IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

CASE NO:2382/2017

Heard on: 23 March 2018
Delivered on: 22 June 2018

- REPORTABLE: **NO**
- CIRCULATE TO JUDGES: **YES**
- CIRCULATE TO MAGISTRATES: **NO**
- CIRCULATE TO REGIONAL MAGISTRATES: **NO**

22 June 2018
DATE SIGNATURE

In the matter between:

NEDBANK LIMITED **APPLICANT**

and

RAYMOND B LOUW **RESPONDENT**

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] This is an opposed summary judgment application brought in terms Rule 32(1)(c) for the delivery of a motor vehicle. In its Notice of Motion dated 8 November 2017, the applicant, acting on behalf of its sister company MFC, is seeking for an order in the following terms:

'1. Confirmation of the termination of the agreement;

2. Return of the vehicle described as 2014 Nissan NP 200 1.6 a/c Safety Pack P/U S/C, engine number: K7MF710UJ16654, chassis number: ADNUSN1D5U0081921;

3. Asset may be handed over to a duly authorized representative of the plaintiff or the Sheriff;

4. Authorization that the Sheriff or the authorized representative of the plaintiff may attach and remove the asset wherever it may be found;

5. Forfeiture of all amounts paid by the defendant in terms of the agreement;

9. Attorney and client costs to be taxed; and

10. Further and /or alternative relief

Prayers 6, 7 and 8 to stand over for later determination.'(*Sic)*

FACTUAL BACKGROUND

[2] On 20 October 2014 at Kimberley the applicant and the respondent concluded a written sale agreement ('the Agreement") in terms of which the applicant sold a 2014 Nissan NP 200 1.6 a/c Safety Pack P/U S/C, engine number: K7MF710UJ16654, chassis

number: ADNUSN1D5U0081921 to the respondent in the total amount of R173 692-98, which vehicle was delivered to the respondent.

[3] The salient terms of the Agreement were, *inter alia*, that the defendant shall pay an amount of R3 466-21 towards his first installment payable on 1 December 2014 and thereafter 70 equal monthly installments of R3 466-21 payable on each corresponding day of each consecutive month. A final payment of R3 466-21 would be payable on 1 November 2020.

[4] The Agreement further states that should the respondent fail to pay the installment on due date or fail to satisfy any of his obligations in terms of the Agreement, the applicant shall, without prejudicing any of its other rights in law, be justified in:

'4.1. Cancelling the Agreement and in the instance of such cancellation:

4.1.1 Claim the return and possession of the vehicle;

4.1.2 Be entitled to retain all payments already made by the respondent;

4.1.3 To claim payment of the difference between:

1. The amount outstanding at the date of cancellation of the Agreement less a rebate on finance charges calculated from the date of termination of the agreement and;

2. The amount at which the vehicle is valued in terms of the agreement or re-sale value thereof, whichever is the greater;

4.2 Interest;

4.3 Costs on attorney and client scale.....'

[5] At least according to the applicant, as at 4 September 2017 the respondent was in arrears in the amount of R10 762-14 and as at 8 September 2017 the outstanding balance stood at R140 312-12.

[6] On 19 September 2017 the applicant complied with the requirements of section 129 of the National Credit Act 34 of 2008 by sending out a letter of demand to the respondent's chosen address notifying the respondent that he has failed to satisfy his repayment obligations in terms of the Agreement and that his arrears were in the amount of R10 762-14. It is alleged by the applicant, despite receiving the said Notice, the respondent failed to respond to the said demand.

[7] As a result of the above alleged defaults by the respondent, the parties corresponded with each by way of letters. In reply to queries raised by the respondent regarding his debit orders, the applicant's attorneys wrote to the respondent requesting him to respond to their email dated 27 September 2017 in which letter the following is stated:

'.....We kindly request that you provide us with the statements you perused to ascertain that your debit orders did in fact go through; alternatively provide our office with proof of payments as our records show that payments that you allege were debited from your account were in actual fact returned due to insufficient funds being available in your account'.

[8] The respondent did not respond to the above letter. On 10 October 2017 the applicant caused Summons to be issued against the respondent for an order in the following terms as per the Particulars of Claim:

'1. Confirmation of the termination of the agreement;

2. Return of the vehicle as referred to herein;

3. Asset may be handed over to a duly authorized representative of the plaintiff or the Sheriff;

4. Authorization that the Sheriff or the authorized representative of the plaintiff may attach and remove the asset wherever it may be found;

5. Forfeiture of all amounts paid by the defendant in terms of the agreement;

6. Payment of the difference between:

6.1 The amount of R140 312-12 (amount outstanding at date of termination of the agreement) less a rebate on finance charges for the period not yet lapsed at the termination of the contract (to be calculated) plus any outstanding finance charges (to be calculated)

AND

6.2 the amount the vehicle is valued at or the re-sale value of the vehicle, whichever is the greater.

