Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 6574/2011

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

WESBANK a division of FIRSTRAND BANK LTD **Applicant**

and

ELECTRONIC BONDS CC t/a SK PROPERTIES **Respondent**

JUDGMENT DELIVERED THIS DAY OF 17 JUNE 2011

BINNS-WARD, J:

[1] The plaintiff, which is cited as 'Wesbank a division of FirstRand Bank Ltd', has applied for summary judgment against the defendant close corporation for the delivery up of a motor vehicle of which the defendant was placed in possession in terms of a lease agreement. The defendant is alleged to have been in breach of its

payment obligations under the contract, which has resulted in the plaintiff exercising its right of cancellation under the agreement.

[2] The defendant opposes the application. Ms Khan, the sole member of the defendant corporation raises the following points in opposition and defences to the claim in her 26 page opposing affidavit:

1. The deponent to the supporting affidavit does not adequately establish her qualification to make the averments therein.

2. She denies the existence of a legal entity by the name of Wesbank, a division of FirstRand Bank Ltd.

3. She disputes the authority of the deponent to the supporting affidavit to make the affidavit on behalf of the plaintiff.

4. She points out that supporting affidavit was deposed to before the notice to which it was attached and to which reference is made in the affidavit was signed.

5. She denies that the agreement was not subject to the National Credit Act 34 of 2005, as alleged by the plaintiff with reference to s

6. She points out that the deponent to the supporting affidavit did not allege that a sum of money was due and payable by the defendant. She contends that the summons and the supporting affidavit therefore did not make out a cause of action.

7. She alleges that the particulars of claim are excipiable.

8. She alleges that the lease agreement is incomplete and deficient (onvolledig en gebrekkig) to the extent that there is in fact no agreement in existence between the parties.

9. She denies that she signed the schedule to the lease agreement. She avers that the signature appearing as hers, in the capacity of the defendant's representative, on the schedule to the lease agreement appears to be a forgery. She annexes a copy of a statement that she made to the police in this regard. In the statement to the police, the deponent admits signing annexure C to the summons, but suggests, on the basis of a suggestion allegedly made to her by the defendant's attorney, that her signature on annexure D appears to have been forged. (Schedule D to the summons is essential to give the deed of contract meaning. Thus, annexure C to the summons, which purports to set out what appear to be the plaintiff's standard terms for such lease agreements, defines the 'Goods' as meaning 'the Goods as more fully described in the Schedule and which Goods form the subject matter of this Agreement'. '[T]his Agreement' is in turn defined in the document which the deponent to the opposing affidavit admits that she signed as 'this Lease Agreement, which is comprised of these terms and conditions and the Schedule attached'. Clause 13 of the standard terms and conditions set forth in annexure C to the particulars of claim provides 'This is the whole Agreement and no changes may be made to it unless these changes are in writing and signed by both you and the Lessor or are voice logged by you and the Lessor'. The effect of the aforegoing, is that if one accepts the deponent's averment that she did not sign the Schedule

(annexure D to the particulars of claim), her allegation referred to above that there is no agreement in existence between the parties must be good.)

10. She takes issue with the failure of the plaintiff to have issued a certificate of balance as provided for in terms of clause 6.6. of the lease agreement. It is impossible to understand the deponent's reliance on clause 6.6 of the alleged agreement (which resorts in annexure C to the particulars of claim), if indeed, as she points out, there is no agreement in existence. In any event no amount sounding in money is claimed in the summary judgment application.

11. She denies that she was in breach of an obligation to make payments under the lease agreement and complains that the summons does not give sufficient detail of the alleged failure by the defendant 'to maintain regular payments on account'. Later in the opposing affidavit the defendant avers that the particulars of claim are vague and embarrassing in this respect.

12. She denies that the plaintiff was entitled to address the letter of demand alleged in para 10 of the particulars of claim; and in this respect calls in aid the provisions of clause 6.6 of the lease agreement.

13. She denies that the plaintiff was entitled to give notice of the cancellation of the agreement in the summons and in this respect too calls in clause 6.6 of the lease agreement.

14. She denies having received any statements of account in respect of the lease agreement subsequent to her signature of the agreement on 14 September 2007 and complains that this has made it impossible to verify the amount that was allegedly owed.

[3] I have to confess that the impression derived from a consideration of the plethora of (sometimes mutually contradictory) defences and the technical issues raised by the deponent to the opposing affidavit is that of a desperate effort by any means, fair or cynically opportunistic, to avoid judgment. I do not find it necessary to analyse all the issues raised on the defendant's behalf to confirm whether this impression is well founded or not. What is clear is that the defendant cannot have its cake and eat it. At this stage of the action the only relief sought by the plaintiff is vindicatory in nature. The deponent to the opposing affidavit contends that there is no valid agreement in place between the parties in respect of the vehicle. If that is so, there can be no basis for the defendant to keep the plaintiff out of the possession of its vehicle. The defendant does not contest that the plaintiff is the owner and she does not set out in anything approaching a coherent fashion the terms of any other agreement in terms of which the defendant might be entitled to retain the vehicle against its owner. At any subsequent stage of the trial in which the plaintiff might seek to claim a sum in money from the defendant arising out of the cancellation of the agreement, the contested existence of the agreement and the import of its provisions will come centrally to the fore. But if the defendant's case is that for one reason or another there is no lease agreement in place, then it has not made out a defence to a claim for the delivery up of the vehicle.

