

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 7330/2020P

In the matter between:

**VOLKSWAGEN FINANCIAL SERVICES
SOUTH AFRICA (PTY) LTD**

PLAINTIFF

and

JANINE REANTE PILLAY

DEFENDANT

ORDER

The following order is granted:

1. Summary judgment is granted in favour of the plaintiff against the defendant as follows:
 - 1.1. The plaintiff's cancellation of the agreement relating to the vehicle described in paragraph 1.2 of this order is confirmed.
 - 1.2. The defendant is directed to return the vehicle described as a 2019 Volkswagen Amarok 3.0 TDI Hi-Line EX 4 MOT A/T D/C P/U with chassis number: [...] and engine number: [...] ('the vehicle') to the plaintiff.
 - 1.3. The defendant is directed to pay the costs of suit.
2. The plaintiff is granted leave to apply to this court on the same papers, duly supplemented, insofar as it may be necessary, for an order for any damages which it is entitled to, which will be quantified once the vehicle has been located and sold.

3. The plaintiff shall allege and prove, in its action for any outstanding damages, that it has complied with the requirements set out in para 20.3 of the substituted order granted in *FirstRand Bank Limited t/a Wesbank v Davel* [2019] ZASCA 168 .

JUDGMENT

Bezuidenhout AJ

[1] The plaintiff, Volkswagen Financial Services South Africa (Pty) Ltd, instituted action against the defendant, Ms Janine Reante Pillay, claiming inter alia confirmation of the termination of an agreement, return of a motor vehicle, and other related relief. The defendant defended the matter and filed her plea on 21 September 2021. The plaintiff filed an application for summary judgment on 11 October 2021 which has been opposed by the defendant. The matter subsequently came before me as an opposed motion.

[2] The plaintiff and the defendant entered into an agreement on 30 October 2019 in terms of which the plaintiff sold the defendant a Volkswagen Amarok motor vehicle. The principal debt in respect of the motor vehicle was R916 249.51, without finance charges. Once those charges were added, the total principal debt amounted to R1 432 049.76. The monthly instalment was R19 958.58.

[3] The defendant raised a number of defences in her plea. For reasons which will become apparent below, it is necessary to consider these defences in conjunction with what was pleaded in the particulars of claim. I will deal with the plaintiff's and the defendant's affidavits in the summary judgment application later.

[4] The plaintiff pleaded that it had concluded an electronically signed instalment agreement with the defendant on 30 October 2019 at Pietermaritzburg. The defendant admitted the date and place but denied that she had signed the agreement. The averment that the agreement was concluded electronically in terms

of section 13(3) of the Electronic Communications and Transactions Act 25 of 2002 was likewise denied, with no amplification pleaded.

[5] The plaintiff pleaded that it was represented by a duly authorised representative and that the defendant had acted personally. The defendant pleaded that no authorisation signature appears on the quotation or the agreement produced and attached by the plaintiff. She admitted that she had acted personally.

[6] The plaintiff pleaded that it had carried out an assessment in accordance with the requirements of section 81(2) of the National Credit Act 34 of 2005 ('the NCA') and referred to a finance application, which was attached as part of the written agreement. The defendant denied that the assessment was 'concluded' and put the plaintiff to the proof thereof.

[7] The plaintiff pleaded a number of the general terms of the agreement, as is usual in matters of this nature. The defendant responded by admitting that the plaintiff had sold and delivered the vehicle to her. She pleaded further that the plaintiff had failed to conduct a credit worthiness assessment and also that the monthly expenses 'contained' in the attached written agreement were 'incorrect and not at all as per her bank statements'. There is no amplification pleaded of what the correct amounts or expenses were. It was also denied that the terms and conditions, in general, were discussed with her, and, in particular, that it was explained to her that the plaintiff could recover possession of the vehicle should she be in breach of the agreement.

[8] The plaintiff pleaded that the defendant was in breach of the agreement as she failed to make timeous payments. The plaintiff further pleaded that the arrears amounted to R190 295.01 as at 15 September 2020, and attached a certificate of balance confirming the balance. The defendant denied the contents of the paragraph and pleaded further that the certificate of balance did not set out how the alleged arrears were calculated. There was no amplification of the denial that she had failed to make timeous payments and no particulars were pleaded of actual payments made.

