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IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 1398/2023

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant
(Registration Number 1962/000738/06)

And

DANIEL JACOBUS DE WAAL Respondent

Coram: Lever J

JUDGMENT

Lever J

1. This is an application for summary judgment under the amended Rule 32(1), (2) and (3) that came into effect on the 31May 2019. The applicant has three claims for which it now seeks summary judgment. The first claim is in respect of an overdraft facility. The remaining two claims are for instalment sale agreements involving what can be described for present purposes as vehicles or implements intended primarily for agricultural use.
2. The relevant underlying written agreements for each of these claims are annexed to the Particulars of Claim served on the respondent. None of these written agreements are disputed.
3. In respect of both of the instalment sale agreements the relief set out in the prayers included in the Particulars of Claim are: Confirmation of cancellation of the agreement; Return of the specified goods in the respective claims; Retention of the respective amounts paid by the respondent to the applicant in respect of each of the two relevant agreements; Leave to approach the court on the same papers, supplemented if necessary, to claim such damages as it may be able to prove pursuant to the sale of the relevant goods; and Costs on an attorney and client scale.
4. Mr Tsangarakis, who appeared for the applicant in this matter, indicated at the oral hearing of this matter that, at this stage of the proceedings, the

applicant was not seeking the alternative relief sought in the Particulars of Claim for both instalment sale agreements.

5. The respondent has not disputed the underlying facts in the matter. In my view, there is no substantive defence based on the underlying facts. If one were to characterise the issues raised by the respondent in both the plea and the opposing affidavit filed on his behalf, the respondent has marshalled every technical defence that could conceivably be raised in the circumstances, with little else.
6. It is useful as a starting point to set out the common cause and undisputed facts. These facts are as follows: The conclusion and terms of the overdraft facility agreement; That applicant advanced and made available to the respondent the overdraft facility of R715 000.00; That from the 30 November 2020 the credit limit available under the overdraft facility would reduce to an amount of R260 000.00; That the overdraft would be reviewed annually; The conclusion of the first instalment sale agreement, the written terms of such agreement, and the subject matter thereof; The conclusion of the second instalment sale agreement, the written terms of such agreement, and the subject matter thereof; That the applicant delivered the subject matter of both instalment sale agreements to the respondent; That in terms of the respective written instalment sale agreements, the applicant remained the owner of the respective goods until the full amount due in terms of the

respective written agreement had been paid; and The applicant demanded payment of the full outstanding balances due in terms of the overdraft facility and instalment sale agreements which demand also constituted due notice in terms of the provisions of section 129 of the National Credit Act¹ (“the NCA).

7. Turning now to the first point *in limine* raised by the respondent. The respondent contends that the deponent to the applicant’s affidavit filed in support of the application for summary judgment is a Mr Kieran Lionel Sharpley who the respondent contends is employed in the applicant’s Durban Branch, had no dealings with the respondent. The Particulars of Claim establish that the underlying written agreements in respect of the overdraft and both instalment sale agreements were signed by the respondent in Upington.

8. Respondent contends in his opposing affidavit that all the relevant agreements were signed in Upington. That the discussions leading up to such agreements took place in Upington with different people. That the administration of the transactions relevant to the said contracts took place in the Northern Cape. That the deponent to the affidavit in support of the

¹ Act 34 of 2005.

application for summary judgment is based in KwaZulu-Natal a different province some 1000 kilometres away.

9. Ms Boonzaaier, who appeared for the respondent, argued that the said deponent to the affidavit in support of the application for summary judgment does not set out the salient facts. She contends that the said deponent ought to have set out that: the records were captured electronically; that he has certified that the electronic records are correct; that he is authorised to do so; that on the basis of the electronic records which he has certified to be correct he can swear positively to the facts.

10. Ms Boonzaaier submits that the affidavit in support of summary judgment does not identify the nature and the content of the records to which the deponent had reference. Ms Boonzaaier also contends that the said affidavit does not identify the facts established with reference to the records or contain any averments that would indicate the admissibility of their content in terms of section 15 of Act 25 of 2002.

