1 **REPORTABLE**

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL - DURBAN

CASE NO. 14223/2008

In the matter between:

BMW FINANCIAL SERVICES (SA) PTY (LTD) **PLAINTIIFF**

and

FAROUK'S 2 DOOR SHOP CC **FIRST DEFENDANT**

AHMED FAROUK EBRAHIM MANSOOR **SECOND DEFENDANT**

JUDGMENT

SISHI J:

[1] This is an application for summary judgment in terms of rule 32 of the rules of this court. Summary judgment is sought against the Defendant for the delivery of the motor vehicle described as a **BMW 525i Automatic**, with **engine no. 3462752** and **chassis OGX96264,** and costs of suit in the scale as between Attorney and client. The Plaintiff issued summons against the First and the Second Defendants claiming delivery of the said motor vehicle plus certain ancillary relief in the particulars of claim. The Second Defendant signed a surety-ship in favour of the Plaintiff. In terms of this surety-ship, the Second Defendant bound himself as the surety and co-principal debtor for the

punctual performance and payments by the First Defendant for all debts and obligations for whatever nature due to the Plaintiff.

[2] In paragraph 7 of the particulars of claim, the Plaintiff alleges that the First Defendant's failure to pay the instalments due in terms of the agreement constitutes a repudiation of the agreement, alternatively, the First Defendant has materially breached the agreement in that it defaulted in the punctual payment of the monthly instalments in terms thereof. In paragraph 8 of the particulars of claim it is alleged that the Plaintiff elected to accept the First Defendant's repudiation of the agreement and to cancel the agreement, alternatively, the Plaintiff elected to terminate the agreement in consequence of the First Defendant's default of the punctual payment of the monthly instalments payable in terms of the agreement. The Plaintiff's election to cancel the agreement is herewith conveyed to the First defendant, alternatively was conveyed by a cancellation letter forwarded to the First Defendant, dated 18 June 2008.

[3] Annexed to the Application for summary judgment is a verifying affidavit by one Charissa Olivia Hector who describes herself as a manager: Legal Collections of the Plaintiff.

In paragraphs 2-5 of her affidavit Hector says:

"The facts of this affidavit falls within my personal knowledge and are to the best of my ability true and correct, unless specifically otherwise stated.

I administer and have insight of the records of the Applicant/Plaintiff in respect of the First and Second Respondents/Defendants and as such the information contained herein is within my personal knowledge.

I have read the summons, particulars of claim and annexures thereto in this action and verify and confirm the cause of action.

It is my opinion that the First and/or Second Defendant's have no ***bona fide*** *defence against the Applicant's claim and that an appearance to defend has been entered herein solely for the purpose of delaying the action".*

In response to the Plaintiff's application for summary judgment, the First Defendant filed an affidavit opposing summary judgment in terms of rule 32(3)(b). In this affidavit, the First Defendant has raised 3 points ***in limine*** and thereafter dealt with the merits of the action itself.

FIRST DEFENDANT'S FIRST POINT *IN LIMINE*

[4] The First Defendant alleges that the deponent to the Plaintiff's verifying affidavit is unlikely to have personal knowledge of the facts relevant to the action. The First Defendant alleges further that this aspect becomes more relevant because Hector, the said deponent does not set out the basis on which the facts deposed to by her in her affidavit are within her personal knowledge.

[5] Counsel for the First Defendant submitted that the verifying affidavit does not satisfy the stringent requirement of rule 32 and accordingly the application is fatally defective and falls to be dismissed with costs. Counsel for the First Defendant has referred to the following cases in support of the submission:

Paddy's Investments (Pty) Ltd v Moolman Bros Construction Co. Ltd 1982(1) SA 249 (D); Trekker Investments (Pty) Ltd v Wimpy Bar 1977 (3) SA 447 (W); Meddent Medical Scheme v Avalon Brokers (Pty) Ltd 1995 (4) SA 862 (D); Fischereigesellschaft F Busse & Co. Kommanditgesellschaft v African frozen Products (Pty) Ltd 1967(4) SA 105(C); and ***Raphael & Co. v Standard Produce Co. (Pty) Ltd 1951 (4) SA 244 (C)***. He also referred to the case of ***Bowman NO v Howe 1980 (2) SA 226 (W) at 228*** where the court says:

"… The conclusion of the contract of sale, the cancellation of the bond, the payment of commission and all other matters referred to in the particulars of claim are all inseparable part and parcel of the Plaintiff's cause of action. After the Defendant has made the allegation that the Plaintiff has had no part in any of those dealings, especially in view of the fact that the allegation is made that the transaction referred to in the Plaintiff's particulars of claim relate to a period of time prior to his appointment and in respect whereof the Plaintiff has had no dealings whatsoever; coupled with the further allegation that the Plaintiff at no time interviewed the Defendant in respect of the alleged transactions, the Plaintiff must have obtained the information sworn to from someone else.