[9] The plaintiff pleaded that the defendant applied for debt review on or about 19 February 2020, which averment was admitted.

[10] The plaintiff pleaded that it had not received any payments in terms of a restructured payment arrangement, and elected to cancel the defendant's debt review, as it was entitled to do so. The defendant denied the contents of the paragraph and pleaded further in amplification that 'no restructured arrangement was received by the plaintiff in terms of a counter proposal to the standard proposal sent to the plaintiff'. (sic)

[11] The plaintiff pleaded that it had drawn the notice of the termination of the debt review to the attention of the defendant, the debt counsellor involved as well as the National Credit Regulator after a period of sixty days had elapsed. The plaintiff further pleaded that it had terminated the debt review after ten business days had elapsed following the notice of termination. The defendant admitted these averments and pleaded nothing further.

[12] The plaintiff attached copies of the relevant notices in terms of section 86(10) of the NCA together with proof of service. The defendant admitted these averments.

[13] As mentioned above, the plaintiff launched an application for summary judgment. In terms of the amended Uniform rule 32(2)(b), a plaintiff is required to explain briefly why the defence pleaded does not raise any issues for trial. In *Tumileng Trading CC v National Security and Fire (Pty) Ltd*,¹ Binns-Ward J undertook a detailed analysis of the implications of the amendments to the rule, and held that 'a plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely for the purposes of delay'.² A court is furthermore 'not charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of

¹ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC).

² *Ibid* para 22.

whether the pleaded defence is genuinely advanced, as opposed to a sham put up for purposes of obtaining delay.’³

[14] The plaintiff, in its affidavit in support of summary judgment, dealt with the various defences raised by the defendant individually and concluded that there was no merit in the defences raised. I will only highlight what was stated in respect of two of the defences.

[15] In response to the defendant’s plea that the plaintiff had failed to conduct an affordability assessment, the plaintiff alleged that it had conducted a full and proper assessment in accordance with the information provided by the defendant. This included three months’ bank statements of the defendant’s Capitec bank account as well as her salary advice as proof of her income. The plaintiff also obtained reports from the credit bureau. The plaintiff further stated that the defendant was required to fully and truthfully declare her existing financial means and monthly obligations. The defendant, however, at no stage disclosed that she had entered into a further credit agreement with MFC a few days before entering into the agreement with the plaintiff. This second credit agreement with MFC did not yet reflect on the credit bureau’s report. The defendant’s bank statements also did not alert the plaintiff to this second credit agreement as no instalment had yet been paid. It was submitted that the defendant had a duty to disclose this agreement with MFC and it materially affected the plaintiff’s ability to make a proper assessment.

[16] The plaintiff also dealt with the defendant’s plea denying the breach, the balance outstanding, and the plaintiff’s failure to set out how the arrears were calculated. The plaintiff, quite correctly, stated that the defendant bears the onus to prove payment which entails an obligation to properly and fully provide the court with proof of all the payments made.

[17] Uniform rule 32(3)(b) sets out what is required of a defendant. In *Breitenbach v Fiat SA (Edms) Bpk*⁴ the court held that

³ Ibid para 23.

⁴ *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229A.

‘All that is required is that the defendant’s defence be not set out so baldly vaguely or laconically that the Court, with due regard to all the circumstances, receives the impression that the defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have.’

[18] A defendant is required to disclose fully the nature and grounds of its defence and the material facts relied upon. A defendant also has to demonstrate that it has a *bona fide* defence to the action. In *Tumileng Trading*, Binns-Ward J held as follows: ‘The assessment of whether a defence is bona fide is made with regard to the manner in which it has been substantiated in the opposing affidavit, viz upon a consideration of the extent to which ‘the nature and grounds of the defence and the material facts relied upon therefor’ have been canvassed by the deponent. That was the method by which the court traditionally tested, insofar as it was possible on paper, whether the defence described by the defendant was ‘contrived’, in other words, not bona fide. And the amended subrule 32(3)(b) implies that it should continue to be the indicated method.’⁵

[19] The defendant’s affidavit opposing summary judgment dealt only with a limited number of issues, and by no means addressed all the issues referred to by the plaintiff when it dealt with the defences raised in the defendant’s plea.

