary accounting.

c. *The defence based on the CPA and debt review*

[41] BMW Finance contends that the CPA point was introduced only in the summary-judgment opposition and is inconsistent with the plea. It also says the CPA does not apply to BMW in the capacity alleged because BMW was the financier rather than the supplier of the vehicle.

[42] This is inextricably tied up with the defence concerning BMW Finance responsibility for the incorrect model year being reflected in the instalment sale agreement.

[43] In any event, his defence based on the CPA alone are vague and pleaded with insufficient particularity; reliance upon broad notions of consumer fairness do not in and of themselves answer BMW Finance's contractual claim for repossession.

[44] I have already alluded to the defendant's defence based upon his alleged entitlement to have continued with the debt review proceedings. Suffice to say that BMW Finance engaged with the process and was well within its rights to terminate the process as it did.

⁹ *supra*

d. *The 2019/2020 model discrepancy*

- [45] I have dealt with this defence last as it requires the greatest attention.
- [4] BMW's answer is essentially that it is the financier, not the dealer or supplier which selected or sold the vehicle. It says that the defendant received the vehicle he selected, signed the release documentation and, if the dealer misrepresented the model year or value, his remedy lies against the dealer.
- [46] BMW Finance submits that the year-model dispute does not provide a defence to its contractual right to cancel and repossess the vehicle. It says that it did not market or supply the vehicle, that the defendant selected it from the dealership, and that any misrepresentation by the dealership concerning the model year is a matter between the defendant and the dealer.
- [47] In this respect, reliance is placed in particular, upon *ABSA Bank Ltd v Baloyi*,¹⁰ where the High Court held that the financier was not the supplier and that alleged misrepresentations by a dealership concerning a vehicle fell to be pursued against that dealership. In essence, BMW Finance says that the model-year discrepancy is not its problem and the defendant may sue the dealer for misrepresentation or for the difference in value attributable to the incorrect model year.
- [48] It also relies upon *Mutual & Federal Insurance Co Ltd v Da Costa*¹¹ concerning representations as to a vehicle's age, model and value, and submits that any difference in value attributable to the model-year discrepancy may be pursued against the dealer.
- [49] Finally, BMW Finance submits that the defendant admits arrears and that a dispute about the precise balance cannot prevent repossession where default is otherwise established.
- [5] There is considerable force in that last submission considered in isolation. However, as will be demonstrated later in this judgment, should the reduction in

¹⁰ *ABSA Bank Limited v Baloyi* (2024/143345) [2025] ZAGPJHC 1095 (27 October 2025),

¹¹ 2008 (3) SA 439 (SCA)

the value of the vehicle as a 2019 model as a 2020 model have the result that the arrears would have been extinguished, would call into question BMW Finance's right to cancel the agreement and seek repossession.

The contemporaneous correspondence and its significance

- [50] The defendant's complaint concerning the model year was not formulated for the first time in response to the present proceedings. The correspondence annexed to the plea demonstrates that the dispute arose years earlier and was pursued persistently with both Jaguar Land Rover South Africa and BMW Finance. That history is relevant not merely to the defendant's *bona fides*, but also to the substance of the defence now advanced.
- [51] On 21 September 2021, Jaguar Land Rover South Africa, through its Customer Relationship Centre, informed the defendant in writing that the year model reflected on its system for the vehicle was 2019. This is important because the defendant's allegation that the vehicle was not a 2020 model was thus supported, at an early stage, by information emanating from the manufacturer itself.
- [52] Thereafter, on 2 December 2021, the defendant addressed the matter squarely with BMW Finance's Head of Complaints. He complained that the vehicle had been sold to him as a 2020 model, that the dealer's description was inconsistent with the manufacturer's information, and that a 2020 pricing schedule had apparently been used. He went further and alleged that an "*old (stock) vehicle was sold as if it was a new (stock) vehicle*", that a 2020 pricing schedule had been used in pricing the vehicle rather than a 2019 schedule, and that the dealer had consequently benefited financially from the transaction.
- [53] The defendant therefor placed responsibility squarely at BMW Finance's door and expressly requested that BMW Finance investigate the dealer's conduct.
- [54] BMW Finance did not at that stage respond that the matter lay exclusively between the defendant and the dealership. On 14 December 2021 it informed the defendant that the complaint remained under investigation and that the Regional Manager associated with the dealer had been notified. That response is significant because it shows that BMW Finance initially treated the complaint

as one requiring investigation within the transactional framework in which it and the dealership had participated. This sits somewhat uneasily with BMW Finance's present submission that the matter was simply between the defendant and the dealership.

