IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE – MTHATHA

Case No.:	**918/2013**
Date Heard:	**8 August 2013**
Date Delivered:	**22 August2013**

In the matter between :

MERCEDES BENZ FINANCIAL SERVICES **Plaintiff**

and

RHUDULU'S TRANSPORT CC **Defendant**

JUDGMENT

BROOKS A J

[1] This is an application for summary judgment brought by the plaintiff against the defendant for an order confirming the termination by the plaintiff of a contract purchase agreement (the agreement) entered into with the defendant in respect of a Mercedes Benz 1840LS/36 AXOR2 motor vehicle with engine number 45793700160002 and vehicle identification number WDB9440326L390115 (the vehicle); directing the defendant to return the vehicle to the plaintiff and for costs on the attorney and client scale. The plaintiff is a company and the defendant is a close corporation, both duly incorporated and registered in accordance with the company laws of the Republic of South Africa.

[2] The combined summons was served on 25th April 2013. Notice of appearance to defend the action was served and filed on 2nd May 2013. On 15th May 2013 the plaintiff served and filed the application for summary judgment, identifying that such application would be moved on 6th June 2013. In the circumstances, the time period requirements set out in Rule 32 (2) of the Uniform Rules of Court have been complied with.

[3] In support of the application for summary judgment, the plaintiff relies upon the affidavit of one **Kavitha Kaylaser**, who describes herself as a manager of the plaintiff who has in her possession and under her control all the files and records of the plaintiff pertaining to the agreement and with which she has familiarised herself during the course of the plaintiff's dealings with the defendant. Accordingly, she states that the facts deposed to by her fall within her personal knowledge. I am satisfied that the deponent is competent to depose to the prerequisite affidavit required by Rule 32 (2) of the Uniform Rules of Court (**Maharaj v Barclays National Bank Ltd**. 1976 (1) SA 418 (A) at 424 A to D). The defendant does not challenge the authority of the deponent directly, but the enquiry is indirectly relevant to the assessment of the merits of the defendant's defence as expressed in the opposing affidavit. The further content of the affidavit relied upon by the plaintiff complies with the requirement of the sub-rule.

[4] On 6th June 2013 there was an appearance on behalf of both parties and by agreement the matter was postponed to 4th July 2013 with the issue of wasted costs being reserved. On 4th July 2013, again by agreement, the matter was further postponed to 18th July 2013 with a directive to the defendant to file its opposing affidavit before that date to avoid summary judgment being taken. On this occasion, the defendant agreed to pay the

wasted costs occasioned by the postponement. The opposing affidavit was served and filed on 16th July 2013. On 18th July 2013, the matter was postponed to 8th August 2013 and the issue of liability for payment of the wasted costs was again reserved.

[5] As required by the provisions of Rule of Practice 8 (b) of the Joint Rules of Practice for the High Courts of the Eastern Cape issued by the Judge President, heads of argument were filed timeously on behalf of both parties to enable the matter to be heard.

[6] What is required by the defendant who has elected to place an opposing affidavit before the Court is that the affidavit contains sufficient disclosure by the defendant of the nature and grounds of its defence and the facts upon which it is founded, and that the defence so disclosed is both *bona fide* and good in law. (**Joob Joob Investments (Pty) Ltd. v Stocks Mavundla Zek Joint Venture** 2009 (5) SA 1 (SCA) at 11 G to 12 D). The defendant's affidavit is deposed to by the sole member of the defendant close corporation. The kernel of the defences which it purports to raise are to be found in the following paragraphs :

"3.

3.1

I am aware of the instant proceedings and contents thereof have been interpreted to me by defendant's legal representatives. This is an action seeking to enforce the terms of the credit agreement between the plaintiff and the defendant.

3.2

In terms of paragraph 5 of the particulars of claim it is averred that the defendant is in breach of the terms of the credit agreement and as a result of that breach the defendant was in arrears in the amount of R658 956.84 as on 04th February 2013. In clear terms the defendant is in default in the amount mentioned above.

3.3

Paragraph 7 states that the plaintiff had complied with the provisions of Section 129 of the National Credit Act in that a letter had been delivered to the defendant by registered post on 13th February 2013. In terms of the letter aforesaid, the plaintiff demanded an amount of R7 403.78 for which the account was in default of.

3.4

The court must be reminded that on 04th February 2013 the account was in arrears with R658 956.84 according to the particulars of claim. It is my submission that for the default aforesaid, it does not appear from the record that the defendant was notified in terms of the provisions of Section 129 of the Act. The plaintiff had never put to the attention of the defendant that he is default of R658 956.84 and I submit that, it is for that default that plaintiff seeks an order in the manner it does. It is my submission that the plaintiff has prematurely instituted the instant action. There is no cause of action.

4.