On the basis of ***(Mowschenson's case 1959 (3) SA 362(W)),*** *I have to determine the matter on the assumption that the defendant's allegation in this regard is correct. On the reading of* ***Mowschensons*** *case, and that of* ***Trekker Investments (Pty) Ltd (supra)****, it does not become necessary to investigate whether the defendant has disclosed a bona fide defence in the opposing affidavit because, once a court comes to the conclusion that there is a reasonable possibility that the Plaintiff's case is defective, the application ought to be dismissed."*

[6] Mr Mohamed for the First Defendant submitted that clearly the legal collections manager in the present case would not be in a position to have personal knowledge as to the terms and conditions of the agreement, when the agreement was concluded, nor would she have any idea as to what were the arrangements in place prior to the matter being referred to her. See also: ***Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd 1959 (3) SA 362 (W); Northern Cape Scrap & Metal (EDMS) BPK v Upington Radiators & Motor Graveyard (EDMS) BPK 1974 (3) SA 788 (NC) at 793C-D; and Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd and Another 1998 (1) SA 679 (O).***

[7] Mr Mahomed submitted that in so far as the relief sought in the summons, his concern is that, the Plaintiff claims for the delivery of the motor vehicle, an order confirming the cancellation of the agreement and then an order holding the First and Second Defendants, jointly and severally liable for an amount. He submits that no where in the particulars of claim does the Plaintiff make an allegation in whose possession the motor vehicle is. He submits that, despite the fact that the relief is sought against both of them in the summons, this is not the position with regard to the application for summary judgment. He then referred to the application for the summary judgment and submitted that the notice states:

"Please take notice that application will be made to the above honourable court on the 13th day of February 2009 or soon thereafter as Counsel made heard for summary judgment against the Defendant."

He submits that summary judgment is claimed against a single defendant without specifying whether it is the First or the Second Defendant.

[8] Mr Mohamed submits that this issue is important because in the instant matter the First and the Second Defendants are cited in the particulars of claim as being jointly and severally liable for a debt, in the application for summary judgment, only mention is made of a single defendant. He submits that the importance thereof is illustrated in the case of ***Gulf steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd and Another, supra,*** where the court stated: *"At the hearing of this matter there was no formal or any kind of application to attempt to amend the summons or the application for summary judgment even though there were two Defendants before court and just one application for summary judgment against "the Defendant" in the singular".* (at 682 I-J – 683 A). Mr Mohamed submits that the Court in this case held that the Affidavit in support of the application for summary judgment was defective because there were two Defendants before Court and the application for summary judgment did not specify which of the Defendants summary judgment was claimed against. The Court in ***Gulf Steel (Pty Ltd*** case, pointed out (at 683 H), that there are two basic requirements that the Plaintiff must meet namely, a clear claim and pleadings which are technically correct before the Court. The Court found that if either of these two requirements is not met, the Court is obliged to refuse summary judgment. The case of ***Northern Cape Scrap & Metal (EDMS) BPK v Upington Radiators & Motor Graveyard (EDMS) BPK, supra,*** was cited with approval in this case.

[9] Miss Olsen for the Plaintiff referred to the case of ***Standard Bank of South Africa Ltd v Roestof 2004 (2) SA 492 (WLD).*** In this case amongst the grounds upon which the 1st point ***in limine*** was based, was that the Defendant was the only Defendant in the action, the verifying affidavit referred to the "Defendants" which were indebted to the Plaintiff. It was then submitted that it did not appear ***ex facie*** the affidavit that the requisite verification contemplated in rule 32 had been complied with and that the Court would not have jurisdiction to grant summary judgment. Amongst the issues raised in the 2nd point ***in limine*** was that the Plaintiff did not meet the two basic requirements, namely, a clear claim and pleadings which are technically correct.

