IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
08/03/16	
DATE	**SIGNATURE**

CASE NUMBER: 100729/15

DATE: 14 March 2016

THE STANDARD BANK OF SOUTH AFRICA LIMITED — Plaintiff

V

HENRY JOHN TEITGE — Defendant

JUDGMENT

MABUSE J:

[1] This is an application for summary judgment in which the plaintiff seeks against the defendant, the following orders:

1.1 an order rectifying Annexure 'B' by the substitution of the words describing the goods as having an Engine number 1GR5583394 and a chassis number

JTEBU25J606124280 with the words Engine number 1GR5583394 and chassis number JTEBU25J505124290;

1.2 an order cancelling the Agreement;

1.3 an order directing the Defendant to restore to the Plaintiff possession of the goods being a model 2008, Toyota Prado VX4.0 V6 A/T with Engine number 1GR5583394 and chassis number JTEBU25J505124290;

1.4 leave that the Plaintiff may apply on the same papers, duly amplified where necessary, for:

1.4.1 damages, if any, in an amount to be calculated by subtracting the current market value of the goods, if returned to the Plaintiff, from the balance outstanding and allowing for a rebate on unearned finance charges;

1.4.2 interest on the said damages at the rate of 10% per annum from date of service of the summons to date of final payment; and,

1.5 further ancillary relief.

[2] This application for summary judgment is opposed by the Defendant who has, in terms of the Rules governing applications for summary judgments, delivered an opposing affidavit for that purpose.

[3] The Plaintiff's cause of action has its origin in a written Instalment Sale Agreement ("the Agreement"), entered into by the parties on certain terms and conditions on or about 24 August 2012 at Brits. The Defendant bought a model 2008, Toyota Prado VX4.0 V6 A/T with Engine number 1GR5583394 and chassis number JTEBU25J505124290 ("the vehicle"). The Agreement of Sale incorrectly reflected the details of the motor vehicle as Engine Number: 1GR5583394 and chassis number JTEBU25J606124280. It is for this reason that the Plaintiff seeks an order in terms of which the aforementioned details of

the motor vehicle are rectified to reflect the correct details as set forth in paragraph 1.1 supra.

[4] The Defendant bought the said motor vehicle for the amount of R325,480.00 of which he had paid a deposit of R36,000.00. The said amount of R325,480.00 represented the amount of loan that the Defendant had secured from the Plaintiff.

[5] The Plaintiff had advanced the said amount of loan to the Defendant on certain terms and conditions, which the Defendant had accepted, chief among them being that:

5.1 the Defendant would refund the said loan ("the principal debt") in equal 59 monthly instalments of R7778.95 each commencing on 3 October 2012 and thereafter on the 3rd of each and every successive month;

5.2 that the Defendant would pay the final instalment of R7778.95 on 3 September 2017;

5.3 the Defendant would pay interest on the principal debt calculated at 14.7% per annum;

5.4 it was a material term of the said agreement that should the Defendant fail to make any payment of any amount due to the Plaintiff or breach any term of the Agreement;

5.4.1 the Defendant should remedy his default within the time specified by the Plaintiff when notifying the Defendant of the said default by notice as provided for in the National Credit Act 32 of 2005 ("the Act");

5.4.2 that, if the Defendant failed to remedy his breach; or,

5.4.3 failed to avail himself of the options available to him in terms of the Act,

the Plaintiff may exercise any of its remedial rights which rights included, subject to the applicable legislation, the Plaintiff commencing legal proceedings against

the Defendant to enforce the terms of the parties' agreement in order to recover from the Defendant all amounts owing by the Defendant to the Plaintiff arising from the Agreement. The Plaintiff complied with its obligations arising from the Agreement in that it delivered or caused to be delivered to the Defendant the motor vehicle in question.

[6] The Defendant breached the terms of the parties' Agreement inasmuch as he failed to make full and punctual payments of his monthly instalments. When he could not make his monthly instalments, the Defendant applied, in terms of s 86 of the Act, to Magistrate Madibeng under case number 1857/2015 for a debt review. On 22 April 2015, the said Magistrate granted a debt re-arrangement order in terms of which the Defendant's monthly payment was reduced in order to accommodate his inability to pay the amount he had undertaken to pay in terms of the agreement. In terms of the Magistrate's Court order, the Defendant was ordered to pay a sum of R5057.00 per month at an annual interest rate of 10% over an estimated period of 68 months.

[7] Once a Court had made an order in terms of s 87(1)(b)(ii) of the Act, the Plaintiff's rights in terms of s 88(3) of the Act kicked in. S 88(3) of the Act provides that:

"Subject to sections 86(9) and (10), a credit provider who receives notice of Court proceedings contemplated in section 83 or 85 or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until –

(a) the consumer is in default under the agreement; and

(b) one of the following has occurred:

(i) an event contemplated in subsection (1)(a) through (c); or

(ii) the consumer defaults on his obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a Court or the Tribunal."

