Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NUMBER: **2167/22**
HEARD ON: **19 OCTOBER 2023**
DELIVERED ON: **27 OCTOBER 2023**

In the matter between:

FFS FINANCE SOUTH AFRICA (PTY) LTD Plaintiff
t/a ABSA VEHICLE & ASSET FINANCE

and

RYNO GROENEWALD Defendant

Coram: **Olivier, AJ**

JUDGEMENT

OLIVIER, AJ

[1] The parties approached this Court for the determination of two special pleas raised by the defendant in his plea of 17 February 2023.

[2] It is common cause that the plaintiff issued combined summons under the above case number against the defendant on 7 November 2011 and that the plaintiff's claim is, in essence, based on the defendant's alleged non-compliance with the terms of an installment sale agreement entered into between the parties on or about 30 September 2020 (herein after referred to as "***the Agreement***").

[3] The plaintiff alleges that the defendant had breached the terms of the agreement by failing to make due and punctual monthly payments to the plaintiff. The defendant does not deny the above.

[4] The special pleas raised by the defendant may be summarised as follows:

[4.1] That this Court should direct the parties to consider referring the dispute between the parties for mediation in terms of the provisions of ***Rule 41A(3)(b)*** of the Uniform Rules of Court (herein after referred to only as "***the Rules***") and to report back to the Court, a Judge or a case management Judge regarding the outcome of the consideration ("***the mediation special plea***"); and

[4.2] That, by virtue of the fact that the action arose out of a credit agreement governed by the **NATIONAL CREDIT ACT**[1], by virtue thereof that the defendant is allegedly over-indebted and by virtue thereof that proposals were made for the restructuring of the defendant's obligations, this Court should:

[4.2.1] Refer the matter directly to a debt counsellor with the instruction that the defendant's circumstances be evaluated and that a recommendation be made to this Court in terms of ***Section 86(7)*** of the above **NATIONAL CREDIT ACT**; or

[4.2.2] Declare the defendant to be over-indebted and make an order as contemplated in ***Section 87*** of the **NATIONAL CREDIT ACT** in order to relieve the defendant's over-indebtedness ("***the NCA special plea***").

[5] Mr Eillert, who appeared for the defendant, abandoned the NCA special plea at the commencement of the proceedings and I was consequently required to hear argument on and to determine only the mediation special plea.

[6] It was not in dispute between the parties that both parties had exchanged the required notices in terms of ***Rule 41A(2)(a)*** and ***(b)*** of the Rules and it was also not disputed that the plaintiff indicated that it is not amenable to the matter being referred for mediation whilst the defendant indicated his willingness to have the matter mediated.

[1] Act 34 of 2005

Neither of these notices were placed on the Court file (correctly so)[2] and I consequently had no insight into the reasons for the respective parties' above points of view.

[7] The parties required this Court to decide:

[7.1] Whether an order as prayed for by way of the mediation special plea is a competent order to make; and

[7.2] Whether it is clearly evident from the papers at hand that mediation would be to the benefit of the parties involved.[3]

Is the order prayed for a competent order for this Court to make?

[8] It is by now trite that a Court does not have the authority to order parties to litigation to refer the dispute between them for possible resolution by way of mediation[4], simply because of the fact that, by virtue of the provisions of the Rules, mediation is a voluntary process entered into by agreement between the parties.[5]

[9] In this instance, however, the defendant asks the Court by way of the mediation special plea to direct the parties to consider the referral of the dispute to mediation and to report back to the Court on the outcome of the consideration.

[10] I have little doubt that it would be competent for this Court to direct the parties as prayed for by the defendant in the first part of the above paragraph, namely

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[2] See **Rule 41A(2)(d)** read with **Rule 41A(6)** and read with **Rule 41A(9)(b)** of the Rules
[3] ***Nedbank Ltd v D & Ano*** [2022] ZAFSHC 331 (SAFLII Reference) at paragraph [15.10.3]
[4] See *inter alia*, ***Nedbank Ltd v D & Ano***, *supra* and **P v O** [2022] ZAGPJHC 826 (SAFLII Reference) at paragraph [20]
[5] See the definition of "*mediation*" as it is set out in **Rule 41A(1)** of the Rules. Also see ***Kalagadi Manganese (Pty) Ltd & Others v Industrial Development Corporation of South Africa & Others*** [2021] ZAGPJHC 127 (SAFLII Reference) at paragraph [30(b)]

to consider the referral of the dispute between them for mediation as this is exactly what the Rules provide for.[6]

[11] It is the second part of the above prayer by the defendant that I take issue with, namely the request for an order that the parties report back to the Court on the outcome of the consideration as the Rules do not provide therefore.

[12] If one considers the provisions of ***Rule 41A(7)(a)*** and ***Rule 41A(8)(c)*** of the Rules, it appears that the Registrar of this Court will be the proper person to whom any reports on the success or not of mediation proceedings should be made/submitted.

[13] It is therefore my view that, if I should direct the parties in this matter to consider referring the dispute between them for mediation in terms of ***Rule 41A(3)(b)*** of the Rules, I may only order the parties to inform the Registrar of this Court of the completion of the mediation process[7] and to file the required joint minute with said Registrar.[8]

[14] In view of the fact that the above processes of informing the Registrar of the completion of the mediation process and the filing of the joint minute with the Registrar are prescribed by the Rules, it is doubtful whether an order to comply with these requirements is really necessary.

