REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 82666/2017

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

19.03.2018
DATE

SIGNATURE

20/3/18

In the matter between:

FIRSTRAND BANK LIMITED **PLAINTIFF/APPLICANT**

and

BRANDON CORNNELIUS **DEFENDANT/RESPONDENT**

JUDGMENT

HATTINGH AJ

BACKGROUND

[1]. On 12 December 2013, the parties entered into a written instalment sale agreement ("the agreement").

[2]. The parties will hereinafter be referred to as the applicant and respondent.

[3]. The agreement falls within the scope of the National Credit Act 34 of 2005 ("the NCA"). It is not in dispute that the applicant is duly registered as a credit provider in terms of section 40 of the NCA.

[4]. In terms of the agreement the respondent purchased the following vehicle from the applicant: Huyndai I20 1.6, 2010 model, Engine Number G4FC8U512879, Chassis No: MALBC51DR9M062420 ("the vehicle").

[5]. The applicant seeks in a summary judgment application for an order that the vehicle be returned by the respondent.

[6]. The applicant contends that the respondent is in material breach of the agreement in that he is in arrears with his instalments.

[7]. The respondent applied to be placed under debt review in terms of section 86 of the NCA. The applicant has not received any payment as specified in the application

for debt review. The applicant proceeded to terminate the respondent's debt review in terms of section 86(10) of the NCA. There is thus no debt review process pending.

[8]. The applicant in the application for summary judgment submits that the respondent does not have a *bona fide* defence.

[9]. The first point of defence turned on the contention that the deponent of the founding affidavit lacks authorization and personal knowledge. This defence is of no moment.

[10]. The deponent to the affidavit in support of the summary judgement application specifically states that he has acquired the requisite personal knowledge after he has perused the source documentation relevant to the matter at hand.

[11]. The court is *prima facie* satisfied that the deponent has the ability to swear positively to the facts essential to the effectiveness of the affidavit as the basis for summary judgment.

[12]. Any person who can swear positively to the facts may make an affidavit in support of the application for summary judgment. Rule 32(2) does not require that the supporting affidavit be made by the plaintiff himself.

[13]. The court was referred to the matter of **Barclays National Bank Ltd v Love**[1] where it was held that the nature of the deponent's office in itself may suggest very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank.

[14]. In **Shackleton Credit Management v Microzone Trading 88 CC & Another**[2] it was held in paragraph 13 that: ***"first-hand knowledge of every fact which goes to make up the applicant's cause of action is not required, and where the applicant is a corporate entity, the deponent may well legitimately rely on records in the company's possession for his personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts"***.

[15]. In the same way as the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit, so it is that the deponent to the verifying affidavit filed in terms of rule 32(2) need not be authorised by the plaintiff to depose to the affidavit[3].

[16]. The counsel for the respondent also conceded that this point *in limine* does not hold any substance.

[17]. On the merits of the issue the respondent denies that the monthly instalment amount payable was an amount of R2,989.08 (Two Thousand Nine Hundred and

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[1] 1975 (2) SA 514 (D).
[2] 2010 (5) SA 112 (KZP)
[3] First Rand Bank Limited v Ellis 2010 (6) SA 565 (ECP) AT 569 C – G.

Eighty Nine rand and Eight Cents). He however confirms that the applicant deduct an amount of R3,046.06 (Three Thousand and Forty Six Rand and Six Cents) monthly from his account.

[18]. He further states as follows:

"4.4. I wish to confirm that following payments were deducted from my bank account and paid over to the applicant. These payments do not reflect on the schedule of the applicant nor are these payments deducted from the alleged outstanding amount as per particulars of claim:

PAYMENT LISTED ON BANK STATEMENT

Date	*Amount*	*Total*
01-08-2016	*R7,500.00*	*R7,500.00*
02-08-2016	*R3,500.00*	*R11,0000.00*
02-08-2016	*R3,046.06*	*R14,046.06*
05-10-2016	*R6,000.00*	*R20,046.06*
05-10-2016	*R3,046.08*	*R23,092.14*
30-10-2016	*R6,500.00*	*R29,592.14*
31-10-2016	*R6,500.00*	*R36,092.14*
04-12-2016	*R3,100.00*	*R39,192.14*

4.5. I furthermore confirm that from January 2017 up and until April 2017, the monthly instalments were made in cash deposits directly to the Applicant.