[8] It is contended by the Plaintiff that the Defendant has, notwithstanding the Instalment Sale Agreement terms and the Magistrate's Court order of 22 April 2015, respectively, failed to comply with the terms of the said Agreement and the Magistrate Court Order. Furthermore it is contended by the Plaintiff that the Defendant has, notwithstanding, failed to surrender the said motor vehicle to the Plaintiff as envisaged by the provisions of s 127 of the Act.

[9] By reason of the Defendant's aforementioned defaults, the Plaintiff is entitled to cancel the parties' Agreement which it did in the summons; and to claim possession of the said motor vehicle as well as damages.

[10] According to the Certificate of Balance, as at 18 November 2015, the amount due owing and payable by the Defendant to the Plaintiff, together with interest thereon charged at 10% per annum from 18 November 2015, was R346,306.77. In the said Agreement, the parties had agreed that a certificate signed by any manager of the Plaintiff would, on its mere production, be sufficient proof of the amounts and other information mentioned in it unless, the contrary is proved.

[11] The Plaintiff has elected to cancel the said Agreement; to reclaim possession of the said motor vehicle and to claim damages against the Defendant. In addition, the Plaintiff has tendered to make payment to the Defendant of any excess in the event of the value of the motor vehicle returned to the Plaintiff exceeding the amount of R346,306.77.

[12] By the combined summons issued by the Registrar of this Court on 22 December 2015 the Plaintiff commenced litigation, as it was entitled to, to secure the relief set out in paragraph 1 supra. A copy of the Plaintiff's summons in this regard was served on the Defendant on 19 January 2016. On 2 February 2016, the Defendant, through his legal representatives, delivered his notice of intention to defend the Plaintiff's action. On 11 February 2016, the Plaintiff caused to be delivered a notice of application for summary judgment. In support of such an application for summary judgment is an affidavit by one Erika Petronella van der Westhuizen, the Plaintiff's manager at the Vehicle and Asset Finance, Personal and Business Banking credit Department, located at the Plaintiff's business address in Johannesburg.

[13] In the said affidavit, the said van der Westhuizen has testified that she had access to the Plaintiff's electronic and other records; that she had in her possession and under her control the agreements entered into between the Plaintiff and the Defendant, together with other documentation pertaining to the facts upon which the Plaintiff's cause of action was founded. In addition she confirmed and swore positively to the facts and thereby verified the Plaintiff's cause of action. She opined that the Defendant had no *bona fide* defence and that his notice of intention to defend was delivered solely for the purpose of delay.

[14] As indicated in paragraph 2 supra, the Defendant resists the Plaintiff's application for summary judgment. For that purpose the Defendant has delivered an affidavit in which he opposes the said application.

[15] When this application came before Court on 11 March 2016, Advocate Schoeman, or should I say Mrs. Schoeman, for there is another advocate who goes by the same surname, appeared for the Plaintiff while Advocate Strauss, appeared for the Defendant. As required by the Practice Manual of this Division Mrs. Schoeman had filed both her Practice Note and Short Heads of Argument. Mrs. Strauss, on the other hand, had filed no Short Heads of Argument as enjoined by the Practice Manual. Her inability to do so seemed to have emanated from the fact that she received her brief so late that she had very little time to prepare and have them delivered for the Court and the Plaintiff's counsel. As the Rules provide no sanction for the Defendant who fails to comply with the Practice Manual in that regard we proceeded with the matter.

[16] In his opposing affidavit, the Defendant had raised three points *in limine* against the application for summary judgment. In the first point *in limine*, the Defendant, while he admitted that the parties had concluded an Instalment Sale Agreement referred to hereinabove, contended that the deponent to the affidavit in support of the summary judgment has no personal knowledge of the facts deposed to. In the second point *in limine* raised by the Defendant it was contended that the affidavit in support of the application for summary judgment had not properly attested. Thirdly and lastly, the Defendant had contended that the summons and the application for summary judgment were premature.

[17] By reason of the subsequent concessions made by Mrs. Strauss in respect of the first and third points *in limine*, I do not consider worthwhile to be detained by them any further. Suffice to state that these two points *in limine* fell by the wayside once they she conceded them. It was only the second one that remained the tug of war between the parties. A brief summary of the origin of this point *in limine* will suffice. The certificate of

attestation of the affidavit in support of the application for summary judgment reflected that the affidavit was commissioned in Johannesburg. On the other hand the office stamp of the commissioner of Oath, a certain attorney Suzan Jacobs, showed that her office was located in Brooklyn in Pretoria. A point was taken by Mrs. Strauss that it is highly unlikely that the affidavit was sworn in Johannesburg while the Commissioner of Oaths was located in Pretoria. On that basis she argued that the affidavit had not been properly sworn to and that there was no proper affidavit before the Court.