[11] With regards to the 1st point ***in limine***, raised in the ***Standard Bank*** case supra, Blieden J stated:

"In my respectful view, the approach of Meskin J in ***Absa Bank Ltd v Coventry 1998 (4) SA 351 (N) at 354 B-E*** is artificial. In that case, the facts are almost identical to those in the instant case. The learned Judge found that the verifying affidavit filed on behalf of the Plaintiff was 'hopelessly ambiguous' as the deponent to the Plaintiff's affidavit in that case in terms of rule 32 (2) also referred to the Defendants in the plural but it was plain that there was only one Defendant in the case. It was for this reason that he non-suited the Plaintiff in its application for summary judgment. In my view, no one reading the papers as a whole in this matter, could be in any doubt as to what Duncan was verifying in his affidavit. The use of the word "Defendants"

is plainly an error as there is no room whatsoever for a Second Defendant to be involved in the present action." (At 396 B-C). The Judge went on to state:

"A reading of rule 32 as a whole makes it plain that, once there is an affidavit by the Plaintiff or someone acting on its behalf, who can swear positively to the facts verifying the cause of action and the amount, if any, claimed, stating that in his opinion there is no bona fide defence to the action and that intention to defend was delivered solely for the purposes of delay, the Plaintiff is entitled to summary judgment unless the Defendant has complied in some way or other with the requirements of rule 32 (3). If the papers are not technically correct due to some obvious an manifest error which causes no prejudice to the Defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one, where the reading of the Defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the Plaintiff's case against him. It should further be mentioned that the in the ***Conventry*** *case, the court found that in any event, there were serious doubts that the deponent to the Plaintiff's affidavit in support of the application for summary judgment had the knowledge he claimed to have. In the present case, the Defendant has made no suggestion to this effect in regard to Duncan's affidavit. This is a further reason for not following the* ***Conventry*** *case." (at 396 E-I).*

[12] With regard to the second point ***in limine*** raised in the ***Standard Bank*** case Blieden J stated the following:

"In my view, the attitude adopted by Meskin J in the ***Coventry*** *case, supra, and also that of Gihwala AJ in the* ***Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd and Another 1998(1) SA 679 (O) at 683 G – 684 B****, is emphasising the technical correctness of the Plaintiff's pleadings as a prerequisite for the hearing of summary judgment application, notwithstanding the contents of the Defendant's affidavit filed in terms of rule 32 (3) (b) is unjustified. The papers as a whole must be looked at in order for a court to come to a conclusion as to whether leave to defend should be granted to the Defendant or not. The function of the court should not be to protect dishonest defendants because the plaintiff's pleadings are less than perfect. Each case must be judged on its own facts. In the present case, as with the first objection* ***in limine****, the Defendant has not, nor has he claimed he suffered any prejudice as a result of the Plaintiff's manifest error. To rely on the technical errors in the summons and the Plaintiff's rule 32 affidavits and at this stage deny the Plaintiff summary judgment, if it is otherwise entitled to such an order, would, in my view, result in a legal nonsense." (at 498 A-D).*

[13] I align myself with the views expressed by Blieden J with regard to technical defences of this nature. In the present case, it is clear that in the verifying affidavit, Hector is verifying the cause of action in respect of both the First and the Second Defendants. If one reads the papers as a whole in this matter, the use of the word "Defendant" in the notice of application for summary judgment is clearly an error as the First and the Second Defendants are cited as parties in all these papers which includes the summons, the notice of application for

summary judgment and all the affidavits filed. The submission by Mr Mahomed for the First Defendant that only one Defendant has been cited in the papers cannot be correct. It is only in the notice of the application for summary judgment that the word Defendant has been referred to, it is clear that the First Defendant was intended. It is also clear from the opposing affidavit that it is only the First Defendant which has filed an affidavit opposing summary judgment and not the Second Defendant. The Second Defendant deposed to this affidavit on behalf of the First Defendant. In my view, these are that types of errors contemplated by Blieden J in the ***Standard Bank*** case, ***supra***.