4.6. These payments also do not reflect on the schedule of the Applicant nor is it deducted from the alleged outstanding amount as per summons.

4.7. It therefore wish to confirm that there are no amount due and owing to the Applicant for reasons as set out above."

[19]. In this matter the respondent must satisfy the court by affidavit that he has a *bona fide* defence.

[20]. In so far as the *bona fide* defence is concerned what is required of the respondent is to set out a defence, valid in law, in a manner which is not inherently or seriously unconvincing[4]. In addition to **Breitenbach's** case in **Standard Bank of South Africa Ltd v Roestoff**[5].

[21]. The remedy provided by rule 32 has been described as drastic and extraordinary. It effectively closes the door of the court to the respondent. It is based on the

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[4] Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) at 228.
[5] 2004 (2) 492 (WLD).

supposition that the respondent's claim is unimpeachable and that the defendant's defence is bad in law.

[22]. Summary judgment applications must accordingly be approached with great circumspection and with a reluctance to grant. In this regard see **Dawson & Dobson Industrial Ltd v van der Werf**[6].

[23]. It was also stated in **Maharaj v Barclays National Bank Ltd**[7]:

"The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised.... The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law."

[24]. A more preferred approach would be that of **Navsa JA in Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture [2009] 3 All SA 407 (SCA)**[8]:

"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 ('extraordinary' and 'drastic') and to concentrate rather on the proper application of the rule,

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[6] 1981 (4) SA 417 (C) at 419.
[7] 1976 (1) SA 418 AD at 423 E – H.
[8] 2009(5) SA 1 (SCA) at para [33].

as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425 G – 426E."

[25]. The abovementioned matter was as in this case concerned with whether the defendant presented a sustainable defence or triable issue in order to prevent summary judgement being granted against it.

[26]. In **Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd[9] at 236I – 237A** the court suggested that the case law quoted to it all predated our Constitution and whereas there was a traditional insistence on strict compliance with the requirements of rule 32(2), it is at least arguable that since coming into operation of the Constitution this should even be more so. Section 34 of the Constitution provides that everyone has the right to have his/her dispute resolved in a fair, public hearing before a court, or where appropriate such other forum as mentioned.

[27]. It is stated in Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, Fourth Edition, Juta as follows: ***"The affidavit filed by the defendant must set out his defence fully. This has been held to mean that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence. A bona fide defence is disclosed if the defendant swears***

[9] 1999 (4) SA 229 (C)

to a defence, valid in law, in a manner that is not inherently or seriously unconvincing. In other words, the affidavit must set out facts that, if proved at the trial, would constitute a defence to the plaintiff's action".

[28]. It is further stated in Erasmus, Superior Court Practice, Second Edition, Van Loggerenberg, Volume II, Juta: ***"Bona fide defence: All that the court requires in deciding whether the defendant has set out a bona fide defence is: (a) whether the defendant has disclosed the nature and grounds of his defence; and (b) whether on the facts so disclosed the defendant appears to have, as to either to the whole or part of the claim, a defence which is bona fide and good in law..."***

[29]. In other words if the respondent's affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial he must be allowed the opportunity to defend the case.

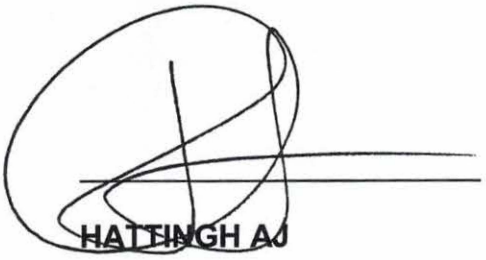
[30]. It is indeed so that the respondent did not attach proof of these payments nor did the respondent attach any deposit slips in terms of cash deposits.

[31]. That, however, does not detract from the fact that the affidavit clearly set out facts that, if proved at trial, would constitute a defence to the plaintiff's action.

[32]. It is therefore ordered as follows:

32.1. The defendant/respondent is granted leave to defend the plaintiff's action.

32.3. The costs of the application for summary judgment are costs in the cause of the action.



HATTINGH AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA