

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 46506/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE:

SIGNATURE:

In the matter between:

FFS FINANCE SOUTH AFRICA (PTY) LTD

Plaintiff

and

KRUGER, ANTHONY JOSEPH

Defendant

JUDGMENT

Todd AJ.

Introduction

1. This is an application for summary judgment.

2. The plaintiff seeks relief confirming the cancellation of an instalment sale agreement concluded with the defendant and the return of the motor vehicle acquired by the defendant under the terms of that agreement.
3. The application is opposed by the defendant.
4. Ms Mitchell, who appeared for the plaintiff, submitted that the defence raised by the defendant in opposing the summary judgment application was not a *bona fide* defence to the claim.
5. To satisfy a court that it has a *bona fide* defence, a defendant must disclose the nature and grounds of a defence that is *bona fide* and good in law.¹
6. The defence must go to the merits of the application and not consist merely of an attack on the language of the summons, and the defendant must disclose the material facts that he relies on in support of his defence, although this does not mean that he is required to set out the facts exhaustively or to disclose the whole of his defence.
7. Of course, as pointed out by Mr Nxumalo, who appeared for the defendant, a court seized with a summary judgment application is not required to determine the substantive merits of a defence raised or its prospects of success, and must focus only on the question whether the defence raised is genuine as opposed to a sham that is put up for the purposes of delay.²
8. A defendant is required to satisfy the court that he has a *bona fide* defence and not prove his defence:

“What the rule requires is that the defendant sets out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff’s claim. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in the summons are disputed or new facts are alleged constituting a defence, the court does attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.”³

¹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426

² *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraph [23]

³ *Maharaj v Barclays National Bank Ltd* (supra); *Cumulative Properties Limited v Name Plate Centre Signs (Pty) Limited* [2018] SAGPJHC 34 at paragraph [8]

9. In the present matter the defendant raises two issues on the strength of which he seeks to satisfy this court that he has a *bona fide* defence to the plaintiff's claim. The first is an outright denial that the agreement relied upon was concluded at all. In this regard the defendant points specifically to the fact that the agreement relied upon is said to have been signed electronically. He denies that it was so signed, and consequently disputes the existence of any agreement at all.
10. Second, the defendant disputes that he received the notice sent by the plaintiff in terms of the provisions of section 129(1) of the National Credit Act, 34 of 2005.
11. Elaborating on the first point, Mr Nxumalo submitted that the provisions of rule 18(6) require a party relying on a contract to state, in its pleadings, among other things where the contract was concluded, and that in the present circumstances it is "*impossible to determine from the Plaintiff's particulars of claim when offer and acceptance took place*".
12. These contentions do not establish a *bona fide* defence for the defendant. The defendant admits that the motor vehicle was delivered to him and also admits that he signed a written delivery notice, a copy of which is attached to the pleadings, which contains the essential terms of the agreement. He also admits to having commenced making monthly payments in terms of the agreement, and admits the balance due.
13. Although denying the existence of the agreement relied upon, the defendant provides no alternative explanation for the basis on which he received delivery of the vehicle, and points to the existence of no other agreement other than that relied upon by the plaintiff. In my view he has failed to set out the material facts upon which his defence is based with sufficient particularity and completeness to enable the Court to decide whether or not the affidavit discloses a *bona fide* defence.⁴
14. In those circumstances the defendant's denial of the existence of the agreement constitutes a bare denial which fails to satisfy the requirements of a *bona fide* defence.
15. As regards the defendant's denial that he received a section 129 notice, he fails in this regard too to set out any factual basis for a conclusion that he did not receive the notice. His affidavit again constitutes no more than a bare denial. I agree with Ms Mitchell's submission that the plaintiff has established compliance with its obligations

⁴ See *Maharaj v Barclays* supra at 426D

under section 129 of the National Credit Act in a manner consistent with the approach of the Constitutional Court in *Kubiyana v Standard Bank of South Africa Ltd.*⁵

16. In the circumstances I am satisfied that the Plaintiff is entitled to summary judgment.

Order

I make the following order:

1. The agreement between the parties is cancelled.
2. The defendant is ordered to return to the plaintiff, alternatively the Sheriff of this Court is authorised to attach and return to the plaintiff, the following motor vehicle:

2019 Ford Ranger 2.0D Bi-Turbo Wildtrack A/T P/UD

Engine number: YN2LPKY22655

Chassis number: AFAPXXMJ2PKY22655

3. Leave is granted to the plaintiff to approach the court on the same papers, duly supplemented, for judgment in respect of the damages suffered by the plaintiff together with interest thereon.
4. The defendant is ordered to pay the plaintiff's costs.

C Todd

Acting Judge of the High Court of South Africa.

⁵ 2014 (3) SA 56 (CC)

REFERENCES

For the Plaintiff:

Adv. K Mitchell

Instructed by:

Smit Sewgoolam Inc.

For the Defendant:

Adv. NS Nxumalo

Instructed by:

Steve Merchak Attorneys

Hearing date:

07 September 2022

Judgment delivered:

09 September 2022