IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

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

26 June 2013
DATE SIGNATURE

CASE NUMBER 57807/2013

26/6/2014

In the matter between:

STANDARD BANK OF SA LIMITED **APPLICANT**

AND

THULANI CYRIL NGCOBO **RESPONDENT**

REASONS

MAVUNDLA, J.

[1] On the 15 April 2014 I granted summary judgment against the respondent as follows:

1. That cancelation of the agreement is confirmed;

2. That the defendant is ordered to return the following motor vehicle to the applicant:

2012 Toyota Fortuner 4.0 V6 Heritage,

Engine Number : 1GRA384414;

Chassis number : AHTZU69G000003692;

3. That the damages component of the Plaintiff / Applicant's claim, arising out of the Defendant / Respondent's breach of the agreement entered into between the parties, to be postponed sine die;

4 That the Defendant / Respondent is ordered to pay the Plaintiff /Applicant's costs related to the summary judgment application.

5 That reasons for the order shall be furnished upon written request to be filed within 10 days of the grant of the order.

[2] It would seem that the respondent filed with the registrar of this court a written request for the reasons on the 22 April 2014.This fact was unfortunately only brought to my attention by the respondent personally on the 20 June 2014.

[3] I therefore proceed to set out the reasons for the aforesaid order.

[4] It is common cause that the parties, during or about January 2012 and at Midrand, entered into an instalment sale agreement in terms of which the plaintiff sold to the defendant the motor vehicle mentioned in order referred to herein above, for the Purchase price of R639 467.28 (including VAT).

[5] In the particulars of claim, it was alleged that the respondent was on the 1st October 2013 in arrears in the amount of R44 301.36, whereas the monthly instalment was R8 881.49. It was alleged that the respondent is in breach of the agreement and therefore applicant seeks cancellation of the agreement and restitution of the said motor vehicle.

[6] A copy of the agreement was attached to the summons as annexure "B". It is common cause that the agreement is governed by the National Credit Act 34 of 2005.

[7] Subsequent to the defendant entering an appearance to defend, the plaintiff brought an application for summary judgment, which was opposed by the defendant.

[8] At this stage of the proceedings I need not decide any balance of probabilities or determine the likelihood of the deponent's allegations being true or false. All that I need to concern myself with is whether the respondent has in his affidavit sufficiently set out facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If I am satisfied that the respondent has placed sufficient facts which show that the applicant's case is not

unassailable, then I must refuse the summary judgment application and grant leave to defend.[1]

[9] The defendant contended, raising what he termed a point *in limine* that, inter alia:

9.1 Paragraphs 8 to 11 of the particulars of claim do not in totality, contain a clear and concise averments of the material facts upon which they rely for the claim, with sufficient particularity to enable the defendant /respondent to answer fully thereto due to the fact that:

9.1.1 the averments do not allege fully the relevant portions of s129 read with s 130 of the National Credit Act with regards to having met all the requirements of NCA before commencing with the legal proceedings;....

9.1.2 the plaintiff has not alleged in their particulars of claim and / or cause of action that they have met any further requirements as set out in s130: in particular, subsections 130(1))b)(i) &(ii). Therefore the defendant may not be in a position to holistically and fully and fairly respondent to the plaintiff's particulars of claim."

[1] *Vide Marsh and Another v Standard Bank of SA LTD* 2000(4) SA 947 at 949B-950B; *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467A.

[10] There is no merit in this alleged point *in limine* for the following reasons: The requirement of sending a notice in terms of s129 of NCA is a preliminary step, to be complied with before legal action can be commenced with. It is not in dispute that the notice in terms if s129 was sent. Where a party raises an exception that the particulars of claim are vague and embarrassing, the vagueness and embarrassment complained of must be directed to the whole cause of action and not selected paragraphs.[2] The sending of s129 notice is a prescribed preliminary step to be complied with before commencing an action and does not form the cause of action. The compliance or nor compliance of this requirement is a *facta probantia,* and not *facta probanta.* Therefore the alleged vagueness complained of by the applicant does not attack the cause of action and therefore stands to be rejected for this reason.