[14] As indicated above the First Defendant has alleged that the deponent to the Plaintiff's verifying affidavit Hector, is unlikely to have personal knowledge of the facts relevant to the action. Referring to the case of ***Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd and Another 1980(1) SA 929 (SE)***, Ms Olsen submitted that it is not necessary that Hector should have personal knowledge of the facts on which the First Defendant might seek to base defences which are additional or extrinsic to the facts on which the cause of action is based because the facts referred to in the sub-rule are those on which, the cause of action is based. In ***Barclays Western Bank*** case, the Court clearly pointed out that it could not have been the intention of rule 32(2) of the Uniform Rules of Court that a deponent to the Affidavit on behalf of the Plaintiff must have personal knowledge of the facts on which a Defendant may seek to base a defence, ***(at 937 A-B).*** In this case in

opposing summary judgment on an agreement of lease, the Defendant alleged that the agreement was a "simulated" contract, took the defence ***in limine*** that the Plaintiff's deponent did not have personal knowledge of the negotiations giving rise to the written agreement between the parties as she had not been one of the Plaintiff's servants employed there at the time, and therefore it was alleged that she did not satisfy the provisions of rule 32(2). This defence ***in limine*** was rejected by the court on the grounds set out above. A similar defence has been raised in the present application. In my view, it should be rejected on the same grounds.

[15] In the ***Barclays Western Bank*** case, ***supra***, the court stated*: "As legal manageress, she would* ***prima facie*** *have knowledge of the contract and its conclusion, of the terms and its effect; and she would be entitled, on reference to her records, to claim knowledge of the amounts paid and owing by the First Defendant, (which in the event the Defendant did not deny)",* at 937 C-D. In my view the affidavit of Hector in this case complies with the requirements of the rule.

[16] Ms Olsen also submitted, correctly in my view, that Hector is not required to set out the detail facts demonstrating her personal knowledge. She does not have to disclose the means or source of her knowledge. Furthermore its not necessary that Hector must from personal knowledge, be able to give evidence of each and every fact which the Plaintiff would want to prove or

may prove at the eventual trial. See ***Wright v Mc Guiness 1956(3) SA 184 (C) at 187 B-D; Sand & Co. Ltd v Kollias 1962(2) SA 162 (W) at 166 A; and Standard Bank of South Africa Ltd v Secatsa Investments (Pty) Ltd 1999 (4) SA 229 (C) at 235 A.***

[17] On this point, it was finally submitted by Ms Olsen that Hector as Manageress of Legal Collections would ***prima facie*** have knowledge of the contract and its conclusion, its terms and effect and she would be entitled on reference to her records to claim knowledge of the amount paid and owing by the First Defendant. See ***Barclays Western Bank Ltd v Bill Jonker Factory Servises (Pty) Ltd, supra, at 937 C-E; Nedcor Bank Ltd vs Beharden 2000(1) SA 307 (C) at 311 B-C and Kurz v Zinhirm 1995 (2) SA 408 (D) at 410 F-G.*** The views expressed by the court in these decisions are to the effect that such knowledge can be obtained from the documentary records available. Hector, in the present case was also entitled to refer to the documents and the company records to obtain the necessary knowledge.

[18] Ms Olsen submitted correctly in my view that the two cases ***Paddy Investment (Pty) Ltd v Moolman Brothers Construction and Company, supra, and Trekker Investments (Pty) Ltd v Wimpy Bar, supra,*** are based on debts that had been ceded. The Plaintiff in those cases did not originally deal with the Defendant, those debts were ceded to them and they sued on

those bases. In the present case we are dealing with a very different set of circumstances which do not involve cession.

[19] The case of ***Meddent Medical Scheme v Avalon Brokers (Pty) Ltd, supra,*** also referred to by Mr Mohamed for the First Defendant in support of the First point ***in limine*** relates to stolen cheques and in that case the court held that the deponent to the affidavit did not have the requisite personal knowledge. In the other two cases referred to by the Defendant, ***Fischereigasellschaft, F. Busse & Kommanditgesellschalt v African Frozen Products, supra, and Raphael & Co, v Standard produce Co. (Pty) Ltd, supra***, the deponent to the verifying affidavits was an Attorney of the Plaintiff.

[20] In the light of what is set out above I am satisfied that the First Defendant's First point ***in limine*** should be dismissed, and is accordingly dismissed.

