

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 051209/2022

Date of Judgment: 13 October 2023
Reportable? No
Of Interest to Other Judges? No

In the matter between:

SA TAXI DEVELOPMENT FINANCE (PTY) LTD

Plaintiff

and

MOGORANE, POGISHO PAUL

Defendant

JUDGMENT

Mc Aslin AJ:

1. In this matter the Plaintiff, as cessionary, seeks summary judgment against the Defendant for the return of a motor vehicle, confirmation of the termination of the agreement between the parties and costs on the scale as between attorney and client.

2. It is not in dispute that on 21 September 2021 the cedent, Potpale Investments (RF) (Pty) Ltd, and the Defendant concluded a written agreement in terms of which the cedent undertook to finance the Defendant's purchase of a 2015 model Toyota Quantum 2.7 Sesfikile 16S with engine number 2TR8688825 and chassis number AHTSX22P607022654 ("the motor vehicle").
3. The motor vehicle was purchased by the Defendant for the purpose of conducting a taxi business, and it is accepted by the parties that the contract concluded by them was a credit agreement within the provisions of the National Credit Act 34 of 2005 ("the Act").
4. In terms of the credit agreement the ownership of the motor vehicle remained with the Plaintiff notwithstanding delivery of the vehicle to the Defendant, until such time as the Defendant paid all the amounts set out in the credit agreement.
5. The Defendant was obliged *inter-alia* to pay a monthly instalment of R15 057.90. If he failed to do so the credit agreement provided that the Plaintiff would be entitled to terminate the agreement, to repossess the motor vehicle and to recover its legal costs in doing so on the scale as between attorney and client.
6. The evidence shows that the Defendant commenced paying the monthly instalment, but by the beginning of 2022 the payments became irregular and invariably less than the required amount. By September 2022 the Defendant ceased paying any amount to reduce his indebtedness to the Plaintiff.
7. In his affidavit opposing the summary judgment application, the Defendant admits that he is in arrears with his payments and states that "*I cannot afford the monthly payments as my monthly income is not enough to pay [the] instalments on a regular basis*".
8. Notwithstanding this candid admission, the Defendant never approached the Plaintiff to agree on an affordable repayment plan nor did he take any steps to restructure his debt through any of the avenues available to a consumer under the Act. Instead, he was content to continue using the motor vehicle to earn an income from his taxi business but without paying for the use of that vehicle.

9. The Plaintiff commenced action proceedings against the Defendant on 25 November 2022 wherein it terminated the credit agreement and, after the Defendant filed his plea, the Plaintiff duly applied for summary judgment.
10. The relief sought is aimed primarily at securing the return of the motor vehicle, which the Plaintiff intends to sell and apply the proceeds of the sale to reduce the amount of the Defendant's indebtedness to the Plaintiff. This the Plaintiff is entitled to do in terms of the express provisions of the credit agreement.
11. As a result, the Plaintiff does not pursue the relief in prayer 3 of its particulars of claim viz. to be paid the expenses incurred for the removal, valuation, storage and sale of the motor vehicle because it accepts that those costs will only materialise and become known after the sale of the motor vehicle and, consequently, will be better suited to recovery once the extent of the Defendant's indebtedness is known.
12. The Defendant opposes the application for summary judgment on the basis that the credit agreement was reckless because no risk assessment was conducted in his presence and, if one was conducted at all, it was done on the basis of a forged document.
13. In addition, the Defendant alleges that although he can sign his name and although he admits that he signed the credit application form, the income assessment form and the credit agreement, he is actually illiterate and the content of those documents was never explained to him.
14. On the basis of his allegation of reckless credit, the Defendant contends that the credit agreement should be set aside or its force and effect should be suspended. In either event, the law is that the Defendant would be obliged to return the motor vehicle to the Plaintiff and so the defences raised are no defence to the relief sought by the Plaintiff in this action (see: Standard Bank of South Africa v Panayiotts 2009 (3) SA 363 (W) at 370 and SA Taxi Securitisation (Pty) Ltd v Mbatha 2011 (1) SA 310 (GSJ) at [45] to [50]).
15. Given the Defendant's candid concession that he cannot afford to pay the instalments on the motor vehicle, one could reasonably conclude that it would be in the best interests of the Defendant to return the motor vehicle to the Plaintiff and to allow the proceeds of its sale to be used to reduce his indebtedness to the Plaintiff.

