IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 1890/2014

In the matter between:

TOYOTA FINANCIAL SERVICES (SOUTH AFRICA) (PTY) LTD Plaintiff

And

SARAH KATHLEEN FREDERICKS Defendant

HEARD ON: 21 AUGUST 2014

JUDGMENT BY: E.K. TSATSI, AJ

DELIVERED ON: 18 SEPTEMBER 2014

INTRODUCTION:

[1] This is an opposed summary judgment against the defendant for the:

(a) Cancellation of the agreement;

(b) an order in terms of which the 2012 Toyota Hilux 3OD/4D Raider Xtra Cab P/U with engine number

IKD…… and chassis number AHT………. be delivered by the defendant to the plaintiff, alternatively that the Sheriff takes possession of the said vehicle from whichever position it may be found, and place the plaintiff in possession thereof;

(c) Damages be postponed *sine die* until the return of the vehicle to the plaintiff to determine the value thereof and the amount due;

(d) Leave to approach the Honourable Court on the same papers supplemented by a damages affidavit;

(e) Interest on the same amount of damages, to be determined at the applicable interest;

(f) Costs of the action.

1.1 The defendant applied for condonation for the late filing of the replying affidavit.

FACTS

[2] This application was based on an instalment sale agreement concluded on or about 14 May 2012, between the plaintiff and the defendant. The said agreement falls within the scope of the National Credit Act, Act 34 of 2005 and was identified and categorised as a credit agreement. A copy of the agreement was attached to the summons as annexure "A". The principal debt amounted to R335 661.39 and finance charges amounted to R149 032.52.

[3] The defendant breached the agreement by not paying certain instalments. The breach was common cause between the parties. The plaintiff's claim arose from the said breach. The plaintiff alleged that the defendant has fallen into arrears at the time when summons were issued in the amount of R25 030.78 and outstanding balance in the amount of R289 051.55.

[4] The defendant opposed the application on the following grounds:

4.1 Non-compliance by the plaintiff with the provisions of section 129 of the National Credit Act;

4.2 The challenge of Yolande Theresa Schoeman, the specialist collection manager in the employ of the plaintiff, to depose to the affidavit in support of the application;

4.3 Non-compliance with Uniform Rules of Court by the plaintiff, the plaintiff failed to state "where, when and by whom the contract was concluded";

[5] Ms Yolande Theresa Schoeman described herself as the specialised collection manager of the applicant. She alleged in her affidavit that she had possession and control of all the applicant's records accounts and other documents relevant to the claims forming the subject matter of the action instituted against the defendant. She further indicated that she had acquired personal knowledge of the defendant's financial standing. She further indicated that she could

swear positively to the facts alleged and amounts claimed.

ISSUES

[6] The issue in this application is whether or not the defendant has a *bona fide* defence to the plaintiff's application for the return of the motor vehicle by way of summary judgment.

SUBMISSIONS

[7] The plaintiff opposed the defendant's application for late filing of her replying affidavit. It was submitted on behalf of the plaintiff that defendant's replying affidavit was vague, sketchy and bad. Such affidavit did not set out a *bona fide* defence. It was further submitted on behalf of the plaintiff that the National Credit Act does not envisage that a consumer may claim to be over - indebted whilst at the same time retaining possession of the goods which formed the subject matter of the agreement. Such goods should be sold to reduce the defendant's indebtedness – **Standard Bank of South Africa Ltd v Panayiotts** 2009 (3) SA 363 (W) at 375.

[8] The defendant's counsel argued that the plaintiff was prohibited from enforcing the agreement if the plaintiff failed to comply with section 129 of the National Credit Act. It was further submitted on behalf of the defendant that the court was not called upon to determine whether the defendant's defences which were raised would hold water at the time of

the trial. The court must simply determine whether the defendant raised a defence which if proved at trial will constitute a *bona fide* defence to the plaintiff's claim – **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 470 (O) at 467 – 477. The defendant was opposed to the amount that the plaintiff charged her. However counsel argued that there was dispute regarding the amount.

THE LAW

[9] In **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) at 426A – E it was stated that one of the ways in which a defendant may successfully oppose a claim for summary judgment, was by satisfying the court by affidavit that he had a *bona fide* defence to the claim. Here the defence was based upon facts in the sense that material facts alleged by the plaintiff in his summons or combined summons were disputed. In addition if new facts were alleged constituting a defence, the court does not attempt to determine those issues or to determine whether or not there was a balance of probabilities in favour of the one party or the other. All that the court enquired into was:

(a) Whether the defendant has "fully" disclosed the nature and grounds of her defence and the material facts upon which it was founded; and

(b) Whether on the facts so disclosed the defendant appeared to have, as to whether the whole or part of the claim, a defence which was 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 defendant needed not to deal exhaustively with the facts and the evidence relied upon to substantiate them, she must at least disclose her defence and the material facts upon which it was based with sufficient particularity and completeness to enable the court to decide whether the affidavit disclosed a *bona fide* defence. (See: **Herb Dyers (Pty) Ltd v Mahomed and Another** 1965 (1) SA 31 (T).)

[10] Section 129 of the National Credit Act provides that:

"**129 Required procedures before debt enforcement**

(1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombudsman with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and

(ii) meeting any further requirements set out in section 130."

[11] The summary judgment is regarded as drastic and should only be granted upon the satisfaction of the requirements of Rule 32(2). The Rule provides that:

> "(2) The plaintiff shall… deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay."