Second Point in Limine

[21] The First Defendant alleges that it is evident that the Plaintiff's claim is in respect of the delivery and return of a certain motor-vehicle and thereafter the calculation of a value of such vehicle, and thereafter the claim in respect of the difference in value of the vehicle from the estimated value and the alleged outstanding amount due to the Plaintiff. The First Defendant alleges that the said Hector, in the verifying affidavit, however, does no more than state that

she verifies the cause of action yet does not set out in any particular detail which claim is being verified and thereafter makes no further allegation as to what is to happen to the damages claim if any, having regard to the provisions of the breach clause.

[22] In the application for summary judgment, the Plaintiff seeks delivery of the motor-vehicle as against the Defendant, there is only one claim that is subject of the summary judgment application, namely, the delivery of the motor-vehicle which form the subject matter of the instalment agreement. This has manifested from the notice of application for summary judgment. The claim by the First Defendant that it does not know which of the claims is being verified in the affidavit is therefore without merit.

[23] Furthermore, Mr Mahomed submitted that clause 12.2 sets out the remedies available to the Plaintiff. This clause reads: *"Upon an event of default or the loss, damage or destruction of the goods as determined in clause 9.3, the seller may at its election, and without prejudice to any other remedy which it may have in terms of these agreement or otherwise…."* And then 12.2.2 - *"After due demand, cancel the agreement and obtain possession of the goods and recover from the purchaser as pre-estimated liquidated damages, the total amount payable not yet paid by the purchaser, whether the same are due for payment or not, less the value of the goods as at the date on which the seller obtains the possession of same…"*

[24] Mr Mohamed then submitted that the first relief that is claimed in the particulars of claim is for the delivery of the motor-vehicle to the Plaintiff. The second order that is sought is an order confirming the cancellation of the agreement. He submits that this raises some difficulty because in so far as summary judgment is concerned, the second order which is sought, which is for the confirmation of the cancellation, is not the relief that could possibly be claimed in summary judgment. Now, were this court to order the delivery of the motor vehicle in paragraph (a) in the summary judgment application, the remaining orders would have to be referred to trial in the ordinary court.

[25] Mr Mahomed conceded that the Plaintiff did send the First Defendant the letter of cancellation, for allegedly non-payment of the instalments. He, however, submitted that the Defendants state that in so far as the agreement is concerned, the Plaintiff was not entitled to cancel the agreement by virtue of the fact that the agreement falls to be rectified and the account falls to be abated. So, this raises an issue of whether or not the Plaintiff was entitled to cancel the agreement. He submits that there are two claims which are pleaded in the particulars of claim, the first is for the cancellation of the agreement and the second is for the delivery of the motor vehicle. The court can only grant an order for the delivery of the motor vehicle if the agreement has been cancelled.

[26] The Plaintiff indeed cannot seek cancellation of the agreement in the summary judgment application. That is why it sought the relief relating to the delivery of the said motor vehicle. The Plaintiff cancelled the agreement in terms of the relevant clause of the agreement and the letter of cancellation was sent to the First Defendant. The Plaintiff does not need the confirmation of the court for the cancellation of the said agreement. Mr Mahomed referred to the cases of ***Evelyn Haddon and Company Ltd v Leo Janko (Pty) Ltd 1967 (1) SA 662 (O) and Mahomed-Essop (Pty) Ltd v Sekhukhulu and Son 1967 (3) SA 728 (D)***.

In the case of ***Evelyn Haddon***, ***supra***, it is clearly stated that one does not need a court order to cancel the agreement. The ***de facto*** position in this case is that the agreement has been cancelled. The letter of cancellation dated 18 June 2008, is annexed to the particulars of claim. The last sentence of the letter reads: *"We have elected to cancel the agreement with you and we hereby notify you that the agreement has been cancelled".*

The submission by Mr Mahomed that this court needs to confirm cancellation of the agreement before the plaintiff is entitled to delivery of the motor vehicle, which it seeks in the summary judgment application, is entirely unfounded. The second point ***in limine*** also falls to be dismissed, and is accordingly dismissed.

