



**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF
KWAZULU-NATAL
HELD AT DURBAN**

Case no:KZN/DBN/RC

6985/2019

In the matter between:

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED

Applicant

and

FEROSTAR INVESTMENTS (PTY) LTD

Respondent

Judgment Delivered: 19 November 2020

Introduction

[1] This is an opposed application for summary judgment in terms of which the Applicant sought summary judgment against the Respondent for:

1. Confirmation of termination of the Agreement;

2. An order for the return of the **2014 RENAULT PREMIUM 440/26 MAN SPRING 6X4 T/T C/C bearing CHASSIS NO: VF625KPA000003171 AND ENGINE NUMBER DXI11321177A1L;**
3. Cost of suit on the scale as between Attorney and Client, including such costs as the Plaintiff may incur in locating, removing, storing and disposing of the vehicle;
4. An order authorising the Plaintiff to apply to this Honourable Court on these same papers, supplemented insofar and may be necessary, for an order for any damages to which it is entitled, which can only be quantified once the vehicle has been located and sold;
5. Further and/or alternative relief.

[2] The application was argued on 5 November 2020. Advocate S Anderton instructed by Allen Attorneys, appeared on behalf of Plaintiff / Applicant and Mr S Joosab of Shabeer Joosab Attorneys, appeared on behalf of the Defendant / Respondent.

[3] In this matter the parties will be referred to as in convention.

The Pleadings

[4] The Plaintiff's pleaded case as set out in the Particulars of claim can be summarised as follows:

- (a) The parties concluded a written instalment sale agreement on the 15th of November 2017;

- (b) The salient material and express, implied or tacit terms of the agreement included *inter alia* that the Plaintiff sold the vehicle described in the agreement to the Defendant who undertook to pay the principal debt by way of a deposit of R300 000 followed by 48 monthly payments of R13 865.24;
- (c) That the Defendant is in default of its obligations in terms of the agreement, and in material breach of the terms thereof in that the Defendant failed to maintain timeous payments of the instalments.
- (d) That by 8 October 2019 the Defendant was in arrears in the amount of R42 908.65.
- (e) That by virtue of the default on the part of the Defendant, the Plaintiff became entitled to claim immediate payment of the full amount that the Plaintiff would have paid had the Defendant fulfilled all its obligations in terms of the agreement.
- (f) That the Plaintiff would be entitled to *inter alia*:
 - (i) Cancel the agreement;
 - (ii) Recover possession of the vehicle;
 - (iii) Sell the vehicle;
 - (iv) Retain all the instalments already paid by the Defendant and
 - (v) Claim from the Defendant any balance owing as damages.

The Application

[5] The summons was duly served on the Defendant on 19 November 2019 whereafter the Defendant entered an appearance to Defend. The Application for Summary Judgment was launched. In the supporting affidavit attested to by Dana

Leigh Swartz, a Team Leader of the Plaintiff with delegated authority, swore positively that the Defendant is indebted to the Applicant on the grounds and in the amount set forth in the Summons. Ms Swartz also verified the cause of action as set out in the summons. Furthermore, Ms Swartz stated that in her opinion the Defendant has no *bona fide* defence to the action and that the Notice of Intention to Defend has been delivered solely for the purposes of delay.

Grounds of Opposition

[6] In the opposing affidavit attested to by Ayub Rosay, the sole director of the Defendant company the following grounds for opposition were set out that:

- (a) He denied that the Defendant has no *bona fide* defence to the Plaintiff's claim and that the appearance to defend was entered solely for the purpose of delay;
- (b) The Defendant is armed with a good and *bona fide* defence to the action;
- (c) The Defendant denies that it breached the instalment sale agreement by failing to maintain timeous payments of the instalments that fell due on the agreement and that as at 8 October 2019 was in arrears in the amount of R42 908.65 as alleged by the Plaintiff in the particulars of claim;
- (d) The Defendant disputes the amount allegedly claimed as being owed as is the right of the Defendant as per the terms and conditions of the instalment sale agreement;
- (e) That the Defendant elected the "Take-a-break" payment plan and
- (f) That the instalments are up to date.