- [55] On 14 January 2022 the defendant again wrote to BMW Finance. He referred to Jaguar Land Rover South Africa's confirmation that the vehicle was a 2019 model and stated expressly that the instalment sale agreement concluded between himself and BMW Finance contained incorrect vehicle information. He further contended that he had suffered financial loss as a result. In substance, therefore, the defendant linked the alleged misdescription to BMW Finance's own instalment sale agreement long before litigation commenced.
- [56] BMW Finance's response of 26 January 2022 is particularly important. It stated that its team had reviewed the complaint and that the supporting documents, including the invoice and registration documents, reflected a 2020 year model. BMW Finance further stated that, in South Africa, it worked according to the registered year model and that the contract, invoice and registration papers all matched. It therefore concluded that nothing had been sold under false pretences.
- [57] That response demonstrates that BMW Finance itself initially engaged with the correctness of the description of the vehicle and relied upon the contents of the contract, invoice and registration documents in rejecting the complaint. It did not at this stage characterise itself merely as a financier that had nothing to do with the description of the vehicle and did not maintain that the description of the model year was exclusively a matter between Mailula and the dealer.
- [58] The defendant immediately challenged BMW Finance's conclusion in a detailed response sent to BMW Finance the following day. He again relied upon Jaguar Land Rover South Africa's information, explained his understanding of the VIN coding, and challenged BMW Finance's reliance upon the dealership's documents in the face of contrary information from the manufacturer. He directly challenged BMW's proposition that registration documents could alter the

manufacturer's model year. He argued that neither the dealer nor BMW Finance could "flip" or alter the manufacturer's model-year information.

- [59] Significantly the defendant also requested a comparison with the monthly instalment that would have applied to a comparable 2019 Jaguar XF, contending that if the vehicle was indeed a 2019 model the sale agreement was incorrect and unfair to him.
- [60] This part of the correspondence is relevant to the remedy ultimately asserted. The defendant did not at that stage unequivocally purport to cancel the agreement. His approach was instead to seek investigation, correction of the transaction and an adjustment of its financial consequences. That is consistent with an election to pursue an affirmatory remedy, such as a reduction in price or other monetary adjustment, rather than rescission.
- [61] The dispute continued through February 2022. On 10, 16 February 2026 and on 24 February, the defendant complained that BMW Finance had not properly engaged with the manufacturer's information, sought escalation to more senior personnel and eventually requested the contact details of BMW Finance's legal department. The sequence confirms that the issue was persistent and genuine, not contrived in order to resist repossession after he had fallen into arrears on the agreement.
- [62] BMW Finance's final substantive response, dated 24 March 2022, marked a change in stance. It stated that the matter had been referred to its Regional Manager and the dealership, that the information and documents gathered had been reviewed, but that the complaint was not finance-related and could not be resolved by BMW Finance. It advised the defendant to pursue the matter with the dealership, stating that BMW Finance could resolve only finance-related matters and that it merely provided finance and paid out on the documentation agreed between dealer and customer. It advised the defendant that he was free to seek further legal assistance.

