

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER:

A545/2009

5 **DATE:**

28 MAY 2010

In the matter between:

MANINA BEUKES

Appellant

and

10 **THE STANDARD BANK OF SOUTH AFRICA LTD** Respondent

J U D G M E N T

15 **BOZALEK, J:**

This is an appeal against the judgment in the Cape Town Magistrate's Court on 14 May 2009, granting summary judgment in favour of the respondent against the appellant in
20 the following terms:

1. Cancelling a credit agreement relating to the purchase of a certain Peugeot motor vehicle.
- 25 2. An order directing the appellant to return the vehicle to
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respondent.

3. For payment of the outstanding balance on the agreement in an amount of some R239 000 plus interest.

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4. Costs on the attorney/client scale.

The respondent bank and credit provider in terms of the National Credit Act 34 of 2005, sued the appellant for the
10 above relief, arising out of an instalment sale agreement, which she had concluded with the appellant on 22 January 2007. In terms whereof the appellant purchased the vehicle against an undertaking that she would pay the price, together with finance charges and that by way of 60 monthly instalments
15 commencing in December 2006. Amongst the terms of the agreement were that the respondent would remain owner of the vehicle until it was paid off and, in the event of the appellant failing to make regular payments, the respondent would be entitled to cancel the agreement, to claim the outstanding
20 balance and to take possession of the vehicle, the market value of which would be set off against the appellant's indebtedness and to claim costs of any legal proceedings on the attorney and client scale.

25 In its particulars of claim, the respondent averred that by

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October 2008 the appellant was in substantial arrears with her payments and, despite due notice being given to her in compliance with the provisions of the National Credit Act, she remained in default. When the appellant entered appearance
5 to defend the respondent applied for summary judgment and this led to the appellant filing three affidavits opposing summary judgment. In granting summary judgment the magistrate found that the appellant had furnished contradictory grounds of defences in her affidavits and concluded that she
10 had raised no *bona fide* defence and was merely seeking to delay judgment. In her reasons for judgment, the magistrate made the finding that the court was satisfied that the contract was binding on the defendant, a finding criticised on appeal by the appellant.

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It is necessary in the first place to set out the relevant portions of the appellant's opposing affidavits. In an affidavit deposed to on 9 March 2009 the appellant explained that she was married to her husband in community of property, that he
20 bought her a different vehicle as a gift whereafter they "exchanged" the vehicle and bought the present vehicle. She states further:

25 "After a year of problems with the vehicle, we exchanged the car and bought a Peugeot 307

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station wagon. I signed the finance agreement on behalf of my husband using a power of attorney given to me by him. This is how I obtained the credit with the bank as it was based on his income."

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She complained that her husband was not reflected as a defendant in the summons and, mentioning a pending divorce and financial problems, asked for a postponement of the matter until her divorce was finalised.

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On 6 April 2009, the appellant deposed to a further affidavit stating that she had a *bona fide* defence and that her husband should have been cited as a party in view of their being married in community of property, notwithstanding the fact that the agreement referred to her marital status as "ANC without
15 accrual". She attached a copy of a marriage certificate but it sheds no light on the matrimonial property regime and lacks other details.

20 On 14 May 2009, appellant, now enjoying formal legal representation, deposed to yet a further affidavit, terming it a supplementary opposing affidavit. After furnishing some background, the appellant stated she was advised that her initial opposing affidavit was defective in that it failed to fully
25 disclose the nature and grounds of her defence. She then

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avers that she was advised and believed that the instalment sale agreement was null and void, because:

5 "In terms of section 15(2)(f) Matrimonial Property Act, a spouse married in community of property shall not, without the written consent of the other spouse, enter, as a consumer, into a credit agreement to which the provisions of the National Credit Act apply."

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The appellant's defence, it will be seen, appears to have shifted or evolved from simply relying on the respondent's failure to cite her husband as a co-defendant to one in which she averred that the instalment sale agreement was void by
15 reason of the respondent having failed to obtain her husband's written consent to her concluding the agreement.

