


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

|   |                                 |
|---|---------------------------------|
| (1)   | REPORTABLE: NO                  |
| (2)   | OF INTEREST TO OTHER JUDGES: NO |
| (3)   | REVISED: NO                     |
| <div><div>18/06/2019</div><div>DATE</div></div> <div><div></div><div>SIGNATURE</div></div> |                                 |

CASE NO: 62331/18

In the matter between:

**FIRSTRAND BANK LIMITED t/a GWM FINANCE**  
**A DIVISION OF WESTBANK**

**PLAINTIFF**

And

**BIANCA GOLDBERG**

**DEFENDANT**

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**JUDGMENT**

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**COLLIS J:**

## **INTRODUCTION**

1. This is an opposed Summary Judgment.

## **BACKGROUND**

2. The plaintiff's cause of action is based on a written agreement in terms of which the defendant purchased from the Plaintiff:

**1 X 2012 Nissan Juke 1.6**

**Dig T Tekna**

**Chassis Number: SJN FAAF 15Z6173693**

The Instalment Sale Agreement was electronically conducted between the parties on 7 February 2014.

3. In terms of the agreement so conducted the defendant was required to maintain regular payments as the account and the plaintiff shall remain the owner of the vehicle until the defendant has paid all amounts and have complied with all its obligations in terms of the agreement.
4. In breach of the terms of the agreement the defendant as at 11 June 2018, was in arrears in the sum of R22 520, 20.<sup>1</sup>
5. Approximately, two years after concluding the agreement the defendant applied to be placed under debt review after the credit agreement was referred to a debt counsellor in terms of section 129(1) read with section 130 of the National Credit Act 34 of 2005.
6. In pursuance of the said referral, the plaintiff as at 11 June 2018 directed a notice in terms of, section 86(10) of the National Credit Act to the defendant.<sup>2</sup>  
At paragraph 17 of the Particulars of Claim it is alleged that the defendant has

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<sup>1</sup> Particulars of Claim para 14 pg. 6.

<sup>2</sup> Particulars of Claim para 15.

failed to respond to the said notice and further that the defendant has failed to surrender the motor vehicle to the plaintiff as contemplated in section 127 of the National Credit Act.

7. Pursuant to the issuing of the summons on the 27 August 2018, it was served on the defendant on 31 August 2018. The defendant thereafter entered an appearance to defend which resulted in the plaintiff applying for summary judgment on 26 September 2018.
8. In the matter *Breitenbach v Fiat SA* (Edms) BPK at 227F – G, the Court held:  
*“To avoid summary judgment the defendant is required in terms of Rule 32(3) (b) of the High Court Rules to set out in an affidavit, facts which if proved at trial, will constitute an answer to the plaintiff’s claim. The rule also requires that the defendant satisfy the court that the defence is bona fide. This means the defendant must swear to a defence, valid in law in a manner which is not seriously unconvincing. Finally it is required of a defendant that he discloses fully the nature and grounds of the defence and the material facts relied upon therefore. This means that the statement of material facts must be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at trial will constitute a defence to the plaintiff’s claim.”*
9. In *First National Bank of SA Ltd v Myburg and Another* 2002 (4) SA 176 (C) at 177D – F the Court held:  
*“The court will grant summary judgment only where the plaintiff has an unanswerable case. If it has the slightest doubt the court will not grant summary judgment.”*
10. In the opposing the application for summary judgment the defendant have raised a number of challenges. Firstly, she challenges the *locus standi* of the plaintiff. Secondly the defendant contends that the plaintiff has not complied with the provisions of section 86(10) of the National Credit Act 34 of 2005 and thirdly the defendant also challenges the jurisdiction of this court to hear the application. In addition to the above the defendant also contends that the



agreement entered into was reckless credit and as such she is over indebted. Lastly she also mounted a challenge to the authority of the deponent to the founding affidavit.

#### AUTHORITY OF DEPONENT

11. As per the Affidavit Resisting Summary Judgment, and more specifically paragraph 4.1 thereof the defendant challenges the authority of Ms. Lungile Madinana. The challenge relates to the omission of Ms. Madinana's identify number for her to be identified by. Secondly, the defendant attacks the Certificate of Authority attached to the founding affidavit which specifically authorized Ms Madinana to launch the summary judgment application and lastly the defendant challenges whether Mr. De Kock the signatory of the certificate of authority is in fact employed as a director at the plaintiff.

