

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

Case Number: 19950/2022

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED. NO

...25 August 2023.....

DATE
SIGNATURE

FIRSTRAND BANK LIMITED TRADING AS WESBANK
and SUZUKI MOBILITY FINANCE
(REGISTRATION NUMBER: 1929/001225/06)

Plaintiff/Applicant

and

MISS NARELLE ANGELINE FARRÄR
(IDENTITY NUMBER:[...])

Defendant/Respondent

This judgment was handed down electronically by circulation to the parties/and or parties' representatives and uploading on CaseLines. The date and time of hand-down is deemed to be 25 August 2023 at 10h00.

JUDGMENT

JORDAAN AJ

INTRODUCTION

[1] This is an opposed application for summary judgment brought in terms of Rule 32 of the Uniform Rules of Court, as amended. The Applicant in this summary judgment application, is the Plaintiff in the action instituted against the Defendant, who in turn, is the Respondent in this application.

BACKGROUND

PLAINTIFF'S CASE

[2] On 20 June 2018 the Plaintiff and Defendant entered into an Electronic Instalment Sale Agreement ("the Agreement") in terms of which the respondent purchased a 2015 SUZUKI SWIFT 1.4 GLS A/T bearing CHASSIS NO. [...] and ENGINE NO. [...] ("motor vehicle") from the Plaintiff. On 20 June 2018, the Defendant took delivery of the motor vehicle.¹

[3] An express term and condition of the agreement set out in the particulars of claim, reads as follows:

"8.1 On the amount of R179,075.00 (hereinafter referred to as the "PRINCIPAL DEBT"), the Defendant undertook to pay the Plaintiff an

¹ CaseLines C4 page C16

amount of R65,581.72 in respect of finance charges at a rate of Prime plus 0.75% NACM Variable over a period of 72 months. The total amount therefore indebted to the Plaintiff by the Defendant in terms of the Agreement amounted to R244,656.72 (payable as follows):

8.1.1 72 instalments of R3,467.01 (inclusive of a monthly service fee) on the same day of each successive month; the first of which instalment shall be due and payable on 01 August 2018.”²

[4] One of the relevant material terms of the Agreement provide as follows:

4.1 The Plaintiff shall remain the owner of the vehicle until the Defendant has paid all amounts and complied with all its obligations in terms of the Agreement.³

[5] The Agreement further set out the rights of the Plaintiff should the Defendant breach any of the terms of the Agreement:

5.1 Plaintiff shall be entitled to immediately obtain possession of the vehicle and recover from the Defendant, as pre-estimated liquidated damages, the total amount payable, but not yet paid, less the value of the vehicle as at the date of delivery thereof to the Plaintiff.⁴

² CaseLines Annexure “A” page C5 to C6

³ CaseLines C6 page C18

⁴ CaseLines C6 page C18

[6] It was a further term of the Agreement that in the event of the Plaintiff incurring any legal charges in order to enforce any of its rights in terms of the Agreement against the Defendant, the Defendant would be liable to pay such legal charges calculated on the attorney and client scale and including, but not limited to collection commission, tracing, storage, appraisal and transport costs.⁵

[7] The Plaintiff avers that Defendant referred the Agreement to a debt counsellor at the time the payments were in arrears of R121 429.57.

[8] The Plaintiff contends that on 18 May 2022, at a time when the Defendant was in arrears with payments due, in the amount of R121,429.57 the Plaintiff complied with the provisions of Section 86(10) of the National Credit Act, by addressing a letter in terms thereof to the Defendant, the Debt Counsellor and the National Credit Regulator. The Defendant failed to respond to the Plaintiff's notice as aforesaid and, failed to surrender the vehicle to the Plaintiff as contemplated in Section 127 of the National Credit Act. The abovementioned s86 notices have reached the appropriate post offices for delivery to the Defendant, the Debt Counsellor and The National Credit Regulator.

[8] As a consequence Plaintiff issued summons claiming *inter alia*:

8.1 Cancellation of the Agreement as at date of judgment;

⁵ CaseLines C6 page C19

- 8.2 Repossession of the 2015 SUZUKI SWIFT 1.4 GLS A/T. with CHASSIS NUMBER: [...] and ENGINE NUMBER: [...] (referred to as the GOODS) referred to in paragraph 6 of the Plaintiff's particulars of claim;
- 8.3 Damages, being the difference between the value of the GOODS upon repossession and the balance outstanding under the Agreement due to the Plaintiff by the Defendant;
- 8.4 Costs of suit on attorney and client scale including storage costs
cartage costs, appraisal fees and collection charges;
- 8.5 Interest calculated on prayer 8.3 at the rate of Prime plus 0.75% NACM Variable a tempore more;
- 8.6 Further and/or alternative relief.

