REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023-126064

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED: NO

DATE: 9 May 2025

SIGNATURE:

In the matter between:

ABSA BANK LIMITED **PLAINTIFF**

AND

SYDNEY THIPE MODINGWANA **DEFENDANT**

JUDGMENT

MYBURGH, AJ

INTRODUCTION:

[1] The Plaintiff in the summary judgment applicationt was ABSA Bank Ltd, with its status as a duly registered bank and its registration as an authorized Financial Credit Provider in terms of Section 40 of the National Credit Act, Act 34 of 2005 (herein after referred to as “NCA”), being common cause.

[2] On 14 May 2019, at Centurion, the Plaintiff and the Defendant entered into a written Instalment Sale Agreement, in terms whereof the Defendant purchased from the Plaintiff a 2013 Nissan Juke 1.6, properly identified in the agreement, for the purchase price of R85 652.17 (herein after referred to as “the Agreement”).

[3] In terms of the Agreement, the Defendant was further liable to pay to the Plaintiff finance charges in the amount of R44 661.81 at a variable rate of 12.57% per annum over a period of 72 months. The agreement afforded the Plaintiff the right, in the event of the Defendant failing to make any payment in terms of the Agreement or fail to comply with any other provision of the Agreement or any legal provision applicable in respect of the said Agreement, to terminate the Agreement in which event, the Plaintiff shall be entitled, subject to the provisions of Section 127 and Section 129 read with Section 130 of the NCA, to the return and possession of the motor vehicle.

[4] The Defendant failed to make the payments as required in terms of the Agreement and was in arrears with monthly instalments in the amount of R 37 983.57.

[5] The Plaintiff duly complied with the prescripts of the NCA, specifically Section 129 read with Section 130, by dispatching a letter of demand, informing the Defendant that he was in default under the Agreement and has remained in default for more than 20 business days and that the full outstanding amounts have become due, owing and payable. The Defendant was informed of his options in terms of the NCA, and insofar as he fails to make payment of the arrear amount outstanding plus interest thereon at the default interest rate within 10 days from the date of delivery of the notice, the Plaintiff will approach a Court.

[6] The Defendant did not take any steps contemplated in Section 127 of the NCA and as such the Plaintiff elected to cancel the Agreement.

[7] The Plaintiff thus claims, in this Summary Judgment, the return of the motor vehicle, with the claim for damages, if any, to be postponed *sine die*.

[8] Before this Court the Defendant represented himself.

[9] On proper consideration of the Defendant's affidavit resisting summary judgment and his argument, all of the aforementioned were common cause, save that the Defendant argued that the Agreement was "voided" on 14 May 2019, being the date on which the Agreement was, according to the Plaintiff, concluded. The Defendant submitted that *"…the Agreement voided when the unregulated "Mechanical Breakdown Warranty" appeared on the agreement under "Additional fees""*.

[10] In paragraphs 17 to 18 of the Defendant's affidavit resisting summary judgment, he states the following:

> *"The Plaintiff misrepresented the "Mechanical Breakdown Insurance" as what the Defendant was buying, when in fact it is immediately converted to an unregulated loan, namely "Mechanical Breakdown Warranty".*
>
> *The "Mechanical Breakdown Warranty" was not misrepresented as an insurance product, it is the actual unregulated lending product that masquerades as the "Mechanical Breakdown Insurance", the insurance product, the Applicant's summary is ambiguous and misleading."*

[11] The Defendant argued that the Mechanical Breakdown Warranty contravened Section 8(2) of the NCA and therefore, per paragraph 27 of his affidavit, *"…voids the credit agreement as it is based on an unlawful provision as per the NCA".*

[12] The Defendant, in argument, submitted that he is prepared to return the motor vehicle to the Plaintiff once he has received repayment of all monies paid by him to the Plaintiff, plus interest.

THE NATIONAL CREDIT ACT 34 OF 2005:

[13] The argument advanced by the Defendant should be considered against the express provisions and dictates of the NCA, and as a point of departure, Section 8(2) thereof, being the only express contravention submitted by the Defendant.

