

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



Case number: 28366/2015

Date: 31/7/15

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
31/7/2015	<i>[Signature]</i>
DATE	SIGNATURE

In the matter between:

FIRSTRAND BANK LTD t/a WESBANK

Plaintiff/Applicant

And

PRESCISION SA 050207 CC

Defendant/Respondent

JUDGMENT

PRETORIUS J.

[1] In this opposed summary judgment application the respondent relies solely on points *in limine*. Summons was served on the respondent on

6 May 2015. The cause of action is that the applicant and respondent had entered into a written instalment sale agreement on 2 October 2013 in terms of which the applicant sold to the respondent a vehicle for an amount of R336 789.92. The respondent failed to make the requisite instalment payments as agreed, thereby breaching the agreement. On 23 March 2015 the respondent was in arrears of R229 948.21.

- [2] The respondent relied on three points *in limine*, that the verifying affidavit was not properly commissioned; lack of personal knowledge by the deponent to the verifying affidavit and not meeting the requirements of section 129 of the **National Credit Act, 34 of 2005**, (“NCA”).

LACK OF VERIFYING AFFIDAVIT:

- [3] According to the respondent the verifying affidavit deposed to by Mr Fahim Ebrahim does not comply with the requirements for the making of an affidavit as required by Regulation 3(1) of the Regulation for the Administering of an Oath or Affirmation (made in terms of the **Justices of the Peace and Commissioners of Oaths Act, 16 of 1963**).

- [4] It is set out at the end of the affidavit by Mr Ebrahim:

“SIGNED and SWORN TO at FAIRLANDS on this the 3rd day of June 2015 by the deponent who has stated that:

- a. He knows and understands the contents hereof and that same are true and correct.
- b. He has no objection to taking the prescribed oath.
- c. He regards the prescribed oath as binding on her

conscience.”

- [5] It is clear that the reference to **Nkondo v Minister of Police and Another 1980(2) SA 362 (O)** by the respondent, is not applicable as in the present instance it is stated that the affidavit was “signed and sworn to”, whereas in the Nkondo case there was no reference that the deponent had “sworn to” the veracity of the affidavit.
- [6] I find that the applicant had sworn to the affidavit and complied with the provisions of Regulation 3(1)(*supra*) and therefor has discharged the onus by showing on a balance of probabilities that he has placed evidence in a proper form before the court as set out in the Nkondo case.

LACK OF PERSONAL KNOWLEDGE BY THE DEPONENT TO THE VERIFYING AFFIDAVIT:

- [7] According to the respondent the verifying affidavit does not confirm the personal knowledge of the deponent of the facts upon which the action is based. The deponent set out in the affidavit:

“1.3 I have regard to the account history on our Computerised System which shows the complete up to date history of the account since the credit agreement was entered into. From the account history I have access to information such as the outstanding balance, interest, costs, the Defendant’s full payment history on the account, the capital amount as well as the amount in arrears.

1.4 The contents of this affidavit fall within my personal knowledge and are true and correct.”

[8] The argument is that the deponent does not specifically mention knowledge of the letter of demand which was sent in terms of section 129 of the National Credit Act and that all reference to the letter in the summons is hearsay and should be ignored.

[9] I am of the view that the decision in **Standard Bank of South Africa Limited v Secatsa Investments (Pty) Ltd and Others 1999(4) SA 229 (C)** and **Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another 2009(3) SA 384 (T)** are correct and applicable in the present instance.

[10] Satchwell J held in the **Firststrand** case (*supra*) at page 391:

*“In the present case the deponent does not ask the court to rely inferences to be drawn. **He states that the facts contained in the affidavit fall within his personal knowledge and are based on records and documents available to him. He is indeed pre-eminently the person who would have knowledge of the relevant facts.** It may well be that the ‘relationship managers’ with whom the second respondent dealt created or accessed the same records and documentation to which the deponent had access and upon which he relied in deposing to the affidavit.”* (Court’s emphasis)

[11] Van Heerden AJ found in the Carl Beck Estates case (*supra*) at page 235:

*“It is clear from the case law that first hand knowledge of every fact which goes to make up the plaintiff’s cause of action is not required and that, **where the plaintiff is a corporate entity,***

the deponent may well legitimately rely for his or her personal knowledge of at least certain of the relevant facts and his or her ability to swear positively to such facts, on records in the company's possession." (Court's emphasis)

[12] It is quite clear from Mr Ebrahim's affidavit that he had all the information pertaining to this case available when he deposed to the affidavit. It is not necessary in the modern era of computers for Mr Ebrahim to have had personal interaction with the respondent. He has all the necessary information at his disposal to depose to the respondent's indebtedness to the applicant. This point *in limine* has to be dismissed.

THE REQUIREMENTS OF SECTION 129 OF THE NATIONAL CREDIT ACT:

[13] The summons was served on 6 May 2015 and the application for summary judgment was served on 10 June 2015. The section 129 letter was attached to the summons, so the respondent had received the letter, at least, on 6 May 2015. This application was heard on 27 July 2015. The respondent had at least eleven weeks after receiving the summons and the letter to apply for business rescue if it wished to do so. Nothing had been done by the respondent up to the hearing of the application for summary judgment.

[14] Apart from the letter attached to the summons the applicant had mailed a letter in terms of section 129(1)(a) of the National Credit Act to the respondent's chosen *domicilium citandi et executandi* by registered mail. A track and trace report was furnished to show that

the letter had been collected at the Post Office.

[15] Due to the fact that counsel for the respondent conceded during argument that the respondent had received the letter, albeit attached to the summons, I find that this point *in limine* cannot succeed. It would serve no purpose to dispatch the notice in terms of section 129 a second time, as conceded by counsel for the respondent, as form should not be placed above substance.

[16] In the opposing affidavit the respondent set out:

"I am advised that, in light of the point in limine as raised by the Defendant, it is not necessary to provide the nature and grounds of the Defendant's bona fide defence against the claim of the Plaintiff."

[17] Therefor the court cannot find on a balance of probabilities that the respondent has a *bona fide* defence. I find that the applicant has proved on a balance of probabilities that summary judgment should be granted, as all the points *in limine* should be dismissed for the reasons set out in the judgment.

[18] At this stage the applicant is only requesting the court to grant an order directing the respondent to return the vehicle in question, as well as the cancellation of the agreement and costs on the scale between attorney and client.

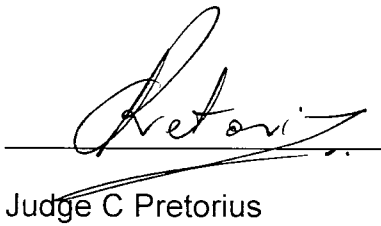
[19] I make the following order:

Summary judgment is granted as follows:

1. The cancellation of the credit agreement is confirmed;
2. The respondent/defendant is ordered to return the vehicle, a 2013

NISSAN QASHQAI 1.6 VISIA with chassis no. JJNFAAJ10Z2707917 and engine no. HR16312719C to the applicant/plaintiff and the Sheriff of the High Court in whose area of jurisdiction the vehicle is found is authorised to attach and remove it and deliver it to the applicant/plaintiff.

3. The respondent/defendant is ordered to pay the applicant/plaintiff's taxed costs of suit on the scale as between attorney and client.



Judge C Pretorius

Case number : 28366/2015

Appeal heard on : 27 July 2015

For the Applicant : Adv. JH Groenewald

Instructed by : Bruce Loxton Inc.

For the Respondent : Adv. JAY May

Instructed by : Lampen Attorneys

Date of Judgment : 31/07/2015.