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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG.**

CASE NUMBER: 9578/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

29 August 2022

In the matter between:

TOYOTA FINANCIAL SERVICES (SOUTH AFRICA) LIMITED Plaintiff

and

WASTE PARTNERS INVESTMENT (PTY) LIMITED Defendant

JUDGMENT

OLIVIER AJ:

Introduction

[1] This is an application for summary judgment brought by the Plaintiff against the Defendant in terms of Rule 32 of the Uniform Rules of Court. The Plaintiff is Toyota Financial Services (South Africa) Ltd, a company duly incorporated in accordance with the company laws of the Republic of South Africa, and a registered credit provider in terms of the National Credit Act 34 of 2005 (“the National Credit Act”). The Defendant is Waste Partners Investment (Pty) Limited, a private company

duly incorporated in accordance with the company laws of the Republic of South Africa.

Background facts

[2] According to the Particulars of Claim, the Plaintiff sold and delivered a certain 2019 HINO 500 2836 (DU5) 6X4 LWB F/C C/C vehicle to the Defendant in terms of an Instalment Sale Agreement concluded electronically between the parties on 25 March 2019.

[3] In terms of the Agreement the total purchase price payable was the sum of R2 571 058,20, payable by an initial deposit of R186 444,00, including interest charges in the sum of R668 300,70 calculated at 13,5% per annum, the cash price for the vehicle being the sum of R1 239 577,50.

[4] The Agreement was for a period of 60 months and the Defendant was to pay monthly instalments of R39 743.57 commencing on 10 May 2019.

[5] The Plaintiff would remain the owner of the vehicle until receipt of all amounts payable by the Defendant.

[6] Should the Defendant breach any terms of the Agreement, the Plaintiff would be entitled to cancel the Agreement, recover the vehicle from the Defendant and claim from the Defendant the amount which would have been paid to the Plaintiff had the Defendant fulfilled its obligations in terms of the agreement.

[7] As alleged in the Particulars of Claim, the Defendant defaulted by failing to maintain monthly payments. The Plaintiff elected to enforce its rights in terms of the agreement. On 20 March 2020 the Plaintiff instituted a claim against the Defendant for cancellation of the agreement, return of the motor vehicle, and judgment for damages to be postponed *sine die*. By 13 February 2020 the Defendant was in arrears in an amount of R96 415.81.

[8] On 11 June 2020 a Notice of intention to Defend was delivered, with the plea following on 10 September 2020. The Plaintiff launched this application for summary judgment on 22 September 2020. The Defendant served its answering affidavit on 16 October 2021.

[9] In its plea the Defendant admitted only its own details, and pleaded non-compliance by the Plaintiff of its notice obligations. Everything else was denied.

Relevant legal principles

[10] Summary judgment proceedings are regulated by Rule 32 of the Uniform Rules of Court. It was designed to prevent a plaintiff's claim, based upon certain circumstances, from being delayed by what amounts to an abuse of the process of the court. In certain circumstances, the law allows a plaintiff to apply to the court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial. However, a defendant can escape a summary judgment against him by showing that he has a *bona fide* defence to the action – the defendant must disclose fully the nature and grounds of the defence, and the material facts on which it is based. A defendant “may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he has advanced may succeed on trial.”¹

[11] One of the leading cases is *Maharaj v Barclays National Bank Ltd*. The judgment was penned by Corbett JA (as he then was), who set out how to conduct a summary judgment enquiry. The court must determine whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, and whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. And while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and

¹ *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467E-H.

completeness to enable to the court to decide whether the affidavit discloses a *bona fide* defence.²

[12] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* the Supreme Court of Appeal summarised Corbett JA's approach:

In the *Maharaj* case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.³

[13] The exposition of the relevant principles above shows that the defendant must meet four requirements: he must disclose the nature of grounds of his defence, he must disclose the facts on which he bases his defence, the defence must be bona fide, and the defence must be good in law. The facts that he provides must be such that if proven at trial, they will constitute an answer to the plaintiff's claim.

[14] Considering the extraordinary and drastic nature of summary judgment, if the court has any doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should accordingly be refused.