- [63] That formulation is of particular significance in light of the recent Supreme Court of Appeal authority in *NiekeNiekerk v FirstRand Bank Limited*.¹² The position adopted by BMW Finance in March 2022 - that it was concerned only with finance and that complaints relating to the vehicle itself belonged to the dealer - is substantially the same type of distinction which the Supreme Court of Appeal rejected. It was held that where the terms of an instalment sale agreement established that an instalment-sale financier whose contractual position makes it owner and seller cannot necessarily adopt that characterisation; it may simultaneously “wear two hats”, as credit provider and supplier.
- [64] The correspondence dealt with above has significance on several levels. First, it strongly supports the *bona fides* of the defendant’s defence, because the model-year dispute was raised and pursued years before summons was issued. Second, it shows that the defendant expressly connected the alleged misdescription to BMW Finance’s own instalment sale agreement. Third, it shows that BMW Finance initially investigated the complaint substantively and only later adopted the position that the issue lay exclusively with the dealership. Fourth, it supports the defendant’s contention that he sought a correction or financial adjustment rather than treating the transaction as cancelled.
- [65] In my view, this documentary history is inconsistent with the suggestion made by BMW Finance that the model-year defence is an afterthought raised merely to delay repossession. It is instead a long-standing dispute concerning the contractual description and value of the very goods sold under the instalment sale agreement. Whether that dispute ultimately entitles the defendant to rescission, a reduction in price, damages or no relief at all is a matter for trial. But the defence raised requires at least that the defendant should be permitted to have it adjudicated fully at a trial in due course.
- [6] I say this primarily because the defendant has recent Supreme Court of Appeal (SCA) authority supporting his position.

¹² 2026 (2) SA 516 (SCA)

Van Niekerk v FirstRand Bank

- [66] The defendant relies upon a decision of the Supreme Court of Appeal that in my view is decisive. This is the recent decision of *Van Niekerk v FirstRand Bank Limited*.¹³ In *Van Niekerk* the bank had instituted action upon an instalment sale agreement and sought cancellation and damages. The purchaser resisted the claim on the basis of latent defects in the motor vehicle, alleged that she had validly cancelled the agreement and counterclaimed for restitution.
- [67] The High Court held that the bank merely financed the vehicle and was not the supplier. That is substantially the characterisation advanced by BMW Finance in the present matter. The SCA, however rejected this characterisation. It interpreted the instalment sale agreement as a whole and gave particular weight to provisions under which the bank sold the goods, remained their owner until payment and was registered as titleholder. It held at para 24 that the bank “*most certainly wore two hats*”, namely that of supplier and that of credit provider. At para 25 it held that the bank, as owner of the vehicle, was both supplier and credit provider.
- [68] The SCA expressly rejected the narrow approach adopted in *MFC (a division of Nedbank Ltd) v JAJ Botha*,¹⁴ according to which the credit provider’s role is simply to provide credit and not to fulfil the role of supplier. The SCA reasoned that while the NCA excludes the credit transaction itself from the operation of the CPA, section 5(2)(d) of the CPA does not exclude the goods which are the subject of that transaction.
- [69] Four contractual terms in the First Rand Bank instalment sale agreement were decided as decisive. The first was that the agreement defined the supplier as the party from whom the goods had been procured. The second was that it was stated:

¹³ 2026 (2) SA 516 (SCA)

¹⁴ *MFC (a division of Nedbank Ltd) v Botha* (6981/13) [2013] ZAWCHC 107 (15 August 2013)

"We Sell the Goods to you on the terms and conditions of this Agreement."

- [70] The other two terms provided that the bank would remain the owner until all amounts had been paid and required the bank to be registered as title owner.
- [7] The contractual terms in the agreement before the SCA which led it to the conclusion that *"the bank most certainly wore two hats when it entered into the agreement, namely, as that of supplier and that of credit provider,"* are equally present in the matter before me; indeed, the provisions in the instalment sale agreement in the matter before me are more extensive and serve to heighten the conclusion that was reached by the SCA in *Van Niekerk*.
- [71] In the clauses quoted by me at the beginning of this judgment in the instalment sale agreement before me, BMW Finance calls itself the "Seller", it is provided that the defendant takes delivery on its behalf, that ownership passes from the dealer to BMW Finance and remains with it, and demonstrate that BMW Finance invokes precisely the proprietary rights of a seller when it seeks cancellation and repossession.
- [72] In my view *Van Niekerk* prevents BMW Finance from disposing of the model-year defence on the simple basis that *"BMW Finance was only the financier and the defendant must sue the dealer."* The legal relationship created by the agreement is more complex and may in fact indicate that BMW is the seller vis-a-vis the defendant and that it has a separate relationship between it and the dealer that means that the defendant's port of call is indeed BMW Services.
- [73] This does not mean that the dealer is necessarily immune from liability, nor that the separate juristic personality of companies within the BMW group may be ignored. The fact that the dealership operated under the BMW brand and that BMW Finance is another BMW entity does not, without more, merge their corporate identities or make every representation by one attributable to the other. But that they are entities under the BMW umbrella does make BMW Finance's insistence that it is not responsible and that the defendant's remedy is against the dealer a little artificial and serves to elevate form over substance, even if it does not necessarily warrant the piercing of the corporate veil.