Section 15 of the Matrimonial Property Act 88 of 1994 provides, insofar as it is relevant, as follows:

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"Powers of spouses -

(1) Subject to the provisions of subsections (2),
(3) and (7), a spouse in a marriage in
community of property, may perform any
25 juristic act with regard to the joint estate

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without the consent of the other spouse.

- 5 (2) Such a spouse shall not, without the written consent of the other spouse - ... (f) enter as a consumer into a credit agreement, to which the provisions of the National Credit Act, 2005 apply as "consumer" and "credit agreement" are respectively defined in that Act but this paragraph does not require the written consent of a spouse before incurring each successive charge under a credit facility as defined in that Act; ...
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- 15 (5) The consent required for the performance of the acts contemplated in paragraphs (a), (b), (f), (g) and (h) of subsection (2), shall be given separately in respect of each act and shall be attested by two competent witnesses...."

On appeal it was contended on behalf of the appellant, that the
20 magistrate had erred in granting the drastic remedy of summary judgment, where the appellant had raised a triable issue or defence, namely, that being married in community of property, before she could validly conclude the instalment sale agreement she had to have the consent of her spouse, given
25 separately in respect of the written transaction and attested by

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two competent witnesses in compliance with the provisions of section 15(2)(f) and 15(5) of the Matrimonial Property Act.

It was contended on behalf of the appellant further, that by
5 implication the magistrate found, incorrectly, that the power of attorney referred to by the appellant in her initial opposing affidavit satisfied the "deemed consent" provisions in section 15(9)(a) of the Act. I can find no trace of any such finding in the magistrate's brief reasons and in my view the provisions of
10 section 15(9)(a) need not be considered in the determination of this appeal.

The argument on behalf of the appellant in regard to the critical issue of her husband's consent is set out in the
15 appellant's heads of argument as follows:

20 "There is, however, no indication on the papers as to whether the power of attorney referred to by the appellant in her affidavit opposing summary judgment constituted consent as contemplated in section 15(5) of the Matrimonial Property Act, furnished specifically and separately for the conclusion of the agreement with the respondent. This is an aspect that should have been considered
25 by the magistrate, especially given the fact that a

general power of attorney would not suffice. Furthermore, the absence of such consent, as required in terms of the Matrimonial Property Act was specifically raised as a defence in the
5 supplementary opposing affidavit filed by the appellant."

This was indeed the critical issue in the summary judgment application but the magistrate could hardly consider it in the
10 absence of the power of attorney or any information from the appellant concerning its terms or the circumstances in which the appellant obtained it from her husband. Assuming for present purposes that the appellant was, at the material time, married in community of property, she could not ordinarily
15 enter into the instalment sale agreement without the written consent of her husband. However, implicit, if not explicit, in her initial opposing affidavit was that she concluded the agreement with his consent embodied in a power of attorney. The actual wording which she used "I signed ... on behalf of
20 my husband", cannot have been literally meant since the form of the agreement was that the appellant and respondent were the only parties thereto.

Of this power of attorney, as I have said, there is no sign. It is
25 not put up by the appellant nor are its terms cited. Appellant's

counsel speculates that it might only have been a general power of attorney, in which event it may well not satisfy the requirements of section 15(5) of the Matrimonial Property Act. But again, as I have said, this highly relevant information,
5 namely the nature and terms of the power, lay within the appellant's knowledge and was highly material to her defence.

The test for the fullness of a defendant's account of his or her defence and the role of the concept of *bona fides* in summary
10 judgment proceedings were classically spelt out by Colman, J in Breytenbach v Fiat SA (Eiendoms) Beperk 1976(2) SA 226 (T) as follows, 228D-E, 229 and 229A-H:

15 "I respectfully agree, subject to one addition, with the suggestion by Miller, J in Shepstone v Shepstone 1974(2) SA 462 (N) 466-467 that the word "fully" should not be given its literal meaning in Rule 32(3) and that no more is called for than this: that the statement of material facts be
20 sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is
25 averred in a manner which appears in all the circumstances to be needlessly bald, vague or

sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*... What I have set out in that regard is not a demand for or an encouragement to present lengthy and prolix affidavits in summary judgment cases. 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, clearer version of the defence which he claims to have."

