ORIGINAL

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No: 6650/10

In the matter between:

SA TAXI SECURITISATION (PTY) LTD Plaintiff

And

MEEK MOYI ROBINSON Defendant

J U D G M E N T

SEEGOBIN J

INTRODUCTION

[1] This is an opposed application for summary judgment arising from a credit agreement governed by the provisions of the National Credit Act 34 of 2005 ['the Act'].

[2] The plaintiff, SA TAXI SECURITISATION (PTY) LTD, instituted action against the defendant, MOYO ROBINSON MEEK, on 25 August 2010 arising out of certain alleged breaches of a lease agreement between them. The plaintiff claimed, *inter alia*, the return of the leased vehicle and

costs to be taxed on the scale as between attorney and client. The plaintiff annexed copies of both the lease agreement and the notice in terms of section 86(10) of the Act to its particulars of claim. The defendant filed his appearance to defend on 14 September 2010. Thereafter the plaintiff applied for summary judgment in which it claimed return of the vehicle in question and payment of costs as set out above.

FACTUAL BACKGROUND

[3] The agreement in question was entered into on 23 June 2009. It related to the lease of a 2009 Toyota Quantum Sesfikile. In terms of the agreement, the defendant was obliged to pay to the plaintiff a deposit of R45 000,00, an initial rental of R8 543,77 on 1 August 2009 followed by 59 equal rentals of R8 543,77 payable on each corresponding day of each consecutive month. The defendant took delivery of the vehicle while ownership thereof remained vested in the plaintiff. The defendant thereafter breached the agreement by failing to pay the rentals due. By 4 August 2010 the defendant was in arrears in the sum of R41 145,67.

[4] It is apparent that the defendant experienced financial difficulties as he applied to a debt counsellor for debt review in terms of section 86(1) of the Act. It is not clear on the papers precisely when the debt review application was made by the defendant. However, the relevant debt counsellor delivered a notice as contemplated in section 86(4)(b)(i) of the Act on 5 May 2010. It seems that thereafter neither the debt counsellor concerned nor the defendant took any of the further steps contemplated in subsections 86(5), (6), (7) or (8) of the Act. Three months having elapsed since the delivery by the debt counsellor to the plaintiff of the notice in

terms of section 86(4)(b)(i) of the Act, the plaintiff on 4 August 2010, gave notice to the defendant, the debt counsellor and the National Credit Regulator in the prescribed form, of its election to terminate the debt review in terms of section 86(10) of the Act. As at the date of this notice the defendant was alleged to have been in arrears in the sum of R41 145,67. The total amount outstanding by the time summons was issued was the sum of R255 550,30.

[5] The full extent of the relief claimed by the plaintiff in its particulars of claim were (1) for confirmation of termination of the agreement; (2) return of the vehicle in question; (3) forfeiture of all amounts paid by the defendant in terms of the agreement; (4) expenses incurred for removal, valuation, storage and sale of the vehicle; (5) a postponement of the claim for damages until such time as the vehicle was recovered, valued and the defendant credited with such value; (6) affording the plaintiff the opportunity to set the matter down, duly supplemented, for judgment on the issue of damages, and (7) attorney and client costs to be taxed. As already mentioned the summary judgment application only concerns the relief set out in (2) and (7) above.

DEFENDANT'S OPPOSING AFFIDAVIT

[6] In his opposing affidavit, the defendant raised the following issues which were pursued in argument on 3 March 2011. First, he contended that the affidavit put up by the applicant in support of its application for summary judgment was hearsay and did not pass muster within the context of the requirements of Rule 32 of the Uniform Rules in that the deponent does not state that he was personally involved in any of the transactions relating to the defendant. Second, it was contended that the plaintiff failed to

place the defendant in *mora* as required in terms of clause 8.2.2 of the agreement, alternatively, that the plaintiff failed to set out the necessary averments to entitle it to the relief sought in the application for summary judgment. Third, it was contended that the debt review process had not been terminated lawfully for want of proper delivery of the notice in terms of section 86(10) of the Act. The basis for the third contention was that in paragraph 38 of his opposing affidavit, the defendant avers that he verbally informed the plaintiff of both his residential address as well as his postal address. He further averred that as he is not familiar with legal terminology he did not know what the words '*domicilium address*' meant. He states that had he known or was informed that he would be receiving notices in the mail, he would have demanded that it be sent to his postal address since he does not receive any mail at his residential address. He draws attention to the fact that the agreement in question appears to be a standard form agreement which only makes provision for one address. The agreement excludes provision for the postal address which he supplied to the plaintiff. Lastly, he avers that there is no proof that the plaintiff informed him of his options in terms of section 65(2) of the Act.