Legal Principles

[7] It is trite that summary judgment is a procedure enacted to assist a Plaintiff in a case where a Defendant cannot set up a *bona fide* defence.¹ The case of ***Maharaj v Barclays National Bank Ltd***² succinctly sets out the threshold which has to be crossed as prescribed by Rule 14 (3).³

[8] It is an accepted legal principle that the Respondent need not deal exhaustively with the facts and evidence relied upon to substantiate them.⁴ It is trite that a Defendant with triable issues worthy of being ventilated should be afforded an opportunity to challenge the action against him or her by way of trial, if there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. Furthermore, it is imperative that the defence disclosed must be both *bona fide* and good in law.⁵

[9] The rule is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from laying his defence before the court. The remedy provided by this rule has been regarded as an extraordinary and very stringent remedy in that it closes the doors of the court to the defendant and permits judgment to be given without a trial.⁶ However, through decided cases it has become evident that the effect of this remedy is only drastic to a defendant who has no defence.

¹ Rule 14 (3) (b) of the Magistrates' Court Rules.

² 1976 (1) SA 418 (A).

³ Jones and Buckle, Volume 2, 10th Ed, page 14-1 '*...he has a bona fide defence and that he in his (accompanying) affidavit has disclosed fully the nature and grounds of his defence and the material facts relied upon...*'.

⁴ *Estate Potgieter v Elliot* 1948 (1) SA 1084 (C).

⁵ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11G-12D.

⁶ Van Loggerenberg *Erasmus Superior Court Practice* 2nd ed, Vol. 2 (Juta) at D1-381.

Parties' Principle submissions and application of the law

[10] Both parties prepared written submissions. In light of the conclusion to which I will come I do not deem it necessary to deal with each of the points raised *ad seriatim*, and will for the purposes of this judgement, focus on the salient submissions made by the parties.

[11] The Defendant submitted that the Plaintiff failed in its Particulars of Claim to allege or state fully with clarity the monthly instalments it is alleged that the Defendant has failed to maintain and fell due on the agreement to prove the breach.⁷ Additionally, the Defendant contended that the *'Plaintiff has failed to take the court into its confidence and put up evidence for this Honourable Court to conclude that the Defendant had breached the instalment sale agreement.'*

[12] The Defendant contended that the Plaintiff stands and falls by its case and that it is not for the Defendant to prove the Plaintiff's case. I am imbued to consider the application on the papers before me. This is based on the trite legal principle that the Applicant must stand or fall by his founding papers which principle has been enunciated in ***Director of Hospital Services v Mistry***⁸ where the Appellate Division held:

"When...proceedings were launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by

⁷ Respondent's Heads of Argument para 3.4.

⁸ 1979 (1) SA 626 (AD) at 635H-636B.

Krause J in Pountas' Trustees v Lahanas 1924 WLD 67 at 68 and has been said in many other cases:

'...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application in the replying affidavit (per Van Winsen J in SA Railways Recreation Club and Another v Gordonias Liquor Licensing Board 1953(3) SA 256 (C) at 260)''

[13] In ***South African Transport and Allied Workers Union and Another v Garvas and Others***⁹ it was held that:

'Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.'

[14] It bears mentioning that the Defendant has during argument raised additional submissions which were not set out in the opposing affidavit pertaining to the agreement which is unsigned. In this regard, the Defendant argued that the Plaintiff should have put up a signed contract. It is trite that the onus rests with the Plaintiff to prove the credit agreement relied upon and the right to cancellation of the credit agreement due to breach of the repayment obligations.

⁹ [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 114.

[15] In accordance with the best evidence rule, it is trite that a party is to produce the original executed documents as proof of an agreement unless the original document is not available. In this regard, the Plaintiff has failed to put up a compliance affidavit to the effect that the attached agreement is in compliance with Section 13 and 14 of the Electronic Communications and Transactions Act (The “ETCA”)¹⁰ wherein the following averments are to be made *inter alia* that:

- (a) the manner in which the agreement is concluded meets the requirements of Section 13 (3) of the ETCA;
- (b) the agreement is retained in the memory of the Plaintiff’s computer system and is accessible when the need arises in accordance with the ETCA and Financial Intelligence Centre Act¹¹;
- (c) the agreement has been retrieved from the computer as a data message and complies with the requirements of Section 14 of the ETCA and
- (d) in terms of Section 14(2) of the ETCA, the agreement has remained complete and unaltered.

[16] The Plaintiff however argued that the Defendant does not deny that the agreement was entered into and in fact relies on the Take-a-Break clause therein which states as follows:

‘19 Take-a-Break

19.1 *If you have elected the “Take-a-Break” repayment plan, then you acknowledge that:*

¹⁰ Electronic Communications and Transactions Act No 25 of 2002.

