REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 21833 /2013

Delete whichever is not applicable

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

BMW FINANCIAL SERVICES (PTY) LTD **APPLICANT/PLAINTIFF**

And

DARRYL SHAFF **RESPONDENT/DEFENDANT**

JUDGMENT

ANDREWS AJ

1. This is an application for an order directing the respondent to return a BMW motor vehicle, financed by the applicant under an instalment sale agreement between the parties, and in the event of him failing to do so, authorizing the Sheriff to attach it and hand it over to the applicant. The applicant seeks an order postponing the question of damages for determination *sine die* and until after the return of the vehicle. The applicant seeks leave to approach the court on the same papers supplemented by a damages affidavit once it has determined the damages.

2. The application is opposed by the respondent who has filed a counterclaim, in which he seeks an order declaring the instalment sale agreement between the parties to be reckless, and setting it aside. The respondent also seeks payment of the amount of R245,335.21 together with interest on this sum, being the amount he claims to have paid the applicant.

3. The following facts are common cause. The respondent purchased a BMW motor vehicle from the applicant and the vehicle is still in his possession. It was intended that the vehicle would be bought on credit and that the intended credit transaction was to be subject to the provisions of the National Credit Act 34 of 2005 ("NCA") On or about 9th November 2010 the applicant and respondent concluded a written instalment sale agreement ("the agreement") in terms whereof the applicant sold and delivered to the respondent a BMW 2010 320d A/T motor vehicle with engine number 81027421 and chassis number ONM97310. The purchase price was payable in instalments. The agreement was signed by the respondent but not by the applicant.

4. A document purporting to be the agreement was annexed to the applicant's founding affidavit. Its terms include that failure to pay the instalments provided for would constitute an event of default as defined in the agreement, and upon such default the applicant would be entitled, after demand, to cancel the agreement, obtain possession of the vehicle and recover damages from the respondent as provided for in the agreement.

5. The applicant made the following averments in its founding affidavit. The respondent had breached the agreement by failing to pay the instalments due and was in arrears as at 15th May 2013 in an amount of R22824.24. The applicant had complied with the provisions of section 129 and 130 of the NCA, and that the respondent did not avail himself of the rights afforded him under that act. The applicant cancelled the agreement in writing as it was entitled to and the respondent has no right to remain in possession of the vehicle.

6. The respondent denied that the agreement was binding on the parties as it had not been signed by the applicant. He stated that the applicant had granted credit to him recklessly as envisaged in section 80(1) of the NCA. As a consequence the agreement stands to be set aside and the applicant is not entitled to enforce the agreement against him. He

denied that he had breached the agreement by failure to pay instalments due. Apart from these defences which were not stated in the alternative, the respondent raised several further defences which include:

a. the *locus standi* of the applicant as well as the authority of the deponent to the founding affidavit to depose thereto is disputed ;
b. the terms and conditions of the agreement contains erroneous terms;
c. the applicant failed to comply with the provisions of section 129 of the NCA;
d. the agreement was cancelled prematurely;
e. the applicant can only proceed if it can prove that the section 129 notice was in fact delivered to him.

7. The applicant stated that before dealing with the defences it wished to point out that regardless of which defence was relied on by the respondent, on his version there is no agreement between the parties, hence he has no right to possess and use the vehicle, but continues to do so. .

The locus standi of the applicant.

8. The respondent stated in his answering affidavit that the applicant had not attached a resolution evidencing its *locus standi*, and the deponent's authority to depose to the founding affidavit in order to institute the proceedings or represent the applicant therein. The authority of the applicant's attorneys was likewise disputed. A resolution authorizing the proceedings and the appointment of attorneys to represent the applicant and confirming the authority of the deponent to act on its behalf, dated 3rd April 2013 was attached to the applicant's replying affidavit, together with relevant confirmatory affidavits. This point was not persisted with in argument. No notice as envisaged in Rule 7 of the Uniform Rules of the High Court appears in the file challenging the applicant's attorney's authority and the applicant stated that none had ever been served. On the basis of this information I accept that the deponent and the applicant's attorneys were duly authorised to bring the proceedings and that the challenge to its *locus standi* has no merit.