4.1

On the second level, I submit that I had never received a letter contemplated by the provisions of Section 129 of the Act. I saw it for the first time when I received the summons. After settlement negotiations have aborted at the instance of the plaintiff, I decided to make enquiry about the so called Section 129 letter at Msobomvu post office, Butterworth." (sic)

The defence raised in respect of the plaintiff's failure to comply with the provisions of s129 of the National Credit Act 34 of 2005 (the NCA) receives extensive further attention in the opposing affidavit, but no amplification in substance.

[6] In the assessment of the nature of the defences raised, the facts relied upon, the legal sufficiency thereof and whether the defendant raises them in a *bona fide* manner, the content of the opposing affidavit must be held up against a consideration of the allegations made in the summons upon which the plaintiff relies. Paragraph 7 of the particulars of claim alleges that in compliance with the provisions of s129, s130 and s131 of the NCA, the plaintiff caused a written notice to be dispatched to the defendant at its *domicilium citandi et executandi* by way of pre-paid registered post. The letter was prompted by a breach of the material terms of the agreement in the form of non-payment by the defendant of the instalments due. It is common cause that such a letter was dispatched but not retrieved by the defendant from the relevant post office. A copy of the agreement is annexed to the particulars of claim. The first page thereof is immediately relevant in identifying the agreement in its preamble as not subject to the provisions of the NCA. (Annexure “A1”). The terms of agreement find expression in the third section, which is headed “Finance Agreement (outside the provisions of the National Credit Act 34 of 2005)” (Annexure “A3”). In his heads of argument, Mr **Immerman**, who appeared on behalf of the plaintiff, submits that the agreement is not subject to the provisions of the NCA because it is an agreement between the plaintiff and a juristic person as referred to in the provisions of s4 (1) (a) (i) of the NCA, alternatively, in the event that the non-disclosure of the defendant’s asset value or annual turnover excludes this finding, that the agreement is a large agreement as described in the provisions of s9 (4) of the NCA which exists between the plaintiff and a juristic person and accordingly the applicability of the provisions of the NCA is excluded by s4 (1) (b) of the NCA.

[7] The value of the defendant’s asset base is not disclosed. Nor is its annual turnover. The principal debt is disclosed by the content of the agreement to be R987 368.40, an

amount which characterises the agreement as a large agreement as described in s9 (4) of the NCA. Accordingly, whatever the asset value or annual turnover of the defendant, the provisions of the NCA do not apply to the agreement. A person in the position of the defendant cannot claim that it is entitled to have received a notice in terms of s129 of the NCA. (**Firstrand Bank Ltd. v Carl Beck Estates (Pty) Ltd. & Another** 2009 (3) SA 384 (T) at 388 F to 389 E and at 391 E.) I am of the view that the fact that the plaintiff erroneously purported to send out a letter by pre-paid registered post to the defendant in terms of s129 of the NCA cannot alter the position. In any event, the passage of the defendant's opposing affidavit that I have quoted makes reference to an attempt at settlement negotiations with the plaintiff which were aborted and which prompted the deponent to then make enquiry about the letter at the relevant post office. Although not required by statute, it is apparent that the defendant make use of an opportunity to do something about the indebtedness specifically with an eye on the provisions of s129 of the NCA. It follows that this defence is not good in law and cannot defeat summary judgment proceedings.

[8] The defendant's opposing affidavit makes no attempt to raise a defence on the merits of the plaintiff's claim. The particulars of claim annex a certificate of indebtedness produced in terms of the agreement by the manager of the plaintiff's legal department reflecting the current total value outstanding due and payable by the defendant to be R658 956.84. (Annexure "B"). The allegation is made that the defendant has breached the terms of the agreement by not making the agreed regular repayments. The agreement provides that in these circumstances the plaintiff shall be entitled to cancel the agreement, obtain return of the vehicle, retain all payments made and claim and recover the payment of such damages as it may be entitled to recover (Clause 13). The production of the certificate is authorised (Clause

18.3). The plaintiff is entitled to claim costs on an attorney and client scale (Clause 17.3). All that the defendant alleges in response to this reality is set out in the paragraphs of the affidavit already quoted. If anything, the content thereof serves to confirm the circumstances of default in which the defendant finds itself. It follows that no valid defence is raised on the merits.

[9] On all the information before the Court, the plaintiff is entitled to its summary judgment. There is no reason why the wasted costs should not follow the result. I make the following order :

1. The application for summary judgment is granted in the following terms :

   (a) the termination of the agreement entered into between the parties on 23 August 2010 is confirmed;

   (b) the defendant is directed to return to the plaintiff the 2010 Mercedes Benz 1840LS/36 AXOR2 motor vehicle with engine number 45793700160002 and vehicle identification number WDB9440326L390115;

   (c) the defendant is directed to pay the costs of suit on the scale as between attorney and client, such costs to include the reserved costs of 6 June 2013 and 18 July 2013, respectively.

R W N BROOKS
JUDGE OF THE HIGH COURT (Acting)

Appearances:

For Plaintiff : *Mr Immerman of Hughes, Chisholm & Airey Inc., Mthatha*

For Defendant : *Mr Zono of A S Zono & Associates, Mthatha*