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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 13056/2017P

In the matter between:-

McCARTHY FINANCE, A DIVISION OF WESBANK,
A DIVISION OF FIRSTRAND BANK LIMITED **PLAINTIFF**

and

KHANYISILE LUCIENDRA PRECIOUS MBAMBO **DEFENDANT**

JUDGMENT

CHETTY AJ

[1] This is an opposed application for summary judgment, in which the Plaintiff, in the main, seeks an order for the return of a 2012 model Toyota Quantum 2.5D-4D Sesfikile motor vehicle bearing engine number: 2KD5917418 and Chasis Number: AHTSS22P007001281from the Defendant (the vehicle).

[2] Pursuant to the application for summary judgment being made, the Defendant, duly represented, filed her affidavit resisting summary judgment.

[3] The matter was set down on the opposed roll, for the 26th April 2018, and the Defendant failed to comply with the practice directive for opposed applications.

[4] On the date set down, counsel for the Defendant requested an adjournment of the application and having listened to argument by counsel in favour of the application for the adjournment and with the Plaintiff no doubt opposing same, I granted an ***ex tempore*** judgment refusing the application for the adjournment.

[5] At that juncture counsel for the Defendant handed into court a duly prepared and signed notice of withdrawal as attorneys of record on behalf of the Defendant. In all the circumstances, it would appear that there was good reason for the refusal of the adjournment and the subsequent withdrawal as attorneys of record appears to me, simply to be an abuse of the process of court. The application for summary judgment was served on the Defendant's attorneys on the 26th January 2018, and despite the lapse of time, not only was there no compliance with the practice directive, but in addition thereto, matters appear to have been left for the last moment, hoping, that with the appearance of counsel at an opposed application, the adjournment would simply be granted upon a mere request therefore. In refusing the application for summary judgment, I was mindful of the threshold set out by Mahomed A J A (as he was then) in the case of *Myburg Transport v Botha T/A S A Truck Bodies*[1] having regard to the fact that the true reason for the Defendant's

[1] Myburg Transport v Botha T/A S A Truck Bodies, 1991 (3) SA 310 at page 310 H – J and at page 311 A - F

unpreparedness was not fully explained and furthermore the application for a postponement was not timeously made, the court was of the view that the application for the postponement was not ***bona fide.***

[6] With the court expressing its concern regarding the Defendant's conduct, leave was granted to counsel to withdraw on behalf of the Defendant and counsel for Plaintiff addressed the court with regard to the granting of summary judgment.

[7] This is not the usual kind of action that one would find as a matter of course, when goods are sold or monies advanced by finance institutions but an action which set out a ***causa*** for unlawful possession.

[8] By way of background, it is pleaded by Plaintiff that on the 2nd November 2012, and at Pinetown, a written instalment sale agreement (the agreement) was concluded with a certain Thulani Mkhize (the deceased). In terms of the aforesaid agreement, the vehicle was sold to the deceased.

[9] A deposit of R100 000.00 was paid in respect of the purchase price and the monthly instalments, which attracted interest at 16.5% per annum was the sum of R5905.42 per month. The deceased passed away on the 5th October 2013 and since that date there has been no payment received in respect of the vehicle. In addition thereto, no executor had been appointed to deal with the estate of the deceased and for reasons which are not detailed in the summons, the Defendant was in possession of the vehicle.

[10] The agreement which is in accordance with the Act[2], makes provision for the following:

"4. Ownership

4.1 we will remain the owner of the Goods until you have paid all the amounts due under this Agreement;

12. Breach

1.2.1.1 if you do not comply with any of the terms and conditions of this Agreement (all of which you agree are material); or

12.1.2 you fail to pay any amounts due under this agreement; or

12.1.3 ...

12.1.4 ...

12.1.5 ...

12.1.6 ...

12.1.7 you, being a natural person dying or being a juristic person undergo a material restructure, or ...

... then we may (without affecting any of our other rights) proceed with the enforcement or termination of the Agreement as set out in the Act;

12.2 Upon the occurrence of any of the above mentioned events, we shall be entitled at our election and without prejudice to:-

[2] National Credit Act, Act 34 of 2005, as amended from time to time

12.2.1 *claim immediate payment of the outstanding balance together with the interest and all amounts owing or claimable by us, irrespective whether or not such amounts are due at that stage; or*

12.2.2 *take possession of the goods in terms of an attachment order, retain all payments already made in terms thereof by yourself and claim as liquidated damages, payment of the difference between the balance outstanding and the market value of the Goods determined in accordance with clause 11.2.3 which amount shall be immediately due and payable."*

[11] The Plaintiff in its summons deals with conclusion of the agreement with the deceased and contends that the Plaintiff performed all its obligations in terms of the Agreement, adding that the Defendant had no lawful right to be in possession of the vehicle and therefore sought an end to Defendant's unlawful possession, requesting return of the vehicle.