12. As per the affidavit filed in support of the application for summary judgment Ms Madinana alleges as follows:

*"2. I am duly authorized to bring this application and depose to this affidavit on behalf of the Applicant. I refer in this regard to the resolution of the Applicant annexed hereto marked "A".*

*3. In my capacity as the Debt Review Manager, I have in my possession and under my control all the Applicant's accounts, records and other documents relevant to the claim forming the subject –matter of the action instituted against the Respondent under the above case number ("the action")."*

13. The defendant save to allege that it cannot be said with certainty as to whether Ms. Madinana is in fact the same person mentioned in the attached Certificate of Authority, no cogent reason is put forward by the defendant to challenge the authority or her identity. The challenge to her authority is made badly without setting out the basis challenging her authority.

14. In *Rees and Another v Investec Bank*<sup>3</sup> the Court held the following:

*“Undue formalism in procedural matters is always to be eschewed and must give way to commercial pragmatism. At the end of the day whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions or large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions or large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj.”*

15. In the present instance Ms. Madinana set out in her affidavit, that she has under her control all the applicant's records, documents and accounts relevant to the claim and as such she possesses the requisite knowledge to depose to the affidavit on behalf of the applicant.

16. Consequently I am satisfied that she possesses the requisite authority to depose to the affidavit on behalf of the applicant.

#### JURISDICTION OF THIS COURT

17. In this regard and more specifically the defendant alleges that the plaintiff's claim falls within the monetary jurisdiction of the Magistrate's Court and as such this claim ought to have been instituted in a Magistrate's Court and not a High Court. In addition to this the defendant alleges that the residential address of the defendant is situated within the jurisdiction of the High Court of South Africa, Gauteng Local Division Johannesburg. Coupled to the above the defendant also asserts that albeit that the defendant have failed to sign the Terms and Conditions of the Installment Agreement, paragraph 22.8 specifically records that the defendant would have consented to the jurisdiction of the Magistrate's Court.<sup>4</sup>

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<sup>3</sup> 2014 (4) SA 220 (SCA)

<sup>4</sup> Affidavit Resisting Summary Judgment paragraph 8.1 and 8.2 p 7



18. As per the Particulars of Claim the plaintiff alleges that the Defendant's residential address and chosen domicilium citandi et executandi is situated within the jurisdiction of the above Honourable Court.<sup>5</sup>
19. If one has regard to the relief sought by the plaintiff in the summary judgment application, at this stage the plaintiff merely seeks the cancellation of the installment sale agreement and the repossession of the motor vehicle and in the event of there being a shortfall once the vehicle is sold after repossession, the plaintiff now already seeks an order that any damages claim in future should be postponed *sine die*.
20. Section 19 of the Superior Court Act 10 of 2013 provides as follows:
- “(1) (a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and shall subject to the provisions of subsection (2) in addition to any powers or jurisdiction which may be vested in it by law.....”
21. Mr. Venter appearing on behalf of the defendant had argued that the defendant with reference to paragraph 22.8 of the Terms and Conditions have consented to the jurisdiction of the Magistrates Court and it is on this basis that counsel has argued that this court lacks the necessary jurisdiction. Counsel however did concede during argument that this court have concurrent jurisdiction with the Gauteng Local Division Johannesburg but had argued that given the heavy court rolls that this court should transfer the matter to its Local Division or the Randburg Magistrate's Court.
22. As per the affidavit resisting summary judgment and more specifically paragraph 8.2 thereof, the defendant denies having been a signatory to the terms and conditions attached to the Instalment Sale Agreement and she further disputes the contents thereof.
23. The defendant having denied being a signatory of the Terms and Conditions so

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<sup>5</sup> Particulars of Claim para 2

mentioned cannot place reliance on the provisions of paragraph 22.8 thereof. In additions to this, the provisions of section 19 of the Superior Courts Act, clearly permits the plaintiff to have instituted proceedings in this Court, as this Court has concurrent jurisdiction with its Local Division.

24. Furthermore, it simply would not be cost effective as suggested by Mr. Venter to transfer an application which is already opposed and having been argued, to another court simply for this matter to be argued again.

