Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 15924/2012

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

BMW FINANCIAL SERVICES (SOUTH AFRICA) PTY LTD Plaintiff

and

IMRAN-SHER KHAN Defendant

JUDGMENT DELIVERED: 16 NOVEMBER 2012

BINNS-WARD J:

[1] The plaintiff instituted action against the defendant for delivery up of a 2011 BMW 320i motor vehicle purchased by the defendant in terms of an instalment sale agreement concluded between the parties on 4 October 2011 and certain consequential relief sounding in money. The consequential relief can only be dealt with after the vehicle has been recovered and realised. The defendant entered appearance to defend the action and the plaintiff thereupon applied for summary judgment.

[2] The instalment sale agreement qualifies as a 'credit agreement' within the meaning of the National Credit Act 34 of 2005 ('the NCA'). It appears from the allegations in the plaintiff's particulars of claim that the plaintiff was at the time of the conclusion of the agreement a registered credit provider in terms of the NCA. A copy of the relevant 'confirmation of registration' issued by the National Credit Regulator was annexed as annexure C to the summons. According to the tenor of the confirmation of registration the plaintiff was registered in terms of the Act for the period 21 September 2011 to 20 September 2012.

[3] The institution of the action in this matter had been preceded by a notice given by the plaintiff to the defendant in terms of s 129 of the NCA, dated 30 May 2012, which was despatched by registered post to the defendant's *domicilium citandi* on 31 May 2012. The Post Office 'track and trace' report annexed to the summons, in compliance with the practice directive issued by the Constitutional Court in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) 142 (CC), indicates on its face that the notice was delivered to a post office serving the area of the defendant's *domicilium citandi* and collected from there by someone bearing the defendant's surname on 18 June 2012. The action was thereafter instituted on 16 August 2012, with service of the summons being effected at the defendant's address on 21 August 2012. The institution of action had been preceded by a letter to the defendant, dated 24 July 2012, in which the defendant was informed of the plaintiff's election to cancel the agreement.

[4] The notice given to the defendant in terms of s 129 of the NCA advised that he was at that stage in arrears in contract payments in the sum of R19 926,85. The notice

invited the defendant to remedy his default within 10 business days of delivery of the notice, alternatively to take any of the other steps provided for in terms of s 129(1)(a) of the NCA, failing which legal proceedings would be instituted against him.

[5] The defendant took a number of points in his affidavit opposing the summary judgment application. These were mainly of a procedural or technical, rather than a substantive nature. I shall deal with each of them in turn.

[6] The first point was that the deponent of the affidavit in support of the application for summary judgment was not qualified to confirm the cause of action, it being denied that the facts of the matter could have been within her personal knowledge. The deponent testified that she is employed by the plaintiff in the capacity of Manager: Asset Loss Recovery. She averred that she had within her control all the documents and files of the plaintiff pertaining to the action and had acquainted herself with the facts as set out in the particulars of claim. In my judgment the averments made in the supporting affidavit are sufficiently compliant with the requirements of rule 32(2) as discussed by Corbett JA in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423-4. As pointed out by the learned judge of appeal at the place cited, the court assesses the adequacy of the averments in the supporting affidavit looking at it in the context of all the documents in the case that are properly before it. On that approach the application passes muster.

[7] The defendant also sought to make something of the fact that the letter of cancellation from the plaintiff erroneously referred to the notice in terms of s 129 of the NCA as having been sent to him on 31 January 2012. There is nothing in the

point. The reference was most probably an error, as indeed confirmed by the defendant's own averment that he never received a notice dated 31 January 2012. As mentioned earlier, it is clear from the allegations in the summons which are corroborated by the content of the annexures thereto that the s 129 notice was posted to the defendant on 31 May 2012 and collected by him, or on his behalf, on 18 June 2012. The position explained in *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) and, in the post *Sebola* era, confirmed in the judgment of this court in *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 (5) SA 569 (WCC) is that in any event the risk of non receipt is on the defendant. All that the defendant said in his affidavit in respect of the notice posted to him in May 2012 was that he could not recall having received the letter and that he was not prepared to admit that it had been posted to him. In the face of the proof of postage by registered post and the content of the 'track and trace' report the defendant's averments in this do not make out a *bona fide* defence.