[20] The first issue the defendant dealt with was her application for debt review. She alleged that after she had applied for debt review on or about February 2020 and
‘whilst in the period of making application for debt review and attending to sending out the relevant notices, the country was placed into lockdown level 5 for a period of time, whereafter the lockdown restrictions were lifted gradually, however it was still impossible for me to attend the offices of the Debt Counsellor and/or the attorney to do the necessary in order sign documents for debt review’.

⁵ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) para 25.

It is not clear what the defendant is attempting to convey as it not stated in response to anything contained in the plaintiff's affidavit. It appears as if the defendant is attempting to justify not fully completing or complying with the debt review process.

[21] The next issue which the defendant addresses is the notice in terms of section 129 of the NCA. She alleges that the plaintiff failed to attach and failed to deliver a notice in terms of section 129 of the NCA, in terms of which she would have been directed to refer the matter to *inter alia* a debt counsellor within ten days. Seen against the fact that the defendant admitted in her plea that she received the plaintiff's notice in terms of section 86(10) of the NCA, these allegations likewise make no sense.

[22] The defendant addresses the issue of her alleged breach by stating that she had been making payments 'in terms of the restructured payment' and attaches to her affidavit a schedule reflecting payments made on certain dates as well as closing balances. She further alleges that the plaintiff had been receiving regular monthly payments, and, in fact, 'actually received more than double' than what is set out in the original agreement. The defendant denies that she is indebted to the plaintiff. A perusal of the attached schedule however shows sporadic payments made between April 2020 and November 2021 - definitely not regular monthly payments. The payments made furthermore do not come anywhere close to the monthly instalment of R19 958.58 in terms of the agreement, and the closing balance of R970 172.80 on 9 April 2020 increases to R1 149 321.62 on 10 November 2021.

[23] Not only has none of this been pleaded but the defendant is being untruthful when she states that she has been making 'regular monthly payments' and paid more than double than what she was required to.

[24] The defendant also alleged that her debt counsellor sent out 'the necessary form 17.1' to the plaintiff and that no counter proposal 'was ever received by the Debt Counsellor in order to negotiate a reduced instalment'. This was likewise not pleaded, and also contradicts what was previously stated, namely that the defendant was making payments in terms of 'the restructured payment'. The defendant's proposal is furthermore not attached to the affidavit. The defendant further does not

provide any information as to what steps the debt counsellor took when he or she did not receive a counter proposal from the plaintiff.

[25] With reference to the plaintiff's allegations that it conducted an assessment of the defendant's means, the defendant stated that if the plaintiff had only gone through the bank statements presented to it, 'then they have failed to do a proper credit assessment as to my affordability and means'. No response is provided to the allegations made by the plaintiff regarding the credit agreement concluded with MFC a few days before the present agreement was concluded. There is also no indication as to what else the plaintiff should have done in order to conduct a proper credit assessment.

[26] In argument before me, counsel for the plaintiff, Mr K Gounden, submitted that the defendant had failed to disclose a *bona fide* defence. He also submitted that what was set out in the defendant's opposing affidavit differed from what was pleaded in the defendant's plea. He also submitted that new issues were raised in the heads of argument filed on behalf of the defendant that were not previously raised in either the plea or the opposing affidavit.

[27] Counsel for the defendant, Mr A Gevers, made a number of submissions in his heads of argument but before me concentrated his efforts mostly on one issue, which requires closer scrutiny.

[28] It was submitted, with reference to the defendant's denial that the plaintiff was entitled to cancel the defendant's debt review, that the plaintiff was obliged in terms of section 86(5)(b) of the NCA to participate in good faith. Section 86(5)(b) reads as follows:

'(5) A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection (4) (b), must—

...

(b)

participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.'

It was also submitted that it is necessary to 'read into' section 86(10) of the NCA that a credit provider may only terminate a debt review if he is acting in good faith. None of this was pleaded by the defendant nor was it raised in her opposing affidavit.