[12] The Defendant in opposing the grant of summary judgment raised 3 points ***in limine***:-

[i] Firstly the Defendant contended that the deponent to the summary judgment affidavit, one Sunette Stewart (Stewart) did not deal with the Defendant personally and therefore did not have any personal

knowledge of the facts and particulars relating to this action, essentially, disqualifying her from launching the application. In proffering this defence, the Defendant placed reliance on the judgment of Wallis J (as he then was) in the case of *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & Another*[3]. The Defendant challenged the authority of Stewart to depose to the affidavit stating that there was no proof that she was authorised to depose to the affidavit in the form of a resolution by the directors of the Plaintiff authorising Stewart to institute the proceedings against Defendant;

[ii] Secondly the Defendant contended that Stewart was not properly authorised to depose to the affidavit in support of summary judgment.

[iii] Thirdly the Defendant raised Plaintiff's apparent non-compliance with the provisions of the Act and contended that there had been no compliance with Section 129 (1) read with the provisions of Section 130 of the Act.

[13] In dealing with the first point raised by the Defendant, it is necessary to recite that portion of the affidavit in support of the application for summary judgment. The affidavit reads as follows:-

"I, the undersigned, Sunette Stewart, do hereby make oath and state:

[3] Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & Another, [2011] 1 ALL SA 427 (KZP)

1.

I am the Manager, Specialised Collections KZN of the Plaintiff and am duly authorised to depose to this affidavit.

2.

I do hereby:

(a) Confirm that the facts herein deposed to are within my personal knowledge, save where the contexts indicates otherwise, and are true and correct;

3.

(b) In referring to certain details regarding the Instalment Sale Agreement and the associated accounts and transactions, I have relied on information from the Plaintiff's documents as amplified below;

(c) In my capacity as Manager of the Plaintiff I have access to, and have under my control, all documents, records and information to enable me to monitor and determine:

(i) The Instalment Sale Agreement (the Agreement) sued upon in this action and the compliance of the Defendant in terms of the Agreement;

(ii) The circumstances under which the debt claimed was incurred;

(iii) The total indebtedness of the Defendant to the Plaintiff in terms of the Agreement;

(iv) The transaction history of all payments made, the arrears and the outstanding balance from time to time, under the Agreement;

(v) Whether, when and how notices under the various provisions of the National Credit Act 34 of 2005 were sent.

(d) Swear positively that the Defendant is indebted to the Plaintiff on the grounds set forth in the Summons;

(e) Verify the Plaintiff's cause of action as set out in the summons.

4.

In my opinion the Defendant has no bona fide defence to this action and a Notice of Intention to Defend has been delivered solely for the purposes of delay.

WHEREFORE I pray that summary judgment be entered against the Defendant, as set out in the summons".

[14] In the affidavit resisting summary judgment the Defendant records that:

" *6.2 All Stewart could do was access the main information system, as many other employees would be capable of doing;*

6.3 She has never once personally dealt with me or interacted with me on any level;

6.4 *Stewarts affidavit resultantly constitutes inadmissible hearsay which cannot advance the Plaintiff's case any further (or at all) in fact".*

What the Defendant sought to do, and incorrectly in my view, was to use the *dicta* in the Wallis judgement to set up a defence to the application. Not only was this a clear misdirection but also factually incorrect as Stewart categorically records (as an employee of the Plaintiff) and as manager of specialised collections KZN she had access to and had under her control all documents, records and information to deal with this matter. In the Shackleton Credit Management case (***supra)*** the Applicant took cession of a number of claims from a bank including agreements concluded between the bank and the First Respondent. Of necessity this included the cession of certain suretyship agreements that were provided by the Second Respondent. In an application for summary judgment the affidavit was deposed to by the attorney for the Applicant who alleged ***inter alia*** that the facts deposed to in the affidavit where within "*his personal knowledge and belief*" The learned Judge in conducting a clear and decisive analysis of Rule 32 and no doubt making reference to various cases came to the conclusion that the attorney had no direct or personal knowledge in relation to those claims. At paragraph [11] the Learned Judge says *"he states unequivocally that his personal knowledge"* of the facts giving rise to the Applicant's cause of action derived from the documents that he has inspected and that this constitutes his investigation of the claim. In other words, his affidavit is entirely hearsay when he purports to verify the facts giving rise to the claim and the amount of that claim.

He is in no different position from any other attorney who has been given instructions by their client and furnished with documents in support of those instructions. Any resultant affidavit is then nothing more than an affidavit of information and belief". The facts in the Shackleton Credit Management case are clearly distinguishable from the facts in this matter. Stewart in her capacity as manager of the Plaintiff had access to and control of all the relevant documentation regarding this matter. On the contrary, and on a close introspection, there is clearly no one in a better position than Stewart to depose to such an affidavit.

