REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2013/10126

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

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In the matter between:

AFRICA BANK LIMITED Applicant

And

CATHARINA JOHANNA GREYLING Respondent

JUDGMENT

WEINER J:

1. In this matter the applicant (Africa Bank Limited) has applied for summary judgment to be granted against the respondent (Catharina Johanna Greyling).

Background

2. This matter concerns two claims arising out of two separate credit agreements concluded between the applicant and the respondent. The first was a loan agreement concluded on or about the 16th of November 2011. It was agreed that the total amount payable to the applicant would amount to R15, 571.68. The respondent was to pay this amount by way of 24 equal monthly instalments of R648.82, the first payment being due on 21 November 2011 ("the first agreement").

3. The second agreement was for a loan (relating to the acquisition of a vehicle) and was concluded on the 20th of January 2012. In terms of the agreement, the applicant paid an amount of R99,999.99 to the dealer, Hatfield VW Braamfontein. It was agreed that that the total amount payable by the respondent to the applicant would be R199,078.74, by way of 42 equal monthly instalments of R4,739.97 each ("the second agreement").

4. In terms of the Standard Terms and Conditions in both agreements, in the event of default, an acceleration clause enables the applicant to terminate the agreement, in which event the full amount outstanding would become due.

5. The respondent failed to pay the instalments in terms of both agreements. As is required in terms of Section 129 of the National Credit Act 34 of 2005 ("NCA"), notice was sent to the respondent by registered post at the chosen domicilium of the respondent. The respondent failed to respond to the notice and thus the applicant terminated the agreement.

6. As at 22 January 2013, the total amount outstanding in terms of the first agreement was R8.620.68 plus interest calculated thereon at the rate of 15,5% per annum, calculated daily and debited monthly, as from 1 January 2013 to date of final payment.

7. As at 24 January 2013, the total amount outstanding in terms of the second agreement was R114,459.18 plus interest calculated thereon at the rate of 15,5% per annum, calculated daily and debited monthly, as from 1 January 2013 to date of final payment.

8. The applicant applied for summary judgment on the 3rd of March 2014 and the 3rd of June 2014. In both instances postponements were granted at the request of the respondent. The respondent has now filed opposing papers, submitting that she has *bona fide* defences to the applicant's claims.

Defences

9. Firstly, the respondent indicates that she is not a party to the second agreement. She states that same is signed by CJ Ehlers and not her. She claims that the signature reflected on page 21 of this agreement is not her signature and she thus denies that the agreement is binding on her. She

submits that it does not accord with her signature on the first loan agreement (claim A). However, the signature is that of one CJ Ehlers on both agreements and annexures thereto, which is the same name on the defendant's payslips, which she attaches to her affidavit. The defendant failed to set this out in her affidavit resisting summary judgment and sought to rely on the fact that the agreements referred to the name "Greyling", as opposed to "Ehlers". Obviously Ehlers or Greyling was her name previously (as appears from the payslips) and/or same changed subsequently to Greyling or Ehlers. This amounts to a dishonest concealment from the court. This defence of the defendant is not *bona fide* and can be rejected.

10. It is noteworthy that the respondent does not deny that monies were loaned to her and that she is in arrears. Nor does she deny that she is in possession of a vehicle for which finance was provided.

11. Secondly, the respondent submits that she did not have any dealings with Hatfield Volkswagen Braamfontein at any stage.

12. The respondent made payments in terms of the second agreement. She is also in possession of the vehicle. The respondent would have had no reason to make payments in terms of the agreement if she did not sign same and was not making use of the vehicle. The respondent does not state which vehicle dealer she did have dealings with in order to obtain the vehicle and the court is entitled to accept that the applicant made payment to a dealer, and that the respondent received the vehicle. This defence too is not *bona fide* and should be rejected.

13. Thirdly, the respondent states that she did not receive the Section 129 (of the NCA) letter as she was not residing at the address to which it was sent. However:-

    a. On both agreements the respondent states that both her physical and postal address are 45 Hewitt Avenue, Brakpan 1540.
    b. That is where the Section 129 letters were sent.
    c. The summons was served at that address, on her mother, who confirmed that the respondent resided there.
    d. It is the address she chose in the agreements as her *domicilium citandi et executandi* and accordingly service with proof of posting and a track and trace report is sufficient. See ***Sebola and Another v Standard Bank of South Africa Ltd and Another*** 2012 (5) SA 142 (CC), as qualified by Mhlantla AJ in ***Kubyana v Standard Bank of South Africa Ltd*** 2014 (3) SA 56 (CC) at [39]:-

> "*In sum, the Act does not require a credit provider to bring the contents of a section 129 notice to the subjective attention of a consumer. Rather, delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice. Thus, a credit provider's obligation may be to make the section 129 notice available to the consumer by having it delivered to a designated address. When the consumer has elected to receive notices by way of the postal service, the credit provider's obligation to deliver generally consists of dispatching the notice by registered mail, ensuring that the notice reaches the correct branch of the Post Office for collection and ensuring that the Post Office notifies the consumer (at her designated address) that a registered item is awaiting her collection."*

The applicant has satisfied all those requirements.

