IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

DATE **SIGNATURE**

Case number: 55936/2020

In the matter between:

NEDBANK LIMITED

Applicant

and

TSHEPO HEROLD TSHOGA Respondent

(IDENTITY NUMBER: [….])

JUDGMENT

MADIBA AJ

[1] This is an application for summary judgment in terms of Rule 32 of the Uniform Rules of Court. The relief sought against the respondent is as follows:

(a) Confirmation of the cancellation of the credit agreement as per Annexure A of the particulars of claim;
(b) Ordering the defendant to return the motor vehicle Volkswagen Polo GP 1.2 TSI Comfortline (66kw) 2017 model with engine number CJZG45618 and Chassis number AAVZZZ6RZU080592;
(c) Forfeiture of all the monies paid by the defendant to the plaintiff in terms of the parties' agreement attached as Annexure A of the particulars of claim;
(d) Damages, if any, and any further reasonable expenses incurred by the plaintiff in the repossession of the goods in an amount to be calculated by subtracting the correct market value of the aforesaid goods (as well as a rebate on an unearned financial charges from the balance outstanding if applicable).
(e) Costs of suit.
(f) Further and/or alternative relief.

[2] The application for summary judgment is resisted mainly on the following grounds:

(a) That the credit agreement be declared a reckless credit agreement;

(b) Lack of jurisdiction;

(c) The deponent attesting to the affidavit in support of the summary judgment (Christel Toweel) is not the same person indicated on the summary judgment application (Nicolean Ferreira);

(d) That the applicant was not represented by an authorised employee as the application does not disclose the full details of the person who represented it.

Factual matrix

[3] A written variable rate instalment sale agreement was entered into between the applicant and respondent on the 15th of August 2017 in terms whereof the respondent purchased a 2017 Volkswagen Polo 1.2 TSI Comfortline (66kw) with engine number CJZG45618 and chassis number AAVZZZ6RZU080592 from the applicant.

The total purchase price inclusive of finance costs was the sum of R388 939.22. The respondent was to off-set the collectable amount of R388 939.22 in 72 monthly instalments of R5 515.08 commencing on the 1st of November 2017 with the last monthly instalment payable on the 1st of September 2023.

The express terms of the agreement are among others:
Ownership of the motor vehicle in this matter was to pass over to the respondent after the debt was fully paid and the respondent has complied with all obligations relating to the parties' instalment sale agreement. The said motor vehicle Polo 1.2 TSI Comfortline 2017 model was sold and delivered to the respondent.

In the event of the respondent breaching the agreement, the applicant is entitled to cancel the parties' agreement, return of the vehicle, forfeiture of the amounts paid by the respondent, payment of the outstanding amount and damages.

[4] The provisions of the National Credit Agreement Act 34 of 2005 are applicable to the parties' agreement.

The applicant complied with all obligations in terms of the instalment agreement with the respondent.

On the other hand, the respondent defaulted on the agreement as he failed to maintain regular monthly instalments as agreed.

As at the institution of the action, the balance owing by the respondent was the sum of R275 133.74 inclusive of arrear amounts and interest payable.

The amount owing and payable by the respondent as at 15 February 2022 is the sum of R283 111.95 inclusive of interest while the current arrear amount is R159 338.14. The respondent has failed to effect any instalment payments for a period of twenty-five months.

During 7 October 2020, the applicant elected to cancel the agreement alternatively is seeking the cancellation of the said agreement. Summons were issued against the respondent (defendant) and a notice to defend together with a plea were entered by the respondent.

Consequently, the applicant launched a summary judgment application against the respondent. An opposing affidavit resisting the summary judgment was served and filed by the respondent.

The respondent was ordered to launch a substantive application for condonation as the opposing affidavit was filed out of the required time frame.

Condonation application

[5] It is settled law that the standard for considering an application for condonation is the interest of justice. See ***Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*** **2000 (2) SA 837 (CC)** at paragraph [3].

Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case.