¹¹ 38 of 2001.

- 19.2 You may only enjoy this benefit 12 (twelve) months after the commencement date of this Agreement; and
- 19.3 You must elect the month in which you want to “Take-a-Break” on signature of this Agreement and the month you elect will remain constant for the duration of the Agreement.¹²

[17] It is prudent to refer to the Defendant’s affidavit opposing summary judgment wherein it is stated that the Defendant ‘elected the “Take – a – Break” repayment plan and which the Applicant had failed to implement as per terms of the agreement. The Applicant ...erred by failing to apply the Take – a – Break option on the Respondent account as per the agreement...The Respondent submits that the Take – a – Break option allows the Respondent an opportunity to delay the instalment repayment.’¹³

[18] The Plaintiff referred to the matter of **Pillay v Krishna and Another**¹⁴ and argued that ‘if one person claims something from another in a court of law, then he is to satisfy the court that he is entitled to it.’¹⁵ In further amplification, the Plaintiff contended that if the Defendant elected to exercise the payment plan, it was obliged to have made an election to do so on conclusion of the agreement, and to have informed the Plaintiff of the month when the break would occur. Furthermore, the Plaintiff argued that the Defendant provided no details nor documents to support his contention that he elected the “Take-a-Break” option.

¹² Index to Pleadings, page 18.

¹³ Index to Pleadings, Affidavit Opposing Summary Judgment, para 8, page 49.

¹⁴ 1946 at 952 ‘Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.’

¹⁵ Applicant’s Heads of Argument, para 8, page 3.

[19] Additionally, the Plaintiff contended that when summons was issued, the Defendant was approximately 3 months in arrears with his monthly instalment payments. In regard to the terms of the “Take-a-Break” repayment option, the Defendant is precluded from exercising a break in payment for the duration of November 2017 to November 2018. The “Take-a-Break” option would effectively only have been available to the Defendant between November 2018 and November 2019 when the action was instituted by the Plaintiff. This would essentially only have reduced the arrears by an instalment of one month in the amount of R13 739.84. An amount of R29 000.00 would still be due and owing by the Defendant which effectively renders the Defendant in default of payment.

[20] The Defendant furthermore argued that the Plaintiff’s case hinges on the certificate of balance which contradicts the particulars of claim in relation to the balance as at a specific date. In this regard, the Defendant contended that *‘a certificate of balance is open to challenge and that the certificate of balance is “merely to assist the court in the calculation of the amount allegedly claimed as being owed” and cannot be considered as proof that the Defendant is in breach of the agreement.’*¹⁶

[21] In this regard it is apposite to refer to the terms of the agreement wherein the following is stipulated:

‘6.6 You agree that the Seller may provide a certificate from one of its managers, whose position it will not be necessary to prove, showing the

¹⁶ Respondent’s Heads of Argument, para’s 3.7 – 3.8.

amount due to the Seller and how it is calculated. Unless you disagree with such amount and are able to satisfy the court that the amount in the certificate is incorrect, you agree that the Seller may take any judgment or order it is entitled to in law based on the facts contained in the certificate, or such amount as the court may find to be due.'

[22] The Plaintiff argued that the Defendant had failed to provide any evidence to demonstrate that the arrears have been incorrectly calculated nor that the amount owing is incorrectly recorded. Furthermore, the Plaintiff contended that for the Defendant to raise a defence capable of surpassing the test for summary judgment, the Defendant would be obliged to show the court that it paid all the instalments on due date, and that there were no arrears due.

[23] The Defendant makes a bald statement that he is not in arrears. In ***NPGS Protection & Security Services CC And Another v FirstRand Bank Ltd***¹⁷ it was held that:

*'The ever increasing perception that bald averments and sketchy propositions are sufficient to stave off summary judgment is misplaced and not supported by the trite general principles developed over many decades by our courts...'*¹⁸

[24] In terms of the certificate of balance, the amount owing as at the 4th of November 2019 was in the amount of R354 117.12; the arrears being calculated as R42 908.65. It does however bear mentioning that the certificate of balance is not an original document.

¹⁷ 2020 (1) SA 494 (SCA).

¹⁸ See also *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

[25] In the **Maharaj** (*supra*) it was held that:

*'The most important elements of any application for summary judgment are the claim and the defence...summary judgment should not be refused if the defendant has no defence on the merits and he relies upon a technical defect in the application...'*¹⁹

[26] In this regard, the Defendant contended that it is required that the deponent to the supporting affidavit in the summary judgment must swear positively to the facts verifying the cause of action and the amount, if any claimed and stating that in his or her opinion there is no *bona fide* defence to the action and that the notice of intention to defend has been served solely for the purpose of delay as required in the Rule. It was mooted that Dana Leigh Swartz did not swear positively to the facts that verify the cause of action. The Defendant contended that Ms Swartz verified the cause of action, but not the facts and as such the lack of details renders the application defective. In **Liberty Group Ltd v Singh and Another**²⁰ reference was made to **W. M. Mentz & Seuns (Bpk) v Katzoke**²¹ where it was held that *'it was never the intention to give weight to purely technical defences because that would defeat the object of summary judgment proceedings.'*²²

[27] In **Phillips v Phillips and Another**²³ it was held:

¹⁹ At page 420.

²⁰ (9105/2011) [2012] ZAKZDHC 33; 2012 (5) SA 526 (KZD) (7 June 2012)

²¹ 1969 (3) SA 306 at 311 A

²² See also *Standard Bank of South Africa Ltd v Roestof* 2004 (2) 492 (WLD) at 496F – H *'...the court found that a plaintiff should not be non-suited if the papers are not technically correct due to obvious and manifest errors, causing no prejudice to the defendant...'*

²³ (292/2018) [2018] ZAECGHC 40 (22 May 2018); *Breitenbach v Fiat (Edms) Bpk* 1976 (2) SA 226 (T) 228 *'It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the bona fides of his defence, it will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously*

[39] *The test is whether on the set of facts before it, the court is able to conclude that the defence raised by the defendant is bogus or is bad in law. What falls to be determined by this court is whether, on the facts alleged by the plaintiff in its particulars of claim, it should grant summary judgment or whether the defendant's opposing affidavit discloses such a bona fide defence that it should refuse summary judgment.'*

[28] The question to be answered is whether the Respondent has fully disclosed the nature and grounds of his defence as well as the material facts upon which its defence is founded. Additionally, it is trite that the defence disclosed either in whole or in part must be good in law.

[29] It is evident that there is no dispute of fact that an agreement was entered into between the parties. There is however a dispute of fact as to whether there is an amount owing to the Plaintiff by the Defendant. This cannot be resolved on the strength of the certificate of balance relied upon by the Plaintiff as the certificate of balance is not an original document and there appears to be a discrepancy concerning the dates and possibly the amount. It is trite that where the facts are disputed the court is not permitted to determine the balance of probabilities on the papers, but must apply the **Plascon-Evans** rule²⁴ where Corbett JA held that a Respondent's version might not always be accepted:

unconvincing.'

²⁴ *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (AD) at 634H-635C.

'There may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.'

[30] There are however two exceptions to the general rule. The one is where a denial by Respondent of a fact alleged by Applicant is not such as to raise a real, genuine or *bona fide* dispute of fact.²⁵ It is now trite that a bare denial of Applicant's material averments cannot be regarded as sufficient to defeat an Applicant's right to secure relief by motion proceedings in appropriate cases.²⁶

[31] An important consideration flowing from the second exception to the Plascon-Evan's rule is whether the allegations or denials by the Respondent are so clearly untenable, improbable or unrealistic that the court is justified in rejecting such denials on the papers.²⁷ The Defendant's defence is that he is not indebted to the Plaintiff. Inasmuch as it is incumbent on the Defendant to fully disclose the nature and grounds of his defence as well as the material facts upon which its defence is founded, the court is to consider whether the Defendant's defence is so untenable, improbable or unrealistic.

Conclusion

[32] It is trite that the Defendant bears the onus of proof and is obliged to properly and fully disclose the basis of its defence in terms of Rule 14(3)(b). However,

²⁵ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 35.

²⁶ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 155 (T).

