

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN  
REPUBLIC OF SOUTH AFRICA**

**Case No.: 11274 /2009**

**In the matter between:**

**FIRSTRAND BANK LIMITED**

**trading as WESBANK**

**PLAINTIFF**

**and**

**ARI CARRIERS CC**

**FIRST DEFENDANT**

**MR RUDESH RAMPERSAD**

**SECOND DEFENDANT**

**MR NEEL RAMPERSAD**

**THIRD RESPONDENT**

**MRS REEDHA TAKURPERSAD**

**RAMPERSAD**

**FOURTH DEFENDANT**

**MR LIZO ALFRED ZWENI**

**FIFTH DEFENDANT**

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**JUDGMENT**

Delivered on: 24 August 2010

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**SISHI J**

[1] This is an opposed application for summary judgment. In this matter, the applicant is the owner of the Motor-vehicle which is

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subject of this application and the right to possess the said motor-vehicle emanates from the instalment sale agreement.

[2] The respondent is the defendant and the applicant is the plaintiff in an action instituted by the plaintiff whereby it claims inter-alia:

(a) An order authorising the Sheriff of the Court to take possession of and to deliver to the applicant, the goods being:

**2003 VOLVO FM 12 380 4 X 2 SLEEPER T/T**

**Chassis Number : YV2JCMC542842055**

**Engine Number : D12388453**

[3] The defendant filed this notice of intention to defend and the plaintiff accordingly filed for summary judgment.

[4] In resisting the application for summary judgment, the defendant has alleged that the application for summary judgment in this case is defective as it does not comply with the Rules of this Court. It is alleged that the affidavit in support of summary judgment is not properly before Court in that the deponent, **Sitara Ramsurup**, does not have personal knowledge of the facts of the matter. The

deponent in the said affidavit states that she is the legal supervisor in the employ of the applicant and has knowledge of the applicant's claim in this matter. It is alleged that the said deponent does not have personal knowledge of the surrounding circumstances and the actual transaction between the parties. The defendant further alleged that the deponent cannot, therefore, swear positively to the facts, especially considering that the defendant's defence is based on certain defects to the vehicle in question and plaintiff's inability and refusal to repair such defects.

[5] On the merits, it is alleged that the plaintiff sold to the first defendant, a defective motor-vehicle. Despite having knowledge of such fact, the plaintiff refused to address the first respondent's concerns.

[6] The plaintiff submitted correctly, in my view that, the issues which fall to be determined are whether the following issues constitute a valid defence, to the plaintiff's claim for the return of a motor-vehicle sold to the first respondent under instalment sale agreement:

6.1 That the deponent to the affidavit in support of the applicant's summary judgment application has no personal knowledge of the facts;

6.2 That the vehicle had been incessantly troublesome and the defendants intended to institute a counter-claim in respect of its defects.

**POINT IN LIMINE**

[7] In resisting the application for summary judgment, the defendant has raised a point *in limine* that the deponent, **Sitara Ramsurup** does not have personal knowledge of the facts of the matter. It has been submitted that the person who deposes to an affidavit in support of summary judgment and who alleges that he/she can swear positively to the facts is not sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words. The court was referred to the cases of *Barclays National Bank v Love 1975 (2) SA 514 (D)* and *Cape Town Transitional Metropolitan Substructure v Ilco Homes Limited 1996 (3) SA 493 (C)*.

[8] It has been submitted further that “*Information and belief*” on the part of the deponent is insufficient to grant an order for summary judgment.

See: *Jeffrey v Andries Zietsman (Edms) Bpk 1976 (2) SA 870 (T)*.

[9] It was submitted further that where the plaintiff is a company as in the instant case, the deponent would ordinarily be presumed to have personal knowledge of the matter provided that there is no doubt on the question as to whether the deponent has the requisite personal knowledge of the matter. There is sufficient doubt cast on whether the deponent in this instance has personal knowledge of the matter.

See: *Meddent Medical Scheme v Avalon Brokers (Pty) Ltd 1995 (4) SA 863 (D)*.

[10] Mr Gounden for the applicant submitted correctly, in my view that, this particular point upon which the summary judgment is resisted is quite well settled in our law and that the cases referred to in the respondent’s heads of argument, namely, *Barclays National Bank v Love, supra, and Cape Town Transitional metropolitan Substructure v Ilco Homes Limited, supra*, are actually in support of the applicant’s version.

[11] Counsel for the applicant referred to the case of *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd & Another, 1980 (1) SA 929 SE* where the court stated :

*“As legal manageress, she would prima facie have knowledge of the contract and its conclusion of the terms and its effect; and she would be entitled on reference to her records, to claim knowledge of the amounts paid and owing by the first defendant (which, in the event, the defendant did not deny)”*. **At 937 C-D.**

[12] It was submitted on behalf of the applicant that in rejecting a similar defence in summary judgment proceedings, **Addleson J** observed:

*“ ... it seems to me that when Mrs De Beer states that she is the legal manageress of the plaintiff for this area, that the contents of her affidavit are within her knowledge and that she can swear positively to the facts and verify the cause of action and the amounts claimed, she is entitled to make those allegations. As legal manageress she would prima facie have knowledge of the contract and its conclusion, of its terms and effect; and she would be entitled, on reference to her records, to claim knowledge of the amounts paid and owing by the first defendant (which, in the event, the defendant did not deny). There is nothing before me to rebut or cast out upon, her allegation that she has such personal*

knowledge. In the result, “viewing the matter ‘at the end of the day’” as it was put in *Maharaj’s case at 424*, I consider the affidavit of Mrs De Beer complies with the requirements of rule and the plaintiff is entitled to summary judgment on the claim which the application has been restricted”