Failure to sign the agreement

9. The respondent argued that the agreement is not valid and enforceable as it has not been signed for and on behalf of the applicant; the document is incomplete and the alleged terms and conditions relied upon do not relate to the type of agreement intended by the parties. The respondent argued that on the applicant's version, the parties intended that the writing embodies the contract and that the parties agreed that the

contract shall be a written one. It was argued that a written contract involves the signature of all the parties thereto and such a contract cannot be said to have been fully executed until the consent of the parties has been expressed by the signature upon the document constituting the written contract.

10. The respondent argued further that the NCA requires large instalment agreements to follow the prescribed form, and referred in this regard to Form 20.1. This form relates to quotations for large contracts, not the contracts themselves, and is hence irrelevant. The respondent made no reference to a form that is required for intermediate or large credit agreements and which requires such agreements to be signed by both parties, and I can find none. The NCA does not require credit agreements to be signed by both parties for validity. It states

> "s93. (1) The credit provider must deliver to the consumer, without charge, a copy of a
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> document that records their credit agreement, transmitted to the consumer in a paper form, or in a printable electronic form.
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> (2) A document that records a small credit agreement must be in the prescribed form;
>
> (3) A document that records an intermediate or large agreement-
>
> (a) must be in the prescribed form, if any, for the category or type of credit agreement concerned; or
>
> (b) if there is no applicable prescribed form, may be in any form that-
>
> (i) is determined by the credit provider; and
>
> (ii) complies with any prescribed requirements for the category or type of credit agreement concerned."

11. As elucidated in *The National Credit Act Explained*[1], the provisions of the NCA and section 93 in particular appear to be aimed at ensuring that written copies of these agreements are made available to consumers:

> "The Credit Agreement Act[2] and the Usury Act[3] both provided that an agreement which was not reduced to writing was not invalid that merely because of that fact. Failure to reduce an agreement to writing constituted an offence. Other legislation, such as the Alienation of Land Act[4], explicitly provides that a contract is void if it is not reduced to writing. The NCA neither

[1] JM Otto and R-L Otto 3rd edition Lexis Nexis 2013 page 52
[2] S(2) of Act 75 of 1980
[3] S3(8) of Act 73 of 1968
[4] S2(1) of Act 68 of 1981

> declares a contract void nor creates an offence, for want of compliance with the formality requirements. Section 93, like many other provisions in the act, does however create a right for consumers and a corresponding obligation for credit providers. Like any right, this one can also be enforced, and credit providers repeated failure to furnish copies of agreements may even lead to deregistration of that credit provider."

The respondent's argument that the agreement is invalid for want of compliance with the NCA is without merit.

12. The respondent argued that if the parties agree to have their agreements in writing, then until the document is drawn up there is no *vinculum juris* and therefore no actionable contract. The applicant had failed to prove a valid and binding written agreement and, as such cannot seek to enforce same in this application. The applicant is not entitled to the relief sought as a result. The respondent relied on the judgment in *Goldblatt and Freemantle* 1920 AD 123 where it was stated by Innes, CJ at page 128:

> "Subject to certain exceptions, mostly statutory, any contact may be verbally entered into; writing is not essential to contractual validity. If during negotiations mention is made of a written document, the court would assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract and (*Grotius* 3.14.26 etc.). At the time it is always open to parties to agree that they contract shall be a written one (see *Voet* 5.1.73. *V Leeuwen* section 4,2, sec 2, *Decker's note*); and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question is in each case one of construction."