7. Interest on the amount referred to in prayer (6) (being the total recalculated balance) calculated at 12% per year, alternatively at the current interest rate linked to the fluctuation of the interest rate calculated from date of termination of the agreement to the date of payment;

8. Expenses incurred for removal, valuation, storage and sale of the vehicle;

9. Attorney and client costs to be taxed;

10. Further and / or alternative relief'.

[9] On 26 October 2017 the said Summons was served on the respondent by affixing same to his principal door. A day thereafter, that is, 27 October, the respondent filed his Notice of intention to defend which resulted in the applicant issuing this Application for Summary Judgment on 8 November 2017. The respondent opposed the application by filing an Opposing Affidavit on 13 December 2017 and attached to it correspondence between himself and the applicant's attorneys and his bank statements which he considered to be relevant to the facts in issue. These bank statements relate to, *inter alia*, transactions that include debits by the applicant, reversals of such debits due to insufficient funds in the respondent's account, EFT payments by the respondent and refunds to the respondent by the applicant.

APPLICANT'S SUPPORTING AFFIDAVIT FOR THE SUMMARY JUDGMENT APPLICATION

[10] The applicant's Supporting Affidavit in respect of this Summary Judgment application was deposed to on 1 November 2017 by Ms Nicolean Ferreira, wherein she avers that she is the Manageress of the Special Support and Litigation Department of the applicant and that she is competent and duly authorized to depose to the supporting affidavit and that the contents of the said affidavit fall within the ambit of her personal knowledge and that she confirms the contents thereof to be both true and accurate. She further avers that she has personal knowledge of the facts of this matter as set out in the Summons and the Particulars of claim as set out in her supporting affidavit and that she verifies the cause of action; the facts upon which the cause of action is based; and the claimed amounts as set out in the Summons, are correct. Lastly she states that it is her opinion that there is no *bona fide* defence against this matter by the respondent and that the Notice of intention to defend has been delivered solely for the purpose of delaying the action.

SUBMISSIONS BY THE RESPONDENT

[11] In his submissions, the respondent started off by raising what may be termed a point *in limine*, by contending that the applicant has failed to comply with Rule 32 of the Uniform Rules of Court due to the fact that its supporting affidavit does not sufficiently satisfy the requirements of Rule 32(2) of the Rules in that the person who deposed thereto in support of the summary judgment application does state nor show that she has sufficient personal knowledge of the relevant facts to the matter nor that she could verify all the facts in this matter, since all she does is simply to refer the court to the particulars

of claim. Further, it was submitted, the deponent has also failed to state if she has access to the respondent's account.

[12] Further, he submitted as a result of this defect, the applicant's affidavit comes short of what was held in the matter of **Joob Joob Investments (Pty) Ltd v Stock Mavundla Zek Jint Venture [2009] 3 All SA (SCA) par 31**-32, where the court quoted what was held in **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (AD) that the courts must be satisfied that the person deposing to the affidavit had sufficient personal knowledge and could verify all facts in the matter. He submits that the deponent has not made out a case of 'personal knowledge' to support the application and submits that for this reason the application must be dismissed with costs.

[13] Regarding the merits of the claimed arrear amounts, the respondent submitted that he has a *bona fide* defence since he does not owe the applicant contrary to its allegations in the particulars of claim and the summary judgment application, arguing that the applicant had in fact recovered the 3 (three) months payments he had missed by debiting his account on dates not agreed to in the Agreement. He further argued that even the summons was issued prematurely since he was still in the process of obtaining clarity on the alleged arrears from the applicant's attorneys and was surprised when the applicant issued summons. He argued that despite the fact that the applicant had sent him a letter on 3 October 2017 to which he still had to respond, he was surprised when on 25 October 2017 he found summons which were issued on 10 October 2017 affixed to

his door. He argued that the period between 3 October 2017 through the 25th thereof was not sufficient enough for him to could have responded to the applicant's letter and that otherwise, this court process could have been avoided.

[14] He further submitted that in terms of the laws relevant in *casu*, the courts should not only look at the agreement terms between the parties but the interests of the consumer and their protection against abuse and unfair practices by the service provider.