Third Point in limine

[27] In this point ***in limine***, the Defendant alleges that the Plaintiff's claim is based on a cancellation of the agreement and the return or delivery of the motor-vehicle in question. The Plaintiff must in terms of the agreement prove that the First Defendant has breached the agreement which would give rise to the breached of the provisions clause 12.2 of the agreement. In order to prove the breach, the Plaintiff must show that there is in fact an outstanding balance that is owed to the Plaintiff because without the outstanding balance there can be no breach. The Plaintiff's claim is in essence for the difference in the value of the motor vehicle upon delivery and the outstanding amount owed to the Plaintiff if any. The agreement between the parties calls for a certificate of balance to certify the extent of the outstanding liability of the First Defendant. The First Defendant alleges that as no certificate of balance has been annexed to the particulars of claim, there is therefore no certainty as to the amount owed to the Plaintiff.

[28] Mr Mohamed referred to clause 3.10 of the particulars of claim which states:

"a certificate signed by a Manager or a Director of the Plaintiff whose appointment need not be proved by the Plaintiff, as to any amount stated in the certificate to be owing by the Defendant to the Plaintiff would constitute prima facie evidence of the facts therein contained".

[29] Mr Mahomed submits that in order for the Plaintiff to prove a breach of the agreement in terms of clause 12.2, the Plaintiff is obliged to put up a certificate to show what the outstanding balance is to certify that there are any arrears in the account. Only once it certifies those amounts as being outstanding can the Plaintiff cancel the agreement for that breach, without a breach there can be no reliance on clause 12.2 of the agreement.

[30] The Plaintiff is not obliged to provide the certificate of balance as proof of the amount owed. The agreement between the parties does not say that the certificate of balance is a requirement. It is merely ***prima facie*** proof. All the Plaintiff is required to do is to prove its cause of action at this stage. This is what the Plaintiff has exactly done. Furthermore, in paragraph 9 of the particulars of claim, the Plaintiff alleges that as at 27 October 2008, the sum of R89 290.51 was due owing to the Plaintiff, comprising a capital of R83 258.68 and the amount of R6 031.90, in respect of interest and arrear instalments. The capital amount the Plaintiff alleges is clearly evident from the payment history annexed to the particulars of claim as E3. Furthermore, it is in fact not possible for the Plaintiff to provide a certificate of balance until the motor vehicle has been returned and valued. The First Defendant's third point ***in limine*** in this regard has no merit and is accordingly dismissed.

[31] In the light of what is set out above in this judgment, I am satisfied that all the three points ***in limine*** raised by the First Defendant are without merit and are accordingly dismissed.

Defence on the merits

The interest rate

[32] The First Defendant alleges that at the time of the conclusion of the agreement, it was an express term of the agreement that the interest rate would be fixed for the duration of the agreement and that the interim amount owing would be settled in equal monthly instalments payable over 60 months. The First Defendant also alleges that the interest rate was to have been fixed at 7% over the duration of the contract.

[33] Counsel for the First Defendant submitted that the Plaintiff had varied the interest rate over a period of time and that had led to the net conclusion that there was a balance outstanding, but had the correct interest rate been applied, then it would appear that the First Defendant is not in arrears.

[34] In support of these contentions, Counsel for the First Defendant referred to the co-operate finance application annexed to the particulars of claim as C1.

He submits that in terms of this document, the rate agreed was at 6.5%, and the payment of R4 937,00 per month payable over a period of 60 months.

[35] The contentions by the First Defendant as set out above appear to be contrary to the terms of the purchase and sale agreement signed by both parties in this matter. The instalment sale agreement entered into between the parties is annexure B1 to the particulars of claim. The Annual Finance Charge Rate (AFCR) and the payment plan are dealt with on page 1 of this document. It provides that:

"The annual finance charge rate compounded in terms of the payment plan is:

1. …

2. Linked in terms of clause 16, by a margin of minus 4.3805% per annum, below the prime overdraft rate from time to time, so that at any given date the AFCR will equal the sum of this rate, as at that date, plus that margin indicated above as adjusted in terms of clause 16.4. The AFCR at commencement date hereof is 7.1195%."

It also deals with the payment plan as follows:

Subject to the variation as provided in this agreement, the total collectable is payable as follows:

60 payments of R4 177, 45 at monthly intervals, commencing on 15 August 2004.

Clause 16 of the instalment sale agreement deals with linked rate and also deals with the definition of various terms which includes prime rate, and the lending base rate.