11. At this point, it is necessary to set out the relevant passages of the affidavit filed on behalf of the applicant verbatim. The said passages read:

“I the undersigned, KIEREN LIONEL SHARPLEY do hereby declare under oath and state that:

1. I am a major male Manager, Business Support and Recoveries, Business and Commercial Banking Credit, employed as such by the

plaintiff at its branch office situate at 1st Floor, NE Q[...], 1 K[...] Way, Durban, Kwazulu Natal Province.

2. The content of this affidavit falls within my personal knowledge, except where the context indicates the contrary, and is both true and correct.
3. I can swear positively to the facts contained in this affidavit as I have, in my aforementioned capacity as Manager Business Support and Recoveries, Business and Commercial Banking Credit, in my possession and in my control all of the plaintiff's records, accounts and other documents relevant to the claims forming the subject matter of the action instituted by the plaintiff against the defendant in the main action proceedings.
4. I am duly authorised by the plaintiff to depose to this affidavit and to prosecute the present application for summary judgment against the defendant as more fully evident from a resolution to this effect attached hereto and marked "STB 1".
5. In the ordinary course of my duties as Manager, Business Support and Recoveries, Business and Commercial Banking Credit, and having regard to the plaintiff's records, accounts and all other relevant documents in my possession, and under my control, I have acquired personal knowledge of the defendant's business dealings and financial standing with the plaintiff, and can positively swear to the facts alleged in the particulars of claim and to the amounts claimed.
6. I verify the cause(s) of action against the defendant, as more fully pleaded in the particulars of claim filed in the main action proceedings, as well as the amount(s) claimed from the defendant as set out in the particulars of claim.
7. I additionally swear positively to the facts set out in the particulars of claim on which the aforesaid causes of action, as well as the amount(s) claimed, are based. ..."

12. Ms Boonzaaier for the respondent based her arguments set out above on the judgment of Binns-Ward J in the matter of ABSA BANK v LE ROUX², in particular, she relied on the following passage of the said judgment:

“Thus, if the deponent to a supporting affidavit in summary judgment proceedings were to be able to aver that he is (i) an officer in the service of the plaintiff, (ii) that the salient facts – which should be particularised – are electronically captured and stored in the plaintiff’s records, (iii) that he had regard thereto, (iv) that he is authorised to certify and has executed a certificate certifying the facts to be contained in such record to be correct, and (v) on the basis thereof is able to swear positively that the plaintiff will – having regard to the provisions of s 15(4) of act 25 of 2002 – be able to prove the relevant facts at the trial of the action by producing the electronic record or an extract thereof, the requirement of subrule 32(2) would be satisfied.”

13. In response to these arguments raised by the respondent Mr Tsangarakis has done a comprehensive review of the authorities going back to the case MAHARAJ v BARCLAYS NATIONAL BANK LIMITED³. It is not necessary for me to assess and repeat Mr Tsangarakis’ research and submissions related thereto as for the most part the authorities assessed by Mr Tsangarakis have been dealt with by the SCA in the case of REES v INVESTEC BANK⁴. The SCA appears to endorse the same authorities referred to by Mr Tsangarakis and in any event comes to the same conclusion.

² 2014 (1) SA 475 (WCC) at 485E-H and particularly at F to H.

³ 1976 (1) SA 418 (A).

⁴ 2014 (4) SA 220 (SCA).

14.It is clear from a reading of the REES case that context is important and what I mean by that is, what is pleaded, what documents are annexed to the pleadings and what is disputed by the respondent in the plea. The SCA in the REES case endorsed Maharaj’s case where one looks at all the documents properly before the court at the “end of the day”⁵.

15.In the present case, after the 2019 amendment of the Rules, we have the respondent’s plea. From such plea it is evident that none of the written contracts entered into, or their initial terms are in dispute. Further, neither the applicant nor the respondent have made the Electronic and Communications and Transactions Act⁶ applicable to this case. Finally, it is evident from the annexures to the Particulars of Claim that the certificate of balance signed by the present deponent were indeed dispatched to the respondent together with the section 129 of the NCA notices. This shows that the said deponent corresponded with the applicant’s attorneys in order for them to send the said section 129 notice. In other words, he must have acquainted himself with the salient facts even at that stage.

16.The pleadings also show that respondent does not dispute being served the said section 129 notices together with the relevant certificates of balance. If respondent disputed the relevant certificates of balance, one would have

⁵ Maharaj., above at 423H.