[29] Defendant's counsel referred to *Mercedes Benz Financial Services SA v Dunga*⁶ where Blignault J suggested that 'the implication of a proviso into s 86(10), to the effect that a credit provider may only terminate a debt review if he is acting in good faith' would avoid any unfortunate results of a misinterpretation of section 86(10). He however held that it was 'not necessary to define the precise ambit of the suggested "good faith" criterion'.⁷

[30] I was also referred to *SA Taxi Securitisation (Pty) Ltd v Ndobela*⁸ where the court agreed 'that good faith is an important requirement of debt review and failure to act in good faith can lead to the termination of the debt review by the credit provider declared invalid'.⁹ The court held that it will depend on the facts and circumstances whether a credit provider had failed to act in good faith.¹⁰ The court stressed that submissions from the bar were not sufficient and that enough facts must be placed before the court.¹¹

[31] It is clear from the defendant's plea and opposing affidavit that no facts in this regard were placed before me.

[32] A submission was made in the heads of argument that the defendant was facing impossibilities as regards 'timeously attending to the debt review proceedings' and that the plaintiff had failed to respond to the defendant's proposal with a counter proposal, and that this was an indication that the plaintiff had failed to act in good faith. As mentioned before, none of this was pleaded or raised in the opposing affidavit.

⁶ *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 (1) SA 374 (WCC) para 48.

⁷ *Ibid* para 51.

⁸ *SA Taxi Securitisation (Pty) Ltd v Ndobela* [2011] ZAGPJHC 14.

⁹ *Ibid* para 21.

¹⁰ *Ibid*.

¹¹ *Ibid* para 22.

[33] It was also submitted that the lack of an averment in the particulars of claim or summons that the plaintiff complied with his obligations to act in good faith, as contemplated in section 86(5) of the NCA, renders the particulars of claim excipiable. Reliance was placed on *Pottas and others v FirstRand Bank Ltd and others*.¹² In this matter, the plaintiff issued summons in which the only averment relevant to the NCA was that the plaintiff had complied with the provisions of the NCA and, in particular, sections 129 and 130 thereof. Nothing further. Alkema J held that a number of averments should have been contained in the summons – one of them being that the credit provider participated in good faith.

[34] Counsel for the defendant also referred me to *SA Taxi Securitisation (Pty) Ltd v Miya L*¹³ where Ncube AJ found that the debt review process in that matter had not been terminated properly because of the lack of participation in good faith by the applicant. The facts relating to the debt review process were fully pleaded and the process included a proposal by the debt counsellor, a rejection by the applicant, and a counter proposal. After the debt counsellor filed an application at the magistrates' court, the applicant terminated the debt review. The applicant filed an answering affidavit in the magistrates' court and thereafter issued summons. This is clearly not authority for the proposition that a failure to plead participation in good faith by a plaintiff would render the particulars of claim excipiable. The facts in any event differ completely from those in the present matter.

[35] I have not been able to find any authority in which *Pottas* was followed to the extent that a failure to plead participation in good faith would render the particulars of claim excipiable, perhaps for good reason. Countless similar matters serve before the courts on a regular basis and I have yet to come across one where a plaintiff has pleaded that it participated in good faith. In my view, a defendant who wishes to rely on a credit provider's lack of participation in good faith in the debt review process, should plead the relevant facts properly to enable the court to consider whether or not a credit provider failed to act in good faith when participating in the process. As far as *Pottas* is concerned, I respectfully disagree with the finding

¹² *Pottas and others v FirstRand Bank Ltd and others* [2015] JOL 32803 (ECP).

¹³ *SA Taxi Securitisation (Pty) Ltd v Miya L* 2012 JDR 1020 (KZP).

that a failure to plead participation in good faith renders the particulars of claim excipiable.

[36] As far as good faith is concerned, it of course goes both ways, as a consumer, such as the defendant, also has to act in good faith. In *Ndobela* the court held that:

‘The duty to act in good faith is not only confined to credit providers, it extends to consumers as well. It is a reciprocal duty on both parties to engage meaningfully in a debt review negotiations. What I imply is that a consumer is not permitted to sit back when he or she does not receive any counter proposal or response from the credit provider and allow the 60 business days to pass before raising an argument that the credit provider acted in bad faith. The consumer has a reciprocal duty to act diligently and proactively the moment it becomes clear that the credit provider is not engaging in good faith or does not respond to his or her proposals for debt review.’¹⁴

[37] Given the lack of averments and allegations in the defendant’s plea and opposing affidavit, I cannot find that the defendant has disclosed fully a defence in this regard.