Defendant's submissions

² *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G-426E.

³ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at para [32].

[15] The Defendant challenges the authority of the deponent to depose to the founding affidavit, as well as his personal knowledge of the relevant facts. The Plaintiff describes the objections as opportunistic and vexatious.

[16] Paragraph 3.1 of the heads of argument of Defendant's counsel refers to the deponent as "Sunette Stewart", which is incorrect. In paragraph 3.2 the deponent is identified as "Silver". The affidavit in support of summary judgment is in fact deposed by Mr Alistair Samuels, who describes himself as a manager in the specialised collections department of Wesbank. In terms of an operational service agreement, Wesbank is tasked with the recoveries of debts owed to the Plaintiff.

[17] The Defendant submits that no certificate of resolution has been adduced to show that the deponent was authorised to depose to the affidavit on behalf of the Plaintiff. It relies on *Maharaj* where the court held that the mere assertion by a deponent that he can swear positively to the facts is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words.⁴

[18] There is a resolution attached to the founding affidavit which contains the names and signatures of the directors, granting individuals listed in the resolution authority regarding legal action on customer accounts. Mr Samuels's name is on the list. The Defendant objects, claiming that there is no indication that the signatures are in fact those of the directors. Defendant submits further that its attachment is in itself irregular and that it be struck out from the affidavit, for non-compliance with the Rules – or that the application should be dismissed with a punitive costs order. It is of little import, however, considering the judgment of *Ganes and Another v Telecom Namibia Ltd*, where the court observed that the "deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit" but that it is the "institution of the proceedings and the prosecution thereof which must be authorised."⁵ The Defendant has not challenged the institution of the proceedings by the Plaintiff. There is no merit in this point.

⁴ *Maharaj supra* at 423D—E.

⁵ [2003] ZASCA 123; [2004] 2 All SA 609 (SCA) at para [19].

[19] The Defendant further argues that the deponent lacks the requisite knowledge of the facts, and claims that the Affidavit does not comply with the provisions of Rule 32(2). The Defendant claims specifically that the deponent is relying on second-hand knowledge, based on documents where rights related to the documents and claims were ceded to the Plaintiff by a third party. The deponent recovers debts on behalf of the Plaintiff in terms of an operational service agreement, which is not before the court. Also, the parties to the transaction were not employees of the Plaintiff. The deponent to the Defendant's resisting affidavit submits that she has never heard of or seen the deponent, and have never had any dealings with him. The deponent was not the author of the documents relied on, and is therefore unable to swear positively to or verify the signatories and contents of the various agreements or verify that the agreements were entered into validly. The Defendant submits that the evidence of the deponent is hearsay and inadmissible. Defendant says that the deponent has failed to state specifically that he swears positively to the facts verifying the cause of action.

[20] In *Rees and Another v Investec Bank Ltd* Saldulker JA stated:

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*.⁶

[21] In *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd & Others* the court observed that

[f]irst-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

⁶ 2014 (4) SA 220 (SCA) at para [15].

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.⁷

[22] Taking into consideration the *Rees* judgment, I am satisfied that the deponent has the requisite personal knowledge to depose to the founding affidavit. Furthermore, the deponent shows in the affidavit that he has sufficient personal knowledge. The specific agreement is under his direct supervision and control; he is familiar with the relevant documents and facts; he verifies the cause of action. He deals with the necessary points in adequate detail to show that he has personal knowledge of the matter. It is unrealistic to expect that only someone who has had direct interaction with the Defendant may depose to an affidavit in respect of the transaction with the Defendant.

[23] The Defendant denies that Annexure "B" to the Particulars of Claim is a copy of the agreement concluded between the parties, claiming that Annexure "B" is an unsigned template which does not contain the signatures of the parties.