⁶ Act 25 of 2002.

expected him to do something about it when they were served on him on the 23 June 2023. It is evident from the pleadings and the respondent's affidavit opposing summary judgment that when the section 129 notice was served on him together with the relevant certificates of balance, he did nothing to protect his interests or dispute the section 129 notices, the attached certificates of balance or the status of any of the relevant accounts. This is the context in which Mr Sharpley's affidavit in support of the summary judgment must be assessed.

17. At the end of the day taking all the documents properly before the court together with the common cause facts and what is not disputed on the pleadings and in the affidavit opposing the summary judgment application, it is evident that the said deponent can and did swear positively to the relevant facts necessary for the plaintiff's claim as contemplated in Rule 32(2) of the Rules. In my view Mr Sharpley, in the relevant affidavit did indeed comply with the approach taken by the SCA in the REES case cited above. Accordingly, the first point *in limine* cannot stand and is dismissed.

18. Turning now to the second point *in limine*. The respondent objects to the deponent in the affidavit filed in support of summary judgment verifying the causes of action relevant in this matter by referring to specified passages in applicant's Particulars of Claim and incorporating such passages into the said

affidavit by reference instead of repeating the facts upon which such causes of action are based in such affidavit.

19. Muller J in the matter of ALL PURPOSE SPACE HEATING Co. v SCHWELTZER, in essence dealt with this situation in the context of Rule 32(2) before the 2019 amendment to the said Rule. Muller J concluded:

“...On the other hand, such an affidavit must verify all of the facts supporting the cause of action. It is impossible to lay down any rule of general application as to the degree of particularity required of an affidavit under Rule 32(2). In view of the infinite variety of causes of action each case must depend on its own circumstances. In my view, it is permissible for a plaintiff in an affidavit in support of a summary judgment application, to incorporate by reference only the allegations contained in his summons. By doing so the plaintiff takes a calculated risk that his summons does not contain sufficient allegations to enable the Court hearing his application for summary judgment to hold that his claims are of a nature specified by Rule 32(1).”⁷ (references omitted)

20. It must be remembered that Muller J in the ALL PURPOSE SPACE HEATING case was dealing with a simple summons as contemplated in Form 9. Muller J in that case went on to conclude that the summons indicated the nature of the claims.⁸ However, summary judgment was refused on facts peculiar to the case before him.

⁷ ALL PURPOSE SPACE HEATING v SCHWELTZER 1970 (3) SA (D& CLD) at p 563G to 564A.

⁸ ALL PURPOSE SPACE HEATING case., above at 564B.

21.If as Muller J pointed out in the ALL PURPOSE SPACE HEATING case that it was permissible to grant summary judgment where the applicant simply incorporated the facts asserted in the summons into the affidavit in support of the summary judgment application in circumstances where such applicant brought itself within the circumstances contemplated by Rule 32(1), then it would be so much less problematic to do so where a combined summons has been filed incorporating a proper Particulars of Claim. It is clear that prior to the 2019 amendment of the Rule it was proper to incorporate by reference the cause of action set out in the combined summons or simple summons in the affidavit in support of summary judgment.

22.Whether this position remains the same after the 2019 amendment to the said Rule was dealt with by Leech AJ in the matter of FIRSTRAND BANK LIMITED v BADENHORST N.O. and OTHERS⁹. Leech AJ in the said judgment at paragraph 9 thereof quotes Erasmus' work on SUPERIOR COURT PRACTICE and certain other authorities which seem to have concluded that such facts as are set out in the 'Declaration' or 'Particulars of Claim' must be repeated in the affidavit in support of the application for summary judgment or at least such facts should be cross-referenced in such affidavit. However, after considering the developments required by the 2019 amendment of Rule 32 reached the conclusion at paragraph 12 of his

⁹ SAFLII (2022/5936)[2023] ZAGPJHC 779 (10 July 2023).

judgment that: “The repetition of the alleged facts is no more necessary under the amended rule, and the introduction of an express requirement to reference the alleged facts would be superfluous in the context of the established interpretation of the requirement to verify the cause of action.”

23.I agree with the approach taken by Leech AJ in the above quoted case. It is not necessary to repeat the facts upon which the cause of action is based or to incorporate them by cross-referencing them in the affidavit in support of summary judgment. If I am wrong in this conclusion, the applicant has in any event cross-referenced its cause of action by incorporating into the relevant affidavit specific paragraphs of its Particulars of Claim. That is indeed sufficient for the post 2019 Rule 32(2).

24.In these circumstances the respondent’s second point *in limine* cannot stand and is also dismissed.

25.Turning now to the third point *in limine*. The substance of this objection is that some of the relief claimed in the Notice of Application for Summary Judgment is not competent in such an application. In relation to the claims in respect of the two instalment sale agreements the said Notice of Application for Summary Judgment includes notice that the applicant will seek the following relief:

- Retention of all monies already paid by the respondent to the applicant for each of the respective instalment sale agreements; and
- That leave be granted to the applicant to approach the court, on the same papers duly amplified, if necessary to claim such damages together with interest at the applicable rate, that the applicant may be able to prove pursuant to the sale of the goods in respect of each instalment sale agreement.

26. It is contended by the respondent that these prayers are not competent relief that can be granted by this court in summary judgment proceedings.

27. As an aside, it seems that respondent has misunderstood the intentions of the applicant in this regard. This is evident from two passages of the affidavit opposing the summary judgment application. These read:

“26 The prayer for the retention of all monies already paid to the plaintiff is an invalid and unlawful prayer. On what grounds can the plaintiff request that all monies already paid to it in regard to the loan agreement (sic)(the agreement referred to here should be one of the instalment sale agreements) may be retained by the plaintiff, and that I then have to repay the total amount outstanding? This is relief for which no case exists.

27 The amounts already paid to the plaintiff should be taken into consideration when determining the full outstanding amount, which, I submit, the plaintiff has not done and it is now seeking relief that this need not be done at all.”

28. If one has regard to the Notice of Application for Summary Judgment, the applicant seeks damages after the relevant goods are returned to it and subsequently sold in order to place it in the position it would have been in,

but for the respondent's default. This clearly shows that the applicant seeks to follow the process contemplated in the NCA.

29. Aside from the obvious misunderstanding outlined above this court still needs to deal with the question as to whether the prayers objected to are competent in summary judgment applications. Before I turn to this question the respondent included in this third point *in limine* an unconnected question which ought to have been raised as a point *in limine* on its own. This point can be disposed of quickly and expeditiously so I will deal with it in the sequence in which respondent raised it. The respondent's additional objection is that in respect of the instalment sale agreements the applicant sought alternative relief to the return of the goods which amounts to the respondent keeping the goods but in that instance the applicant seeks the outstanding balance in respect of each contract. As already indicated at the outset Mr Tsangarakis indicated that the applicant will not be seeking this alternative relief. In the present context this disposes of this additional objection.

30. Returning now to the question of whether prayers for retention of all monies already paid and whether leave can be granted to return to court on the same papers supplemented if needed to claim damages after the goods have been sold is competent relief in summary judgment proceedings.

31. In dealing with this question Mr Tsangarakis referred me to the decision of the SCA in the case of *FIRSTRAND BANK t/a WESBANK v DAVEL (UNIVERSITY OF THE FREE STATE LAW CLINIC AS AMICUS CURIAE)*¹⁰.

32. In respect of the point that the court in summary judgment proceedings cannot postpone the damages claim, as such relief is not provided for in Rule 32(1), it is clear from the ruling made by the SCA in the case of *FIRSTRAND BANK t/a WESBANK v DAVEL*, that the SCA as a matter of fact granted summary judgment in that case and included an order that the damages component be postponed *sine die*. That disposes of that objection to the relief claimed in the Notice of Application for Summary Judgment.

33. Turning now to the second objection under this point *in limine*, being the prayer to order retention of the monies already paid by the respondent in respect of the relevant instalment sale agreements is not competent relief under the provisions of Rule 32.

34. Mr Tsangarakis submitted that an order in those terms was given in the court below and the SCA did not object to it in the *FIRSTRAND BANK t/a WESBANK v DAVEL* case. If this was as far as it went, I would have difficulties with it. However, if one refers to the order made by the SCA in

¹⁰ [2020] 1 All SA 303 (SCA).

that case a different picture emerges. In this regard, I refer specifically to 20.3 and 20.4 of the said Order, which reads as follows:

“20.3 Upon the return of each of the vehicles described in paragraph 20.1.2(a), 20.1.2(b) and 20.2.2 to each respective plaintiff:

20.3.1 The plaintiff shall, within 10 business days from the date of receiving return of the vehicle, give the defendant written notice:

- (a) setting out the estimated value of the returned vehicle;
- (b) informing the defendant that it intends to sell the returned vehicle as soon as is practicable for the best price reasonably obtainable; and
- (c) informing the defendant that the price obtained for the returned vehicle upon its sale may be higher or lower than the estimated value.