[74] Indeed, the agreement itself contemplates the participation of authorised dealers, agents and business partners in the transaction. Whether the dealership acted independently, as supplier to BMW Finance, as BMW Finance's authorised intermediary for particular purposes, or in some combination of those capacities, and who supplied the information which resulted in the vehicle being described in BMW Finance's contract as a 2020 vehicle, are questions which cannot appropriately be determined on these papers. But they are issues that could and should properly be fleshed out at a trial.

[75] Nor does *Da Costa*¹⁵ answer that enquiry. That case concerned the materiality and valuation consequences of descriptions of a motor vehicle in an insurance context. It may ultimately assist in assessing whether the difference between a 2019 and 2020 model was material and what financial consequence followed; it does not determine whether BMW Finance, as contractual seller and owner, may disclaim responsibility for the description of the merx in its own instalment sale agreement.

[76] Likewise, after *Van Niekerk*, *Baloyi* cannot be treated as establishing an absolute proposition that a credit provider under an instalment sale is merely a financier. The contractual arrangements must be examined. To the extent that *Baloyi* rests upon a proposition inconsistent with the later SCA authority, I am bound by *Van Niekerk*.

The limits of the Van Niekerk defence and the remedy elected by the defendant

[77] *Van Niekerk* does not, however, determine this application automatically in the defendant's favour. There are a number of further issues concerning the defendant's elected remedy that require consideration.

[78] Mrs Van Niekerk proved serious latent defects at trial, had cancelled her agreement and counterclaimed for restitution under the *actio redhibitoria*. The SCA held that she was entitled to do so and confirmed the cancellation.

¹⁵ *Mutual & Federal Insurance Co Ltd v Da Costa* (243/06) [2007] ZASCA 89; [2007] SCA 89 (RSA); 2008 (3) SA 439 (SCA) (6 June 2007),

- [79] I might mention that BMW Finance sought to distinguish *Van Niekerk* on the basis that the vehicle contained serious latent defects. I do not agree. The fact that the vehicle was a 2019 model and not a 2020 model as represented to the defendant, equally constitutes a latent defect. It was not something readily discernible prior to confirmation of the VIN number by BMW South Africa. The defect was thus certainly latent. And the fact that it was a 2019 model and not a 2020 model was, without doubt, a defect.
- [80] However, the defendant has not pleaded its case on the basis of the *actio redhibitoria* as Ms Van Niekerk had done. But does that distinguish his case from that relied upon by the defendant?
- [81] The defendant's plea does not contain an unequivocal election cancelling the agreement between him and BMW Finance. His continued payments and expressed desire to regularise his account and negotiate a reduced purchase price in view of the reduced market value of the model that he was provided with may ultimately amount to affirmation rather than rescission of the instalment sale agreement between the defendant and BMW Financial Services.
- [82] It is consequently possible that the defendant's ultimate remedy is not cancellation, but a reduction of the purchase price, damages, or some other monetary adjustment flowing from the misdescription. That question is a matter for determination by a trial court in due course.
- [83] That being said, I should mention that the defendant has consistently stated that he has no relationship with the dealer and that his relationship is with BMW Financial Services, who in fact purchased the vehicle from the dealer and not him. He thus argues that it is BMW Financial Services that ought to have cancelled the contract with the dealer due to misrepresentation and released him from his financial obligations under the subsequent instalment sale agreement concluded with him. Thus, although he did not cancel the agreement with BMW Financial Services themselves, as the defendant had done in *Van Niekerk*, cancellation of the sale had been his ultimate objective.
- [84] It was only after BMW Financial Services had refused to do so and had indicated that his recourse was against the dealer and not them, that he, attempted to