[24] This cannot be correct. On the face of it Annexure "B" is a valid credit agreement concluded electronically between the parties in compliance with Section 22(1) of the Electronic Communications Transactions Act, 25 of 2002.⁸ In the founding affidavit to this application the deponent sets out in detail the process whereby an electronic agreement is concluded. As explained by him, if the customer accepts the relevant terms and conditions on each page, the customer's acceptance of the relevant terms and conditions is imprinted with a watermark signature towards the middle of the particular page. Annexure "B" clearly contains a watermark signature imprinted on each page, indicating the identity of the person who acted on behalf of the Defendant – in this case the name on the watermark is Thabang Moeng, the CEO of the Defendant and the deponent to the resisting affidavit. For all intents and purposes it represents the signature of the person who entered into the

⁷ 1999 (4) SA 229 (C) at 235A–C, referred to in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & Another* 2010 (5) SA 112 (KZP) at para [13]. See too *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) SA 384 (T) at 391F–G.

⁸ See *FirstRand Bank LTD t/a Wesbank v Molamuagae* (24558/2016) [2018] ZAGPPHC 762 (26 February 2018), where the court granted summary judgment based on an electronic agreement.

agreement. Clearly the proper process described in the founding affidavit was followed. It complies with the Electronic Communications and Transactions Act 25 of 2002.

[25] The Defendant denies that the terms of the agreement between the parties are those encapsulated in Annexure B. This is the baldest of bald denials. The Defendant admits to nothing, and disputes everything. However, the Defendant offers no facts in support of its denials.

[26] A certificate of balance and a detailed statement are attached to the application papers. The certificate of balance sets out the customer's name, account number, amount in arrears, and the total amount outstanding on the agreement, as at the date of the certificate, which in the present case is 15 September 2020. It is signed by Allistair Samuels, who is the deponent to the founding affidavit. The statement reflects the customer's name and number, postal and physical addresses, description of the vehicle, normal instalment payable, contract balance, arrear amount, and a detailed record of payments. According to the statement the last payment was received on 14 February 2020. According to the Certificate of Balance, on 15 September 2020, the defendant was in arrears in the amount of R399 438.26.

[27] The Defendant challenges the certificate of balance, the amount in arrears, and the balance due to the Plaintiff; the Defendant denies that it is indebted to the Plaintiff as alleged, alternatively, denies that it is indebted at all. The Defendant avers that the calculations are wrong and misleading, and that the Plaintiff is unable to show what the rate of interest is. However, the Defendant provides no material facts in support of its defence. In the answering affidavit the Defendant claims not to be able to attach any documentation to support its version. It claims not to have had sufficient time to obtain bank statements, and that the court is therefore faced with two different versions that require the matter to be referred to trial. With respect, this is a feeble excuse. Defendant could, for example, have attached some proof of payment to bolster its version. It simply cannot be that the Defendant has no records

available to provide at least some factual support for its defence. The onus to prove payment lies on the party who claims that payment was made.⁹

[28] The Defendant submits that no certificate of balance was attached to the particulars of claim, and that the certificate of balance is in any event inadmissible. The defendant relies on *Thrupp Investment Holdings Pty Ltd v Goldrick* as authority that a certificate of balance is merely an evidentiary tool which does not establish liability.¹⁰ The following excerpt from the judgment of Maya JA (as she then was) in *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans (Formerly First Rand Bank of South Africa Ltd)* explains the position:

The certificate did not, as the court a quo considered, amount to new evidence which would be inadmissible under rule 32(4). To the extent that the certificate reflects the balance due as at the date of hearing, it is merely an arithmetical calculation based on the facts already before the court which the court would otherwise have to perform itself. Such calculations are better performed by a qualified person in the employ of a financial institution. And to the extent that such a certificate may reflect additional payments by the defendant after the issue of summons, or payments not taken into account when summons was issued, this constitutes an admission against interest by the Bank and the Bank is entitled to abandon part of the relief it seeks. Certificates of balance handed in at the hearing (whether a quo or on appeal) perform a useful function and are not hit by the provisions of rule 32(4).¹¹

[29] The deponent certifies in the affidavit that the statement and certificate of balance are correct in all respects, including the amounts. In terms of clause 6.6 of the agreement, the Defendant agreed that the Seller may provide a certificate from one of its managers, whose position it will not be necessary to prove, showing the amount due to the Seller and how it is calculated. Furthermore, the Seller may take

⁹ *Pillay v Krishna* 1946 AD 946 at 955; and *Nedperm Bank Ltd v P Lavarach & Others* 1996 4 SA 30 (AD) at 47B.