20.3.2 The plaintiff shall sell the vehicle as soon as practicable for the best price reasonably obtainable.

20.3.3 After selling the returned vehicle, the plaintiff shall:

- (a) credit or debit the defendant with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the plaintiff in connection with the sale of the goods; and
- (b) give the defendant written notice stating the following:
 - (i) the settlement value of the agreement immediately before the sale;
 - (ii) the gross amount realised on the sale;
 - (iii) the net proceeds of the sale after deducting the plaintiff’s permitted default charges, if applicable, and the reasonable costs allowed under paragraph (a); and
 - (iv) the amount credited or debited to the defendant’s account.

20.3.4 The notice referred to in paragraph 20.3.3(b) above shall state that:

- (a) ...
- (b) ...

20.3.5 If any amount falls to be credited to the defendant’s account which exceeds the settlement value immediately before the sale of the returned vehicle, the plaintiff must remit such excess amount to the

defendant together with the notice referred to in paragraph 20.3.3(b) above.

20.3.6 If an amount is credited to the defendant's account which is less than the settlement value before the sale, or an amount is debited to the defendant's account, the plaintiff may demand payment from the defendant of the remaining settlement value in the notice referred to in paragraph 20.3.3(b) above.

20.3.7 If the defendant fails to pay the amount demanded in terms of paragraph 20.3.6 above within 10 business days, the plaintiff may commence proceedings against the defendant for any outstanding damages.

20.3.8...

20.3.9...

20.4 The respective plaintiff shall aver and prove in its action for any outstanding damages, that it has complied with the requirements set out in paragraph 20.3 above."

35. The orders set out in paragraphs 20.3.1, 20.3.3, 20.3.5, 20.3.6, 20.3.7, and 20.4 only make sense if the payments already paid by the respondent to the applicant are in fact retained by the applicant. Clearly, these provisions are designed to put the plaintiff in the position it would have been in if the defendant had not defaulted and the instalment sale contract had run its full course.

36. Consequently, the effect of these parts of the order in the case of FIRSTRAND BANK t/a WESBANK v DAVEL are that the payments already made by the respondent to the applicant are to be retained by the applicant. This follows the architecture of the NCA.

37.As already set out the case of FIRSTRAND BANK t/a WESBANK v DAVEL dealt with and is applicable to summary judgment applications. The only conclusion that can be reached in the circumstances is that the SCA clearly regarded retention of the monies paid and leave to approach the High Court for damages after the sale of the relevant goods as merely ancillary to the order for return of the specified goods, which certainly is competent relief under Rule 32(1).

38.This court bound by the approach adopted by the SCA in the case of FIRSTRAND BANK t/a WESBANK v DAVEL. In the circumstances this third point *in limine* cannot be upheld and is dismissed.

39.Turning now to the further defences raised by the respondent.

40.The next issue raised by the respondent that needs to be considered is the issue of whether the certificate of balance relied upon by the applicant is *contra bonos mores*. The applicant relies on a certificate in respect of each of its three claims. That is the claim in respect of each of the overdraft credit facility and the two instalment sale agreements.

41.The respondent at the hearing argued in respect of the overdraft credit facility that the applicant's claim is not for a liquidated amount in money and

the only thing that makes it for a liquidated amount in money is the certificate of balance, but that the said certificate of balance being *contra bonos mores* the applicant cannot rely on it. Then, Ms Boonzaaier argued that being the case the applicant's claim is not for a liquidated amount in money and accordingly the applicant cannot seek summary judgment in respect of that claim. In relation to the two instalment sale agreements the respondent simply maintains that such certificates are *contra bonos mores*.

42. This line of argument is somewhat different to what the respondent set out in its plea and in its affidavit opposing the summary judgment. The respondent is confined to the defence it raises in its plea, but despite this and for the sake of completeness, I will consider both arguments raised by the respondent.