[14] Section 8(2) reads as follows:

> *(2) An agreement, irrespective of its form, is not a credit agreement if it is—*
> *(a) a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance;*
> *(b) a lease of immovable property; or*
> *(c) a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel.*

[15] Sections 8(2)(b) and 8(2)(c) find no possible application in the present matter. Section 8(2)(a) is applicable to policies of insurance and credit provided to the insured by an insurer. In any event, Section 8(2) merely regulates the status of certain agreements as not being credit agreements and does not impose any penalty of voidness. I thus find the Defendant's reliance on Section 8(2) as misplaced.

[16] Albeit not specifically argued, I consider Section 89(1) to (2) of the NCA, which reads as follows:

> *Unlawful credit agreements*
> *(1) This Section does not apply to a pawn transaction.*
> *(2) Subject to subSections (3) and (4), a credit agreement is unlawful if—*
> *(a) at the time the agreement was made the consumer was an unemancipated minor unassisted by a guardian, or was subject to—*

(i) an order of a competent court holding that person to be mentally unfit; or

(ii) an administration order referred to in Section 74(1) of the Magistrates' Courts Act, and the administrator concerned did not consent to the agreement, and the credit provider knew, or could reasonably have determined, that the consumer was the subject of such an order;

(b) the agreement results from an offer prohibited in terms of Section 74(1);

(c) it is a supplementary agreement or document prohibited by Section 91(a);

(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered; or

(e) the credit provider was subject to a notice by the National Credit Regulator or a provincial credit regulator requiring the credit provider—

(i) to stop offering, making available or extending credit under any credit agreement, or agreeing to do any of those things; or

(i) to stop offering, making available or extending credit under the particular form of credit agreement used by the credit provider,

whether or not this Act requires that credit provider to be registered, and no further appeal or review is available in respect of that notice.

[17] In terms of Section 89(5), and if a credit agreement is unlawful in terms of this Section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that the credit agreement is void as from the date the agreement was entered into.

[18] The Defendant was not a minor, and as such Section 89(2)(a) finds no application in the present matter. The agreement did not result from an offer prohibited in terms of Section 74(1) not was it a supplementary agreement or

document prohibited by Section 91(a). At the time the Plaintiff was a registered credit provider and was not subject to a notice by the National Credit Regulator or a provincial credit regulator.

[19] The agreement that forms the subject of this summary judgment was therefore not unlawful.

[20] Again, and although not specifically argued, I now turn to consider whether the specific provision, being the "*mechanical breakdown warranty*", was unlawful.

[21] Section 90 of the NCA deals with unlawful provisions of credit agreements. The argument advanced by the Defendant seems to suggest that the "*mechanical breakdown warranty*" provision was unlawful.

[22] There is simply no factual or legal basis to find that, in terms of Section 90(2)(a), its general purpose or effect was to defeat the purposes or policies of the Act, deceive the Defendant or subject the Defendant to fraudulent conduct.

[23] There is simply no factual or legal basis to find that, in terms of Section 90(2)(b), it directly or indirectly purports to waive or deprive the Defendant of a right set out in the Act, avoided the Plaintiff's obligation or duty in terms of this Act, set aside the effect of any provision of the Act or authorised the Plaintiff to do anything that is unlawful in terms of the Act or fail to do anything that is required in terms of this Act.

[24] There is no waiver of rights contemplated in Section 90(2)(c) and did not the from an offer prohibited in terms of Section 74(2) or (3), as contemplated in Section 90(2)(d). It did not make the agreement subject to a supplementary agreement prohibited by Section 91(a), contemplated in Section 90(2)(e). It did not require the Defendant to enter into a supplementary agreement, or sign a document, prohibited by Section 91(a), contemplated in Section 90(2)(f). It further did not purport to exempt the Plaintiff from any liability contemplated in Section 90(2)(g). It did not express any acknowledgement by the Defendant contemplated in Section 90(2)(h).

[25] The provision did not express an agreement to forfeit any money (Section 90(2)(i)), it did not purport to appoint the Plaintiff, or any employee or agent of the Plaintiff as an agent of the Defendant for any purpose other than those contemplated in Section 102 (Section 90(2)(j)). It did not contain an authorisation for any person acting on behalf of the Plaintiff to enter any premises for the purposes of taking possession of goods to which the credit agreement relates, or grant of a power of attorney in advance. It did not contain an undertaking to sign in advance any documentation relating to enforcement of the agreement, a consent to a pre-determined value of costs relating to enforcement of the agreement, a limitation of the credit provider's liability for an action contemplated in subparagraph (iv), or a consent to any jurisdiction (Section 90(2)(k)).

[26] The "*mechanical breakdown warranty*" did not expresses an agreement by the Defendant to deposit with the Plaintiff, or with any other person at the direction of the Plaintiff, an identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device or provide a personal identification code or number to be used to access an account (Section 90(2)(l)).

[27] The "*mechanical breakdown warranty*" did not purport to direct or authorise any person engaged in processing payments to give priority to payments for the Plaintiff over any other credit provider (Section 90(2)(m)). It did not purport to authorise or permit the Plaintiff to satisfy an obligation of the Defendant by making a charge against an asset, account, or amount deposited by or for the benefit of the Defendant, except by way of a standing debt arrangement, or to the extent permitted by Section 124 (Section 90(2)(n)).

[28] The "*mechanical breakdown warranty*" did not state or imply that the rate of interest is variable, except to the extent permitted by Section 103(4) (Section 90(2)(o)).

[29] Even on the broadest reading of the affidavit resisting summary judgment and the heads of argument filed by the Defendant, such provision in the agreement does

not fall fowl of Section 90. The inclusion of an unlawful provision, in any event, does not carry with it the automatic result of voidness of the agreement *in toto*.

[30] I therefore find that the "*mechanical breakdown warranty*" was not an unlawful provision in terms of Section 90 and did not result in the Agreement being void.

[31] The Defendant did not allege an inability to pay or over-indebtedness and as such it is accepted that the Agreement complied with Sections 79, 80 and 81 of the NCA.

[32] Lastly, the Defendant also argued that, due to the inclusion of the provision in the Agreement, the Plaintiff contravened the Prevention of Organized Crime Act 121 of 1998 Chapter 3 and was involved in money laundering. These arguments are rejected as baseless.

THE APPLICABLE TEST IN SUMMARY JUDGMENT PROCEEDINGS:

[33] In ***Maharaj v Barclays National Bank Ltd***, 1976 (1) SA 418 (A) at 4268-C Corbett JA outlined the principles and what is required from a Defendant in order to successfully oppose a claim for summary judgment as follows:

> *"All that the Court enquires into is: (a) whether the defendant had "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence."*

[34] See also in this regard ***Breitenbach vs Fiat SA (Edms) Bpk*** 1976 (2) (TPD) 226 at 229E-H and ***South African Land Arrangements CC v Nedbank Limited*** 2015 JDR 2364 (SCA) para [13].

[35] In ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*** 2009 (5) SA 1 (SCA) Navsa JA said:

> *'[31] The summary judgment procedure was not intended to "shut a defendant out from defending", unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.*
>
> *[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful applications in our courts, summary judgment proceedings can hardly continue to be described as extraordinary.'*

[36] I find, having properly considered the affidavit resisting summary judgment, the heads of argument filed by the Defendant as well as the argument presented in Court, that the Defendant had fully disclosed the nature and grounds of his defence and the material facts upon which it is founded.

[37] I interpose to state that, at the onset of the matter, I enquired from the Defendant whether he required legal assistance, which he confirmed he did not. He came over eloquently and was more than capable in expressing himself, evidenced by the fact that he drafted his own pleadings.

[38] However, and having regard to the discussion above, the defence raised by the Defendant is not good in law. There is no triable issue or sustainable defence insofar as it concerns the return of the motor vehicle. On the Defendant’s own

version, he should not retain the motor vehicle. Having made such finding it is unnecessary to make any finding on *bona fideis*.

[39] In the result I am satisfied that the Plaintiff is entitled to be awarded summary judgment in its favour insofar as the return of the motor vehicle is sought.

ORDER

[40] I therefore make the following order:

1. *Ex abudandi cautela* the cancellation of the Instalment Sale Agreement is confirmed.

2. Summary judgment is granted in favour of the Plaintiff against the Defendant, and the Defendant is directed to return the vehicle identified as a **2013 NISSAN JUKE 1.6 ACENTA** motor vehicle with engine number **H[...]** and chassis number **S[...]** to the Plaintiff.

3. The Defendant is ordered to pay the costs of this application, such costs to include the costs of counsel on Scale B.

4. The remaining issues are postponed *sine die*.

SJ MYBURGH
ACTING JUDGE OF THE HIGH COURT, PRETORIA

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