¹⁰ 2008 (2) SA 253 (W) at 256.

¹¹ [2010] ZASCA 130; 2010 (6) SA 439 (SCA); [2011] 2 All SA 56 (SCA) (30 September 2010) at para [47].

any judgment or order it is entitled to in law based on the facts contained in the certificate or such amount as the court may find to be due, unless the Defendant disagrees with the amounts and is able to satisfy the court that the amount in the certificate is incorrect. Even though the Defendant disputes the amount, it has not provided any material facts in support of this defence and is unable to satisfy the court that the amount in the certificate is incorrect, or that this issue should be referred to trial.

[30] Lastly, the Defendant alleges that the Plaintiff has not complied with its obligations under the National Credit Act. The Defendant argues that the Plaintiff has failed to show that it sent the section 129 notice to the Defendant's nominated address and/or its *domicilium* address, or to the address where the Defendant was in fact trading from, or the Defendant's last known address, or the address as indicated in the instalment sales agreement. Furthermore, the Plaintiff failed to indicate in its papers where it obtained such addresses.

[31] This argument is also devoid of merit. In the founding affidavit the deponent states that the credit agreement falls outside the ambit of the National Credit Act, because the Defendant is a juristic person and the agreement is a "Large Credit Agreement" (an agreement where the loan amount is R 250 000 or over in terms of Section 4(1)(b) of the Act). The provisions of the National Credit Act do not apply to juristic persons with an asset value or annual turnover of more than R1 million, nor does it apply to juristic persons with an asset value or annual turnover of less than R1 million who enters into a mortgage agreement or an agreement with a loan value of more than R250 000. In this case the loan amount exceeds R 250 000, so irrespective of the turnover of the Defendant, the National Credit Act is not applicable, and there is, therefore, no statutory requirement to deliver a notice to the Defendant in terms of section 129 prior to the enforcement of the agreement.

[32] However, the Plaintiff on 26 February 2020 sent the Defendant a letter of demand, dated 24 February 2020, by pre-paid registered post to the business address of the Defendant, which is its *domicilium citandi et executandi* in terms of the agreement. The track and trace report attached to the particulars of claim shows

that the letter arrived at the relevant post office and that a first notification was sent to the recipient.

[33] The Defendant submits that it has disclosed a *bona fide* defence and raised issues for trial. In respect of costs the Defendant prays for an order on a punitive scale, but also that the action be stayed pending payment of such costs by the Plaintiff.

[34] I cannot agree. The Defendant has failed to provide the material facts upon which its defence is based with sufficient particularity and completeness. No *bona fide* defence has been disclosed. Summary judgment should be entered in favour of the Plaintiff. I intend to make the draft order presented by the Plaintiff an order of court. It is reproduced below.

IN THE RESULT I MAKE THE FOLLOWING ORDER:

1. Summary judgment is granted against the Defendant for:
 - a. Cancellation of the credit agreement;
 - b. An Order directing the Defendant to forthwith return to the Plaintiff a certain 2019 HINO 500 2836 (DU5) 6X4 LWB F/C C/C motor vehicle with chassis number [...] and engine number [...] (“the vehicle”), failing which the Sheriff is authorised to attach the vehicle wherever he may find same and hand the vehicle to the Plaintiff;
2. Judgment for the amount of damages that the Plaintiff may have suffered, together with interest thereon, is postponed sine die, pending the return of the vehicle to the Plaintiff, and the subsequent valuation and sale thereof and the calculation of the amount which the Plaintiff is entitled to;
3. The Plaintiff is granted leave to apply to the Registrar of the Honourable Court for damages on the same papers, duly supplemented by an affidavit, in the event of a shortfall;
4. Costs of suit.

M Olivier

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 16h00 on 29 August 2022.

Appearances

For the Plaintiff: P. van Niekerk (replacing K. Meyer)

Instructed by C. F. Van Coller Inc

For the Defendant: O.L. Mbunye

Instructed by Mukansi Attorneys.

DATE OF HEARING: 26 May 2022

DATE OF JUDGMENT: 29 August 2022