13. In reply the applicant referred to legal developments since the *Goldblatt* case. Reference was made to *Mervis Brothers v Interior Acoustics and Another* 1990(3) SA 607 (*Mervis Brothers)* and *Pillay and Another v Shaik and Others* 2009(4) SA 74 at 83 F (*Pillay)* wherein Farlam, JA stated:

> "In my opinion it is clear from *Goldblatt versus Freemantle*, supra, and the authorities cited there in that in the absence of a statute which prescribes writing signed by the parties or their authorized representatives as an essential requisite for the creation of a contractual obligation (something that does not apply here) an agreement between parties which satisfies all the other requirements for contractual validity will be held not to have given rise to

contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with the formality or formalities before binding contract can come into existence."

14. In the *Mervis Brothers* judgment, which deals with an agreement to refer a dispute to arbitration, is was stated on page 610:

> "In terms of section 1 of the Arbitration Act 42 of 1965, an agreement providing for reference of a dispute to arbitration is required to be in writing. Generally such a provision postulates signature by both parties. However an document may constitute an agreement in writing even though it is signed by only one party. That the signature of one party is lacking does not matter, depending on the circumstances of the case. The test is whether the parties have deliberately intended to record their agreement in writing and have shown that the document so produced constitutes the agreement between them. (*Union Government (Minister of Finance) v Chatwin* 1931 TPD 317). In the present case the second document was sent in response to the first and constituted a counter-offer to the proposal of arbitration. It was received without demur and the parties proceeded to arbitration. By its conduct the appellant accepted the terms expressed therein. In my opinion it is clearly part of a written document within the meaning of s1 of the Act"

15. In the present case there is no pre-existing contract as referred to in *Pillay*. An offer, contained in a document entitled "Quotation and Pre Agreement Statement" was presented to the respondent, and was signed by him. The offer sets out the parties' understanding of how the agreement was to come into being and bind them contractually. This is unambiguously stated on page 14 under paragraph G as follows:

> "You can accept this quotation and pre-agreement statement by being present at BMW financial services registered business premises and by initialling each page and signing in full in the space provided hereunder, within five business days of you receiving this quotation. The quotation and pre-agreement statement together with any other documentation required to be signed by you will form the entire instalment sale agreement together with the terms and conditions attached hereto between you and BMW financial services."

16. The agreement did not therefore require signature by the applicant to constitute a valid and binding agreement. It only required signature by the respondent. The facts that follow are not in dispute. The respondent after signing the agreement signed the release notes, insurance confirmation and debit order confirmation on the same day as signing the agreement. The release note confirms that he received the vehicle in good

order and condition. The insurance confirmation, also signed by the respondent confirms the existence of the agreement and that he considered himself bound thereby, as implied by the following wording:

> "I agree that should any problem occur which causes me to miss payments on my finance agreement leading to possible repossession of the asset, I will in no way hold BMW financial services or the dealership responsible."

17. The respondent took possession of the vehicle, maintaining payments in terms of the agreement for a period of at about three years. At no stage did he indicate that he did not consider himself to be bound by the agreement because it had not been signed by the applicant. In his answering affidavit the respondent refers to several facts which confirmed that the agreement had come into existence. These include the fact that he approached the applicant to conclude a credit instalment agreement, and that the applicant financed the purchase by him of a motor vehicle. He now seeks to have this agreement set aside because he alleges that the credit was extended recklessly.

18. The respondent has therefore advanced no basis for me to conclude that the parties intended the contract to come into existence only once signed by both parties and I confirm that a valid and binding agreement came into effect on signature of the agreement by the respondent.

Alleged erroneous terms

19. The respondent denied the enforceability of certain terms in the agreement, stating that "the alleged terms and conditions relied on seemed to relate to a different type of agreement which was not intended by the parties and were attached in error when the documents were signed by him". In this regard he referred to the fact that the following terms, defined in the applicant's quotation, namely "credit provider", "dealer" and "client/customer" are different from the parties referred to in the terms and conditions, namely "supplier", "seller" and "you." The applicant averred that the same reference number appears throughout the document at the base of each page indicating that the document was generated as a single entity and there is no obvious error as to its intended components.