In considering application for condonation the principles normally taken into account include the following factors:

(a) The degree of non-compliance;
(b) The explanation thereof and the reasonableness of the explanation for the delay;
(c) The importance of the issues raised and the nature of the relief sought;
(d) The prospects of success and the respondent's interest in the finality of his matter and the avoidance of any unnecessary delay.

See ***Federated Employers Fire & General Insurance Co Ltd v McKenzie*** **1969 (3) SA 360 (A)** at 362F-H.

[6] The respondent relies on the following grounds for his condonation for the late filing of his opposing affidavit:-

The respondent could not access his court file kept by his attorney of record as the office were locked for non-payment of rent. It is contended by the respondent that he on numerous occasions tried to contact his attorney to no avail. If condonation is not granted the respondent argues that he will be greatly prejudiced as his constitutional rights to adduce evidence will be compromised. Accordingly, the *audi alteram partem* rule will be defeated as the respondent will be unable to state his case.

The condonation application is not opposed.

It is apparent that there are instances where the respondent indeed failed to comply with the rules of court and with no sufficient and reasonable explanation provided.

I am however not persuaded that non-compliance was so gross that the application for condonation should be dismissed without considering the application for summary judgment.

In the premises the late filing of the opposing affidavit is hereby condoned.

Issue for determination

[7] Whether the opposing affidavit disclosed a *bona fide* defence and the material facts upon which the respondent based his defence.

Legal principles finding application

[8] Summary judgment is intended to afford a plaintiff who has an action against the defendant and who does not have a defence to have a relief without resorting to trial.

In terms of Rule 32(2)(b) of the Uniform Rules of Court, the plaintiff has to identify any point of law and the facts upon which his claim is based. The plaintiff has to briefly explain why the defence pleaded does not raise any triable issues. It is not sufficient to merely state that the defendant has no *bona fide* defence.

The onus rests with the plaintiff to show that the defendant does not have a *bona fide* defence on the merits of the case.

The respondent's defences

Lack of jurisdiction

[9] The respondent contends that since the debt involved in this matter is less than four hundred thousand rand, the magistrates court is best suited to be seized with the parties' matter. It is further contended that the parties' instalment agreement provides that in the event of a dispute, the matter is to be ventilated in the magistrates' court. According to the respondent the plaintiff/applicant is to follow the defendant/respondent to his place of residence and institute his action against the respondent at his *domicilium citandi*.

The applicant avers that the respondent did not plead lack of jurisdiction in his plea and only raises this point in his heads of argument. The point taken does not raise any triable issue or discloses a *bona fide* defence according to the applicant. It is submitted by the applicant that clause 20 of the parties' instalment agreement stating that any legal proceedings that may be brought in terms of their agreement may be heard in a magistrates' court regardless of the amount claimed, does not exclude the jurisdiction of the High Court. Clause 20 accordingly allows the applicant the latitude to elect the forum where the action may be instituted including the High Court unless specifically prohibited by a contract or legislation.

Clause 20 of the parties' instalment agreement simply provides that *"any legal proceedings that may arise between the litigants <u>may</u> (own emphasis) be brought in the magistrates' court."* The clause as aforesaid does not preclude the applicant form instituting its action in the High Court.

The court held in ***Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd and Others v Gqirana N.O. and Another*** **[2021] ZASCA 92 (25 June 2021)** in deciding whether the High Court could refuse to entertain a matter that fell within the jurisdiction of the magistrates' court, held that a High Court is obliged by law to hear any matter that falls within its jurisdiction and has no power to decline to hear such a matter on the ground that another court has concurrent jurisdiction to hear it.

Section 21 of the Superior Courts Act 13 of 2013 provides that a High Court has jurisdiction over all persons residing or being in a relation to all causes arising within its area of jurisdiction. The instalment agreement was concluded by the parties in this matter in Wonderboom which falls within the area of jurisdiction of the court.

The court in ***Steytler NO v Fitzgerald*** **1911 AD 295** at 346 stated that *"a court can only be said to have jurisdiction in a matter if it has the power, not only of taking cognisance of the suit, but also give effect to its judgment."*

I find that the High Court does have jurisdiction in this matter.