PLAINTIFF'S SUBMISSIONS

[7] In his heads of argument and in oral submissions before me, Mr *Moodley*, on behalf of plaintiff, contended that the defendant failed to set out sufficient facts in his opposing affidavit which, if proved at the trial, would constitute an absolute defence to the plaintiff's claim for delivery of the vehicle. The defence raised must be one that is valid in law. He submitted that the defendant was not entitled to raise technical defences to evade summary judgment. Allegations contained in an opposing affidavit which

are needlessly bald, vague or sketchy will entitle a court to consider whether the defendant has set out a bona fide defence or not. The plaintiff relied in this regard on the matters of *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 (1) SA 310 (GSJ) at paras 25 – 29 and *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227 – 228. It was submitted, with regard to the issue of authority on the part of the deponent to the affidavit in support of the application for summary judgment, that the deponent had gone far enough in such affidavit to make it plain that he not only had the requisite authority but also bore personal knowledge of the matter. Reliance in this regard was placed on the matter of *Technological Pump Development CC t/a TPD Water Services v Irving 630CC t/a B & M Pumps and Another* 2007 (3) SA 370 (T). It was further argued that the defendant did not provide any material evidence to prove that he was not in arrears. With regard to termination of the debt review process, it was contended that no further steps were taken by the defendant nor did he provide details of his current financial position. It was accordingly submitted that the defendant failed to satisfy the court that he in fact has a bona fide defence to the claim.

DEPONENT'S AUTHORITY

[8] The deponent to the affidavit in support to summary judgment averred as follows [pp 21 – 22 of the indexed bundle]:

'1. I am the general manager legal of the above named plaintiff in this matter and am duly authorized to depose to this affidavit on behalf of the plaintiff.

2. The fact herein set out fall within my personal knowledge and are true and correct.

3. In consequence of such position held by me with the plaintiff, I have in my possession and under my control the file and records of the plaintiff pertaining to this matter, the contents of which I have familiarized myself with during the course of the plaintiff's dealings with the defendant and for purposes of this matter. By virtue of the aforegoing, I have personal knowledge of the facts deposed to by me herein.

4. I have read the plaintiff's summons, particulars of claim and application for summary judgment in this matter. I can and do swear positively to the claim set out in the summons and particulars of claim and verify the plaintiff's cause of action.' [My emphasis]

[9] In his opposing affidavit, the defendant specifically challenges the deponent's authority on the basis that the deponent did not have personal knowledge of the transactions entered into the plaintiff and defendant [p 26 of the indexed bundle]. A similar challenge was raised in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP). This case involved an application for summary judgment. The applicant had taken cession of a number of claims from ABSA. The applicant's attorney deposed to the affidavit in support of summary judgment. In his opposing affidavit the second respondent raised an objection that the applicant's attorney could not have had the requisite knowledge to swear positively to the facts. The court noted the requirements in Uniform Rule 32(2) that the affidavit must be made by the applicant himself or some other person who can swear positively to the facts verifying the cause of action. The court relied, at 115F, on *Fischereigsellschaft F Busse & Co Kommanditgesellschaft v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) in which it was held that the requirement that the affidavit be made by a person who can swear positively to the facts meant that that person must have direct or personal knowledge of the facts alleged

in the particulars of claim and that the statement must not be based on the deponent's own information or belief.

[10] In my view, the facts of the present matter are distinguishable from those in *Shackleton*. In that case the deponent to the affidavit was the applicant's attorney and the applicant's claim was a ceded claim as opposed to direct claim. The court referred to the deponent as being twice removed from the applicant's claim [119A]. In the present matter the deponent to the affidavit is employed by the applicant company in the position of a general manager of legal affairs. Furthermore, the applicant's claim is a direct claim and not a ceded claim. It is nonetheless important to note, for the purposes of the present matter, the *obiter* statement by Wallis J in *Shackleton* to the effect that a person may, by virtue of his employment, acquire sufficient personal knowledge of the facts to depose to an affidavit in support of summary judgment. Wallis J held that each case depends on its own facts [119E].