Would mediation be to the benefit of the parties in this matter?

[15] ***Rule 41A*** was obviously introduced to create a mechanism whereby parties may resolve a dispute between them in a speedy and relatively cost-effective

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[6] See **Rule 41A(3)(b)** of the Rules
[7] **Rule 41A(7)(a)** of the Rules
[8] **Rule 41A(8)(c)** of the Rules

manner and to, so it was held recently, possibly avoid an adverse Court order at the end of a trial or motion proceedings.[9]

[16] It furthermore appears from the authorities that I was referred to by counsel on behalf of both parties in their respective heads of argument[10] that the Court has a discretion in this regard[11] and I have to agree with Boonzaaier AJ in the matter of ***Nedbank Ltd v D & Ano*** where she states as follows:

"*… the court may direct the parties to consider mediation as a dispute resolution mechanism when it is clearly evident that such a procedure will benefit the parties and move them closer to better resolving the dispute by such mechanisms.*"[12] (My omissions and underlining)

[17] The fact of the matter however is that, at the point when a Court needs to decide upon whether to direct the parties to consider mediation, the Court will in all probability only have the contents of the pleadings/papers filed in the action/application to consider, since the contents of the notices in terms of ***Rule 41A(2)*** may not be divulged to the Court prior to the costs stage of the proceedings.

In this case I could therefore only consider the combined summons filed on behalf of the plaintiff and the plea of the defendant and I also relied on counsels' advices that the plaintiff was not amenable to mediation whilst the defendant was.

The reasons for these points of view, as was already mentioned, was not known to me.

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[9] ***Maxwele Royal Family & Ano v Premier of the Eastern Cape Province & Others*** [2021] ZAECMHC 10 (SAFLII Reference) at paragraph [50]
[10] I wish to thank Counsel for their assistance in this regard
[11] See ***P v O***, *supra*
[12] *Supra*

[18] The defendant, as was also already mentioned, does not deny that he is in fact in breach of the agreement between him and the plaintiff as he admits to a failure to make payments, alternatively regular payments in terms of the agreement.

[19] Further to the above and from the defendant's plea, it appears that the only relevant issues that are currently in dispute between the parties, are certain terms of the agreement as pleaded by the plaintiff in its particulars of claim.

It is however debatable whether these denials by the defendant of certain pleaded terms of the agreement are capable of being resolved by way of mediation and I hold the view that the process of further particulars and/or a properly conducted pre-trial process would be far more effective in this instance in determining exactly which facts are in dispute and which facts are not.

[20] I agree with Mr Olivier, who appeared for the plaintiff, and I deem it a waste of time, money and resources to, at this point in time, revert back to a process of mediation especially in view of the fact that the plaintiff is not prepared to participate in such process.

[21] In ***SOHCO Property Investments NPC v Stemmett & Others***[13] it was held as follows:

"As regards mediation, there was no prospect of success in pursuing that option… SOHCO was not amenable to the dispute being referred to mediation, and filed a notice to that effect. In the absence of the parties being prepared to agree to refer the dispute to mediation, there is no provision for a judge, in terms of Rule 41A, to refer the dispute to mediation."[14] (My omissions)

[13] [2023] ZAWCHC 127 (SAFLII Reference)
[14] ***SOHCO*** at paragraph [73]

[22] Although, I cannot fully agree with the above remarks as it appears that ***Rule 41A(3)(b)*** of the Rules, and the way in which it is worded, does afford a Court the power to direct the parties to consider mediation as an option, even after service of the required notices in terms of ***Rule 41A(2)***, I do agree that in the instance where one of the parties is not amenable to mediation as an alternative to litigation, a Court would be hard pressed to make a favorable finding as to the prospects of success in a mediation process unless there are obvious and exceptional circumstances to the contrary.

I could, however, find no circumstances in this particular matter to persuade me to exercise my discretion in favour of the defendant, thanks in no small part to the fact that I was not privy to the respective parties' views on why mediation is or is not an option for them as set out in their respective notices in terms of ***Rule 41A(2)***..

[23] If I am allowed to amplify my very last-mentioned remark and with reference back to the abovementioned remark by the learned Boonzaaier AJ in ***Nedbank Ltd v D & Ano***, it should be said that it remains to be seen whether a Court would be able to really determine whether "*it is clearly evident that such a procedure will benefit the parties*"[15] if regards are not had to the parties' reasons (as contained in the notices in terms of ***Rule 41A(2)***) as to why mediation is or is not an option available to them.

I have to agree with Mr Eillert in this regard, namely that the purpose of ***Rule 41A*** might become watered down to a large extent if parties do not seriously consider mediation as an alternative to litigation and if parties decline mediation as an option without such serious consideration and in an attempt to simply adhere to the Rules.

[15]Referring to the procedure of mediation

[24] For now, however, I am persuaded by the existing authorities and the provisions of the Rules in this regard.

ORDER:

[25] In view of the above, the following order is made:

[25.1] THE DEFENDANT'S FIRST SPECIAL PLEA AS SET OUT IN HIS PLEA OF 17 FEBRUARY 2023 IS DISMISSED WITH COSTS; AND

[25.2] THE DEFENDANT IS FURTHERMORE ORDERED TO PAY THE COSTS OCCASIONED BY THE RAISING OF THE SECOND SPECIAL PLEA AND THE ABANDONMENT THEREOF.

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ACTING JUDGE AD OLIVIER
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY

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