



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 60445/2018

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

16/11/18

DATE

SIGNATURE

In the matter between:

NEDBANK LIMITED

Plaintiff

and

NOELINE BONNER

Defendant

JUDGMENT

Baqwa J

- [1] This is an application for Summary Judgement arising out of a written instalment sale agreement between Motor Finance Corporation ("MFC"), a division of the plaintiff and the defendant on 28 November 2014 in terms of which MFC sold to the defendant a motor vehicle, a 2014 Toyota Hilux, a four-wheel-drive.
- [2] The defendant breached the agreement by failing to honour the payments as agreed to the extent that by 9 July 2018 she was in arrears to the tune of R104 084.85 constituting about ten (10) monthly instalments.
- [3] The plaintiff was under those circumstances entitled to cancel the agreement and it did so. In the present action the plaintiff claims the return of the vehicle.
- [4] From the documents filed it would appear that a notice in terms of section 129 of the National Credit Act 34 of 2005 was sent to the defendant but she did not respond thereto.

The Defendant's Opposition

- [5] The defendant opposes this application and she submits **inter alia** that the plaintiff's representative did not sign the agreement rendering it void or voidable. The respondent also challenges the service of the section 129 notice but as already indicated, it is clear from the registered post slip that the notice was sent to the correct domicilium address. The service also complies with the requirements as set out in **Sebola and Another v Standard Bank of SA Ltd and Another** 2012 (5) SA 142 (CC).

- [6] Regarding the issue of signing of the agreement, there is an "*acknowledgement of delivery and acceptance of terms and conditions*" which was signed by the defendant on 28 November 2014 as well as by the seller by means of an electronic signature. Further, the terms and conditions were initialled by both the defendant and the credit provider.
- [7] In the matter of **Novartis SA (Pty) Ltd v Maphil Trading. (Pty) Ltd** 2016 (1) SA 518 (SCA) it was held that the crucial question was whether the parties intended to bind themselves contractually. From the documents filed **in casu** there can be no doubt that the parties intended to conclude a contract that would be binding upon themselves.
- [8] It is of further significance in this regard that the defendant has not denied having signed the agreement as well as the terms and conditions thereof. She not only took delivery of the motor vehicle; she is still in possession thereof despite being in arrears with her payments.
- [9] What is critical in regard to performance by the plaintiff is that it complied with the terms and conditions of the agreement and the defendant has not disputed this fact.
- [10] The defendant also takes issue with the authority of the deponent to the affidavit in support of Summary Judgement in that it is not stated that the facts are within the deponent's personal knowledge or that the deponent was in personal control of all the relevant documents.

- [11] This technical defence has been raised in numerous applications for Summary Judgement. It was decisively and authoritatively pronounced upon in the matter of **Rees and Another v Investec Bank Limited** 2014 (4) SA 220 (SCA) when it was held that:

"The fact that [the deponent] did not sign the certificates of indebtedness nor was present when the suretyship agreements were concluded is of no moment. Nor should these be elevated to essential requirements, the absence of which is fatal to the respondent's case. As stated in Maharaj [Maharaj v Barclay's National Bank Ltd 1976 (1) SA 418 (A)] undue formalisation in procedural matters is always to be eschewed and must give way to commercial pragmatism. At the end of the day, whether or not to grant Summary Judgement is a fact based enquiry. Many Summary Judgement applications brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit and behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in Maharaj. It would be impossible and commercially inconvenient to require every single person involved in a transaction in question, to depose to an affidavit."

In that matter the SCA dismissed the appeal applying the pragmatic and commercial approach. The present case should be no different.

- [12] The defendant also contends that the relief sought is not competent in a Summary Judgement application. Rule 32 (1) is unambiguous in making provision for claims for delivery of specified movable property. The plaintiff in this case claims the return of the motor vehicle on the basis of the defendant's breach.

- [13] Based on the submission that the agreement was either void or voidable the defendant purports to withdraw from same and maintains that she has a counterclaim for R355 559.71 against the plaintiff. As alluded to above, the agreement was not void. Secondly, it was terminated upon service of this section 129 notice and summons. The defendant's submission is therefore not sustainable.
- [14] The fact is, once cancelled, the agreement cannot be revived in terms of sections 123 and 129 (4) (c) of the NCA.
- [15] The most glaring aspect of the defendant's purported opposition is the absence of a **bona fide** defence by the defendant who has resorted to raising technical defences. At the end of the day above all else Rule 32 requires the defendant to establish the existence of a triable issue in the affidavit resisting Summary Judgement. Failure to do so is fatal to the defendant's attempted opposition to the application.
- [16] In the result, Summary Judgement is granted as prayed in the application for Summary Judgement.



S. A. M. BAQWA

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Heard on:	05 November 2018
Judgment delivered:	05 November 2018

Appearances:

For the Plaintiff:

For the Defendant: