

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO. 560/2020

Date heard: 11 August 2020

Date delivered: 20 August 2020

In the matter between:

WESBANK

(A DIVISION OF FIRST RAND BANK LIMITED)

Plaintiff

and

JONATHAN DYLAN MERRINGTON

Defendant

JUDGMENT

RUGUNANAN, J

[1] This is an application for summary judgment. The plaintiff's cause of action is founded on the defendant's breach of an instalment sale agreement ("the agreement"). The agreement falls within the scope of the National Credit Act¹ and was concluded on 28 July 2018 in respect of a Toyota Avanza motor vehicle. The breach allegedly arose from the defendant's failure to make regular payments of fixed monthly instalments of R5 225, 04 that amounted to R19 027, 38 arrears as at 24 January 2020 with the full outstanding contract balance being in the amount of R228 382, 66. The plaintiff claims *inter alia* cancellation of the agreement,

¹ Act No. 34 of 2005

return of the vehicle, alternatively payment of the latter amount in the event that the vehicle is irrecoverable.

[2] The deponent to the affidavit in support of summary judgment is Maureen Vorster. She states:

- “1. I am the Operational Manager, duly employed ... by the Plaintiff in their legal department ...
2. I am duly authorised by virtue of my employment with and the position which I hold with the Plaintiff to depose to this affidavit on the Plaintiff’s behalf.
3. The facts stated herein fall within my personal knowledge and belief, unless the context indicates otherwise or appears otherwise from the context and pertains to matters over which I have direct supervision and control as a result of my employment with and the position which I hold with the Plaintiff.
4. I verify the cause of action and the amount claimed, such appearing from the Particulars of Claim.”

[3] Rule 32, in relevant part, provides:

- “(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment ...
- (2)(a) Within 15 days after delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.
- (b) The plaintiff shall, in the affidavit referred to in subrule (2)(a) verify the cause of action and the amount, if any, claimed ...”

[4] Emphasising the extraordinary and drastic nature of summary judgment proceedings, *Maharaj v Barclays National Bank*² laid down the trite principle

² 1976 (1) SA 418 (AD) at 423B-H

that a deponent other than a plaintiff must have personal knowledge of the facts before he/she can swear positively to them.³ The rationale therefor is that the grant of the remedy is premised on the supposition that the plaintiff's claim is unimpeachable and that the defence put forward by the defendant is either bad in law or bogus. To achieve this end, the deponent must either be the plaintiff himself or someone who has personal knowledge of the facts. Where the affidavit does not measure up to these requirements the defect may be cured by reference to other documents which are properly before the court, such that in deciding whether or not to grant summary judgment, the court "*at the end of the day*" looks at the matter on all the documents before it.

PERSONAL KNOWLEDGE

[5] Nowhere in her affidavit does the deponent swear positively to the facts. While conceding technical non-compliance with the rule Ms Masiza who appeared for the plaintiff, urged that the deponent bases her assertion of personal knowledge on "matters" over which she has direct supervision and control in the course of her employment.⁴ To my mind this source of personal knowledge, in its sweep, is insufficient where there is no pertinent reference to the defendant's account or payment history, nor any indication of precisely what documents were perused to acquire such knowledge. In its breadth the deponent's averment as to source of personal knowledge is insufficient. It is tantamount to a mere rubber stamping of the amount claimed and the cause of action pleaded in the particulars of claim. Regard to the above, the deponent's designation as Operational Manager does, moreover, not assist in attributing personal knowledge.

RELEVANT DOCUMENTS

³ See also Erasmus, Superior Court Practice, Vol 2 at D1-394, [Service 10, 2019]

⁴ See **Wesbank v Hart** (4015/2015) [2015] ZAECHC 131 (10 November 2015) at paragraph [10] wherein reference is made to **Shackleton Credit Management v Microzone Trading 88 2010 (5) SA 112 (KZP)** which referred to "reasons connected with a person's employment that would result in their acquiring sufficient personal knowledge of the facts to depose to an affidavit ...".

[6] It is alleged in paragraph 4 of the particulars of claim that the agreement attached thereto was retrieved from the plaintiff's computer as a data message and that "[it] complies with the requirements of section 14 of the *Electronic Communications and Transmissions Act No. 25 of 2002*." The legislation is inaccurately pleaded, and although it is properly acknowledged as the Electronic Communications and Transactions Act, it is unnecessary to decide whether the latter could be of assistance to the plaintiff. The deponent unthinkingly purported to confirm the inaccurate content of a carelessly drafted particulars of claim. Otherwise stated, the particulars were not read on an informed basis and this court is left without the assurance that she could indeed have verified the cause of action to render the plaintiff's claim unimpeachable. Improper attention to the drafting of particulars of claim and the supporting affidavit, as in this case, should not leave the plaintiff surprised if the application is refused in the exercise of the court's discretion.⁵ In the circumstances I am of the view that the present is not a case when at the end of the day, if all the documents are considered as a whole, one can be satisfied that the deponent to the supporting affidavit has the requisite personal knowledge (*Maharaj supra*).

COSTS

[7] In the normal course of events costs ordinarily follow the result. I am mindful that I may have adopted an unduly stringent approach to the supporting affidavit and it is conceivable that it may be established at a later stage that the deponent did in fact have the personal knowledge that she claimed. I think the most equitable order as to costs would be that they be reserved for determination by the trial court. That court would be better appraised of the true facts and would be better suited to make an appropriate order as to the costs of the application for summary judgment (*Meddent Medical Scheme v Avalon Brokers (Pty) Ltd*⁶).

[8] I accordingly make the following order:

⁵ Erasmus *op cit* at D1-402A [Service 3, 2016]

⁶ 1995 (4) SA 862 (D&CLD)

- (a) The application for summary judgment is refused;
- (b) The defendant is granted leave to defend;
- (c) The costs of the application are reserved for decision by the trial court.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Ms A. N. Masiza instructed by Joubert Galpin Searle, Port Elizabeth, (Ref: Ms. S. Ahmed/Wes3/1153), Tel: 041 396 9200), Email: shakiraa@jgs.co.za

For the Defendant: In person, Tel: 072 9175 839, Email: jonathanmerrington@ymail.com

This judgment was handed down electronically by circulation to the parties' legal representatives by email and release on the SAFLII website. The date and time for hand-down is deemed to be 10H30 on 20 August 2020.