²⁷ *TruThe Verification Testing Centre CC v PSE Truth Detection CC* 1998 (2) SA 689 (W) at 699F-G, *NDPP v Geyser* [2008] 2 All SA 616 (SCA) (25 March 2008) at para 11.

as a starting point, it is crucial that the Applicant's papers must be in order. To this end, the agreement relied upon by the Plaintiff, which is a liquid document, must meet the requisite requirement of set out in the ECTA. There is no compliance affidavit or averments made in the supporting affidavit of Dana Leigh Swartz to the effect that the attached agreement complies with Section 13 and 14 of the ETCA as set out earlier in this judgment, more especially because the agreement is an unsigned document. Although there is no dispute that the parties entered into an agreement, it remains prudent for the Applicant who wishes to rely on the provisions of the agreement in order to invoke the requisite relief in terms of the Rule and the agreement, to ensure that there has been compliance.

[33] Furthermore, for reliance to be placed on the certificate of balance put up by the Plaintiff, the best evidence rule requires that a primary document is to be relied upon and not a secondary document. This is of seminal importance as the clause relied upon in the agreement stated that the Seller may provide a certificate from one of its managers, showing the amount due to the Seller and **how it is calculated** (my emphasis). In this regard the certificate of balance contains the following relevant information:

<i>'Balance as at:</i>	<i>04/11/2019</i>
<i>Account number:</i>	<i>85268668915</i>
<i>Balance currently amounts to:</i>	<i>R354 117.12</i>
<i>Arrears currently amounts to:</i>	<i>R42 908.65</i>

*Interest is 13% per annum (determined at prime currently 10% plus 3%)
From the 8th of October 2019 until settled in full.'*

[34] The certificate does not provide a breakdown of the calculation with specificity. Should a party wish to challenge the certificate as being incorrect, it would in my view, present with potential difficulties especially as the onus shifts by virtue of the following onus encapsulated in the clause, namely:

'Unless you disagree with such amount and are able to satisfy the court that the amount in the certificate is incorrect, you agree that the Seller may take any judgment or order it is entitled to in law based on the facts contained in the certificate, or such amount as the court may find to be due.'

[35] There is a clear dispute as to the amount owing or whether there is any amount at all. It therefore follows that where the facts are disputed the court is not permitted to determine the balance of probabilities on the papers. Even if there is an amount owing, after taking into account the "Take-a-Break" option, the Defendant is not able to challenge same as the certificate of balance, in my view, lacks essential details. As such, I am not satisfied that the certificate of balance complies with the terms set out in the agreement pertaining to the calculation of the amount due. This is of critical importance too in order for the court to be able to consider the *bona fides* of the Defendant's defence(s).²⁸

[36] It is incumbent for the court to emphasise that the Plaintiff would be entitled to the relief sought, provided that the application is not defective and the Plaintiff succeeds in proving that the Defendant is in arrears with the payment for more than 7

²⁸ *Absa Bank Ltd v Le Roux and Others* 2014 (1) SA 475 (WCC) at para 15.

days²⁹. It is only after this hurdle is overcome, then the onus falls to the Defendant who is obliged in terms of the Rule to properly and fully disclose the basis of its defence. As a consequence of the defects highlighted in the application, the Plaintiff's application for Summary Judgment falls to be dismissed.

[37] Even if I am wrong in this regard, it is trite that the court has an overriding discretion whether on the facts averred by the Plaintiff, it should grant summary judgment or on the basis of the defences raised by the Defendant, it should refuse it.³⁰ In light of the aforementioned finding, it is not deemed necessary to deal with any of the other defences raised by the Defendant. Therefore, the court exercises its discretion in favour of the Defendant, as the possibility exists that an injustice may be done if Summary Judgment is granted.³¹

Costs

[38] The general rule is that costs follow the event, which is a starting point. It is fundamental legal principle that the issue of costs is in the unfettered discretion of the court. Therefore, in the exercise of my judicial discretion, I am of the view that the issue of costs should stand over for later determination.

Order:

²⁹ Index to notices, para 11.1 page 17.

³⁰ In *Phillips v Phillips and Another* (supra) it was held that: '[38] ...if the court has doubt as to whether the plaintiff's case is answerable at trial such doubt should be exercised in favour of the defendant and summary judgment should be refused. The court can exercise its discretion and refuse summary judgment even if the requirements resisting summary judgment have not been met.'

³¹ *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 184H.

[39] In the result, the Court, after hearing Counsel for the parties and having considered the documents filed on record makes the following orders:

- (a) Summary judgment is refused;
- (b) The Respondent / Defendant is granted leave to defend the action;
- (c) Costs are to stand over for later determination.

P ANDREWS
Regional Magistrate: Durban