[2] *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (WLD) at 899F-G.

[11] It is not in dispute that the s129 notice[3] was sent per registered post to the applicant by the respondent plaintiff. The said notice drew the applicant's to the fact that the account was in arrears,

[12] In *Collet v FirstRand Bank Ltd*[4] Malan JA held that: 'Where the consumer, however, is in default the credit provider is entitled to enforce that agreement provided the consumer has not made application for debt review pursuant to section 86(1) and the credit provider has complied with the requirements of s129 and 130."

[13] Before any legal proceedings may be taken by the credit provider to enforce the credit agreement a notice in terms of s129 must be remitted to the defaulting consumer. In the matter of *Nedbank Ltd v National Credit Regulator* 2011 (4) ALL SA 131 (SCA) it was pointed out that s129 notice is the first step to be taken before any legal action can be commenced with. Implicitly, the notice referred to in ss130 and 86 is the very notice referred to in s129[5].

[14] In my view, in order to avoid prolixity in the particulars of claim, it is not required of the credit provider to say no more than that he has complied with the provisions of s129 and attach proof thereof,

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[3] Vide annexure B at paginated pages 58-59
[4] 2011 (3) ALL SA 585 (SCA) at p586e.
[5] Standard Bank v Maharaj 2010 (5) SA 518 (KZP) at 120 para [11]D-H].

which was done *in casu*. The fact that only the copy of the s129 notice was attached to the particulars of claim and the contents thereof not repeated in the particulars of claim does not make them vague and embarrassing.

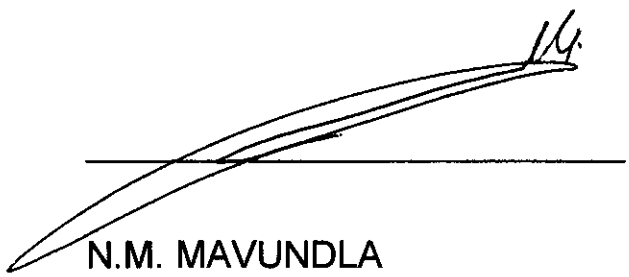
[15] *In casu*, the applicant did not disclose his defence which goes in the merits of the claim. A defence which merely queries the exactness of the amount is in my view, not sufficient to resist summary judgment. The applicant took issue with the fact that the respondent debited one of his other accounts with an amount of R18, 000.00. He, however, did not dispute that his account was in arrears with an amount of R44 301.36, nor alleged that he has applied for the restructuring of his monthly instalments. It needs mentioning that, if the monthly instalment is R8 881.49, the applicant must have been in arrears for 5 months. Neither does the amount of R18, 000.00 obliterate the accumulated arrears.

[16] In the matter of *JOOB Joob Investments (Pty) Ltd v Stock s Mavundla Zek Joint Venture*[6] it was held that "Summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights."

[6]2009 (5) SA 1 (SCA) para 31 [also reported t [2009] 3 ALL SA 407 (SCA)—Ed].

[17] Taking into account the totality of what is contained herein above, I was not satisfied that the applicant has a *bona fide* defence to the respondent's claim and consequently concluded that, in the exercise of my discretion, the opposition to the summary judgment has no merit and should be dismissed and that the relief sought by the respondent/plaintiff be granted, as was done.

[18] Accordingly I hand down the reasons for the order granted on the 15 April 2014.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 26 /06 / 2014

PLAINTIFF`S ATT : HACK STUPEL & ROSS

PLAINTIFF`S ADV : ADV. J.A. Du PLESSIS

DEFENDANT'S ATT : DEFENDANT IN PERSON

DEFENDANT'S ADV : DEFENDANT IN PERSON