43. In respect of the certificate of balance for the overdraft facility, the respondent pleads:

“12 The defendant pleads that the provision in the agreement pertaining to the overdraft facility namely clause 18.12, providing for a certificate to be ‘afdoende bewys’, as referred to in this paragraph, is void and invalid, as a result of the fact that it is against public policy in that it refers to ‘afdoende bewys’, namely ‘sufficient proof’ until the contrary is proved, which contains a reverse onus that is placed on the defendant, and which has already been determined by the South African courts as being void and invalid.”

44. Clause 18.12 of the relevant agreement reads as follows:

“18.12 'n Sertifikaat wat deur enige van ons bestuurders, wie se aanstelling nie bewys hoef te word nie, onderteken is, waarin die bedrag wat

verskuldig en betaalbaar is, gemeld word, sal by blote voorlegging daarvan afdoende bewys wees van enige bedrag wat deur u ingevolge hiedie Ooreenkoms verskuldig en/of betaalbaar is, teensy die teendeel bewys word.”

45.The Afrikaans phrase ‘afdoende bewys’, usually means ‘conclusive proof’, but having regard to clause 18.12 read in its entirety, this is not what the parties meant or agreed to when entering into the relevant contract. In fact, if one reads the plea relating to this issue, which is quoted above, the respondent has quite correctly conceded that in its context in this matter, ‘afdoende bewys’ means nothing more than ‘sufficient proof’.

46.The agreements in respect of the instalment sales are in English and the terms relating to certificates of balance in those respective agreements make it plain that in those agreements the parties agreed that such certificate would be ‘sufficient proof’.

47.The two authorities referred to by Ms Boonzaaier in support of the arguments raised on behalf of the respondent are the SASFIN¹¹ case and SOCIETY OF LLOYD’S v ROMAHN¹². Neither of which support either argument raised on behalf of the respondent.

¹¹ SASFIN (PTY) LTD v BEUKES 1989 (1) SA 1 (AD).

¹² SOCIETY OF LLOYD’S v ROMAHN & TWO OTHERS 2006 (4) SA 23 (C).

48. The majority judgment in the SASFIN case set out the reason why the ‘certificate of balance’ clause relevant to that case was *contra bono mores*, in the following terms:

“The effect of the provisions of clause 3.24.2 is that such certificate cannot effectively be challenged on any ground save fraud. It constitutes the sole memorial of Beukes’ indebtedness, and is conclusive proof of such indebtedness and the amount thereof. These clauses purport to oust the court’s jurisdiction to enquire into the validity or accuracy of the certificate, to determine the weight to be attached thereto or to entertain any challenge directed at it other than on the ground of fraud.”¹³

49. The minority judgment in the SASFIN case supported the majority on the above aspect and Van Heerden JA on behalf of the minority set out the position as follows:

“Ek stem saam dat die klousule in stryd met die openbare belied is. Daar is ’n duidelike onderskeid tussen ’n bepaling wat meebring dat ’n sertifikaat van ’n skuldeiser *prima facie* bewys van die omvang van ’n skuld is, en een wat aan die sertifikaat onweerlegbare bewyswaarde verleen.”¹⁴

In English this statement of the law by Van Heerden JA would read:

“I agree that the said clause conflicts with public policy. There is a clear distinction between a provision in an agreement that amounts to such certificate being *prima facie* evidence of the extent of the debt and a provision that provides such certificate with irrebuttable (unassailable) evidential value.”

¹³ SASFIN case., above at p. 14J to p. 15B.

¹⁴ SASFIN case., Above at p. 23C-D.

50. Van Zyl J in the case of SOCIETY OF LLOYD'S v ROMAHLN & 2 OTHERS identifies the law as set out by the AD in the SASFIN case but indicates that the time might have come in cases of business and commercial efficacy to allow 'conclusive proof' clauses and at the same time expand the grounds upon which such certificates can be attacked¹⁵. Clearly, this case does not support the contentions made on behalf of the respondent in this matter.

