



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED:

Date: **8th June 2018** Signature: _____

CASE NO: 2017/44924

In the matter between:

NEDBANK LIMITED

Plaintiff

and

NTLOKO, NTOKOZE

Defendant

JUDGMENT

ADAMS J:

[1]. This is an opposed application by the plaintiff for summary judgment against the defendant. The plaintiff's cause of action is based on an instalment sale agreement ('the agreement') concluded between the parties on the 27th January 2016 in terms of which agreement the plaintiff sold to the defendant a VW Polo ('the motor vehicle') at an agreed purchase price to be paid over a period of 70 months. The defendant is in breach of the agreement in that as and

at the date on which the summons was issued herein on the 17th November 2017 he was in arrears with his monthly instalments in an amount of R30 160.23.

[2]. In his affidavit resisting summary judgment, the defendant does not dispute that he is in breach of the agreement and that, but for the fact that he is presently under debt review, the plaintiff would have been entitled to cancel the agreement as it is endeavouring to do in these proceedings. The issue which I have to adjudicate is whether the defendant is entitled to be granted leave to defend in view of the disputes between the parties as to whether or not the debt review agreement had been lawfully terminated at the instance of the plaintiff, who caused a termination notice in terms of section 86(10) of the National Credit Act 34 of 2005 ('the NCA') to be sent to the defendant. In its particulars of claim the plaintiff alleges that as and at the time of the delivery of the said notice the defendant had not yet referred the application for debt review to the Magistrates Court in terms of section 86 of the NCA. Furthermore, the plaintiff alleges that the defendant had not made any payments in terms of the proposed and / or agreed monthly instalments.

[3]. These essential allegations are disputed by the defendant, who, in particular, denies that the debt review has been cancelled or that the plaintiff is entitled to cancel the debt review. He denies that he had not paid any of the instalments pursuant to the debt review agreement.

[4]. Central to the issues between the parties is whether the defendant is entitled to a resumption of the debt review under s 86(11). I heard a number of submissions from both Counsels on behalf of the parties. It is an issue, which, in my judgment, cannot be resolved at this stage of the proceedings.

[5]. As pointed out by the author, Erasmus: Superior Court Practice, Uniform Rule of Court 32(3)(b) requires the defendant to satisfy the court by affidavit that

he has a bona fide defence to the plaintiff's claim. '*Satisfy*' does not mean '*prove*'. What the rule requires is that the defendant sets out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other.

[6]. If the affidavit lacks particularity regarding the material facts relied upon and falls short of the requirements of the subrule, the court may not be able to assess the defendant's *bona fides* but it may still, in an appropriate case, exercise its discretion in favour of the defendant if there is doubt whether the plaintiff's case is unanswerable.

[7]. In terms of subrule (5): 'The court may enter summary judgment.' The word 'may' in this subrule confers a discretion on the court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)(b), the court may nevertheless refuse to grant summary judgment if it thinks fit. The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief.

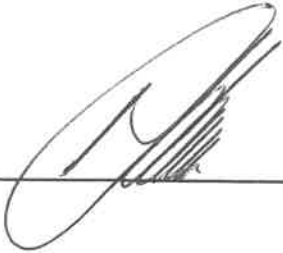
[8]. Applying these principles *in casu*, I am satisfied that in its resisting affidavit the defendant has demonstrated a *bona fide* defence on the merits of the plaintiff's claim, and it is accordingly entitled to leave to defend.

Order

Accordingly, I make the following order:-

1. The defendant is granted leave to defend the action.

2. The cost of the application for summary judgment shall be in the cause of the main action.



L ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

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| HEARD ON: | 5 th June 2018 |
| JUDGMENT DATE: | 8 th June 2018 |
| FOR THE PLAINTIFF: | Adv J Minnaar |
| INSTRUCTED BY: | DRSM Attorneys |
| FOR THE DEFENDANT: | Mr T Hadebe |
| INSTRUCTED BY: | T Hadebe Attorneys |