

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



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

CASE NO: 032118/2022

DELETE WHICHEVER IS NOT APPLICABLE

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

.....

**NEDBANK LIMITED
(Reg. No. 1951/000009/06)**

PLAINTIFF/ APPLICANT

and

**ALFRED MAFODI SITHOLE
(Id. No.: [...])**

DEFENDANT/RESPONDENT

JUDGMENT

MOTHA, J:

Introduction

[1] Having entered into a written variable instalment sale agreement with the

defendant, within the meaning of the National Credit Act 34 of 2005 (NCA), on 25 July 2019, the plaintiff proceeded in terms of section 127 of the NCA, when the defendant returned the motor vehicle on 21 January 2020. The defendant submitted that the Consumer Protection Act of 68 2008 (CPA) finds application in this matter. Disputing this assertion, the plaintiff seeks an order in terms of Rule 32 of the Uniform Rules of Court.

The parties

[2] The plaintiff is Nedbank Limited a public company with limited liability duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with the registration number: 1951/000009/06.

[3] The defendant is Alfred Mafodi Sithole an adult male with Identity No [...].

Facts

[4] The *essentialia* of the agreement are, *inter alia*, the following:

“The plaintiff sold to the defendant the following goods:

2018 Renault Clio IV 900T Authentique 5DR

Registration number: unknown

Engine number: [...] Chassis number: [...] (“the vehicle”)

The goods were sold for an amount of R298 429.63 which amount was made up of, *inter alia*, a principal debt of R186 122.50 (“principal debt”) plus finance charges of R112 307.03.”¹

[5] The said amount was going to be repaid in installments calculated in the following fashion:

“[O]ne payment of R3 525.13 on 1 September 2019, and 70 payments of R3 440.55 each at monthly intervals beginning on 1 October 2019, and thereafter 1 balloon payment of R54 066.00 on 1 August 2025.”²

[6] The defendant stated that:

¹ Particulars of claim paras 4 to 5.

² *Id* para 6

“During the first week the defendant purchased the motor vehicle from the plaintiff he accidentally hit a rock, he went to investigate the damage caused by the accident. Apart from the damage caused he noticed that there were small particles which fell from the motor vehicle and saw that the particles were body filler indicating that the motor vehicle was once involved in an accident and was repaired.

The motor vehicle was taken to the plaintiff and the defendant informed the plaintiff about the body filler in which they said they knew nothing about, and that they do not sell motor vehicles that had been previously involved in an accident.”³

[7] The defendant took the motor vehicle to Diamond Panel beaters:

“They confirmed that the LHS RHS Locker had body filler and that it seemed that motor vehicle was repaired prior to me purchasing it from the applicant”⁴

[8] As a result of this, the defendant submitted that the plaintiff misrepresented the condition of the motor vehicle when he purchased it. In line with section 56 of the CPA, he handed over the motor vehicle on or about 21 January 2020. The plaintiff submitted that the defendant repudiated the credit agreement by stating he could not make any further payments and delivered the vehicle to the plaintiff.

Issues

[9] The question that faces this court is whether the plaintiff can deal with the motor vehicle in terms of section 127 of the NCA, and whether the defendant can find protection under the CPA. But importantly, the question asked of this court is whether the defendant has raised triable issues to starve off the attack in terms of Rule 32 of the Uniform Rules of Court.

The law

[10] Rule 32 of the Uniform Rules of Court reads:

“32. Summary judgment—

- (1) Where the plaintiff may, after the defendant has delivered notice of intention to defend a plea, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only⁵—

³ Defendant's plea sub-paras 6.2 and 6.3.

⁴ Affidavit resisting summary judgment para 16.

⁵ GNR.842 of 31 May 2019.

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejection,

together with any claim for interest and costs.”

[11] To be successful against an application for summary judgment, the defendant must set out in his or her affidavit facts, which, if proven at trial, will constitute an answer to the plaintiff’s case.⁶ On this subject, the court in *Maharaj v Barclays National Bank Ltd*⁷ held:

“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defense to the claim. Where the defense is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the 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 *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.”⁸

[12] Section 127 of the NCA provides:

“127. Surrender of goods—

- (1) A consumer under an installment agreement, secured loan or lease—
 - (a) may give written notice to the credit provider to terminate the agreement; and
 - (b) if-
 - (i) the goods are in the credit provider’s possession, require the credit provider to sell the goods; or

⁶ *Joob Joob Investments v Stocks Mavundla Zek* 2009(5) SA 1 at para 32 page 12.

⁷ 1976 (1) SA 418 (A).

⁸ *Id* p 426 A and B.

- (ii) otherwise, return the goods that are the subject of that agreement to the credit provider's place of business during ordinary business hours within five business days after the date of the notice or within such other period or at such other time or place as maybe agreed with the credit provider.
- (2) within 10 business days after the later of-
 - (a) receiving a notice in terms of subsection (1) (b) (i): or
 - (b) receiving goods tendered in terms of subsection (1)(b) (ii) a credit provider must give the customer rating notice setting out the estimated value of the goods and any other prescribed information,
 - (3) within 10 business days after receiving a notice under subsection (2), the consumer may unconditionally withdraw the notice to terminate the agreement in terms of subsection (1) (a), and resume possession of any goods that are in the creditors credit provider's possession, unless the consumer is in default under the credit agreement."

[13] When it comes to the CPA, the legal position is as clear as mud. Section 5(2) (d) of the CPA reads as follows:

- "(2) This Act does not apply to any transaction—
 - (d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act".

[14] Section 56(2) of the CPA reads:

- "(2) Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, - either—
 - (a) repair or replace the failed, unsafe or defective goods; or
 - (b) refund to the consumer the price paid by the consumer, for the goods"

Discussion

[15] For an in-depth analysis of the issues, this court will quote extensively and liberally from the sources counsel relied on.

Counsel for the plaintiff 's submissions

[16] Counsel for the plaintiff relied on the matter of the *MFC (A Division of Nedbank Ltd) v JAJ Botha*,⁹ in which the court was faced with a similar challenge. As in this case, the applicant in *Botha's* case:

“[H]ad purchased the vehicle in question from a car dealership at the instance of the respondent for the purpose of being able to sell it on to the respondent in terms of the installment sale agreement. The instalment sale agreement is a credit agreement within the meaning of the NCA. The applicant's real role in the sale of the vehicle was thus one of credit provider, and not one of supplier of the goods in question. It is therefore unsurprising that the agreement between the applicant and the respondent expressly excluded any warranty by the applicant as to the condition of the vehicle selected by the respondent. The respondent had nevertheless returned the vehicle to the applicant on or about 30 August 2012 because he had become dissatisfied with it on account of its allegedly defective condition...

The applicant wishes to deal with the return of the vehicle in terms of s127 of the NCAA...The effect of the court acceding to this would be that the vehicle would be sold, and the proceeds credited in reduction of the amount owed by the respondent to the applicant in terms of the aforementioned instalment sale agreement. The respondent on the other hand appears to consider that consenting to such a cause and not opposing the current application would compromise what he considers to be his rights in terms of Part H of chap. 2 of the Consumer Protection Act 68 of 2008('the CPA'). He maintains that he returned the vehicle to the applicant in exercise of his rights in terms of s 56(2) of the CPA...”¹⁰

[17] The court in *Botha* chose a middle-of-the-road approach. On the one hand, the court held that the NCA was excluded by section 5(2)(d) of the CPA and rejected the respondent's submission that he was covered by section 56(2) of the CPA¹¹. On the other hand, the court held that the applicant had not complied with the provisions

⁹ [2013] ZAWCHC 107.

¹⁰Id paras 2 to 3.

¹¹Id para 13

of section 129(1) and adjourned the matter *sine die* pending the compliance with section 129(1) of the NCA.¹²

[18] In *casu*, Counsel, accordingly, submitted that the defendant did not enjoy the protection under section 56(2)(d) of the CPA.