20. The terms referred to by the respondent, in the context of the agreement, connote the same things. As stated in by Wallis JA, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (3) SA 503 at paragraph 18:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the

document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

21. The fact that the applicant is a credit provider, and also supplied the vehicle to the respondent is not a fact that is disputed in this application. The word "dealer" in the context of the sale of motor vehicles I understand to mean the same thing as a seller, and the customer is referred to as "you" in both parts of the agreement. The use of these terms interchangeably does not alter the contractual obligations of the parties in any way.

The respondent's breach.

22. The applicant alleged that the respondent is in breach of contract, a fact denied by the respondent. The respondent states that he has in fact paid 43 instalments which means, according to calculations submitted by the applicant, that he paid instalments that fell due after signing the answering affidavit. He attached no proof of payment. The applicant's replying affidavit contains a payment history from 1st December 2010 to 1st May 2013, which reflects the indebtedness of the respondent as being arrears in the amount of R22 824.24 and which information was addressed to the respondent at the postal address chosen by him in the agreement.

23. I am satisfied as to the inherent credibility of the applicant's factual averments in this regard and will proceed on the basis of the correctness thereof and will include these facts among those upon which I will determine whether the applicant is entitled to the final relief which it seeks (see *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623(A) at 634H-635B).

Compliance with sections 129 and 130 of the NCA

24. The respondent argued that the applicant is only entitled to proceed with the legal process against him for the return of the vehicle if it has complied with section 129 and 130 of the NCA, that it can show that the section 129 notice was in fact delivered to him,

and further that it lawfully cancelled the credit agreement. The respondent denies receiving the section 129 notice and that the "track and trace" report for registered letters constitute proof of delivery. The assertion that the applicant was required to deliver the section 129 notice to the respondent personally is however incorrect.

25. The obligations that a credit provider must discharge under the NCA in order to bring a section 129 notice to the attention of a consumer are now settled law, As stated in the recent judgment of the Constitutional Court in *Moshomo Levin Kubyasa and Standard Bank of South Africa Ltd and the Socio Economics Institute of South Africa [2014] ZACC 1 (Kubyasa)*:

> *"*When delivery occurs through the postal service, proof of that these obligations have been discharged entails proof that –
>
> a. the section 129 notice was sent via registered mail to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deducted from a track and trace report and the terms of the relevant credit agreement;
> b. the Post Office issued a notification to the consumer that the registered item was available for collection;
> c. the Post Office notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted as set out in (52) above;
> d. a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a)-(c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer"

Actual delivery to the respondent of this notice was therefore not required.

26. The respondent does not deny that the applicant sent a letter by registered post on the 24th April 2013 to the address which appears as his chosen *domicilium* on the agreement and that he signed this agreement. He merely denies that he received it. He denies that the registered post "track and trace" report annexed to the founding affidavit proves that he received the letter, but does not deny that the post office in Sandringham was the correct branch of the Post Office for the chosen address nor does he deny that the Post Office sent a notice to him that a registered item was ready for collection.

27. The applicant has satisfied the requirements for notification under section 129 and 130 of the NCA as described by the Constitutional Court, and the respondent's claim of non compliance with the requirements of section 129 and 130 is without foundation.

Cancellation of the agreement

28. The respondent argued that the agreement was not lawfully cancelled, prior to the instituting of legal proceedings against him. He argued that the right to cancel in terms of this specific agreement is "peculiar" and is "causally linked to the delivery of the section 129 notice as contemplated in the NCA". Further that although sections 129 and 130 of the NCA are not intended to govern cancellation of credit agreements, this agreement was peculiar in that statutory and contractual rights "are intertwined". The argument was put as follows by the respondent in its heads of argument:

> "In terms of the agreement the applicant is required to comply with the mandatory requirements of section 129 of the NCA which forms part of the contract for breach and cancellation process, namely the applicant first has to prove the breach, then prove compliance with section 129 in the manner contemplated in terms of the NCA and thirdly in the absence of the respondent exercising the statutory rights provided to him and failing to remedy the breach complained of in the ten business day period provided for in terms of section 129, the applicant only then has the right to cancel the agreement and notify the respondent accordingly. The provisions of section 129 form part of the *mora* process in terms of the agreement relied on."