[18] The Court dismissed the second point *in limine* as lacking in substance. All that is required with regard to an affidavit is that it must identify the deponent; it must be commissioned before a Commissioner of Oath; it must be clear that the Commissioner of Oath is entitled to attest affidavits; it must also be clear that it was commissioned in this country for different requirements apply when an affidavit is attested to and commissioned out of the country. When such an affidavit is attested at a place different from the Commissioner is irrelevant as long as such a Commissioner of Oath is officially regarded as such countrywide.

[19] In his opposing affidavit, the Defendant is requested by Rule 32(3) of the Uniform Rules of this Court to satisfy this Court by an affidavit that he has a *bona fide* defence to the Plaintiff's action; that such affidavit or evidence shall disclose fully the nature and grounds of his defence and the material facts upon which his defence is based. The affidavit is designed to satisfy the Court that its contents disclose the Defendant's *bona fide* defence. Whether the affidavit serves its purpose fully is a matter that is determined by its contents.

[20] I now proceed to examine the defence that the Defendant has raised in his affidavit.

20.1 Firstly, the Defendant testified that on 22 April 2015, the Magistrate granted a debt re-arrangement order. This is the order that I already have referred to somewhere above. What is of supreme importance, however, in his evidence is the averment by the Defendant that the debt review counsellor who moved his application in terms of s. 86 of the Act in his absence and who obtained the order referred to above did not, immediately after obtaining the order, notify him. He is saying that he was not aware of the said order and did not know of its existence. According to his testimony he only became aware of such an order after a copy of the summons had been served on him as mentioned somewhere supra.

[21] All that this Court can remark about his evidence is that the Defendant had adopted a supine attitude towards his case and it is because of his supinity that he was not aware of the Court order, if his evidence is anything to go by. He knew he was in trouble with his payments in terms of the Agreement; he desperately needed a solution to his problems; at his own initiative he approached a debt counsellor seeking assistance; he knew that the debt counsellor would approach the court for an appropriate order. Surely the debt counsellor explained the steps that she would take with regards to the application in terms of s 86 of the Act. The applicant would have been anxious to know the results of his application. He should therefore have taken steps to find out what happened on 22 April 2015 about his application in terms of s 86 of the Act. He wants this Court to accept that he took no steps between 22 April 2015 when the said order was made and 19 January 2016 when he was served with a copy of the summons, to establish the results of his application. To compound the matters, the Defendant who now blames the debt counsellor, has not even obtained such debt counsellor's affidavit to support his contention. He is to blame for this state of affairs.

[22] When ultimately he received a report from the debt counsellor, he was told that he had to pay a total monthly amount of R10,700.00, which amounts would have been distributed among his creditors. He claims that the Payment Distribution Agent failed to pay the correct monthly amount to the Plaintiff as per debt re-arrangement order. It is as clear as crystal that payment of a monthly amount of R10,700.00 was not in keeping with the Magistrate's order of 22 April 2015. If the defendant had become pro-active in the solution of his problems, he would have known that the sum of R10,700.00 would not have sufficiently covered his monthly obligations in terms of the Court order. Again his ignorance can be solely attributed to his supinity. Again in this respect he has not deemed it necessary to obtain his debt counsellor's affidavit.

[23] The defendant unjustifiably blames the Payment Distribution Agent for failing to make correct monthly amounts to the plaintiff as per debt re-arrangement order. If the defendant did not himself make payment in accordance with the Court order, it is highly unlikely that the Payment Distribution Agent would have made the distribution according to the terms of the same Court order. All that the defendant does by his averments is to seek an escape route for his default in what he calls the failure of the Payment Distribution Agent. He also wants this Court to accept that he was misled by his own debt counsellor into believing that an amount of R10,700.00 was enough to cover all his monthly debts. In my view this is highly unlikely. By paying only R10,700.00 the defendant failed to comply with the Court order.

[24] While a Court should approach such matters as an application for summary judgment, fully aware of the implication thereof, a Court cannot come to the assistance of a litigant who shows lack of attention to his own matters. This lack of attention is manifested by

the failure of the Defendant to verify his state of affairs from 22 April 2015 when an order was made up to 19 January 2016 when he was served with a copy of the summons.

[25] In my view the Defendant has not succeeded in satisfying the Court that he has a *bona fide* defence against the application for summary judgment. The Defendant has not raised any issue with the other relief that the Plaintiff seeks in the application for summary judgment, for instance an order in terms of which the Plaintiff seeks to amend the details regarding the Engine and chassis number of the motor vehicle.

[26] In the result prayers 1, 2, 3, 4 and 5 of the application for summary judgment are granted. It is noticed that according to page 2 of the application for summary judgment there are two paragraph 3's, I will accept that the second 3 should be a 4 and that relief in 4 should be 5 and relief in 5 should actually be 6. It is for that reason that I grant prayers 1, 2, 3, 4 and 5 of the application for summary judgment.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:	*Adv. J Schoeman*
Instructed by:	*Hannes Gouws & Partners*
Counsel for the Defendant:	*Adv. Strauss*
Instructed by:	*Wentzel & Partners*
Date Heard:	*11 March 2016*
Date of Judgment:	*14 March 2016*