Credit agreement a reckless lending

[10] The respondent contends that the applicant failed to comply with all statutory obligations in terms of the National Credit Act 34 of 2005 and the Finance Intelligence Centre Act 38 of 2001 in that the applicant was not entitled to take any action to either accelerate, enforce, suspend or terminate a credit agreement between the parties. It is argued that the applicant's failure to conduct due diligence and background check when entering into an instalment agreement with the respondent amounts to reckless credit lending. The respondent contends that it is common knowledge to the applicant that the respondent was only employed for a period of two years when the agreement was concluded and by granting the respondent a loan for a period of five years, the applicant acted recklessly. Applicant could have foreseen that the respondent could not be able to cope with the instalment repayment after a lapse of two years of the respondent's employment contract. The respondent further submits that he has a strong case against the applicant.

On the contrary, the applicant submitted that the respondent must set out the defence of reckless lending in sufficient particularity which the respondent failed to do. A mere fact that the respondent defaulted in his monthly instalment cannot be deemed as a reason for reckless credit. A significant period of time lapsed before the respondent alleged reckless lending and despite the allegations, the respondent did not return the motor vehicle to the applicant. In the circumstances the applicant submitted that the respondent's averments do not raise any *bona fide* defences warranting a hearing in a trial court.

When making a determination as to the reckless credit, section 80(1) of National Credit Act stipulates that a period when the consumer applied for credit is of utmost importance. Section 80(2) enjoins the credit provider to conduct an assessment. Should the credit provider proceed to grant credit

under circumstances which points to consumer's over-indebtedness, such credit agreement will be regarded as a reckless lending.

A credit provider is therefore under an obligation in assessing the consumer, to consider the consumer's state of mind relating to his understanding of the risks and costs of the proposed credit and the disclosure of the consumer's finances to ensure affordability in terms of the credit agreement. The previous consumer's behaviour under the credit agreement has to be taken into account.
See ***Absa Bank Limited v Kganakga*** **2016 JDR 0064 (GJ)** (unreported case no 26467/2012, 18 March 2016)

It is not disputed in this matter that the respondent is the one who supplied the applicant with details to enable applicant to make a determination as to whether the respondent qualifies for a credit or not. The respondent signed an application form (annexure "MF2") containing details including his salary details for assessment. Based on the information provided by the respondent, an instalment agreement was concluded between the parties. After a period of more than nine months of non-payment of the monthly instalments agreed upon between the parties, the respondent cries foul and alleges reckless credit when the applicant launched a summary judgment application.

It is indeed so that the respondent is expected to disclose sufficient facts in support of reckless lending allegations. A court will not declare a credit agreement reckless in the absence of substantiated and detailed allegations. In ***SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases*** **2011 (1) SA 310 (GSJ)** at paragraph 26 the learned Judge commented that there is a tendency for defendants to make a bland allegation that they are over-indebted or that there has been reckless credit. A bald allegation that there was reckless credit will not suffice.

A section 129 notice was served on the respondent and he has acknowledged receipt thereof. The respondent failed to exercise the options provided by section 129 and surprisingly alleges that he (respondent) was not afforded an

opportunity for debt restructuring which allegation cannot be accepted as being correct.

In my view the respondent did not set out his defence of reckless credit sufficiently and in a detailed manner.

I find that the applicant as a credit provider complied with its obligations and that it conducted the required assessment.

Deponent attesting to the summary judgment affidavit not a person indicated in the applicant's notice of motion

[11] The respondent alleged that it recently came to its attention from the court papers that the credit provider was not represented when the parties entered into a variable rate instalment sale agreement. Bianca Steenkamp signed the agreement as a witness and not as a credit provider. It is contended that the applicant failed to comply with the provisions of Rule 18(6) of the Uniform Rules of Court in that it did not mention the names of the person representing it at the conclusion of the parties' instalment sale agreement. Consequently, the respondent argues that the applicant was not represented by an authorised employee and as such the instalment sale agreement between the parties is void *ab initio.*

The applicant avers that the particulars of claim discloses cause of action as all the material facts giving rise to an enforceable claim are contained therein otherwise the claim will be excipiable. The issue as to who represented the applicant at the conclusion of the parties' instalment sale agreement constitutes evidential facts and need not be set out in the pleadings so submitted the applicant. It is disputed that Rule 18(6) requires that a legal entity concluding an agreement must disclose who represent such a legal entity. The applicant further submits that as to who represented the plaintiff in concluding an agreement has no bearing on the cause of action and the defendant is not prohibited from pleading to the claim. No prejudice is suffered by non-identification of the authorised employee representing the applicant in the parties' instalment sale agreement so argued the applicant.