The applicant strenuously opposed this argument.

29. In essence the respondent's argument has three components: Firstly that the applicant was required in terms of the contract to notify him in terms of section 129 that he was in default, before it could cancel the agreement. Secondly the obligations that a credit provider must discharge under the NCA in order to bring a section 129 notice to the attention of a consumer as set out in *Kubyasa* applied to this notice. Thirdly that the applicant did not comply with these obligations and prematurely cancelled the contract. .

30. The first component of the argument is incorrect. Paragraph 11.3 of the agreement, which deals with default and cancellation, does not require a default to be drawn to the attention of the credit receiver in terms of section 129, prior to cancellation. The clause gives the credit provider a discretion whether to do so. The applicant could just as well have sent a registered letter to the respondent saying that it was in default without reference to the NCA. Only if the credit provider wished to commence legal proceedings

to enforce the agreement was it required to provide notice to the consumer as contemplated in section 129(1)(b). The relevant sections of the agreement are as follows

"11.3: Upon an event of default, the seller may, at its election and without prejudice to any other remedy which it may have in terms of this agreement or otherwise: (emphasis added)

11.3.2: if this agreement subject to the provisions of the National Credit Act

11.3.2.1: draw the default to your notice in writing in terms of section 129 of the NCA and propose that you refer this agreement to a debt counsellor, alternative dispute resolution agent, consumer court ombud within the jurisdiction with the intent that the seller and you resolve any dispute under this agreement or develop or agree on a plan to bring the payments under this agreement up to date;

11.3.2.3: after demand referred to in 11.3.2.1 above, cancel this agreement.

15.3 the seller will send any notice to you at the last *domicilium* you have chosen or to your last postal address. The seller shall except that you have received the notice on the third day after the seller has posted it to you."

31. No authority was advanced for the second component of the respondent's argument. The judgment in *Kubyasa* clarifies the obligations that a credit provider must discharge under the NCA in order to bring a section 129 notice to the attention of a credit receiver when delivery is effected through the postal services, and in order to comply with the requirement that notice must be given in terms of section 129(1)(b) prior to the commencement of proceedings to enforce the agreement. The respondent provided no authority for claiming that these requirements were also applicable to a section 129 notice which the applicant had chosen to send prior to cancellation, and that the requirements set out in *Kubyasa* curtail the contractual rights of the applicant in regard to cancellation.

32. Letters drafted in terms of section 129 of the NCA serve to encourage dispute resolution and promote payment of debts before the institution of proceedings for debt recovery. It follows that contracting parties are at liberty to agree that the credit provider may send a section 129 notice at any stage in their contractual relationship when a default occurs. The cancellation of an agreement does not constitute the institution of legal proceedings and hence giving notice in terms of section 129 prior to cancellation is not required in order for cancellation to be valid. The word "proceedings" is not defined in the NCA but according to the law of interpretation of statues words should be given their ordinary

meaning. The Concise Oxford Dictionary[5] defines the word to mean "(1) an event or a series of activities with a set procedure; (2) law action taken in a court to settle a dispute" The cancellation of an agreement, unless agreed to the contrary, is neither of these. The respondent correctly stated that Section 129 of the NCA does not govern cancellation of credit agreements

33. The respondent referred to the judgment in *Standard Bank of South Africa v Hand* 2012(3) SA 319 (GSJ) in support of its argument, but this judgment does not take his case any further. Here the court looked at the requirements for due demand where a contract was ambiguous in this regard. The court concluded that by expressly requiring 'due demand' in the agreement, the parties intended

- a notice by the applicant to the respondent;
- in terms of which the applicant would notify the respondent to perform and/or rectify the breach;
- before or on a specific date.