25. Consequently, I conclude that this Court has the necessary jurisdiction over the person of the defendant and in the result the point is also without merit.

#### DISAVOWAL OF THE AGREEMENT

26. The plaintiff's cause of action is premised on Annexure B annexed to its particulars of claim, which is a true copy of the electronic installment agreement entered into between the parties.<sup>6</sup>

27. In paragraph 8.3 of the affidavit resisting summary judgment, the defendant denied that Annexure B is a true copy of the agreement reached between the plaintiff and the defendant, more so that her signature does not appear on the agreement. The defendant further disputes the amount of VAT which was payable on the sale of the vehicle and also the amount levied in respect of the accessories. Important though is that the defendant does not deny accepting delivery of the vehicle being the subject-matter of this dispute.

28. In this regard, Mr. Du Plessis appearing on behalf of the plaintiff had argued, that where the defendant challenges the terms agreed upon when the agreement was concluded and by extension disavowed the agreement as alleged by the plaintiff this would result in her having no legal basis to retain possession of a vehicle which in law the plaintiff is the owner. It is on this basis alone he had argued would entitle the plaintiff to obtain a repossession order as sought from this court.

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<sup>6</sup> Particulars of Claim para 3



29. This submission as made by Mr. Du Plessis finds favour with this court. Where the defendant challenges the terms agreed upon surrounding the vehicle forming the subject-matter of this dispute, the defendant in all good honesty cannot retain the vehicle if no agreement was reached prior to her taking possession of the vehicle. On this basis alone, the vehicle ought to be returned to the plaintiff.

#### DEFENCES IN TERMS OF THE NATIONAL CREDIT ACT

30. In this regard, the defendant alleges that at the time the plaintiff, granted credit to her, it failed to perform the requisite credit assessment that she was completely over-indebted in that same amounted to reckless credit.<sup>7</sup> The defendant further alleges that at the time when the plaintiff extended credit to her, she was completely over-indebted and as such could not afford the credit extended to her.<sup>8</sup>

31. The National Credit Act<sup>9</sup> does not envisage that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods which form the subject-matter of the agreement. Such goods should be sold to reduce the defendant's indebtedness.<sup>10</sup>

32. As per the particulars of claim, the plaintiff alleges, that it terminated the debt review process in terms of the provisions of section 86(10), which termination the defendant had refuted in her affidavit resisting summary judgment.<sup>11</sup> The said notices of termination were dispatched to the chosen domicilium address of the defendant and to her debt counsellor as required by the NCA and it therefore begs the question, as to why the defendant had not received same.

33. Consequently, this court is not persuaded that the defendant has satisfied this court that she has a bona fide defence which if proved at trial will constitute a defence to the plaintiff's claim.

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<sup>7</sup> Affidavit Resisting Summary judgment paragraph 8.12 p 13

<sup>8</sup> Affidavit Resisting Summary judgment paragraph 8.15 p 11

<sup>9</sup> Act 34 of 2005

<sup>10</sup> Standard Bank of South Africa Ltd v Panayiotts 2009 (3) SA 363 (W) at 370

<sup>11</sup> Affidavit Resisting Summary Judgment paragraph 8.23



**ORDER:**

In the result Summary Judgment is entered in favour of the Plaintiff against the Defendant for:

1. Cancellation of the Agreement as from 14 June 2019.
2. Delivery of the 2012 Nissan Juke 1.6 DIG – T Tekna with **CHASSIS NUMBER: SJNFAAF 15Z6173693 AND ENGINE NUMBER: MR16099253A**
3. Cost of suit.
4. Claim for Damages postponed *sine die*.



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**COLLIS J  
JUDGE OF THE HIGH COURT OF  
SOUTH AFRICA**

**Appearances as follows:**

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|-----------------------------|------------------------|
| For Plaintiff:              | Adv. C.A. Du Plessis   |
| Attorney of the Plaintiff:  | Rossouws, Leslie Inc.  |
| For Defendant:              | Adv. W.P. Venter       |
| Attorney for the Defendant: | George Smith Attorneys |
| Date of Hearing:            | 14 February 2019       |
| Date of Judgment:           | 18 June 2019           |