[4] It is necessary, however, to determine whether there is substance in the defendant's objections to the competence of the summary judgment application.

[5] In my view there is no merit in the defendant's quibble at the citation of the plaintiff and the attendant contention that there is no legal entity known as Wesbank a division of FirstRand Bank Ltd. Essentially equivalent contentions were raised and dismissed in *Wesbank (a division of FirstRand Bank Limited) v Anwar Smith and others* (WCC case no. 12203/10) (per Griesel J) and in *FirstRand Bank Ltd t/a Wesbank v Weltman-Shmaryahu and two other cases* (WCC case no. 18229/2010 and other case numbers) (per Cleaver J). I have no reason to think that those judgments wrongly decided the point. It is plain from the summons that the legal personality of the plaintiff is in FirstRand Bank Limited, the company alleged to be registered as a company under registration number 1929/01225/06 and registered as a bank under the Banks Act 94 of 1990. In context it is clear that Wesbank is one of the trading names of the plaintiff bank – and indeed, the trading name under which it allegedly treated with the defendant.

[6] There is also no merit in the challenge to the adequacy of the affidavit filed by the plaintiff in support of the application for summary judgment. The deponent to the affidavit averred that she is the Legal Manager of the applicant/plaintiff. She says that she is authorised to depose to the affidavit on behalf of the applicant/plaintiff. She points out that she has all the applicant/plaintiff's files and documents pertaining to the matter under her control and states that she has perused them and acquainted herself with the content thereof. In my judgment the deponent to the supporting affidavit has established adequately that she was in as good a position as could be expected in the circumstances to confirm the facts as alleged in the summons and

particulars of claim verifying the cause of action set out in the summons and the particulars of claim. Cf. *Barclays National Bank Ltd. v. Love* 1975 (2) SA 514 (D), at 516-517, approved by Corbett JA in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A), at 424.

[7] The notice to which reference is made in the supporting affidavit, and which the deponent to the opposing affidavit points out was signed after the supporting affidavit had been deposed to, is the notice of application for summary judgment. I do not consider it to be of any moment that the notice was signed after the affidavit. In my view, it would not matter if the notice of application had not even been in existence when the supporting affidavit to the summary judgment application was deposed to. The deponent must have appreciated that her affidavit would be attached to a notice of application because the rules require that. As the Legal Manager she would have appreciated that the notice would set out the relief which the plaintiff's attorneys would be instructed to seek in the application. The importance of the supporting affidavit is not to verify the notice of application, but to verify the claim set forth in the summons. Summary judgment is sought in terms of prayers (a) and (b) of the combined summons.

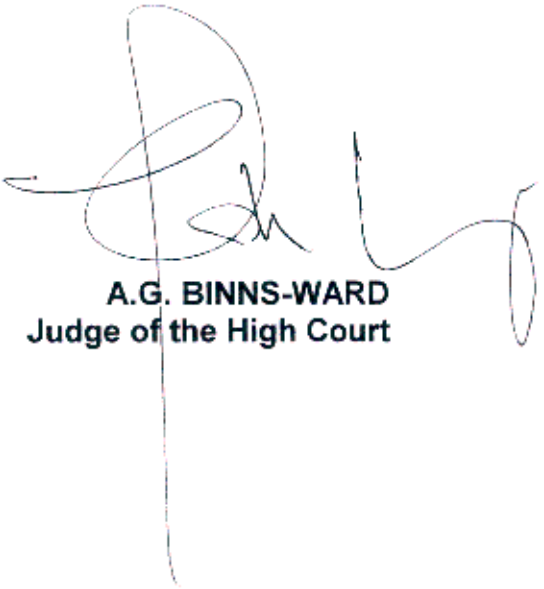
[8] It is also necessary to consider the defendant's allegation that the alleged agreement was subject to the provisions of the National Credit Act. This is so because if it were, the court would have to exact compliance with by the plaintiff with the requirements of the Act, notwithstanding that the existence of agreement alleged by the plaintiff is denied by the defendant. The National Credit Act, if it applied, would render the plaintiff's common law rights, *qua* owner, to vindicate its property subject to compliance with the requirements of the Act. In that connection the

allegations made by the plaintiff cannot be disregarded simply because the defendant denies that there was a duly concluded agreement.

[9] The defendant alleges that it is not 'a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1)' and therefore does not fall within the exception provided in terms of s 4(1)(a)(i) of the NCA. That is a red herring. The principal debt under the alleged agreement - if the agreement exists - is R297 237,69. That renders the agreement 'a large agreement' as defined in s 9(4)(b) of the Act. In terms of s 4(1)(b) of the Act, its provisions do not apply to an agreement which is a large agreement, as described in section 9 (4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1). Thus if the agreement indeed does not qualify for exception from the Act in terms of s 4(1)(a)(i), it did so in terms of s 4(1)(b) of the Act.

[10] In the result I am satisfied that the plaintiff is entitled to summary judgment

against the defendant for delivery up of Toyota Hilux 3.0D with engine number 1KD7375034 and chassis number AHTEZ39G907008492, and to the payment by the defendant of its costs of suit incurred in the action thus far. Judgment is entered against the defendant accordingly.



A.G. BINNS-WARD
Judge of the High Court