[38] I requested counsel for the defendant to address me on the defendant ‘s failure to deal with all the issues raised by the plaintiff, and specifically the issue regarding the other finance agreement entered into with MFC. It was submitted that a defendant does not have the duty to respond to everything in a plaintiff’s affidavit, and, in particular, not *ad seriatim* to each paragraph. This unfortunately flies in the face of what was held in *Tumileng Trading*, where it was held that a defendant is ‘expected to engage with the plaintiff’s averments concerning the pleaded defence’.¹⁵ A warning was sounded that a defendant who fails to deal with the argumentative matter in its opposing affidavit, ‘does so at its peril’.¹⁶

[39] Defendant’s counsel also urged me to exercise my discretion in favour of the defendant and to refer the matter back for the resumption of the debt review.

¹⁴ *SA Taxi Securitisation (Pty) Ltd v Ndobela* [2011] ZAGPJHC 14 para 22.

¹⁵ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) para 24.

¹⁶ *Ibid* para 41.

[40] Plaintiff's counsel, in reply, referred to *Standard Bank v Panayiotts*¹⁷ where it was held that a consumer cannot claim to be over-indebted whilst at the same time retaining possession of the goods forming the subject matter of the agreement. The goods should be sold to reduce the indebtedness. Similar views were expressed in *FirstRand Bank v Barnard*¹⁸ and in *FirstRand Bank v Obeholster*.¹⁹

[41] I agree with these views. The defendant is in possession of what is considered a luxury utility vehicle priced at close to a million rand whilst paying very little in return. I have no doubt that the matter is only being defended for the purpose of causing a delay. The defendant clearly has no *bona fide* defence and is merely trying to avoid the inevitable. What is of great concern is that the defendant applied for debt review a mere four months after purchasing the vehicle. I cannot find any reason to exercise my discretion in favour of the defendant.

[42] At the conclusion of the hearing, I requested plaintiff's counsel to provide me with a draft order, should I decide to grant summary judgment, which makes provision for an order that the plaintiff should allege and prove any outstanding damages, in line with the order granted in *FirstRand Bank Limited t/a Wesbank v Davel*.²⁰ Such an order was not included in the application for summary judgment, and the applicant's counsel expressed doubt that such an order would be appropriate. It has become practice in this division to grant such an order in applications for default judgments in matters involving the return of motor vehicles. As the order in *Davel* was in fact granted in respect of a summary judgment application, I can see no reason why it should not form part of the order when granting summary judgment. It would ensure that the defendant's rights are sufficiently protected.

[43] I accordingly make the following order:

¹⁷ *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W).

¹⁸ *FirstRand Bank Limited v Barnard* 2015 JDR 1614 (GP) paras 25 and 30.

¹⁹ *FirstRand Bank Ltd v Obeholster* [2018] ZAGPPHC 522 para 43.

²⁰ *FirstRand Bank Limited t/a Wesbank v Davel* [2019] ZASCA 168; [2020] 1 All SA 303 (SCA) para 20.3 of the substituted order.

1. Summary judgment is granted in favour of the plaintiff against the defendant as follows:

1.1. The plaintiff's cancellation of the agreement relating to the vehicle described in paragraph 1.2 of this order is confirmed.

1.2. The defendant is directed to return the vehicle described as a 2019 Volkswagen Amarok 3.0 TDI Hi-Line EX 4 MOT A/T D/C P/U with chassis number: [...] and engine number: [...] ('the vehicle') to the plaintiff.

1.3. The defendant is directed to pay the costs of suit.

2. The plaintiff is granted leave to apply to this court on the same papers, duly supplemented, insofar as it may be necessary, for an order for any damages which it is entitled to, which will be quantified once the vehicle has been located and sold.

3. The plaintiff shall allege and prove, in its action for any outstanding damages, that it has complied with the requirements set out in para 20.3 of the substituted order granted in *FirstRand Bank Limited t/a Wesbank v Davel* [2019] ZASCA 168 .

BEZUIDENHOUT AJ

Date of hearing : 17 March 2022

Date of judgment: 1 April 2022

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