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

CASE NUMBER: 2020/17846

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED NO

In the matter between:

NEDBANK LTD (MFC DIVISION)
(Registration number: [....]) **Plaintiff**

And

DT JANSE VAN RENSBURG **Defendant**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 19th of October 2021.

DIPPENAAR J:

[1] The plaintiff sought summary judgment against the defendant for confirmation of the cancellation of a written instalment sale agreement and the return of a motor vehicle, together with ancillary relief. Its claim for damages was to be postponed pending the return of the vehicle.

[2] The plaintiff's case is based on a written instalment sale agreement ("the agreement") concluded between the parties, in terms of which the plaintiff sold a motor vehicle to the defendant and reserved ownership thereof until the amounts due had been paid. It contended that the defendant breached the agreement by falling into arrears with his monthly instalments which amounted to R24 531. 39 as at 23 March 2021 in terms of a letter under s129 of the National Credit Act sent to the defendant. Pursuant to the defendant's failure to remedy his breach, the plaintiff cancelled the agreement by way of a cancellation letter dated 29 June 2020. In the alternative, the plaintiff contended that the agreement was cancelled by service of the summons on the defendant.

[3] The defendant, a practicing attorney, opposed the application on various grounds. He delivered a plea together with two affidavits resisting summary judgment. The plaintiff did not object to the admission of the defendant's supplementary affidavit. He raised various points *in limine.* In terms of the first, he challenged the authority of the deponent to the plaintiff's affidavit filed in support of the summary judgment application as she did not have the necessary personal knowledge and as he had concluded the agreement with Motor Finance Corporation ("MFC") and not with the plaintiff. Reference was also made to a misjoinder based on the latter contention.

[4] This point lacks merit. The instalment sale agreement expressly identifies the credit provider as "MFC a division of Nedbank Limited". It is trite that a division of an entity does not have separate legal personality and that it is the entity which trades through divisions that must institute action[1]. Although the defendant referred to MFC being a subsidiary it is clear from the documentary evidence that MFC is a division, not a subsidiary of the plaintiff.

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[1] Kilburn v Tuning Fork (Pty) Ltd 2015 (6) SA 244 (SCA) paras [10]-[11]

[5] The deponent to the plaintiff's affidavit supporting summary judgment described herself as manager, litigation and estates"" of the plaintiff. It is well established that bank managers such as the deponent are by virtue of their possession entitled to depose to affidavits in summary judgment proceedings[2]. The affidavit contains the necessary averments to conclude that the deponent was a proper person to depose to the affidavit.

[6] In terms of the second point *in limine*, the defendant sought to characterise the agreement as a loan agreement in terms of the vehicle was provided as security. In his plea, the defendant had however admitted the instalment sale agreement and its terms. The terms of the agreement further make it clear that it is an instalment sale agreement.

[7] In his affidavit resisting summary judgment, the defendant contended that the deponent could not verify the cause of action as it contradicted the sale agreement. For the reasons provided, this contention lacks merit.

[8] The defendant further contended that the court lacked jurisdiction as the proceedings should have been instituted in the magistrates court, relying on *Nedbank Ltd and Others v Thobejane and Similar Matters*[3]. This judgment was however overturned by the judgment of the Supreme Court of Appeal in *The Standard Bank of South Africa Limited and Others v Thobojane and Others; The Standard Bank of South Africa Limited v Gqirana And Others*[4], wherein it was held that a court is by law obliged to hear any matter falling within its jurisdiction and has no power to decline to hear a matter on the ground that another court has concurrent jurisdiction.

[9] The defendant disputed that he was in breach of the agreement due to a moratorium provided by the plaintiff during the National State of Disaster. On his own version however, no agreement was concluded between the parties in relation to a moratorium. At best there was an offer for assistance. No evidence was presented that there was any acceptance of the offer, nor was the instalment sale agreement varied in

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[2] Rees and Another v Investec Bank Limited 2014 (4) SA 220 (SCA) paras [5]-[15]; Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)
[3] 2019 (1) SA 594 (GP)
[4] [2021] ZASCA92 (25 June 2021)

writing[5]. Significantly, the defendant's arrears further accrued before the National State of Disaster was declared.

