



REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case No: 21146/2017

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

28/3/18

In the matter between

BMW Financial Services

Applicant

and

Gorona Holdings & Another

Respondent

JUDGMENT

Maumela J.

1. This is an application for summary judgement. It is defended. Plaintiff's cause of action arose out of an instalment sale agreement, "the sale" where the 1st respondent was the buyer while the 2nd respondent acted as surety. The object of the sale is a motor vehicle. The type of the vehicle sold is a Porsche Panamera. The date on which the sale took place is the 14th of August 2014 . The 1st respondent and the plaintiff

granting of summary judgement have been met.

7. On the other hand the court has to determine whether or not there are reasonable grounds to believe that the respondents have a valid and sustainable defence to advance against the applicant's claim. The law provides for the court to assess the submissions by the applicants and those by the respondents in resisting the application. It is upon such a determination that the court may grant or refuse this application.
8. It has to be borne in mind that summary judgement is not a procedure in place for purposes of depriving parties with triable issues or sustainable defences of their proverbial 'day in court'. See *Job Job Investments Pty Ltd v Stocks Mavundlaek Joint Venture*² where the court stated: *"therefore courts will be inclined to grant leave for the defendant to defend where defendants have shown that they have a bona fide defence to the claim."*
9. In *Maharaj v Barclays National Bank Ltd*³, Corbett JA, as he then was, stated: *"All that a Court enquires into is:*
 - (a). *Whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and*
 - (b). *Whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be."*

². 2009 (5) SA 1 (SCA), at 11G-D.

³. 1976 (1) SA 418 (A) at 426B-C

10. This was reiterated in *Breitenbach vs Fiat S A (Edms) Bpk*⁴. In that case the Court was quoting from a judgment of Miller J in *Shepstone v Shepstone*⁵ where the court stated as follows: *"I quote the following passages from the judgment of Miller J, in that case, at p467E-H the court stated: "The Court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the Plaintiff has an unanswerable case."*

That is the first quotation and the second is:

"..... a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial."

11. The respondents raised the following defences against this application:

12.1. That this court lacks jurisdiction to enforce the agreement.

12.2. That the National Credit Act cannot find application to the type of transaction in this matter in that the transaction information involves a large agreement. The respondents argue that by virtue of the fact that the applicant is a juristic person, this court shall contravene section 4 (1) (b) of the Act if it adjudicates over this matter.

12.3. The defendant further raises the point that the applicant ought to have alleged:

12.3.1. A valid contract of suretyship which complies with the provisions of section 6 of the General Law Amendment Act 1956: (Act No 50 of 1956).

12.3.2. The cause of the debt in respect of which the Second Defendant undertook liability.

⁴. 1976 (2) (TPD) 226 at 229E-H

⁵. 1974 (2) SA 462 (N),

- 12.3.3. The actual indebtedness of the First Defendant; that is the amount owed.
- 12.3.4. The defendant raises the point that the summons does not comply with the requirements of the Rules relating to pleading.
12. The defendant views that the value of the *merc* involved, (the vehicle which is the object of the sale) falls beyond the threshold determined by the Minister for purposes of the applicability of the National Credit Act as reflected in Notice 713 of 2006 published in the Government Gazette on the 1st of June 2005, read with section 7 (1) (b) of the Act. Beyond raising points *in limine* the respondents did not dispute indebtedness or the fact that the 1st respondent fell into default of his monthly payments.
13. Plaintiff views that the defences raised by the defendant ought to be dismissed by the court in that they constitute sheer technicalities that do not address the root of the issues. In essence plaintiff contends that its claim remains uncontested. It contends that the respondents are deliberately applying an interpretation to the applicable legislation which wrongly favours their cause with revenue to buy time in a manner undue.
14. In the case of RMB private bank (A division of Firstrand Bank Ltd v Kaydeez Therapies CC (In liquidation) and Others⁶, the court stated as follows: *"It is clear from the Constitution, 1996, that it is not available for any individual or entity other than parliament to determine when and where legislation shall apply. A statute applies ex lege; by parliamentary enactment*

⁶. 2013 (6) SA 308 (GSJ).

and decree of the President. Legislation obtains its force by reason of the will and decision of the legislature, not because individuals or entities elect to be subject thereto." Plaintiff argues therefore that the defence on jurisdiction raised by the respondents be dismissed because it is premised on a wrong interpretation of the applicable legislation on the part of the respondents.