[11] After perusing the papers I noticed that Mr Hainsworth signed both the section 86(10) noticed that is annexed to the summons and the certificate dated 24 August 2010. I also note that a different person, Mr Sachin Maharaj, deposed to the affidavit in support of summary judgment. Indeed, it appears as though yet another person had signed the contract of lease between the plaintiff and the defendant. This does not necessarily mean that the deponent could not have acquired sufficient personal knowledge of the facts. The deponent avers that he has under his possession and control the files and records of the plaintiff that pertain to this matter and that he has '*familiarised*' himself with these files and records '... *during the course of the plaintiff's dealings with the defendant and for purposes of this matter*'.

This phrase suggests that the deponent was involved on an ongoing basis in the transaction entered into between the plaintiff and the defendant. I am therefore satisfied that on the facts of this case the deponent acquired sufficient personal knowledge of the facts to enable him to depose to the affidavit.

NOTICE OF DEMAND

[12] The defendant argued that the lack of due demand in terms of the contract of lease disentitles the plaintiff from claiming judgment for delivery of the leased vehicle. Clause 8.2 of the lease agreements reads [p 11 of the indexed bundle]:

'8.2 Upon an event of default or the loss, damage or destruction of the vehicle as determined in 5.1 the Lessor may, subject to the provisions of the Act and any other applicable legislation, at its election and without prejudice to any remedy which it may have in terms of this agreement or otherwise-

8.2.1 ...

8.2.2 after due demand, cancel this agreement, obtain possession of the vehicle and recover from the Lessee, as pre-estimated liquidated damages, the total amount of payments not yet paid by the Lessee, whether same are due for payment or not or the proceeds of any insurance policy paid by the Lessor in respect of the vehicle. In addition, the Lessor shall be entitled to claim from the Lessee any amount of any value added tax payable in respect of such damages. **For the purpose of this sub-clause, "due demand" shall mean immediately on demand unless the Lessee is entitled to notice, in which case "due demand" shall mean the giving of such notice to which the Lessee is entitled.** ' [My emphasis]

[13] The phrase '*...subject to the provisions of the Act and any other applicable legislation...*' clearly indicates that the parties intended the National Credit Act to override their private agreement in the event of a conflict between the Act and their agreement. The defendant referred the matter to a debt counsellor and thereafter the debt review proceedings were referred to the magistrate's court. The defendant thereby brought into play the machinery of the Act and its provisions governed the relationship between the parties. The plaintiff delivered its termination notice in terms of the Act. It thereafter served summons on the defendant. A summons is a form of demand. Applying the definition of '*due demand*' in clause 8.2.2 to the facts of the present case, I am satisfied that the summons constitutes sufficient immediate demand and that, having called into play the provisions of the Act, the only notice that the defendant was entitled to was the termination notice in terms of the Act.

SERVICE OF THE DEBT REVIEW TERMINATION NOTICE

[14] The plaintiff argued that there was proper service of the termination notice on the defendant. Paragraph 12 of the plaintiff's particulars of claim reads [p 6 of the indexed bundle]:

'On the 5th of AUGUST 2010 the plaintiff gave notice to the Defendant, the debt counsellor and the National Credit Regulator, in the prescribed manner, of its election to terminate the debt review in terms of Section 86(10) of the Act. A copy of that notice is annexed marked "B".'

[15] The defendant contended that he did not receive the termination notice because he was not aware that all notices were being sent to his residential address as opposed to his postal address. The defendant further contended

that he did not understand legal terminology such as '*domicilium address*' and that had he known that all notices were being sent to this address he would have objected and demanded that all notices be sent to his postal address instead. The defendant claimed to have telephonically informed the plaintiff of his postal address.

[16] Clause 11 of the lease agreement reads:

'11. Domicilium and Notices

11.1 The Lessee chooses its domicilium citandi et executandi ('domicilium') for all purposes as its address on the face of this agreement. The Lessee may change its domicilium by written notice delivered by hand or sent by registered post to the Lessor.

11.2 Any notice delivered by hand or sent by registered post to the Lessee's domicilium shall be deemed to have been received if delivered by hand, on due date of delivery o, if sent by registered post on the third day after posting.'

[17] It is clear from the above clause that the agreed method for changing the domicilium address was by way of written notice delivered by hand or sent by the registered post. Oral amendment of the domicilium address was not agreed to between the parties. A further obstacle to the defendant's argument is the non-variation clause, which is contained in clause 12 of the lease agreement and it reads:

'12. Non-Variation

12.1 This is the entire agreement between the parties relating to the vehicle. There are no implied or tacit terms or conditions to be read into this agreement.

12.2 ...