51. The certificate of balance clause applicable to the overdraft facility has been quoted above. The relevant clauses for the respective instalment sale agreements are in similar terms. They are clearly distinguishable from the clause found to be contrary to public policy in the SASFIN case. The clauses relevant to the present matter provide that the relevant certificates of balance would be no more than *prima facie* proof of the existence of the debt, the extent of the debt and the fact that it is due, until the contrary is established. On the approach set out by AD in the SASFIN case, these certificates are not contrary to public policy. This approach was confirmed in the matter of EX PARTE MINISTER OF JUSTICE: In Re DONNELLY v BARCLAYS NATIONAL BANK LTD¹⁶.

¹⁵ SOCIETY OF LLOYD'S case., above at para [125].

¹⁶ 1995 (3) SA 1 (AD).

52. In summary judgment proceedings, it has never been sufficient for the respondent to say he does not know what is owed or how the amount is made up¹⁷. Also, if the defence is that he has paid he must establish that by setting up a factual basis for his position.¹⁸

53. A reverse onus where it has been agreed contractually in civil proceedings is not *contra bonos mores*. The respondent has not established a basis for claiming that a reverse onus in civil proceedings where such reverse onus has been contractually agreed between the parties is *contra bonos mores*. In my view, it is not against public policy.

54. In my view, the applicant has established that its claim in respect of the overdraft facility is indeed for a liquidated amount in money and accordingly, summary judgment is competent.

55. In respect of the first instalment sale agreement the respondent alleged that there had been an oral variation of the said agreement in the plea filed on his behalf and by virtue of the said oral amendment respondent was not in breach of the agreement. That the erstwhile branch manager of the applicant, despite what is set out in the written agreement, assured him that the written variation of the relevant agreement was not required. Respondent then also

¹⁷ Per Makgoka JA in the case of NPGS PROTECTION & SECURITY SERVICES CC & ANOTHER v FIRSTRAND BANK LIMITED 2020 (1) SA 494 (SCA) at para [11].

¹⁸ NPGS PROTECTION & SECURITY SERVICES case., above at para [11].

contended that he relied upon such representation to his detriment. The respondent then pleaded as a result of the representation made and his reliance thereon, the applicant was precluded from alleging that respondent had breached the agreement.

56. The relevant agreement included a clause that provided that any amendment could only be made in writing and would only be effective if signed by both parties. The said agreement also included a clause that the written agreement constituted the entire agreement between the parties.

57. These non-variation clauses have been found to be valid and binding.¹⁹ This has come to be known as the Shifren clause. The validity and enforceability of the Shifren clause has subsequently been upheld by the SCA.²⁰

58. The next question to be considered is whether a representation by an erstwhile employee of the applicant can form the basis of an estoppel by representation in circumstances where the relevant agreement contains a 'Shifren clause'. This question was considered by the SCA in the case of *BA-GAT MOTORS CC t/a GYS PITZER MOTORING AND ANOTHER v KEMPSTER SEDGWICK (PTY) LTD* where the SCA held to uphold a plea of estoppel by representation in these circumstances would negate and

¹⁹ SA SENTRALE KO-OP GRAANMKY. *BPK v SHIFREN* 1964 (4) 760 (A) at P 766C-G.

²⁰ *BRISLEY v DROTSKY* 2002 (1) SA 1 (SCA) at paras [6] to [12].

violate the very purpose of the non-variation clause (Shifren clause).²¹ In these circumstances, the oral variation defence and the estoppel by representation defence cannot assist the respondent and do not constitute a defence to the application for summary judgment.

59. Finally, the respondent raised the issue that the applicant had not pleaded the cancellation. Mr Tsangarakis argued that this matter was not raised in the respondent's plea and that it could not be raised in oral argument. I now believe that Mr Tsangarakis was correct in making this argument. However, at the time, I allowed the parties an opportunity to file supplementary heads of argument on this aspect.

60. The issue of not pleading a cancellation of the agreement clearly relates to the two instalment sale agreements. In respect of both instalment sale agreements the applicant has pleaded a breach thereof. This is disputed by the respondent in respect of both such agreements.

61. The applicant in respect of both instalment sale agreements sent notices as contemplated in section 129 of the NCA to the respondent. These section 129 Notices were served by the Sheriff on the 23 June 2023. This is not disputed on the pleadings. The relevant returns of Service show that the relevant section 129 notices were served on the respondent personally. The said

²¹ (511/2022) [2023] ZASCA 137 (25 October 2023) at para [23].

section 129 notice informed the respondent that he was in breach of the respective agreements. The said notice informed the respondent of certain courses of action he could follow. The said notice also informed the respondent that if he failed to respond, the applicant intended to protect its rights and take the matter further. It is clear from the plea that the respondent did not respond to the section 129 notice.