DEFENDANT'S CASE

[9] The Defendant raised the following defences in her plea:⁶

- 9.1. Defendant denied that an Electronic Instalment Agreement was entered into by the Parties. She pleaded that the document attached to the particulars of claim is not an agreement nor is it signed by either party. The document is only a quotation, "after the quotation, a written agreement of ownership would be concluded between the parties."
- 9.2. Defendant denies that the document attached to the

⁶ CaseLines 002-1 to 002-5

particulars of claim is a copy of the original Agreement and contends that she was not furnished with a copy of the written agreement.⁷

- 9.3. Defendant denies demand and admits not making any payment to the Plaintiff as no written agreement was concluded between the Parties and amplified that the payments were made to the Plaintiff in respect of previous agreements not mentioned and/or provided for herein.⁸
- 9.4. Defendant pleads that she is not liable for payment as no Agreement exists between the Parties.
- 9.5. Defendant admits taking delivery of the motor vehicle.

[10] Having received the Defendant's plea, the Plaintiff in accordance with rule 32, filed an application for summary judgment on the basis of the Defendant's plea.

IN LIMINE

[11] At the inception of the summary hearing, the Plaintiff raised two points *in limine*:

- 11.1 The Plaintiff filed an affidavit in accordance with Consolidated Directive of 18 September 2020 as despite numerous emails Respondent failed to respond in order that a Joint Practice Note

⁷ CaseLines paragraph 3 page 002-2

⁸ CaseLines paragraph 11 page 002-3

Practice be drafted and requested for sake of completeness and expediency that Applicant's Practice Note be accepted as the Joint Practice Note.⁹

11.2 Defendant's affidavit opposing summary judgment was filed four days late on 05 December 2022 and the Heads of Argument and Chronology filed on 10 January 2023, in contravention of paragraphs 2,3 and 4 of the Court Order dated 10 November 2022¹⁰ and accordingly Plaintiff requested leave to enrol the summary judgment on the unopposed roll as per the Court Order.

[12] Defendant conceded their non-compliance with the Directive in regard to filing of a Joint Practice Note as well as their non-compliance with the Court Order dated 10 November 2022.

[13] The Defendant prayed for condonation of their non-compliance by reason that their client was diagnosed with an acute illness, restraining contact. If condonation is not granted the Defendant submitted that they will be greatly prejudiced as their rights to oppose the application will be compromised.

⁹ CaseLines pages Q3-Q8

¹⁰ CaseLines 003-1 to 003-2

[14] It is settled law that the standard for considering an application for condonation is the interest of justice.¹¹ Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case.

[15] In considering the application for condonation the principles normally taken into account include the following factors:¹²

- (a) The degree of non-compliance;
- (b) The explanation thereof and the reasonableness of the explanation for the delay;
- (c) The importance of the issues raised and the nature of the relief sought;
- (d) The prospects of success and the respondent's interest in the finality of his matter and the avoidance of any unnecessary delay.

[16] It is apparent that there are instances where the respondent indeed failed to comply with the rules of court and with the Court Order. I am however not persuaded that non-compliance was so gross that the application for condonation should be dismissed without considering the application for summary judgment.

In the circumstances the late filing of the opposing affidavit, Heads of Argument, Chronology and non-compliance with the Directive is hereby condoned.

¹¹ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) at paragraph 3

¹² *Federated Employers Fire & General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A) at 362F-H

LEGAL PRINCIPLES FINDING APPLICATION

[17] Summary judgement enables a plaintiff to obtain judgment against a defendant without resorting to trial when a defendant has no defence to a claim based on a liquid document, for a liquidated amount of money, for delivery of movable property, and for ejectment. The instant application for summary judgment is for delivery of movable property.

[18] With effect from the 01st of July 2019 an application for summary judgment can only be brought after a defendant has filed its plea, and in doing so the plaintiff must not only verify the cause of action and the amount claimed but must, in addition, also identify any point of law which it relies upon and the facts upon which its claim is based, and must also briefly explain why the defence which has been pleaded by the defendant does not 'raise any issue' for trial.