Counsel for the defendant's submissions.

[19] The defendant's counsel submitted that *Botha's* case elicited major disquiet amongst the ranks of academia. She referred the court to a joint academic paper penned by Professor Jannie Otto of the University of Johannesburg, Professor Corlia M Van Heerden of the University of Pretoria and Jacolien Barnard a Senior lecturer at the University of Pretoria. Zeroing in on the all too familiar situation of an instalment sale agreement, they wrote:¹³

“[T]he consumer buys a motor vehicle from a motor dealership. He cannot pay the full amount of the purchase price immediately. The motor dealership assists him to apply for finance at a financial institution (for example, a bank). that the motor vehicle is financed and an installment agreement (previously called an installment sale agreement) is concluded between the consumer and the bank. Within six months after the delivery of the vehicle, the consumer starts to experience problems with it and it becomes too clear that the vehicle is of an unsatisfactory quality, cannot be used for the purposes for which it was bought, and is defective.

If the customer attempts to hold the motor dealership responsible, the dealership argues that it no longer owns the vehicle and that the bank should be approached. Indeed, the dealership argues that the bank was the seller of the vehicle- which it often is. Should the consumer attempt to hold the bank responsible, the bank refers to the installment agreement in which any warranty as to the condition of the vehicle is expressly excluded, and the bank also argues that it only financed the deal. After all, the bank is not a seller of vehicles in the first place. To make matters worse, it seems that uncertainty over the application of two very important pieces of consumer protection legislation [National Credit Act 34 of 2005 and the Consumer

¹² *Id* para 19,2.

¹³ Barnard, Otto and van Heerden “Redress in terms of the national Credit Act and the Consumer Protection Act for defective goods sold and finance in terms of an installment agreement” (2014) 24 SAMLJ 247-248.

Protection Act 68 of 2008] may leave the consumer without adequate protection...”¹⁴

[20] Interestingly, they placed the *Botha* matter under a microscope and shredded it, for instance they pointed out that the bank cannot be a consumer. A bank is a juristic person whose asset value or annual turnover equals or exceeds the threshold value determined by the Minister (R2 million).¹⁵

[21] Fascinating as this debate may be, this court’s role is a limited one. The essence of the question confronting this court frontally is whether the defendant has raised triable issues. I am persuaded that it cannot be simply said without more that the bank’s real role was that of a credit provider and not one of supplier of goods in question. I could not agree more with the afore-mentioned writers that, in this instance, a bank wears two hats, namely: “that of a seller and that of a financier or credit provider.”¹⁶.

[22] In *casu*, the plaintiff cannot shrug off its responsibility by pointing out to the car dealer. The defendant is entitled to approach the plaintiff for redress. Hence, I am satisfied that the defendant has raised *bona fide* defence to the claim. It is when the consumer takes out a personal loan to purchase a car that the bank is solely a credit provider. The CPA’s section 5(2)(d) applies *ex lege* to goods sold and financed in contracts involving instalment agreements governed by the NCA.

Costs

[23] The matter was set down to be heard on 13 November 2023. It did not proceed due to the applicant’s doing, to put it politely. Hence, Counsel’s protestation against his opponent’s submission that the costs for that day should be borne by the applicant was muted. Accordingly, the applicant will be saddled with wasted costs for that day. The costs of the hearing will be costs in the cause.

[24] In the result I make the following order:

¹⁴ Id page 247 -248.

¹⁵ Id page 272.

¹⁶ Id page 256.-256.

ORDER

1. The application for summary judgment is dismissed.
2. The costs of the summary judgment application are costs in the cause.
3. The defendant is granted leave to defend.
4. The applicant has to pay the wasted costs of 13 November 2023.

M. P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 13 November 2023

Date of judgement: 02 February 2024

APPEARANCES

For the plaintiff/applicant

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For the defendant/ respondent

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