62.The applicant then issued summons. It is clear from the Particulars of Claim and the relief sought therein that the mere issuing of summons in this context that applicant had cancelled the agreement. It is of no moment that this was not specifically pleaded. Upon reading the Particulars of Claim, the respondent could be in no doubt that this amounted to a cancellation of the agreement. In the circumstances, this argument also does not assist the respondent.

63.Finally, the respondent argued that in terms of the overdraft credit facility, there was no fixed term to this agreement there were no predetermined payments to be made into the associated bank account, that the agreement was to be reviewed annually, and respondent denies that there was any material deterioration in his financial position.

64.Applicant pleaded that the respondent had breached the overdraft agreement in that he had: Failed to make payments of the amounts as agreed upon in the

dates specified in the overdraft facility; failed to make payments on his other agreements with the applicant; and despite demand failed to pay the outstanding balance.

65.The import of the respondent's stance is the contention that the applicant has failed to establish a breach of the overdraft agreement.

66.In response to this Mr Tsangarakis pointed to the requirement in the relevant agreement that on the 30 November 2020 the respondent would reduce the balance of his overdraft from R715 000.00 to R260 000.00. Then Mr Tsangarakis pointed to the relevant certificate of balance which showed a balance as at the 6 June 2023 the respondent owed in the order of R1.3 million on such overdraft. Mr Tsangarakis contended that manifestly the respondent had not reduced the overdraft facility in accordance with the relevant agreement and that this constituted a material breach as respondent had failed to pay when he was required to do so.

67.On the facts Mr Tsangarakis is undoubtedly correct. Clearly, the respondent is in breach of the overdraft agreement and this has been sufficiently pleaded in the Particulars of Claim.

68. Accordingly, in all of these circumstances, the respondent has failed to satisfy this court that he has a defence and that he raises such defence in a *bona fide* manner.

In the circumstances, summary judgment is granted as follows:

- 1) Respondent shall make payment in the amount of R1,352,202.49 plus interest at the rate of 7.5% per annum, calculated from the 25 May 2023 to date of payment, both dates inclusive.
- 2) Respondent shall pay costs of suit in respect of the claim on the overdraft on an attorney and client scale.
- 3) The first instalment sale agreement in respect of account 106[...] is hereby confirmed to be cancelled.
- 4) Respondent is to restore to the applicant possession of the 2020 Krone 1290 HDP X Cut Skaal + Vog B with serial number 1[...] ('the goods') so as to enable the applicant to sell it.
- 5) Applicant shall retain all monies already paid to it by the respondent in respect of the first instalment sale agreement.
- 6) Applicant is granted leave to apply to this court, on the same papers, duly supplemented, if necessary to claim damages together with such interest at the applicable rate that the applicant may be able to prove after the sale of the goods.

- 7) Respondent shall pay the costs relating to this first instalment sale agreement on an attorney and client scale.
- 8) The second instalment sale agreement in respect of account number 106[...] is hereby confirmed to be cancelled.
- 9) Respondent is to restore to the applicant possession of the 2020 UBT 30 – TON TRI-AXLE LIGHT DUTY LOW BED TRAILER with chassis number AA9[...] (‘the goods’) so as to enable the applicant to sell it.
- 10) Applicant shall retain all monies already paid to it by the respondent in respect of the second instalment sale agreement.
- 11) Applicant is granted leave to apply to this court, on the same papers, duly supplemented, if necessary to claim damages together with such interest at the applicable rate that the applicant may be able to prove after the sale of the goods.
- 12) Respondent shall pay the costs relating to this second instalment sale agreement on an attorney and client scale.

L.G Lever
Judge
Northern Cape Division, Kimberley.

Representation:

For the Applicant:

ADV S TSANGARAKIS

Instructed by:

PGMO ATTORNEYS INC.

<i>For the Defendants:</i>	<i>ADV MM BOONZAAIER</i>
<i>Instructed by:</i>	<i>MAJIEDT SWART INC.</i>

<i>Date of Hearing:</i>	<i>23 August 2024</i>
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<i>Date of Judgment:</i>	<i>04 April 2025</i>
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