15. Applicant contends that its action amounts to vindication and that it is an action *in rem*. See Philip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd⁷. It contends that it is not a requirement for a plaintiff to allege in pleadings that: "*a suretyship is valid in terms of the provisions of section 6 of the General Law Amendment Act 1956 as it constitutes facta probanda and is a question of evidence.*"
16. In the case of Jagger and CO Ltd v Mohamed⁸ the court stated that for the respondent to successfully raise an exception as a *bona fide* defence against a claim, he or she must show that: "*The exception which has been taken goes to the root of the action and amounts to this, that even if the applicant should prove all the facts alleged by him in his declaration would still not succeed. That, in my opinion, amounts to the defence to the action.*"
17. One of the terms of the agreement in the agreement entered into by the parties reads as follows: "*In the event of default by the first defendant with its obligation in terms of the agreement the plaintiff will be entitled without prejudice to any other rights that may have, that it may have in law to cancel and or*

⁷. 1975 (2) SA 420 (A).

⁸. 1956 (2) SA 736 (C).

terminate the agreement and claim from the first defendant the full amount that would have been paid, had the first defendant fulfil all obligations due in terms of the agreement.” This is what the applicant seeks to be implemented in this case.

18. In the case of *Nedbank Limited v Mmatadi Hendrietta Maredi and Mmatadi Hendrietta Maredi*; (In her capacity as duly appointed executrix in the estate of the late Mr Taote Israel Maredi)⁹, the Honourable Makgoka J stated the following regarding resistance of an application for summary judgement: *“Before I consider the contentions on behalf of the parties, I deem it pertinent to set out the jurisprudential framework within which an application for summary judgment should be considered, which is trite and established. In order to stave off summary judgment, the defendant has to disclose a bona fide defence, which means a defence set up bona fide or honestly, which if proved at the trial, would constitute a defence to the plaintiff’s claim, (Bentley Maudesley & Co. Ltd v “Carburol”(Pty) Ltd and Another¹⁰; Lombard v Van der Westhuizen¹¹. The defendant must satisfy the court that he has a bona fide defence to the plaintiff’s claim and the full nature and grounds thereof.*
19. In the case of *Oos-Raandse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk*¹² the court stated the following: *“Not a great deal is required of a defendant but that he or she must lay enough before the court to persuade it that he or she has a genuine desire and intention of adducing at the trial, evidence of facts which, if true, would constitute a*

⁹ Unreported: North Gauteng Case No:25205/2013. Delivered on: 28/2/2014 By Makgoka J.

¹⁰ 1949 (4) SA 873 (C)

¹¹ 1953 (4) SA 84 (C) at 88)

¹² 1978 (1) SA 164 (W) at 171.

valid defence. All that the court enquires into is whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded and whether, on the facts disclosed so disclosed the defendant appears to have a defence which is bona fide and good in law. See also, Maharaj v Barclays National Bank¹³."

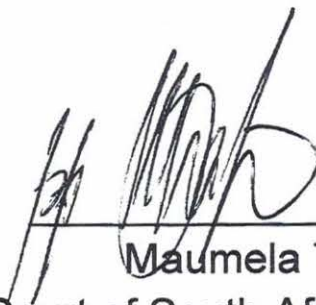
20. The law does not require a party resisting summary judgement to lay out the entire case upon which it relies. Having said that, a party intending to resist summary judgement is required to indicate the basis of its *bona fide* defence so much so that the court get convinced that triable issues obtain in the case which warrant adjudication.
21. In this case the respondents did not go much beyond raising points *in limine*. The points *in limine* raised are premised on a wrong understanding of the legislation applicable to the claim. The plaintiff on the other hand rises from an understanding that the failure on the part of the respondents to comply with the terms of the "agreement" entitles it to cancel the agreement, to claim the return of the object of the sale and to clean compliance by the respondents with the terms as outlined in the sale agreement.
22. As indicated above no more is required of the respondents than to demonstrate to this court that they have a valid defence against the claim advanced. The respondent have not shown before this court that they have a *bona fide* defence to the claim

¹³. 1976 (1) 418 (A) at 426.

23. In the result the application for summary judgment stands to be granted. The following order is made:

ORDER.

1. The application for summary judgment is granted with costs.

A handwritten signature in black ink, consisting of several loops and a long vertical stroke, positioned above a horizontal line.

Maumela T.A
Judge of the High Court of South Africa.