[19] The Defendant opposing summary judgment is required to set out a *bona fide* defence by affidavit disclosing fully the nature and grounds of the defence and the material facts relied upon. The Defendant need not deal exhaustively with all the facts and evidence relied on to substantiate a defence, but the essential material facts on which the defence is based must be disclosed with sufficient completeness, particularly to enable the court to decide whether or not the affidavit discloses a *bona fide* defence.¹³ However a *bona fide* defence is not scrutinised according to the

¹³ Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426C-E

strict standards of pleadings. In summary judgment it is the material and factual defence and not the Defendant which must be *bona fide*.

[20] The rationale and requirements for the grant or refusal of summary judgment are trite and are summarised in the Supreme Court of Appeal judgment of *Joob Joob Investments*¹⁴ as follows:

“The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G-426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

¹⁴ 2009 (5) 1 (SCA) at 11G-12D

Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G-426E.”

[21] The test for the granting of a summary judgment is whether the Defendant has satisfied the Court that he has a *bona fide* defence to the action.¹⁵ What this entails is whether the facts put up by the Defendant raised a triable issue and a sustainable defence in law deserving of their day in court. The defense must not be bald, vague or sketchy.

ISSUE FOR DETERMINATION

[22] Having regard to the test for summary judgment, the issue for determination by this Court, is whether the Defendant has set out a bona fide defense to the Plaintiff's claim.

In order to establish if the Defendant has a triable issue or a sustainable defence, I have regard to the evidence as set out in the respective affidavits and the plea that was filed.

APPLICATION OF LEGAL PRINCIPLES TO THE EVIDENCE

¹⁵ Rule 32(3) of the Uniform Rules of Court

[23] The Plaintiff claim is based on the breach of an Electronic Instalment Agreement, referred to as the Agreement, which was entered into between the Plaintiff and the Defendant on the 20th of June 2018, in terms of which the Defendant purchased a motor vehicle, referred to as the goods. This Agreement was attached to the particulars of claim as required in terms of rule 18 of the Uniform Rules of the High Court.

[24] The Defendant in her plea raised the defence denying that on “20 June 2018 an Electronic Instalment Agreement was entered into by the parties. The document attached is not an agreement, not is it signed by either party. The document is only a quotation. At all times it was agreed between the parties that after the quotation, a written agreement of ownership would be concluded between the parties.”¹⁶

[25] The Defendant in her plea further admits taking delivery of the goods¹⁷ and admits to not paying any amount to the Plaintiff as no written agreement was concluded between the parties¹⁸ and amplifies that payments were made to the plaintiff in respect of previous agreements not mentioned and/ or provided for herein.¹⁹

[26] The entire claim is based on an Agreement, which the Defendant disputes, the Defendant pleads that it is a quotation. This begs the

¹⁶ CaseLines 002-1 to 002-2

¹⁷ CaseLines 002-2 paragraph 4

¹⁸ CaseLines 002-3 paragraph 11.1

¹⁹ CaseLines 002-3 paragraph 11.2

question as to whether there is a contract that came into effect between the parties?

[27] Arising from the plea of the Defendant and her affidavit opposing summary judgment it is clear that the Defendant admits:

27.1. That a quotation was transacted between the Parties²⁰

27.2. That she took delivery of the Goods²¹

27.2. That no payment was made by her²²

[28] When Court had regard to the annexed alleged Agreement it indeed is on the face of it boldly termed a “QUOTATION / COST OF CREDIT FOR AN INTERMEDIATE INSTALMENT AGREEMENT (VARIABLE) In terms of Section 92(2) of the NCA” it also includes the Debit Order Authorisation, Tax Invoice, Delivery Slip and Terms and Conditions, which Terms and Conditions are expressly incorporated in the alleged Agreement in Part H under the heading Terms and Conditions which read “This Quotation / Cost of Credit incorporates the Terms and Conditions attached hereto.”²³

[29] When one has regard to the Terms and Conditions it defines Agreement²⁴ as follows:

“Agreement” means this Agreement, which is made up of the Quotation/ Cost of Credit read together with these Terms and Conditions and all Annexures relating to this Agreement.”