negotiate with BMW Financial Services to reduce the purchase price payable in terms of the Instalment Sale Agreement in line with the market value of a 2019 model of the vehicle that he had purchased. I do not understand why BMW Financial Services were not amenable to this; they were not dealing with a recalcitrant debtor seeking to avoid payment; all he wanted was to pay off the vehicle at the value of a 2019 and not a 2020 model that had been purportedly sold to him.

- [85] But I must also mention that in his heads of argument, the defendant contends that should be treated as cancelled, with the parties effectively restored to their positions prior to the agreement; in the alternative, the defendant seeks that the outstanding balance should be adjusted to reflect the true value of the vehicle as a 2019 model.
- [86] What is important is that Rule 32 does not require that the defendant plead a perfect cause of action for *restitutio in integrum* or *quantum minoris*; all that it requires is that the defendant disclose a *bona fide* defence. A court is not bound by a party's erroneous characterisation of his/her/its defence where the facts pleaded disclose a defence in law. The principle *iura novit curia* permits the court to apply the correct legal rule, provided that doing so does not prejudice the parties by deciding the case upon facts that they were never called upon to meet.
- [87] This is not the case here; cancellation of the agreement, alternatively a reduction in the purchase price was expressly raised in the correspondence attached to the plea and in the heads of argument. BMW Finance can hardly be surprised by the allegations that it was the seller under the instalments sale agreement when its own terms unequivocally state this.
- [88] And the analysis of the defendant's correspondence to its plea serves to indicate that the relief sought by the defendant is that based upon the *actio quantum minoris*.
- [89] If the defendant has affirmed the sale notwithstanding the misdescription and his remedy is therefore effectively one for reduction of price rather than rescission, the conceptual consequence is that the agreement remains in existence. The *actio quantum minoris* proceeds on the basis that the purchaser keeps the contract

and the goods, but obtains a reduction representing the difference between the value contracted for and the actual value of the goods supplied.

- [90] Should the defendant affirm the sale, this leaves it open to BMW Finance to argue that the model-year dispute is relevant to the accounting between the parties after the vehicle has been repossessed and sold, but does not deprive it of its contractual right to repossess the vehicle following the defendant's admitted default in the payments due under the agreement.
- [91] However, if the defendant can show that the proper reduction in price would have meant that he was not in arrears at the date that BMW Finance elected to cancel the agreement, this would go directly to BMW Finance's accrued right of cancellation, and consequently its right to repossession.
- [92] This possibility, in and of itself, to mind establishes that the defendant should be granted the opportunity to have his defence properly interrogated at a trial in due course.
- [93] I thus reject BMW Finance's contention that the defendant will, at that later stage, be able to raise any properly pleaded reduction in the purchase price, damages or set-off which may reduce the ultimate balance outstanding at that stage of the proceedings.

Conclusion

- [94] Were the defendant represented and his plea professionally drafted, the Court might legitimately expect the distinction between rescission, reduction of price, damages and set-off to have been pleaded with greater clarity. It might also expect an express allegation whether any reduction in price would have extinguished the arrears existing when BMW Finance purported to cancel the agreement.
- [95] But the defendant is a lay litigant who, years before these proceedings, identified and persistently pursued the very factual problem which has now assumed legal significance following *Van Niekerk*. He cannot reasonably be expected to have appreciated the juridical distinction between BMW Finance as credit provider,

owner, seller and supplier, or the separate common-law remedies of rescission (*actio redhibitoria*) and reduction of price (*actio quanti minoris*).