Rule 18(6) of the Uniform Rules of Court

[12] Suffice to refer to the provisions of Rule 18(6) which states:-

> *"A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleadings shall be annexed to the pleadings*."

Careful reading of Rule 18(6) reveals that it is not a requirement that the pleader must provide the name and capacity of the parties who concluded the agreement.

In paragraph 3 of the plaintiff's (applicant's) particulars of claim the plaintiff pleaded as follows:-

> *On/or about 15 August 2017 and at Wonderboom the plaintiff (duly represented by an authorised employee) and defendant, in his personal capacity entered into a written Variable Rate Instalment Sale Agreement …"*

The defendant (respondent) confirms that the plaintiff was duly represented by an authorised employee in his plea to the particulars of claim. The defendant (respondent) averred that:-

> *"Ad paragraph 3 thereof –*
> *The contents of this paragraph are admitted. Defendant aver that at the conclusion of the written variable rate instalment sale agreement it was common knowledge between the plaintiff (duly represented by authorised employee) (own emphasis) and the defendant that the defendant was temporarily employed …"*

The averment by the plaintiff (applicant), that it was duly represented by an authorised employee is in my view sufficient to allow the defendant

(respondent) to plead which interestingly he was able to do without any hindrance.

The respondent was not precluded from amending his plea. Respondent did not take the opportunity and option available to him.

It is imperative that the opposing affidavit in a summary judgment must accord with the defendant's plea.

I am of the view that sine the defendant (respondent) did not dispute in his plea that the plaintiff was not represented by an authorised employee when concluding the contract, the respondent cannot raise such an issue in his affidavit resisting summary judgment.

In any event, the High Court is vested with inherent jurisdiction to condone any procedural irregularity and non-compliance with its rules. Accordingly, the court may condone any irregularity or neglect which does not materially prejudice the other party.

I find that the applicant (plaintiff) has pleaded all the material facts required to sustain a cause of action in terms of the parties' contract. The respondent's defence is rejected.

<u>The deponent attesting to the affidavit in support of the summary judgment (Christel Toweel) not the same person indicated in the summary judgment application</u>

[13] The respondent averred that the applicant's notice of motion in the summary judgment stipulates that Nicolean Ferreira's affidavit will be used in support of the application. However, Christel Toweel attested to the affidavit in support of the summary judgment. It is contended that the summary judgment is defective as the applicant was not represented by an authorised employee. The respondent alleges that the defence as raised constitutes a triable issue.

A concession was made by the applicant that indeed the affidavit in support of the summary judgment was signed by Christel Toweel instead of Nicolean Ferreira. The applicant's submission is that it is simply a typing error and the respondent attacks the language used and raises a defence based on mere technicalities. There is no prejudice suffered by the respondent as the defect is purely formal and the court may condone same without a formal application being launched. It is further argued by the applicant that the defence does not address the merits of the application.

The defence relied upon by the respondent does not go to the root of the summary judgment application and fails to establish issues that may be heard in a trial. The ground raised is purely technical and does not assist the respondent in resisting summary judgment.

In ***W.M. Mentz & Seuns (Edms) Bpk v Katzake*** **1969 (3) SA 306 (T)** at 311 the court held that to give effect to purely technical defences in an application for summary judgment would frustrate the purpose of Rule 32.

I hold the view that the alleged defect is of no consequence and it is of no material prejudice to the respondent.