And finally, dealing with the discretion which the court must exercise in summary judgement proceedings, Colman, J stated:

"It seems to me that if, on the material before it, the court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is a sufficient basis on which to exercise its discretion in favour of the defendant."

See also the remarks of Seligson, AJ in District Bank Limited v Hoosain 1984(4) SA 544 (C) 548G-H.

Applying the oft quoted and time hallowed approach to the present circumstances, as articulated by Colman, J in Breytenbach's case, it is immediately apparent that, notwithstanding that throughout her three opposing affidavits the appellant avers that she is married in community of property, in her first affidavit she deposed to the fact that she had her husband's consent to her concluding the instalment sale agreement in the form of a power of attorney. In her final supplementary affidavit, however, she denies that the agreement was concluded with the written consent of her husband which, she avers, the respondent should have obtained from her spouse. This latter formulation is in itself somewhat misleading since the requirement is simply that the appellant should have her spouse's written consent not that the respondent must obtain it.

Glaringly absent from this final affidavit is any reference to the power of attorney upon which she previously relied or any explanations to why she now contends that the agreement was concluded without her husband's written consent. It is clear that, in deposing to the supplementary affidavit, the appellant's attention was pertinently drawn to the material provisions of section 15 of the Matrimonial Property Act, to her first opposing affidavit in which the provisions of the act were

mentioned and to the need for her to disclose the full nature and grounds of any defence.

If the power of attorney was a general power, and as such
5 arguably not in compliance with the requirements of section
15(5) of the Matrimonial Property Act, then one would have
expected the appellant to state this or, better still, to have
annexed it to her affidavit. The appellant's utter failure to deal
with the power of attorney on which she initially relied is
10 mystifying. It is, in my view, a prime example of a defence
being averred in a manner which is "needlessly bald, vague or
sketchy", if not contradictory. There are other unsatisfactory
aspects of the defence raised by the appellant. She alleges
throughout her opposing affidavits that she is married to her
15 husband in community of property. However, the agreement
clearly records her as being married by "ANC without accrual".
The appellant makes no attempt to explain this stark anomaly.

Secondly, whilst the agreement indicates that only her salary
20 was taken into account and makes no mention of her husband
or his income, she states that the credit she obtained was
based on his income. Again no explanation for this anomaly is
furnished by the appellant. Additionally, notwithstanding her
averment that the agreement is void, the appellant does not
25 tender the return of the vehicle to the respondent, nor explain

what its fate will be pending the outcome of any trial. Although the appellant appears not to have been formally legally represented until she filed her final opposing affidavit, her first two opposing affidavits strongly suggest that they
5 were drafted by someone with legal experience.

The appellant enjoyed three opportunities to satisfy the court that she had a "*bona fide* defence to the claim" in an affidavit disclosing the nature and grounds of the defence. The
10 defence which she raises, namely the lack of her husband's written consent to her conclusion of the instalment sale agreement, is seriously compromised by her failure to take the court into her confidence regarding the power of attorney upon which she initially relied and which, depending on its terms,
15 could negate the very defence to the claim which she seeks to raise.

Having regard to the apparently contradictory nature of the contents of the appellant's affidavits and her failure to explain
20 the material discrepancies or omissions to which I have referred, I consider that the appellant failed to establish that she had a *bona fide* defence to the claim. It is so that the magistrate went too far in finding, on the material before her, and erred in making the finding, that the contract was "binding
25 to the defendant". That finding, however, did not need to be

made in order to grant summary judgment and may thus be disregarded.

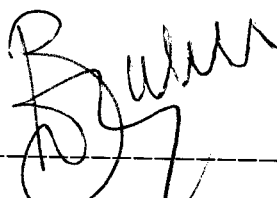
In conclusion, I am, therefore, not persuaded that the magistrate erred in granting summary judgment or, to put it
5 differently, that there is a reasonable possibility that an injustice may be done if summary judgment is granted. In the result, I would dismiss the appeal with costs.

NGEWU, J: I agree.

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NGEWU, AJ

15 BOZALEK, J: The appeal is dismissed with costs.



BOZALEK, J