



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 18287/2014

Date: 18 August 2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
18/8/2014	<i>Pretorius</i>
DATE	SIGNATURE

In the matter between:

MERCEDES-BENZ FINANCIAL SERVICES SA

Applicant

and

JABULANI MAGUBANE

Respondent

JUDGMENT

PRETORIUS J.

[1] In this application for summary judgment the defendant is representing himself in resisting the application.

[2] The application for summary judgment is for: "*Return of Mercedes-Benz C200 CDI be Elegance motor vehicle with engine number*

65191331280692 and chassis number WDD2040012R263606; an order postponing the quantum portion of the Plaintiff's claim sine die; costs of suit on the scale as between attorney and client."

[3] The only relief the plaintiff requests at this stage is the return of the motor vehicle. On 26 October 2012 the applicant and respondent concluded a written instalment sale agreement in terms of which the applicant sold to the respondent a Mercedes Benz C200 CDI Elegance motor vehicle for the total amount of R531 665.37.

[4] In terms of the agreement, should the defendant fail to pay the payments on due date or fail to satisfy any of his obligations in terms of the agreement, the plaintiff, shall ,claim return and possession of the vehicle; retain all payments already made in terms of the agreement; claim payment of such damages as it will be entitled to in the circumstances; claim interest at a variable rate linked to prime, commencing at 8.50% plus 0.00% per annum as from 26 October 2012 to date of payment; claim costs on an attorney and client scale.

[5] The respondent failed to make payments in terms of the agreement and on 25 February 2014 he was in arrears of R13 124.30. On 7 February the applicant delivered a letter to the respondent by registered post, complying with section 129 of the **National Credit Act, Act 34 of 2005**. In this letter the respondent was advised of the extent

of the arrears and the applicant demanding payment of the outstanding balance. On 20 February 2014 the track and trace report shows that a first notification was sent to the respondent by the applicant which was not collected by him at the post office. According to the respondent he did not receive this letter. This fact was submitted by the defendant as a defence in opposing summary judgment. The defendant relied on **Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC)** where Mhlantla AJ held at paragraph 45:

"This is apparent from the excursus of the Act set out above, that (a) a credit provider is under no obligation to bring a s 129 notice to the subjective attention of a consumer; and (b) a consumer must respond reasonably when a credit provider has properly sought to bring such a notice to her attention. In a similar vein, and in addition to acknowledging the importance of a consumer's obligation to act reasonably, the majority judgment stated the following:

'(T)he statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible.'

(Court's emphasis)

[6] This was in relation to **Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC)** to which the respondent had referred.

[7] It is quite clear from these findings that the respondent's reliance on these two cases is misconceived as it was found in both Sebola and Kubyana that it was not necessary for the applicant to prove that the notification had come to the notice of the respondent.

[8] The averment by the respondent that the *"applicant's application is irregular and not in good faith, it contravenes the spirit and purport of the National Credit Act, in that Applicant failed to comply with provisions of section 129, 130 and 86(10) of the National Credit Act"* is dismissed. It is clear that the letter was sent to the correct address by registered post at the correct time. This is confirmed by the track and trace report.

[9] The applicant issued summons against the respondent on 5 March 2014. It was served on the respondent on 6 May 2014. On 6 June 2014 the respondent entered an appearance to defend the action. No plea was received within 20 days and the applicant applied for summary judgment on 19 June 2014, after the 20 days after the summons had been served had expired. On 14 July 2014 the respondent acknowledged that he had received the application for summary judgment.

[10] On 10 July 2014 the respondent filed and served a plea to the plaintiff's particulars of claim. On 4 August 2014, the date of the

hearing of the summary judgment, the respondent handed his affidavit resisting summary judgment to the court from the Bar, without applying for condonation for not adhering to the provisions of Rule 32 (3) (b).

[11] The respondent was adamant that the late filing of his plea should have stopped the application for summary judgment. The annexure which the respondent refers to in his affidavit sets out:

"The Applicant failed, neglected and/or refused to furnish Respondent with full particulars of its claim in the main action despite demanding by Respondent as per annexure : "JM2" .

JM2 dated 14 July 2014 reads as follows:

"I confirm that my computer software has now been upgraded to retrieve attachments of emails.

I further confirm that I am now in possession of your application for summary judgment copy contained in your email.

Please note that I will oppose that application in due course should you not tender a notice of withdrawal of the entire action at your earliest convenience.

Trust you find the above in order"

[12] and then on 29 July 2014:

"Kindly furnish me with requested particulars at your earliest convenience.

Alternatively, deliver a notice of withdrawal of your action that is pending before court. Should you require more details regarding the above please contact us at once.

Trust you find the above in order"

[13] The argument that the applicant had failed to furnish the respondent with full particulars of the claim is incorrect as the respondent himself had attached the e-mail, dated 16 July 2014, which he had received from the applicant to his opposing affidavit, which sets out that the arrears at that stage was R20 662.58.

[14] The further so-called defence that the applicant instituted action in the High Court and not in the Magistrate Court cannot be a *bona fide* defence.

[15] It is quite evident that the respondent's affidavit does not set out a *bona fide* defence as set out in **Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)** at 425 Corbett JA set out:

"Under Rule 32 (3), upon the hearing of an application for summary judgment, the defendant may either give security to the plaintiff for any judgment which may be given, or satisfy the Court by affidavit or, with the leave of the Court, by the oral evidence of himself or any other person who can swear positively to the fact that he has a bona fide defence to the


action. Such affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon therefor.” (Court’s emphasis)

The respondent’s affidavit does not set out the grounds of defence and the material facts relied on.

[16] On 4 August 2014 the court stood the application down to enable the respondent to set out his defence. On 8 August 2014 he handed heads of argument to the court, which did not set out a *bona fide* defence, but once again dealt with his argument relating to the compliance of the provisions of section 129 of the National Credit Act. The court cannot find that the defendant has set out a *bona fide* defence at all and therefore summary judgment should be granted.

[17] The court grants summary judgment as follows:

- a. The return of Mercedes-Benz C200 CDI Elegance motor vehicle with engine number 65191331280692 and chassis number WDD2040012R263606, must be returned to the applicant;
- b. The quantum portion of the Plaintiff’s claim is post postponed *sine die*;
- c. Costs of suit on the scale as between attorney and client.



Judge C Pretorius

Case number	: 18287/2014
Heard on	: 4 August 2014
For the Applicant	: Adv Jacobs
Instructed by	: Strauss Daly Inc
For the Respondent	: In Person
Date of Judgment	: August 2014