16. However, the Defendant has not agreed to surrender the motor vehicle in terms of section 127 of the Act, and in his affidavit resisting summary judgment the Defendant contends that a finding on the reckless nature of the credit agreement is relevant to the lawful termination of the credit agreement, the expenses for the return of the motor vehicle, the costs order in the litigation and to his ability to reclaim some of the instalments paid to the Plaintiff. Consequently, it is necessary for me to proceed to consider the defences raised by the Defendant.
17. The Plaintiff is a duly registered credit provider who provides finance to "*thousands of taxis throughout South Africa*" and who conducts its business from premises in Midrand.
18. Ms Yolanda Niemand, the deponent to the affidavit filed in support of the application for summary judgment, alleges that "*the plaintiff conducted a detailed credit assessment as required by the Act before granting credit to the defendant*".
19. This cannot be a controversial statement, given that the Plaintiff is in the business of financing the purchase of taxis and I would expect the Plaintiff to carry out a credit assessment before extending finance to any prospective taxi owner. The sustainability of its business depends on prudent risk assessments.
20. In his affidavit opposing the application for summary judgment the Defendant does not allege that no credit assessment was done. He alleges that no assessment was done in his presence.
21. It is not in dispute that the Defendant approached a car dealership in Vereeniging to purchase the motor vehicle. The dealership, referred to in the papers as RES Motors, obtained certain documents from the Defendant, including his driver's licence and taxi operating licence, and then presented the Defendant with a credit application and an income assessment form, which the Defendant signed at the dealership.
22. During the argument of the matter, it was accepted by counsel for the Defendant that the credit assessment was done by the Plaintiff at its premises in Midrand on the strength of the documents sent to it by the dealership. The thrust of the Defendant's point in argument was that the credit assessment was done on the basis of a forged document.

23. The background to that submission is that the operating licence stipulates *inter-alia* the route that a taxi operator is licenced to service. The route, in turn, largely dictates the income to be earned by the operator, and the income has an obvious impact on the profitability of the taxi operation. It goes without saying that the profitability of any business venture has a material influence on any credit risk assessment for that venture.
24. In this matter the profitability of the Defendant's taxi operation was determined with reference to an operating licence that permitted the Defendant to operate his taxi from the taxi rank in Seweding along a prescribed route to the taxi rank in Mafikeng and back, as well as from the taxi rank in Lichtenburg along a prescribed route to the taxi rank in Klerksdorp and back,
25. The operating licence appears on the face of it to have been issued in the name of the Defendant and was valid for a 4-year period from 6 April 2018 to 6 April 2022. It bears the stamp of the Department of Transport for the North-West Province and it was signed on behalf of the North-West Operating Licensing Board.
26. It also bears a stamp which records that "the original of this document was seen and copied by me and I confirm that I have verified its authenticity". The stamp is dated 16 September 2021 and bears the signature of R A Ebrahim with ID No: 9010290207083.
27. Mr or Mrs Ebrahim is not identified on the papers, but it is not without significance that the credit agreement was signed by the Defendant at the dealership in Vereeniging on 16 September 2021 and it also bears the signature of an R Ebrahim with the same ID number, who is described as "Finance and Insurance Manager".
28. The credit agreement was signed by the Plaintiff in Midrand on 21 September 2021. On the face of it, Mr or Mrs Ebrahim was the financial manager of the dealership in Vereeniging who certified that he or she saw the original operating licence, verified its authenticity and made a copy of the licence which was then sent to the Plaintiff and used in its credit assessment.
29. The Defendant's version is different. He says he does not know where the aforementioned operating licence comes from because it is not the one that he handed to the dealership. According to the Defendant the licence he gave to the

dealership only authorised him to operate between Jouberton and Klerksdorp, which apparently is a much shorter route and a far less profitable one than the route on which the credit assessment was done.

30. The Defendant furnished a copy of the operating licence that he says he gave to the dealership as an attachment to his opposing affidavit. The copy shows that the licence was apparently issued on 21 August 2008. Parts of the licence are illegible on the copy made available to the court, and no clearer copy could be provided. Importantly, the validity period of the licence is obscured. However, given the date of issue it was almost 13 years old when the credit agreement in this matter was signed. The licence bears no stamp from the issuing authority and the place for signature from the licensing board is blank.
31. I have my doubts as to whether this operating licence was ever issued formally and, if it was, whether it was valid in 2021 when the credit agreement was signed. In either event it could not have been the licence that the Defendant gave to the dealership and which the Plaintiff used to carry out its credit assessment. Fortunately, I do not need to decide the issue of the alleged forgery.
32. In argument before me counsel for the Defendant accepted that it was not in the Plaintiff's best interests to extend finance to an individual that could not afford to pay for it. Hence, he accepted that the forged operating licence would not have emanated from the Plaintiff. According to counsel, the most likely source of the forged operating licence would have been the dealership with a view to inflating the profitability of the Defendant's taxi business so as to facilitate the granting of credit to the Defendant and the sale of the motor vehicle by the dealership to the Defendant.
33. There are other possibilities that I can think of, but even if I accept the submission on behalf of the Defendant it is well established in our law that the fraud of a third party has no impact on the contract between different contracting parties.
34. In Karabus Motors (1959) Ltd v Van Eck 1962 (1) SA 451 (C) Watermeyer J said the following at 453C-D: *"It is a general rule of our law that if the fraud which induces a contract does not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties (see Wessels Law of Contract, para. 1122)"*.