[9] The defendant took several points concerning defects in the affidavit submitted by the plaintiff in purported compliance with consolidated Practice Note 33. There were indeed a number of defects in the affidavit. The fact that the affidavit could have been filed without those defects being detected either by the deponent to the affidavit, or the plaintiff's attorneys of record is lamentable. However, the defective affidavit does not assist the defendant. As I pointed out to the defendant's attorney during argument, Practice Note 33 was drafted in order to assist the judges in this court to complying with their obligation when hearing matters for the enforcement of credit agreements subject to the NCA to be satisfied of the matters

referred to in s 130(3) of the Act. The basis for the relevant portion of the Practice Note has subsequently been overtaken by the requirements laid down by the Supreme Court of Appeal in *Rossouw*. The summons in this matter satisfied those requirements, as also the additional requirements imported consequent upon the majority judgment of the Constitutional Court in *Sebola*.

[10] The defendant also took the point that he was 'unable to admit that plaintiff is currently registered as a credit provider' in terms of the NCA. It is apparent from the description of the facts earlier in this judgment that the plaintiff was a registered credit provider at the time of the conclusion of the credit agreement in issue in this case. There is no requirement in the Act that a credit provider must be registered in terms of the NCA in order to enforce a credit agreement lawfully concluded by it under the provisions of the Act. As it happens, however, it is evident from the certificate annexed to the particulars of claim that the plaintiff was a registered credit provider both at the time of the conclusion of the agreement of issue and also at the time of the commencement of the action.

[11] Finally, the defendant averred that during May 2012 a certain Mr Geldenhuys from the plaintiff's recovery division had contacted him and demanded that he either pay an 'alleged arrears amount of about R30 000,00 or voluntary surrender the vehicle' failing which legal action would be taken against him. The defendant averred that he did not agree with the amount being demanded from him as he was 'genuinely of the belief that he owed something substantially less' - in the region of about R15 000,00. He stated that he did not wish to get involved in a legal dispute and offered to pay an amount of R10 0O0,00 immediately and the balance in the

following month. He averred that Geldenhuys advised that this would not suffice to stave off proceedings and referred him to the person in charge at BMW 'legal' so that he could try to negotiate a settlement. He was unable to recall the name of this person, but stated that he was 'uncompromising'. When he and the head of BMW legal were unable to reach agreement the defendant decided to wait for the summons and defend the action.

[12] It is notable from the afore going that the defendant does not deny that he was in arrears in his payments on the contract. He in fact confirms that he has remained in arrears from May 2012 to the present. It is also noteworthy that the defendant offers no explanation for his failure to respond positively to the request in the notice despatched to him in terms of s 129 of the NCA to pay the arrears in the stated amount of just under R20 000,00. In the circumstances I am not satisfied that the defendant has shown that he has a *bona fide* defence to the plaintiff's claim within the meaning of uniform rule 32.

[13] In the result the following orders are made:

1. The plaintiff's cancellation of the instalment sale agreement entered into between the plaintiff and the defendant on 4 October 2011 is confirmed.

2. Summary judgment is granted in favour of the plaintiff against the defendant for the delivery up of 2011 BMW 320i motor vehicle with engine number A551J049 and chassis number 0NN558943.

3. The defendant is ordered to pay the plaintiff's costs of suit in the action to date hereof on the scale as between attorney and client, as provided for in terms of the instalment sale agreement.

4. The further relief sounding in money sought in terms of the combined summons consequential upon the return of the vehicle by the defendant to the plaintiff is stood over for determination, if necessary, at a later stage.

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