[96] But what he did keenly appreciate was that it was BMW Finance that was the seller in their contract with him and that he had no contract with the dealer and that thus, his recourse was through them and not the dealer. The contractual provisions of the instalment sale agreement that he concluded with BMW Financial Services bear him out on this interpretation and he has Supreme Court of Appeal authority in *Van Niekerk* supporting him.

[97] Pleadings serve to identify the material facts in dispute. It is for the court to apply the law to the facts so presented. The defendant's plea states, in substance, that BMW Finance contracted with him in respect of what the contractual documentation identified as a 2020 Jaguar, that the vehicle was in fact a 2019 model, that BMW Finance was repeatedly informed of the discrepancy, that BMW Finance itself initially maintained that the contractual, invoice and registration information was correct, description o and that the manufacturer thereafter allegedly confirmed that the vehicle he had purchased was a 2019 model and not a 2020 model as he had been told was being purchased by him.

[98] These allegations require an answer at trial. They are supported by contemporaneous correspondence predating the litigation by several years. They are not bare denials of the kind considered in *Cellsecure* and more than meet the threshold required in the amended Rule.

[99] *A fortiori*, BMW Financial Servies itself pleads that the written agreement contained an incorrect description of the vehicle sold that it seeks to rectify as a common or *bona fide* error. That feature reinforces the conclusion that the description of the vehicle in the instalment sale agreement did not relate to the vehicle that the defendant had purchased.

[100] Whether the model-year discrepancy was material, whether it induced the transaction, whether BMW Finance or the dealer was responsible for it, whether the relevant representation may legally be attributed to BMW Finance, whether the defendant affirmed the agreement after acquiring knowledge of the true model year, whether he retained a right to rescind the agreement, whether he

instead possesses a right to claim a reduction in the purchase price under the *actio quanti minoris* or damages claim, and whether any such claim would affect the existence or extent of the default upon which BMW Finance relied, are all matters that ought properly be determined at a trial.

[101] Even where a defence is imperfectly articulated, the court faced with an application for summary judgment retains a discretion where the papers disclose a genuine issue requiring trial. *Joob v Joob* emphasises that summary judgment is intended to prevent recalcitrant debtors from delaying claims to which they have no answer, but equally to afford a litigant who has crossed the threshold of disclosing a *bona fide* defence valid in law the opportunity of ventilating the dispute at a trial.

[102] The defendant complained about the model-year discrepancy long before summons. The manufacturer is alleged to have confirmed his contention by reference to the VIN number. BMW Finance's own contract identifies the vehicle purchased by the defendant as a 2020 model.

[103] Much of BMW Finance's arguments have been rebuked by *Van Niekerk*.

[104] It is thus utterly appropriate that the matter should proceed to trial, where the parties may amend their pleadings if necessary, discover the relevant dealer and manufacturer documentation, lead evidence concerning the VIN and model year, explain the contractual chain and dealership relationship, and address expressly the defendant's election and the monetary consequences, if any, of the alleged misdescription.

[105] I thus conclude that the defendant has disclosed sufficient material facts to establish a *bona fide* defence and a genuine issue for trial. Summary judgment must therefore be refused.

Costs

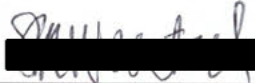
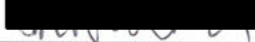
[8] The defendant has succeeded in resisting summary judgment, but the merits of the action remain unresolved. The issues which resulted in refusal of summary judgment are closely connected to matters which the trial court will ultimately

determine. In those circumstances it is appropriate that the costs of the summary judgment application be costs in the cause.

Order

[71] The following order is made:

- a. The defendant's late delivery of his affidavit resisting summary judgment is condoned.
- b. The plaintiff's application for summary judgment is refused.
- c. The defendant is granted leave to defend the action.
- d. The costs of the summary judgment application shall be costs in the cause.
- e. No separate order as to the costs of the condonation application is made.



WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: Adv. R.V Mudau instructed by Velile Tinto Associates Inc
For the Respondent: In person

Date of the hearing: 28 July 2026
Date of the judgment: 28 August 2026