In ***Joubert, Owens, Van Niekerk Ing v Breytenbach*** **1986 (2) 357** the facts in an application for summary judgment were that an affidavit of VN would be used in support of the application. The affidavit which was attached was however deposed by B. It was held by the court aforementioned that the fault in the original application was purely formal and in such instances a condonation application would under normal circumstances be required. However, condonation was granted without the condonation application being launched. The respondent in any event and despite the alleged shortcoming was able to plead.

It is therefore proper to hold that the defence raised is meritless and cannot be entertained.

Issues to be determined

[14] All what the court is to do, is to consider whether the opposing affidavit disclosed a *bona fide* defence and the material facts upon which the respondent is relying on in resisting the summary judgment.

In deciding whether the defendant has set out a *bona fide* defence, the court must satisfy itself whether the defendant has disclosed the nature and grounds of the defence sufficiently.

The defendant must set out facts which proven at the trial, will constitute an answer to the plaintiff's claim. See ***Maharaj v Barclays National Bank*** **1976 (1) SA 418 (A)** at 423F.

The facts and circumstances of this matter based on all the documents that are properly before the court, are to be considered holistically.

The difficulty in my view is that the facts and grounds in the respondent's affidavit resisting summary judgment are not pleaded in his plea. At best, the respondent/defendant's plea is littered with bare denials to averments made in the particulars of claim which are contradictory in their nature. A case in point is that the respondent denied being served with a section 129 notice and in the same breath, acknowledges receipt thereof and further alleges that the respondent was not afforded an opportunity of restructuring his debt.

It is settled law that the court has a residual discretion which must be exercised judicially.

In exercising its discretion, the court may refuse summary judgment even if the defendant has failed to raise triable issues which constitute a *bona fide* defence.

Whether the defences relied upon are *bona fide*, the consideration is informed by the way such defences have been substantiated in the opposing affidavit. The respondent conceded that there is indeed an instalment sale agreement

between the parties and that he defaulted in monthly instalment repayments attributing it to economic and financial challenges. The fact that the respondent was in a two-year employment contract with his erstwhile employer aggravated his financial position until 2019. The respondent however submitted that he has since 2019 qualified as an attorney and is self-employed. Despite a change in his employment situation, he failed to offset the arrears accumulated as he is presently more than twenty-five months in default of his contractual agreement.

The applicant on the other hand is obliged to comply with the requirements of Rule 32(2)(b) in that he *inter alia* has to identify any point in law and facts upon which its claim is based and explain briefly why the defences as pleaded do not raise any issues for trial.

I find that the applicant has indeed satisfied the requirements of Rule 32(2)(b) and the defences raised by the respondent are not genuine and not capable of being sustained at a subsequent trial.

The applicant has in the premises succeeded in establishing a case for summary judgment.

[15] Consequently I make the following order:

(a) The application for summary judgment is hereby granted.

(b) The cancellation of the Credit Agreement attached as Annexure “A” to the plaintiff’s particulars of claim is confirmed.

(c) The defendant is ordered to immediately return to the plaintiff the following motor vehicle:
Volkswagen Polo 1.2 TSI Comfortline (66kw) 2017 model with engine number CJZG45618 and chassis number AAVZZZ6RZU080592.

(d) Forfeiture of all monies paid by the defendant to the plaintiff in terms of Variable Rate Instalment Sale Agreement as per Annexure “A” of the plaintiff’s particulars of claim.

(e) An order authorising the plaintiff to apply on the same papers, to be supplemented if necessary, for judgment in respect of the following:

Damages, if any, and further reasonable expenses incurred by the plaintiff in repossession of the goods in an amount to be calculated by subtracting the current market value of the said goods (as well as a rebate on unearned financial charges) from the balance outstanding, if applicable.

(f) Interest on the said damages at the rate of 10.35 % per annum.

(g) The defendant to pay the plaintiff's costs of suit.

_____

S.S. MADIBA

ACTING JUDGE OF THE HIGH COURT

CASE NO: 55936/2020 and 11060/2021

HEARD ON: 10 March 2022

FOR THE PLAINTIFF/RESPONDENT: ADV. JACOBSZ

INSTRUCTED BY: VHI Attorneys

FOR THE DEFENDANT/APPLICANT: IN PERSON

DATE OF JUDGMENT: 25 March 2022