34. It should be noted that the words "due demand", which are mentioned in clause 11.3.1.1 of the agreement in the present matter do not appear in clause 11.3.2.3, which is the clause governing agreements that are subject to the NCA. Even so, applying the test for due demand set out in the *Hand* case shows that due demand was made, by the applicant in terms of the contract. The respondent was informed of the demand, in the manner contemplated in the agreement. The following averments made by the applicant regarding dates of delivery of the section 129 notice, although denied, I regard as inherently credible. The notice was sent by registered post informing the applicant that he was in arrears on 24th April 2013. In terms of clause 15.3 of the contract it was deemed to have been received on the third day after being sent to the respondent's chosen *domicilium* ie 27th April 2013. The letter gave the respondent ten business days after delivery to rectify the default. More than ten business days after the deemed date of delivery of the letter had passed, the contract was cancelled. The notice of cancellation of the contract was dated 16th May 2013 posted on the 17th May 2013 and was deemed to have been delivered to him on 19th May 2013. There was thus fulfilment of the contractual requirements for notice of default prior to cancellation.

35. This letter was delivered by registered post to the correct post office as per the respondent's chosen *domicilium* as stated on the contract signed by him, and the respondent was notified of its arrival on the 8th May 2013. A reasonable consumer in his position would have had at least eleven days in order to react to the notice, before being

[5] 10th editions 2001

notified of cancellation. Due demand was therefore made in terms of the contract prior to cancellation.

Whether the agreement was concluded recklessly

36. The respondent's heads of argument state that the relief sought in the counter claim will not be claimed at the hearing of this application. Further that whether or not the agreement was concluded recklessly by the applicant will not be relevant to the first phase of the relief sought by the applicant, namely, whether or not it is entitled to the return of the vehicle. As such the issue of the counter application need not be determined now. The respondent contended that the counter application in any event is not ripe for hearing, as the respondent "needs to file its replying affidavit", and will only be relevant if the applicant intends to enforce the agreement and recover of any alleged shortfall from the respondent.

37. The applicant responded arguing that it is not in the respondent's hands to decide when he files the papers. He was obliged to comply with the rules of court and had failed to do so. He was not at liberty to arrive on the date of hearing and state that the court could not deal with his application. It submitted that there was no reason why the court could not deal with this matter in its entirety. Furthermore that the applicant would refer the court to allegations made in support of the counter application because it contended that the respondent's averments therein were dishonest.

38. I see no reason why the counter application cannot be considered. It is over a year since the applicant filed its answering affidavit to the counter application, and the respondent has not replied thereto. The matter was set down and an application for a postponement of the hearing of the counter application has not been made.

39. The respondent's counter application seeks an order against the applicant in terms of the NCA declaring him to be over indebted as a result of the credit granted to him by the applicant, which credit was granted recklessly in terms of section 80(1)(a) as well as section 80(1)(b)(i) and (ii) of the NCA. The purpose of the application is to set aside the credit instalment agreement, arising from the applicant's alleged failure to comply with NCA, and to recover all amounts paid by the respondent in terms thereof to date.

40. The respondent averred that by entering into the credit instalment agreement with applicant he was over indebted as contemplated in terms of section 79 of the NCA at the time of the conclusion of the credit instalment agreement relied upon by applicant. Had the applicant properly conducted a credit assessment in terms of section 81(2) of the NCA it would have established that by entering into the intended credit instalment agreement with the respondent, he would have been over indebted as a result.

41. In support of these averments the respondent set out a chart of his and his wife's total income and expenses at the time of entering into the agreement, although no documentation in support thereof was annexed. He stated that at the time he had a monthly shortfall of R27 000 per month. He was funding monthly shortfalls through the use of credit cards or by escalating debt and had no assets in his name.