[15] In ***Maharaj v. Barclays National Bank Limited***[4], Corbett J. A. stated *"generally speaking, before a person can swear positively to facts in legal proceedings, they must be within his personal knowledge. For this reason the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors and the similar rule in the Magistrate's court, of requiring that a deponent to an affidavit in support of summary judgment, other than the Plaintiff himself, should state, at least, that the facts are within his personal knowledge or make some other averment to that effect unless such direct knowledge appears from the facts stated".* The Learned Judge added[5] *"the mere assertion by a deponent that he "can swear positively to the facts"(an assertion which merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words.*

[4] Maharaj v. Barclays National Bank Limited, 1976 (1) SA 418 at page 423 B – C
See also Rees and Another v. Investec Bank 2014 (4) SA at page 220
[5] Page 423 at D - E

[16] The court in ***Stamford Sales & Distribution (Pty) Ltd v. Metraclark (Pty) Ltd***[6], reiterated the application of this Rule with Swain A J A (as he was then) reiterating at paragraph 10 *"in my view as long as there is direct knowledge of the material facts underlying the cause of action, which may be gained by a person who has possession of all the documentation, that is sufficient"*. The Learned Judge at paragraph 12 stated *"to insist on personal knowledge by the deponent to the verifying affidavit on behalf of the cessionary of all the material facts of a claim of the cedent against the debtor, emphasis formalism in procedural matters at the expense of commercial pragmatism"*. Surely then, with Stewart confirming that all the facts in the affidavit were within her personal knowledge, the threshold that is required is met, and therefore the criticism by the Defendant falls to be rejected.

[17] The second point ***in limine*** raised by the Defendant was that Stewart made no allegation that she was properly authorised to depose to the affidavit in support of summary judgement. In the founding affidavit Stewart records that in her capacity as manager, she is duly authorised to depose to this affidavit. The court in ***Ganes and Another v. Telecom Namibia Ltd***[7], held in determining the question whether a person has been authorised to institute and prosecute motion proceedings, it is irrelevant whether such person was authorised to depose to the founding affidavit. The deponent to the affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof that must be authorised. Thus, where, as in the present case, the

[6] Stamford Sales & Distribution (Pty) Ltd v. Metraclark (Pty) Ltd, Supreme Court of Appeal of South Africa – case number 676/2013

[7] Ganes and Another v. Telecom Namibia Ltd 2004 (3) SA 615 G - I

motion proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the Applicant and in an affidavit filed with the notice of motion, it was stated by the deponent thereto that he was a director in the firm of attorneys acting on behalf of the Applicant and that such firm of attorneys was duly appointed to represent the Applicant and such statement is not challenged by the Respondent, it must be accepted that the institution of proceedings were duly authorised. Such a finding will be strengthened if the Respondent does not avail himself to the procedure provided by Rule 7 of the uniform Rules of Court. In this matter upon defence of the action, no notice in accordance with the provisions of the Rule 7 was filed. On this basis, yet again, there is no merit in the defence set out by the Defendant.

[18] The third point ***in limine*** raised by the Defendant relates to the Act. When one has regard to the principles of privity of contract, reliance can be placed upon the Act if the action was instituted against the representative of the deceased's estate having regard to the demise of the deceased and the alleged breach of the agreement. In those circumstances, the contentions raised by the Defendant would have merit. ***Ex facie*** the summons, that is clearly not the position as the Defendant was not a contractual party to the agreement. Furthermore having regard to the allegations that the Defendant is in unlawful possession of the vehicle and the Plaintiff instituting the action as it did, was asserting its rights as owner, the provisions of the agreement, which I have referred to ***supra*** makes provision for this vindicatory action. There is accordingly no cogency in this defence as well.

[19] The enquiry however does not end there. Whilst it is admitted that summary judgment is an extraordinary procedure, a ***bona fide*** and triable defence has and will generally stand the test of time. The Court in ***Joob Joob Investments v Stocks Mavundla***[8] stated that *"the rationale for summary judgement proceeding is impeccable. The procedure is not intended to deprive the defendant on a triable issue or a sustainable defence of her / his day in Court"*. More importantly the Learned Judge Navsa J.A. referring to the defence in the affidavit resisting summary judgment stated *"what is conspicuously absent is the substance of the a triable defence"*. So too in this matter absent the points ***in limine*** there is no compliance whatsoever with the Rules with Rule 32 (3) (b)[9].

[20] It is perhaps relevant at this stage to state that in assessing the application for an adjournment, as the court did at the commencement of the hearing, the court was influenced by the fact that there was no proper defence to the Plaintiff's claim. It is trite law that the more meritorious a defence is, the more likely that a court, would lean in favour of the Defendant. In this instance, this was clearly not present.

[21] On the issue of costs, counsel for the Plaintiff, correctly in my view, conceded that this application could have been launched in the Regional Court.

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[8] Joob Joob Investments vs Stocks Mavundla 2009 (5) SA page 1 at page 11 H

[9] Satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding day on which the application is to be heard) or with leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a *bona fide* to the action, such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor (my emphasis).

[22] In the circumstances I grant summary judgment as prayed for by Plaintiff, save that costs shall be on the appropriate Regional Court tariff.

CHETTY A. J

Date of Hearing	:	26th April 2018
Date of Judgment	:	8th May 2018

APPEARANCES:

Counsel for Applicant	:	Advocate A. J Boulle
Instructed by	:	Allen Attorneys Incorporated
Counsel for Defendant	:	Advocate Naidoo
Instructed by	:	Manoj Haripersad & Associates