35. There is no evidence that the Plaintiff acted in collusion with the dealership, nor is there anything to suggest that the dealership acted as the agent of the Plaintiff. Consequently, even if I accept the Defendant's submission that the dealership produced the forged document, that fact has no impact on the contract between the Plaintiff and the Defendant.
36. The other defence raised by the Defendant is that he did not know what he was signing because he is illiterate, and no one explained to him what he was signing.
37. The short answer to this is that the Defendant knew that the upshot of all that he signed was that he was required to pay a monthly instalment of R15 057.90 to the Plaintiff. The amount is reflected in the documents that he signed and that is the amount that he started paying. Consequently, if he really was operating on a less profitable route and could not afford the instalment of R15 057.90, then he could and should have known that from the outset.
38. However, I am not convinced that the Defendant is illiterate. He acknowledges that he can sign his name, and his signature is not merely a mark or thumbprint. He says he went to the dealership in Vereeniging because he "*saw an advertisement*" from RES motors and proceeded to make an appointment to buy a taxi from the dealer. All of this suggests that he is able to read. What places it beyond dispute, in my opinion, is that the Defendant has a driver's licence.
39. Counsel for the Defendant acknowledged that his client would have had to be able to read in order to obtain his driver's licence and, consequently, conceded that it is likely that his client is literate. He nevertheless argued that his client did not understand what he was signing and the content of the credit application, the income assessment and the credit agreement was not explained to his client. He also argued that the information in the income assessment form was not furnished by his client and must have been inserted by the dealership.
40. There is no evidence that the Defendant informed anyone at the dealership that he is illiterate. In addition, once it is accepted that the Defendant can read, then he was clearly able to check the information in the income assessment form. So, even if the information was not furnished by him, he did have the means to check the information before he signed the form and warranted that the information therein was accurate and correct.

41. Once again, however, I am not convinced that the Defendant is being truthful when he says that he merely gave the dealership his ID card, his driver's licence, his operating licence, his proof of residence and a letter from the taxi association to which he belongs and then waited about 2 hours without being asked any questions by the dealership before being asked to sign the credit application form, the income assessment form and the credit agreement.
42. I say this because the income assessment form contains the Defendant's cell phone number, which does not appear from any of the documents that were furnished by the Defendant. Hence, the only reasonable inference is that the phone number must have come from the Defendant in response to a question put to him.
43. It is clear to me from what is set out above that the Defendant has not raised a triable defence to the claim for the return of the motor vehicle. To the contrary, the defence raised compels the motor vehicle to be returned to the Plaintiff.
44. In addition, I am not satisfied that the defence is *bona fide* in the sense that it has been raised in good faith. The Defendant has not been candid in certain material respects, and, in my view, the Defendant has opposed the application for summary judgment merely to delay the judgment to which the Defendant knows the Plaintiff is entitled (Skead v Swanepoel 1949 (4) SA 763 (T) at 766-767).
45. There are two issues that are raised in the heads of argument filed on behalf of the Defendant, that do not appear in the opposing affidavit, and which were not pressed in argument. Hence, I address them only briefly.
46. The first is the point that the court should ignore certain paragraphs of the Plaintiff's affidavit in support of its application for summary judgment because the paragraphs in question serve to demonstrate that the Plaintiff did carry out a credit risk assessment.
47. It is the Defendant's defence that no risk assessment took place in his presence, and if one was done then it was carried out on the basis of a forged document. The evidence adduced in the Plaintiff's affidavit in support of the summary judgment application is clearly admissible in terms of Rule 32(2)(b), being the brief explanation why the defence does not raise a triable issue.

48. The second point is that the Plaintiff seeks restitution and, therefore, it is obliged to tender return of the money paid to it by the Defendant.
 49. This point misconstrues the Plaintiff's cause of action. It is not a claim for restitution. Rather, the Plaintiff's cause of action is a damages claim for breach of the credit agreement and its consequent termination.
 50. The current action seeks return of the motor vehicle in terms of the credit agreement, with a view to selling it and using the proceeds to reduce the amount of damages that the Plaintiff has suffered by virtue of the Defendant's breach of contract. In other words, it is a mitigation measure by the Plaintiff to reduce its ultimate loss.
 51. The Plaintiff asks for an order confirming the lawfulness of its termination of the contract, but that is not an order that can be granted by way of summary judgment. Nor do I think an order is required.
 52. The Defendant admits that he failed to pay the instalments due, so there is no dispute that the Defendant was in breach of the credit agreement. Similarly, there is no genuine dispute that the Plaintiff complied with the provisions of the Act in regard to the termination of the credit agreement, and its unequivocal allegation in the particulars of claim that it cancels the credit agreement is merely noted by the Defendant. Consequently, I find that the Plaintiff's termination of the credit agreement was lawful.
 53. In light of what is set out above I grant summary judgment against the Defendant as follows:
 - (i) The Defendant must return the 2015 model Toyota Quantum 2.7 Sesfikile 16S with engine number 2TR8688825 and chassis number AHTSX22P607022654 to the Plaintiff.
 - (ii) The Defendant must pay the agreed or taxed costs of the Plaintiff on the scale as between attorney and client.
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C J Mc Aslin
Acting Judge of the High Court
13 October 2013

On behalf of the Applicant:

Adv. R Stevenson

Instructed by:

Marie-Lou Bester Inc

On behalf of the Respondent:

Adv. N Strydom

Instructed by:

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