

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

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

2 JUNE 2023

.....

.....

DATE

Case Number: 3013/2022

NEDBANK LIMITED

Plaintiff

and

CORNE ELIZABETH KRUGER

Defendant

JUDGMENT

SC VIVIAN AJ

1. This is an application for summary judgment. Argument in the matter was heard simultaneously with argument in case number 6307/2022 involving the same parties. Because this matter can be resolved on an issue that does not arise in the other matter, I have decided to issue separate judgments.

2. On 3 September 2018, the Plaintiff and the Defendant entered into a written instalment sale agreement in terms of which the Plaintiff sold a motor vehicle to the Defendant. In terms of the agreement, ownership of the motor vehicle remained vested in the Plaintiff.

3. The Plaintiff pleads that it was advised that the Defendant applied for debt review in terms of the National Credit Act (Act 34 of 2005; "the NCA"). It then pleads that on 12 May 2020, it accepted a debt restructuring proposal. It annexes to its particulars of claim a document dated 12 May 2021 on the Plaintiff's letterheads entitled "Acceptance of Debt Restructuring Proposal". This purports to accept a debt restructuring proposal. Mr Jacobs, who appeared for the Defendant, submitted that this document on its own does not show that there was agreement on the debt restructure because the Plaintiff has not pleaded what the Debt Restructuring Proposal was. This could, he submits, have been a counter-proposal. Because of the conclusion to which I have come, it is not necessary to consider this submission. It is also not necessary to consider the effect of the difference between the date pleaded and the date in the annexed document.

4. The Plaintiff pleads that, on 18 November 2021 it concluded a further agreement with the Defendant in terms of which they agreed to restructure the original instalments sale agreement. The copy of the agreement annexed to the particulars of claim shows that what was concluded was an addendum to the original instalment sale agreement. Importantly, this provided for the first instalment, in the sum of R7 733,42, to be paid on 1 December 2021.

5. Continuing with the chronology as per the particulars of claim, the Plaintiff pleads: *“The Defendant had breached the agreement in that it has failed to pay the payments in terms of the agreement in that on 1 December 2021 it was in arrears with it’s [sic] payments in the amount of R39 882.02.”*
6. The Plaintiff pleads that, on the same date, 1 December 2021, it *“... terminated the Debt Review process in terms of Section 88(3)(a) and 88(3)(a)(ii) of the [NCA] ...”* It relies on a letter sent by its attorneys to the Defendant on that date. That letter similarly asserted that the Defendant was in arrears in the amount of R39 882,02 on 1 December 2021.
7. In the letter, the attorneys referred to a debt re-arrangement plan that had been concluded between the parties and asserted that the Defendant had not made any payments as agreed upon.
8. The attorneys then notified the Defendant that they would, with immediate effect, enforce the Plaintiff’s rights in terms of the NCA.
9. Accordingly, the Plaintiff pleads that (a) the instalment sale agreement was amended such that the first instalment was due of 1 December 2021 and (b) that the agreement was breached in that, by 1 December 2021, the Defendant was in breach and in arrears in an amount considerably higher than the instalment amount.
10. This simply cannot be. The Defendant would only be in breach if she did not pay the amount due on 1 December 2021. Put differently, she would be in breach on 2 December 2021. Accordingly, on the pleaded case, the Defendant is not in breach of the instalment sale agreement.

11. The Defendant relies on the breach as at 1 December 2021 to sustain an assertion that it terminated the instalment sale agreement or that the instalment sale agreement “*is terminated herewith.*” But absent a breach, such termination would not be lawful. And absent a termination, the Defendant cannot succeed in its claim for return of the motor vehicle.
12. The particulars of claim are accordingly excipiable cannot sustain an application for summary judgment.
13. It matters not that in the affidavit resisting summary judgment, the Defendant admits that she did not pay the 1 December 2021. Summary judgment cannot be granted on excipiable particulars of claim, even if an exception has not been filed.¹
14. Accordingly, I grant the following order:
 - 14.1. The Defendant is granted leave to defend.
 - 14.2. Costs of the application for summary judgment are costs in the cause.

Vivian, AJ

Acting Judge of the Gauteng Division of the High Court of South Africa

¹ South African Bureau of Standards v GGS/AU (Pty) Ltd 2003 (6) SA 588 (T) at 592E-H

APPEARANCES:

FOR THE PLAINTIFF: CJ Welgemoed

FOR THE DEFENDANT: M Jacobs

Date of hearing: 02 June 2023

Date delivered: 02 June 2023