See: *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd & Another, supra, at 929 SE at 937 B-E.*

See also: *Standard Bank Ltd v Secatsa Investments (Pty) Ltd and Others, 1999 (4) SA 229 C at 235 C.*

[13] In paragraph 2 of the affidavit in support of summary judgment, **Sitara Ramsurup** states:

*“The facts herein contained are within my personal knowledge and to the best of my belief, true and correct. I say this because in my capacity as legal supervisor I have been involved with the applicants claim in this matter and have in my position or under my control all the applicant’s files, documents, statements of account and the like relating to the action”.*

[14] The deponent to the affidavit in support of the application for summary judgment in this matter, **Sitara Ramsurup** is a legal

supervisor of the applicant. And as such, will *prima facie* have knowledge of the contract and its conclusion, its terms and effect and would be entitled on reference to her records to claim knowledge of the amount paid or owing by the first defendant.

See: *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd & Another, supra; Nedcor Bank Ltd v Deharden 2000(1) SA 307 C at 311 B-C* and *KURZ v Zinhillm 1995(2) SA 408 D at 410 F-G*.

Views expressed by the court in these decisions are to the effect that such knowledge can be obtained from documentary records of the company. **Sitara Ramsurup**, in the present case was also entitled to refer to the documents and the company records to obtain the necessary information and knowledge.

[15] Considering what is set out above, I am satisfied that the first respondent's point *in limine* has no substance and it falls to be dismissed and it is accordingly dismissed.

### **Merits**

[16] The respondent alleges that the plaintiff sold to the first defendant the defective motor-vehicle. Despite having knowledge of such



defect, the plaintiff refused to address the first defendant's concerns.

[17] The first respondent contends that in selling such motor-vehicle, the plaintiff impliedly warranted the absence of defects in the motor-vehicle. The respondent has referred to the *Minister van Landbou Tegniese Dieineste v Scholtz 1971 (3) SA 188 (A)*. It alleges that the plaintiff is therefore in breach of the contract. As a result of such breach, the first defendant suffered damages and is intending instituting counter-claim against the plaintiff.

[18] In this regard, Counsel for the applicant referred the Court in clause 2.2 of the instalment sale agreement which provides that the purchaser

*“... acknowledge[s] that [they] have inspected the goods and are satisfied that they are in good condition and meet with all [their] requirements, and that the seller shall not be liable to [the purchaser] for any latent defect in and to the goods...”*

[19] The Court was also referred to clause 6.2 of the Instalment sale Agreement which provides that the purchaser

*“... must ensure that the seller receives the full amount of each instalment stipulated on the schedule and ... may not deduct any amount from this...”*

[20] Mr Gounden, submitted correctly, in my view that, in the light of these clauses and the unambiguous wording of the agreement, the defendants have acknowledged that they have inspected the goods and are satisfied that the goods were in good condition. The defendants have failed to show that they were entitled in law to refuse to pay instalments in consequence of the vehicle’s alleged faults and unreliability.

See: *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd & Another, supra, at 934 H to 935 B.*

[21] Clause 4.2 of the Instalment Sale Agreement provides that the seller

*“will remain the legal owner and titleholder of the goods until you have paid all amounts due under this agreement”*.

[22] In rejecting a similar defence in summary judgment proceedings in the case of **Spilhaus & Company Ltd v Coreejees 1966(1) SA 525 at 529 E-H**. Watermeyer J observed:

*“... In his affidavit the defendant has offered no defence to any of the three claims save for saying that he has a counterclaim for damages arising out of the plaintiff’s breach of contract. If the plaintiff’s claim had been a money claim, e.g. for payment of the purchase price, summary judgment could in view of the counterclaim not have been given ... in the present case the defendant has not legal defence to the plaintiff’s claim for the return of the equipment. The ownership of the equipment is still vested in the plaintiff and the defendant has no right of retain possession of it. Even is the defendant were to succeed on is counterclaim judgment thereon would in no way extinguish plaintiff’s claim for return of the equipment ..., in the circumstances, and in the absence of any authority on the point, it seems to me that the fact that the defendant has a counterclaim for damages is not a “defence” to the plaintiff’s action on the claim. There will accordingly be summary judgment in favour of the plaintiff on claim (b) [which is the return of the equipment] with costs.”*

[23] In essence, it appears that the defendants are claiming that they are entitled to the retention of the motor-vehicles as security for their alleged counter-claim. The law does not recognise such a right and affords the defendants no defence to the plaintiff’s claim for the return of the motor-vehicle. In the light of the plaintiff’s election to cancel the agreement, the defendant’s right to possess the vehicle terminated.

[24] Considering all the above, I am satisfied that the first respondent's defence on the merits, namely, that it was sold a defect motor-vehicle should also be rejected, and is accordingly, rejected.

**In the result, I make the following order:**

- **Judgment is granted in terms of paragraphs 1 and 2 of the Notice of application for summary judgment.**

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**SISHI J**

**JUDGE OF THE KWAZULU-NATAL  
HIGH COURT - DURBAN**

Date of hearing : 09 March 2010

Date of delivery : 24 August 2010

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