²⁰ CaseLines 002-2 and B36

²¹ CaseLines 002-2

²² CaseLines 002-3 paragraph 11.1

²³ CaseLines C13

²⁴ CaseLines C18

From the Defendant's plea and affidavit in opposition to the summary judgment, it is patently clear that the Defendant does not deny that she received the quotation. In the circumstances, this court finds that the quotation which the Defendant acknowledges, indeed constitutes the Agreement in writing between the parties.

[30] It is apparent from the plaintiff's particulars of claim that their cause of action is based on the breach of an Electronic Instalment Agreement. The Defendant in her plea further disputes the Agreement on the basis that it was not signed. The Plaintiff in their affidavit in support of summary judgment²⁵ expands in detail how an Electronic Instalment Agreement is generated and signed and that both s2(3) of the National Credit Act³⁴ of 2005 and the Electronic Communications Transactions Act²⁵ of 2002 (ECTA) makes provision for the use of an electronic signature. The Defendant to this explanation in her affidavit opposing summary judgement denies the contents with no material facts on which the bare denial is based.

[31] By virtue of ECTA electronic contracts and signatures are valid in South Africa. Section 13 of ECTA governs electronic signatures and provides:

“(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.

²⁵ CaseLines B8-B9

(2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.

(3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if-

(a) a method is used to identify the person and to indicate the person's approval of the information communicated; and

(b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

(4) Where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved."

In the circumstances this court finds that the stamped signature in the middle of the pages of the Agreement constitutes the electronic signature of the Defendant, so generated electronically.

[32] The Defendant belatedly, in her affidavit opposing summary judgment "pointed out that the Applicant failed to conduct a full and proper credit risk evaluation as is required in terms of the Act"²⁶ and her Counsel submitted that this is the Defendants defence. This argument for the Defendant does not accord with the construction of the Defendant's

²⁶ CaseLines B36

pleaded version. This defence was never pleaded and it was baldly stated with no material facts on which it was based. In this regard the case of *Breitenbach v Fiat SA (Edms) Bpk*²⁷ is apposite. There the court stated as follows:

“One of the things clearly required of a defendant by Rule 32 (3)(b) is that he set out in his affidavit facts, which, if proved at the trial, will constitute an answer to the plaintiff’s claim. If he does not do that, he can hardly satisfy the Court that he has a defence. ...There is no magic whereby the veracity of an honest deponent can be made to shine out of his affidavit. It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the *bona fides* of his defence. It will suffice, if the defendant swears to a defence, valid in law, in a manner in which is not inherently and seriously unconvincing.” (my emphasis)

It does not translate that on her own version the Defendant provides sufficient facts to establish that the Applicant failed to conduct a full and proper credit risk evaluation as required in terms of the Act, but rather that the Defendant is clutching at straws.

[33] This Court having found that the Defendant:

²⁷ 1976 (2) SA 226(T) at 227G-228B

- 33.1. Concluded the Agreement for the purchase of the motor vehicle
from the Plaintiff and an Agreement thus exists between the Parties;
- 33.2. Signed the Agreement electronically;
- 33.3 Through her own admission took delivery of the motor vehicle;
- 33.3. Through her own admission did not make payments and therefore this Court finds Defendant Breached the contract by failing to pay the monthly instalments.

[34] It follows that the defendant has failed to show that she has a *bona fide* defense to the applicant's claim that is good in law accordingly summary judgment must be entered in favour of the plaintiff.

[35] The plaintiff is accordingly entitled to cancel the Agreement, claim the return of the motor vehicle, including payment of damages consequent to the breach of the contract, interest and costs.

ORDER

[36] In the result the following order is made:

- 36.1. Cancellation of the Agreement as at date of judgment;
- 36.2. Repossession of the 2015 SUZUKI SWIFT 1.4 GLS A/T. with CHASSIS NUMBER: [...] and ENGINE NUMBER: [...] (referred to as the GOODS)
referred to in paragraph 6 of the Plaintiff's particulars of

claim;

36.3. The claim for damages suffered by the Plaintiff consequent the breach of the contract by the Defendant is postponed *sine dies* pending the return of the motor vehicle to the Plaintiff, its valuation and sale.

36.4. Interest calculated on the amount to be paid at the rate of Prime plus 0.75% NACM Variable a tempore more;

36.5. Costs of suit on attorney and client scale including storage costs cartage costs, appraisement fees and collection charges.

M T Jordaan

Acting Judge of the High Court,
Johannesburg

HEARD ON

09 March 2023

JUDGMENT DATE

25 August 2023

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