[10] The defendant contended that the monthly premium was added to the initial capital which would distort the calculation of the actual amount claimed, which he contended constituted a triable issue. The defendant's contention is based on a misreading of the instalment sale agreement. Upon a proper interpretation of that agreement, there is no merit in the defendant's contention.

[11] During argument, the defendant pointed out that legal costs had been added to his account by the plaintiff unilaterally. Although the plaintiff was correct in pointing out that the arrear amount upon which its cancellation was based did not include any legal costs, this is an issue which would become relevant when the plaintiff's damages claim is determined. He also challenged a R400 tracing fee added to the account. The defendant did not expressly dispute that he was in arrears at the time the agreement was cancelled although he did in bald terms deny the breach and that the cancellation of the agreement was valid. He did not however put up any controverting facts illustrating a bona fide defence to the plaintiff's version. Thus, these issues do not in my view constitute triable issues at this point in the proceedings. When the plaintiff's damages claim is adjudicated, it is open to the defendant to raise these issues to challenge the quantification of the plaintiff's claim.

[12] The defendant further contended that the s129 letter was premature as he was not in breach. The notice was sent via registered post to his domicilium address. Although the track and trace report attached to the particulars of claim did not evidence that the s129 letter had been delivered to the relevant post office, the defendant did not plead that he had not received the letter nor did he put up any facts to challenge compliance with the National Credit Act[6], as he was obliged to do. The context of his denial was purely based on the contention that the steps taken by the plaintiff were premature and he did not meaningfully challenge compliance with the National Credit Act.

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[5] Required in terms of clause 23 of the agreement.
[6] 34 of 2005

[13] Lastly, the defendant challenged the cancellation of the agreement in bald terms. During argument, he contended that it was improper for the plaintiff to have pleaded cancellation in terms of the written letter of 29 June 2020 and in the alternative cancellation in terms of the summons. I do not agree. In terms of clause 18 of the agreement, the plaintiff was entitled to cancel the agreement upon a breach. The issue is whether the defendant was notified of the plaintiff's election[7]. At the latest, the defendant was notified of the plaintiff's election to cancel the agreement on receipt of the summons.

[14] In these circumstances I am not persuaded that the defendant has established any bona fide defence to the plaintiff's claim or that there is any triable issue. I conclude that the plaintiff is entitled to summary judgment as sought.

[15] The normal principle is that costs follow the result. There is no basis to deviate from the principle. At the hearing on 13 October 2021, the defendant was not present. After hearing argument from the plaintiff, judgment was reserved. Shortly thereafter the defendant appeared and indicated that he wished to apply for a postponement. The order reserving judgment was recalled and the matter stood down until 15 October 2021 to afford the defendant an opportunity to bring a substantive postponement application. The defendant abandoned the postponement application. It is thus appropriate that the defendant be held liable for the costs of both dates.

[16] I grant the following order:

> [1] The cancellation of the instalment sale agreement is confirmed;
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> [2] The defendant is directed to return to the applicant a 2012 Toyota Fortuner 2.5F-4D RB; engine number [....] and chassis number [....];
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> [3] The plaintiff's claim for damages is postponed sine die and the plaintiff is granted leave to apply for damages, if any, in an amount to be calculated in accordance with section 127(5) – (9) of the National Credit Act;

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[7] Middelburgse Stadsraad v Trans-Natal Steenkoolkorporasie Bpk 1987 (2) SA 244 (T) at 249A-G

[4] The defendant is directed to pay the costs of the application, including the costs of the hearings on 13 and 15 October 2021.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 13 and 15 October 2021
DATE OF JUDGMENT	: 19 October 2021
APPLICANT'S COUNSEL	: Adv. M. Reineke
APPLICANT'S ATTORNEYS	: DRSM attorneys
RESPONDENT'S COUNSEL	: Mr D Van Rensburg in person
RESPONDENT'S ATTORNEYS	: Danie Van Rensburg Attorneys