42. This figure is in stark contrast to finance application form completed at the same time as the conclusion of the agreement, annexed to the applicant's answering affidavit to the counter application. This document indicated the respondent's take-home pay to have been R63,000 and total monthly expenses to have been R9000. It contains a declaration that the information provided is true and correct, signed by the respondent. Also annexed was one of the respondent's bank statements from the same time period, which reveals large deposits indicating a substantial monthly income. The bank statement records regular withdrawals of large sums of money and substantial and frequent payments to restaurants and fast food outlets which applicant argued indicated substantial disposable income. The bank statement does not indicate that the respondent had an overdraft facility with a large debit balance as he now alleges. The applicant averred that it had conducted a credit check which did not reveal any information that the applicant should have been concerned about, and attached a report in that regard. It stated that the respondent had also completed a prior instalment sale agreement with it for a BMW motor vehicle and had an exemplary instalment payment history for that transaction. The respondent had paid his monthly instalments for the vehicle under the present agreement from November 2010 until May 2013 which would not have been possible if his monthly shortfall was as he alleged. Further, the respondent had alleged that he had made 43 payments on the agreement which also does not square with being financially over indebted. The applicant's averments have not been disputed to date and I consider them to be inherently credible.

43. The respondent's counter application is a statement made under oath that implies that information provided by him to the applicant at the time of undertaking the financial assessment under section 81 of the NCA did not fully and truthfully answer to requests for information regarding his financial position by the credit provider, the applicant. As such this is a statement providing a complete defence to the applicant against a claim that the agreement is reckless. The application must therefore fail.

44. The notice of motion contains a prayer for an order postponing the question of the determination of the damages suffered by the applicant *sine die* until the return of the motor vehicle to the applicant for the determination of the value and the amount due. it was further prayed that leave be granted to the applicant to approach the court on the

same papers supplemented by a damages affidavit once the applicant has determined the damages.

45. The respondent argued that the quantum of such damages has yet to be determined and the determination of an illiquid damages claim is not an appropriate matter for motion proceedings. Hence a postponement for purposes of later determination of such damages should not be granted. The applicant argued that this court deals with claims of this nature on a weekly basis where the determination of damages is postponed for further determination. If disputes arise these can be dealt with in accordance with the rules of court, but if there is no dispute there is no reason why the matter cannot be dealt with in motion proceedings.

46. I regard the approach argued for by the applicant as the most practical and expeditious and consider it appropriate to grant the postponement for purposes of the determination of damages as prayed.

47. The agreement makes provision for costs incurred by the applicant in enforcing its rights as embodied in the agreement to be awarded on the scale of attorney and client basis. (clause 14.2). The award of costs on this scale is also justifiable in the light of the conduct of the respondent in bringing the counter application.

I make the following order

(i) the respondent is ordered to return the BMW 2010 320d A/T (E90) motor vehicle with engine number 81027421 and chassis number ONM97310 to the applicant. In the event that the respondent does not return the vehicle, the Sheriff is directed to remove the vehicle from wherever it may be found and to return same to applicant;

(ii) an order is granted postponing the question of damages suffered by the applicant *sine die* until the return of the vehicle to the applicant for determination of the value thereof and the amount due;

(iii) the applicant is granted leave to approach this court on these papers supplemented by a damages affidavit, once the applicant has determined its damages;

(iv) costs are to be paid by respondent to applicant on the scale of attorney and client.

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A ANDREWS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,
JOHANNESBURG

DATE HEARD : 2nd September 2014

DATE DELIVERED : 28th October 2014

For the Plaintiff : Adv van Rheenen

Instructed by : Smit Jones and Pratt

For the Defendant : Mr Ker -Phillips

Instructed by : Matthew Kerr-Phillips Attorneys