14. The final defence put forward by the respondent is that the applicant granted her credit recklessly.

15. Section 80 of the NCA provides the following:-

> *"(1) A credit agreement is reckless, if at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased ...–*
>
> 1. *the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or*
> 2. *the credit provider, having conducted an assessment as required by section 81(2) entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that –*
>
> *i. the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or*
>
> *ii. entering into that credit agreement would make the consumer over-indebted."*

16. In terms of Section80(3) of the NCA, if a court declares a credit agreement to be reckless, it can either set aside the consumer's rights and obligations in whole or in part or suspend the force and effect of the credit agreement.

17. In ***SA Taxi Securitisation (Pty) Ltd v Mbatha; SA Taxi Securitisation (Pty) Ltd v Molete; SA Taxi Securitisation (Pty) Ltd v Makhoba*** 2011 (1) SALR 310 (GSJ), Levenberg AJ held that the defendants had not set out their defence of reckless credit with sufficient particularity to comply with the

requirements laid out by Colman J in the case of ***Breitenbach v Fiat SA (Edms) Bpk*** **1976 (2) SA 226** (T) 228. It was held that the following should have been presented to the court – details of the negotiations prior to the agreement, the credit application itself, the indebtedness of the defendants at the time in which the agreement was concluded as well as current indebtedness. See [55].

18. Levenberg AJ further held the following at [25] and [26]:-

> *"[25] In **Breitenbach v Fiat SA (Edms) Bpk** 1976 (2) SA 226 (T) 228 Colman J held:*
>
> > *"… Another provision of the sub-rule which causes difficulty, is the requirement that in the defendant's affidavit the nature and grounds of his defence, and the material facts relied upon therefore, are to be disclosed "fully". A literal meaning of that requirement would be to impose on a defendant the duty of setting out in its affidavit the full details of all the evidence which he proposed to rely upon in resisting the plaintiff's claim at the trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree ... that the word "fully" should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, it is proved at the trial, will constitute a defence to the plaintiff's claim. **What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides** ..."*
> >
> > *[emphasis added].*

*[26] The principles enunciated in **Breitenbach v Fiat** are no less applicable when the defendant deposing to an affidavit resisting summary judgment is relying upon defences based upon sections of the NCA. Since the enactment of the NCA, there seems to be a tendency in these Courts for defendants to make bland allegations that they are "over-indebted" or that there has been "reckless credit". These allegations, like any other allegations made in a defendant's affidavit opposing summary judgment, should not be "inherently and seriously unconvincing", should contain a reasonable amount of verificatory detail, and should not be "needlessly bald, vague or sketchy". A bald allegation that there was "reckless credit" or there is "over-indebtedness" will not suffice."*

19. The applicant alleges that a credit assessment was conducted in terms of Section 81 of the NCA before both agreements were entered into. Section 81(2) of the National Credit Act states that a credit provider must not enter into a credit agreement with a proposed consumer without first taking reasonable steps to assess:-

> *"(a) the proposed consumer's -*
>
> *(i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;*
>
> *(ii) debt re-payment history as a consumer under credit agreements;*
>
> *(iii) existing financial means, prospects and obligations; and*
>
> *(b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement."*

20. The respondent denies that she has ever seen such assessments.

21. It is submitted by the respondent that the applicant used a fictitious salary to grant the loan. According to the respondent, the salary reflected on the vehicle loan agreement differs materially from the salary that she was receiving at the time at which credit was applied for.

22. The vehicle loan agreement reflects the respondent's gross income as per payslip as R41929.73. The respondent claims that her income, at the time of entering into the loan agreement, was in fact R22872.79. She has attached proof of this to her opposing affidavit.

23. The fact that the respondent has not seen the credit assessments is of no consequence as one would not expect her to have been given copies thereof. What is relevant is that the respondent signed the documents, and in particular, signed the document containing the income and expense declaration at page 16 of the terms and conditions which were incorporated in the second agreement. She does not deny that that is her signature, but denies that the signature at the end of the document is hers. The relevant page of the document being the income and expense declaration is a separate page which she signed.

24. Having regard to the authorities set out above, it is my view that the defendant, in making allegations in her opposing affidavit is "inherently and seriously unconvincing". There is no detail as to what her expenses were at the time and why she would not be able to afford the instalments. It is for the defendant to set out, in the affidavit resisting summary judgment, that she has

a *bona fide* defence and this must be set out with the clarity and detail referred to in ***Breitenbach v Fiat*** *(supra).*

25. In my view, there is no *bona fide* defence set out by the defendant in this matter.

Accordingly, the following order is made:-

A. AD Claim A

1. The agreement is hereby terminated, and
2. The defendant is to make payment to the plaintiff:-
    2.1. In the amount of R8, 620.68,
    2.2. Interest on R8, 620.68 at the rate of 15,15 % per annum, calculated daily and debited monthly, from 23 January 2013, to date of final payment.

B. AD Claim B

1. The agreement is hereby terminated, and
2. The defendant is to make payment to the plaintiff:-
    2.1. In the amount of R114, 459.18, and
    2.2. Interest on R114, 459.18 at the rate of 15,15 % per annum, calculated daily and debited monthly, from 25 January 2013, to date of final payment.

C. Defendant is to pay the costs of suit on the attorney-client scale.

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WEINER J

Counsel for the Applicant: Adv. E. Van der Merwe
Applicant's Attorneys: Lynn Strydom Incorporated
Counsel for the Respondent:
Respondent's Attorneys: Clarinda Kugel Attorneys
Date of Hearing: 7 October 2014
Date of Judgment:7 November 2014