12.3 This agreement may not be amended, cancelled or novated except and only to the extent that such amendment, cancellation or novation is reduced to writing and

signed by both parties. No relaxation by the Lessor of any of the terms of this agreement shall be deemed to be waiver of the Lessor's rights and the Lessor may enforce the terms strict at any time.

12.4 The signature of this agreement by the Lessor and the Lessee will mean that any prior agreement/s between the Lessor and the Lessee in respect of the vehicle described herein is cancelled and the terms of this agreement shall determine the contractual relationship between the Lessor and the Lessee.'

[18] In contracts there is a difference between, on the one hand, the delivery address to which notices are to be sent and, on the other hand, the method of delivery to that address. The defendant is concerned with the former and not with the latter. In my view, the defendant claims to have telephoned the plaintiff and informed it of his postal address. There is no indication as to whether this was done before the signing of the contract or afterwards. The defendant does not allege specific facts such as the date of the alleged phone call and the person with whom he spoke.

[19] The method of delivery of notices to the domicilium address, which is a different issue from the delivery address itself, is provided for in clause 11.2 of the lease agreement. The defendant argued that the notices should have been sent to his postal address and not his residential address. The defendant did not object to the notices being sent by registered post. In support of this argument, the defendant relied on section 65(2) of the Act, which provides for the consumer's right to receive documents. This subsection deals with the method of delivery of documents. The defendant also relied on the separate concurring judgment of Cloete JA in *Rossouw and Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA). Cloete JA stated at 457B – D:

'Unless credit providers inform consumers of their options in terms of s 65(2), the benefits of that section are likely to remain illusory rather than real. A consumer could hardly complain if the method of delivery of a document chosen by him or her proves ineffective. But for so long as credit providers standard form contracts which make provision for one possibility only – in the present matter, a notice sent by registered post to an address (which, in the absence of an address specified, will be the address of the mortgaged property) – the argument loses sight of reality. Credit providers should accordingly not complain if courts require compliance to the letter with both the Act and the terms of credit agreements …'

In the present matter the lease agreement provides for two different methods of delivery, that is by hand or by registered post, and not merely one method of delivery. The thrust of Cloete JA's judgment concerned the method of delivery chosen by the consumer. As I said before the method of delivery is different from the address at which delivery is to be made. This is more than a mere technical distinction. The defendant's argument centres on the delivery address and not the method; he would have preferred his postal address to his residential address. I am of the opinion that the plaintiff was entitled to deliver the termination notice by registered post to the agreed address.

[20] I now turn to the issue as to whether the plaintiff lawfully terminated the debt review process. Reference was made to the Full Court judgment of the Western Cape High Court in *Wesbank, a division of FirstRand Bank Ltd v Papier* (14256/10) [2011] ZAWCHC 2 (1 February 2011). Incidentally, this case was approved and applied in *Firstrand Bank Ltd t/a Wesbank v Sewsunker* [2011] JOL 26982 (KZP) at paras 24 and 25.

[21] In my opinion, the case does not avail the defendant. I am of the view that *Papier* is factually distinguishable from the present matter. In *Papier* the defendant applied to the debt counsellor for debt review. The debt counsellor sent out a notice informing all recipients that the debt review application had been successful and this notice was followed by another notice to the effect that the defendant was over-indebted. In the latter notice the debt counsellor informed the credit providers that the debt obligations were in the process of being restructured and attached an instalment offer to the notice [para 4]. The debt counsellor therefore took a further step over and above the section 86(4)(b)(i) notice. The court narrowly framed the issue as being whether a credit provider is entitled to terminate debt review proceedings in cases where a debt rearrangement order has been applied for but not yet granted [para 26]. In the present matter, the plaintiff pleads, in paragraph 11.3 of its particulars of claim, that the debt counsellor took no further steps as contemplated by subsections 86(5), (6), (7) or (8) of the Act. The defendant, in his opposing affidavit, only alleges that the debt review in the magistrate's court was set down for 21 October 2010. The defendant did not attach a copy of the papers from the debt review proceedings or any of the notices sent by the debt counsellor as to whether or not the defendant was over-indebted. The defendant has not produced any evidence to gainsay the plaintiff's factual allegation that no further steps where taken by the debt counsellor after delivery of the section 86(4)(b)(i) notice.

[22] I am of the view that the plaintiff has complied with the statutory requirements for delivery of the termination notice. The termination of the debt review process was therefore lawful.

ORDER

[23] In the result, I grant the relief sought in paragraphs 2 and 7 of the plaintiff's notice of application for summary judgment.

SEEGOBIN J