

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: **18451/12**

In the matter between:

NEDBANK LIMITED

Plaintiff

and

FAZLIN CREIGHTON

Defendant

JUDGMENT DELIVERED: 15 NOVEMBER 2012

FOURIE, J:

[1] This is an opposed application for summary judgment. As this judgment is delivered in the course of my duties in Third Division, I will only provide brief reasons in summarised form for the order which I intend to make. I do,

however, accept that any person interested in this judgment is fully conversant with the respective allegations of the parties as set out in the pleadings.

[2] It is trite law that summary judgment is an extra-ordinary and stringent remedy, in that it closes the doors of the court to the defendant and permits a judgment to be given without a trial. See **Arend v Astra Furnishers (Pty) Ltd** 1974 (1) SA 298 (C) at 304-5. In view thereof, it has often been emphasised that a plaintiff is required to strictly comply with the requirements relating to summary judgment. It has been said that it is only where the court has no reasonable doubt that the plaintiff is entitled to judgment as prayed, that summary judgment will be granted.

[3] What a defendant is required to do, is to disclose a *bona fide* defence in the opposing affidavit, i.e. to provide facts which, if proved at the trial, will constitute a defence to the plaintiff's claim.

[4] A perusal of the plaintiff's particulars of claim and annexures thereto, shows the following discrepancies and/or inconsistencies:

- a) In paragraph 6 of the particulars of claim, it is alleged that defendant has breached the relevant instalment agreement by failing to pay the monthly instalments. No other breach of the agreement by defendant is alleged. However, in annexure D3 to the particulars of claim, it is recorded that there is no arrear amount due in terms of the agreement. The supporting documentation relied upon by plaintiff is accordingly at variance with the particulars of claim.
- b) In annexure D3 to the particulars of claim, there appears to be an attempt to record a different breach of contract by defendant, termed "affordability". This does not make legal or grammatical sense, but, in any event, it is not a breach of contract relied upon in the particulars of claim.
- c) In the affidavit in support of the application for summary judgment, the plaintiff's representative expressly verifies the plaintiff's cause of action as set out in the particulars of claim. This means that the deponent has verified the correctness of the allegation in paragraph 6, namely that defendant has breached the agreement by failing to pay the monthly instalments. As it is common cause that defendant did not commit this breach, the verification of plaintiff's cause of action in this respect, is clearly incorrect.

d) Plaintiff's calculation of the amount due to it after the sale of the vehicle, as appears from annexure B1 to the particulars of claim, is also incorrect. According to the annexure, a remaining settlement value of R124 907 - 36 is due, while a calculation of the figures therein shows that the settlement value ought to be R117 648 - 30. To compound the confusion, a different amount, namely R123 870 - 47, is certified and claimed by plaintiff.

[5] The aforesaid, at best for plaintiff, renders the particulars of claim vague and embarrassing. In these circumstances it cannot be said that plaintiff has established its case with sufficient clarity for a court to find that it has an unanswerable case.

[6] In addition, defendant has raised a defence of duress, in signing the voluntary surrender documentation which led to her vehicle being returned to plaintiff. She alleges that plaintiff's representative had informed her that she could not have two motor vehicles on instalment sale agreements while she was applying to be placed under debt review. Thereafter, according to defendant, plaintiff's representative continued to pester her on a daily basis and threatened her until she eventually signed the voluntary surrender documentation.

[7] It was argued on behalf of plaintiff that the voluntary surrender documentation specifically records that she was not threatened or placed under duress and therefore her defence has no merit. However, the fact that the documentation contains a clause of this nature, does not necessarily mean that defendant was not threatened or intimidated to sign the document. As mentioned earlier, the documentation shows that she was not in arrears with the monthly instalments, therefore it is not improbable that the plaintiff's representatives brought some pressure to bear upon her to hand over the vehicle, even though she had not committed any breach of the agreement.

[8] In my view this constitutes a triable defence, which cannot be rejected out of hand as being false or *mala fide*.

[9] To this I should add that defendant has also placed the reasonableness of the selling price obtained for the vehicle in dispute. Although she may be criticised for being terse in this regard, she does say that the price obtained is unrealistic and not market related, having regard to the model, year of manufacture and condition of the vehicle when it was returned to plaintiff. Plaintiff, on the other hand, has not made any allegation in its particulars of

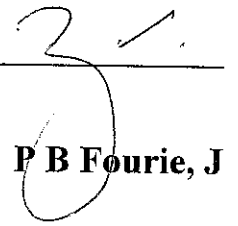
claim as to the reasonableness or not of the amount obtained by selling the vehicle.

[10] In the result I am not persuaded that this is a matter where summary judgment should be granted.

[11] As far as costs are concerned, defendant submitted that, in view of a letter sent to plaintiff's attorneys, indicating her defence, plaintiff ought not to have proceeded with the application for summary judgment, and, therefore, a punitive costs order should be granted against plaintiff. In my view there has not been conduct of the nature required to justify a punitive costs order in this matter. On the contrary, I believe that the usual order as to costs in these matters should follow.

[12] The following order is made:

1. The application for summary judgment is refused.
2. The defendant is granted leave to defend the action.
3. The costs of the application are to be costs in the cause in the main action.



P B Fourie, J