[36] The very first sentence under payment plan on page 1 of the instalment sale agreement state that subject to the variation as provided in this agreement … this sentence makes clear that the interest rate is not a fixed sum, is going to vary according to the lending rates. There is nothing in the instalment sale agreement which states that the interest rate shall be fixed at a certain percentage until the final instalment is paid. It provides for the variation of the interest rate. I therefore find that the First Defendant's submission that the interest rate was fixed for the duration of the instalment sale agreement is accordingly without merit and therefore does not constitute a defence to the Plaintiff's claim.

Rectification

[37] The First Defendant has alleged that he has tried to resolve the issue of the interest rate amicably without success and that it informed the Plaintiff's representative that he would stop all payments on all accounts until such issue was rectified. The First Defendant therefore claims that the agreement between the parties stands to be rectified.

[38] The whole argument relating to rectification, is based on the assumption that the interest rate was fixed for the duration of the agreement and in the light of the finding I have made in this regard, I do not find it necessary to deal with the issue of rectification in this judgment. However, even if I am wrong in this regard, the essential averments to sustain rectification have not been alleged by the First Defendant. The First Defendant appears to allege that the oral agreement was agreed between it and a third party. It does not allege any facts in support thereof. The requirement for rectification in any event is that the parties must have had a continuing intention, that they intended to express this intention in an instrument but that through mutual mistake the instrument did not correctly express the intention. See ***Meyer v Kirner 1974(4) 90 (NPD) at 103 F-G.***

[39] The courts have held that the essence of the relief of rectification is that the document, through common error, does not correctly express the parties agreement or common intention ***(*See *Meyer v Merchant Trust Ltd 1942 AD 244).*** If the First Defendant alleges that there was a mistake, then it must plead the facts. The First Defendant has not done so. There is no allegation nor any facts in support of a contention that the Plaintiff and the First Defendant had a common intention.

[40] The Court was referred to the case of ***Joob Joob Investments (Pty) Ltd v Stocks (161/08)(2009) EZA SCA 23(27 March 2009) (unreported) Paras 32 & 34*** where the court stated as follows:

At para 32 *"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a Defendant with a triable issue of sustainable defence of his or her day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extra ordinary. Our courts, both of the 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* ***Maharaj v Barclays National Bank Ltd 1976(1) SA 418 (A) at 425 G - 426 E,*** *Cobbet JA, was keen to ensure first an examination of whether there has been sufficient disclosures by the 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 the threshold has been crossed is then bound to refuse summary judgment. Cobett J A, also warned against requiring of the Defendant, the precision apposite to the pleadings. However, the learned Judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor".*

At para 34 *"In the present case, as demonstrated above, there is no discernable sustainable defence put by JJ, in respect of the evaluation of work done and materials on the site, JJ did not take issue with the principal's urgent evaluation* ***per se****, as shown, the reference to various provisions of the*

agreement do not assist JJ in establishing a defence. In respect of the certification of damages, the merits of the calculation were not challenged. There are vague references in the opposing affidavits to clause 31.6 and the possible counter claim (without quantification) in respected of an alleged failure by Stocks to protect goods and the materials on sight. Such defences as were proffered out are cast in the most dubious terms. …" per Navsa JA.

[41] The First Defendant in this matter is required to disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable this court to decide whether the affidavit disclosed the ***bona fide*** defence. This is what is lacking in the present case. The alleged defence raised by the First Defendant is not ***bona fide*** and not good in law.

[42] Considering all the facts of this matter, I am satisfied that the Plaintiff is entitled to summary judgment on the claim to which the summary judgment as been restricted. In the result, I make the following order:

(a) Summary judgment is granted against the First Defendant, in terms of paragraphs (a) and (b) of the Notice of Application for Summary Judgment.

SISHI J

Date of Hearing	:	09 June 2009
Date of Judgment	:	13 November 2009
Plaintiff's Attorneys	:	BASCERANO NEL & RICHTER INC C/O JH NICOLSON, STILLER & GESHEN 2ND Floor, Clifton Place 19 Hurst Grove Musgrave Durban Ref: L S Stemmet/gl/BO809/3
Plaintiff's Counsel	:	Ms L K Olsen
Defendant's Attorneys	:	M/S SHAUKAT KARIM & COMPANY 12th Floor, 385 Smith Street DURBAN Ref: Mr S Karim/PM/F322
Defendant's Counsel	:	Mr R Mahomed