[12] Section 23 of the Uniform Rules of Court provides that:

> "Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing…"

<u>APPLICATION OF THE LAW</u>

[13] The defendant was required, in asserting that she had a *bona fide* defence, to fully disclose the nature and grounds of the defence and the material facts relied upon therefore.

This was lacking in the defendant's affidavit. The defendant has instead listed procedural objections that she raised as I have indicated above. It was not enough for this defendant just to list procedural objections, because once stripped off these objections, there was concern if the defence raised was *bona fide*. This was insufficient and fails to comply with the rules.

[14] As far as the complaint that there was non-compliance with section 129 of the National Credit Act, was concerned it was clear from the court documents attached to the summons that a registered letter was sent to the defendant's chosen *domicilium citandi et executandi* in terms of the agreement attached to the summons. The fact that the defendant may not have received the notice, does not mean that the plaintiff has not complied with its obligations. As far as cancellation or termination of the agreement was concerned, counsel for the plaintiff submitted that the registered letter stated that failure by the defendant to respond within 10 days will result in plaintiff approaching the court. The purpose of approaching the court would be to enforce the agreement. Enforcing agreement meant cancellation of the said agreement.

[15] Since the decision of **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) the authority of the affidavits in support of summary judgments were discussed. There were decisions which have relaxed the requirement of personal knowledge and those which still persisted in the deponent's

personal knowledge. In **Shackle ton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another** 2010 (5) SA 112 (KZP) and **Firstrand Bank Ltd v Beyer** 2011 (1) SA 196 (GNP) the court found that a deponent who acquired his knowledge from documents to which he had access cannot swear positively to the facts.

[16] In **Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd and Others** 1999 (4) SA 229 (C) a different view was held and the court held as follows:

> "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."

The preceding view was supported by Satchwell J in **Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another** 2009 (3) SA 384 (T) at 391F – G. Technology has made it easy for people to interact with each other without meeting face to face. Nowadays transactions are made electronically. People are able to hold teleconferences and meetings whilst they are geographically apart.

[17] In light of the preceding and in my view, Ms Yolande Theresa Schoeman was well qualified to depose to the summary judgment affidavit. She had acquired personal knowledge of

the defendant's financial standing in the ordinary course of her duties. In addition, she stated that she could swear positively to the facts alleged and the amounts claimed in the plaintiff's particulars of claim. To hold otherwise will be to frustrate the commercial goods of the plaintiff's business. This view was also expressed in **Stamford Sales & Distribution (Pty) Limited v Metraclark (Pty) Limited** (676/2013) [2014] ZASCA 79 (29 May 2014) quoting **Maharaj**, *supra*, where it was said that:

> "One of the aids to ensure that the claim of the plaintiff is unimpeachable and that the defendant's defence is bogus or bad in law is that the verifying affidavit should be deposed to by the plaintiff or by someone who has personal knowledge of the facts. If however the affidavit fails to measure up to these requirements the defect may nevertheless be cured by reference to other documents relating to the proceedings which are properly before the court….. The principle is that, in deciding whether or not to grant summary judgment, the court looks at the matter 'at the end of the day' on all the documents that are properly before it….."

[18] The appeal court in **Stamford Sales**, *supra*, dealt with the issue also in **Dean Gillian Rees v Investec Bank Limited** (330/13) [2014] ZASCA 38 (28 March 2014), said the following in para [15]:

> "As stated in *Maharaj*, 'undue formalism 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 judgment is a fact-based enquiry. Many summary

> judgment applications are 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 on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in *Maharaj*."

The court went on and said that:

> "….. as long as there is direct knowledge of the material facts underlying the cause of action, which may be gained by a person who has possession of all of the documentation is sufficient."

[19] Regarding the defendant's submission that the plaintiff did not comply with the Uniform Rules of Court, I am of the view that in that case the defendant should have excepted to the plaintiff's particulars of claim, which she failed to do.

[20] The defendant was not paying the monthly instalments and at the same time she had possession of the motor vehicle. The plaintiff reserved ownership of the said vehicle. I am accordingly satisfied that the defendant failed to disclose a *bona fide* defence to the claim of the plaintiff.

ORDER

[21] The following order is made:

Summary judgment is granted in favour of the plaintiff against the defendant for:

21.1 Cancellation of the agreement between the parties;

21.2 Return of the 2012 Toyota Hilux 3D/4D RAIDER XTRA CAB P/U with ENGINE NUMBER: IKD…………… and CHASSIS NUMBER: AHTG…………….., failing which the Sheriff is directed and authorised to attach the vehicle wherever it may be found and to place the plaintiff in possession thereof.

21.3 Damages postponed *sine die* until the return of the vehicle to the plaintiff to determine the value thereof and the amount due.

21.4 Leave to approach the court on the same papers duly supplemented by a damages affidavit after possession of the vehicle, evaluation thereof and calculation of damages.

21.5 Interest on the same amount of damages to be determined at the applicable interest rate in terms of the agreement.

21.6 The defendant is granted condonation for filing her replying affidavit late.

21.7 The defendant is to pay the costs of this action.

E.K. TSATSI, AJ

On behalf of plaintiff: Adv S.J. Reinders

	Instructed by: Kutlwana Mohaleroe c/o Symington & De Kok BLOEMFONTEIN
On behalf of defendant:	Adv R van der Merwe Instructed by: Claude Reid Attorneys BLOEMFONTEIN

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