[15] He further submitted that despite the fact that the applicant sent him a letter terminating the Agreement, the applicant continued to debit his account in *re* the installments payments and requested this court to order that the applicant refund him all such payments received after the termination of the Agreement since they are unlawful.

SUBMISSIONS BY THE APPLICANT

[16] With regard to the point *in limine* raised by the respondent *re* the non-compliance by the applicant with Rule 32 provisions, the applicant submits that the respondent's objection is without merit since it is clear from the reading of the papers as a whole that the deponent, by virtue of holding the position of the Manageress of the Special Support and Litigation Department of the applicant, it must safely be assumed that she has personal knowledge as she had averred. She submitted that her argument is borne by what was held in **Absa v Le Roux and others** 2014 (1) SA 475 (WCC) at par 15 that

first-hand knowledge by the deponent should not be required and that the court can only receive assurance from the deponent (see **Maharaj** above).

[17] She further submitted that from the papers as a whole, the court has assurance that the deponent has acquired personal knowledge in respect of this matter and that she did work on this matter during the course of her duties.

[18] With regard to the arrear amounts, the applicant's counsel submitted that the respondent is in arrears and thus in breach of the Agreement. She further submitted that even from the bank statements relied on by the respondent, it was evident that he misinterpreted the transactions therein, confusing returned debits for honoured ones.

[19] Regarding the respondent's submission that the applicant's attorneys failed to afford him enough time to respond to the letter which he had received on 3 October 2017, the applicant's counsel submits that the respondent had failed to comply with the applicant's attorneys' request as set out in their letter first sent out on 27 September 2017. The applicant's counsel submitted that the applicant is entitled to the relief as set out in its Notice of Application for Summary Judgment dated 8 November 2017, excluding prayers 5 and 6 thereof.

ISSUES

[20] Based on the above, this court is called upon to make a determination in respect of the following issues, namely:

1. Whether the person who deposed to the applicant's supporting affidavit has full knowledge of the facts of the matter or that she can verify the cause of action.

2. Whether the respondent has a *bona fide* defence to the applicant's claim and that in fact he is ahead with his payments.

LEGAL POSITION

[21] In the matter of **Joob Joob Investments (Pty) Ltd v Stock Mavundla Zek Jint Venture [2009] 3 All SA (SCA) par 31-32**, the court quoted what was held by Corbett JA in **Maharaj** at 425G-426E. The Learned Judge held that the court must first ensure and make an examination of whether there has been sufficient disclosure by a defendant, of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

[22] With regard to the deponent's extent of knowledge of the matter's salient facts for purposes of deposing to a supporting affidavit, in **ABSA** above, the court held that 'in the result it follows on the construction of the sub-rule given in Maharaj that unless it appears from a consideration of the papers as a whole that the deponent to the supporting affidavit probably did have sufficient direct knowledge of the salient facts to be able to swear positively to them and verify the cause of action, the application for summary judgment is fatally defective and the court will not even reach the question whether the defendant has made out a *bona fide* defence....'

ANALYSIS

[23] It is common cause that as on the date of the hearing of this application, the respondent had not, *inter alia*, surrendered the vehicle to the applicant nor brought the disputed arrears amounts up-to-date.

[24] With regard to the point *in limine* raised by the respondent, it is so that the deponent in respect of the applicant's supporting affidavit is Ms Nicolean Ferreira who is the Manageress of the Special Support and Litigation Department of the applicant. When one considers what was held in **ABSA** above that unless it appears from a consideration of the papers as a whole that the deponent to the supporting affidavit probably (My emphasis) did have sufficient direct knowledge of the salient facts to be able to swear positively to them and verify the cause of action, the application for summary judgment is fatally defective, then that is where the story should end. The requirement to meet the

test of sufficient direct knowledge is not to be based on the actual fact but a probability of a sufficient direct knowledge will suffice, at least according to ABSA v Le Roux. When one takes into account the deponent's employment position, I am of the view that if an inference was to be drawn that by virtue of holding such employment position, the probability that she has a sufficient direct knowledge of the salient facts to be able to swear positively to them and verify the cause of action would not be far-fetched.

[25] Based on the above, I find that from the reading of the papers as a whole, I am satisfied that the deponent does have a sufficient direct knowledge as she has averred in the affidavit and that the respondent's point *in limine* is frivolous and thus dismissed.

[26] In respect of the claimed arrears, when one looks at the respondent's bank statements, the following is evident:

1. There are a couple of debited amounts which were reversed due to insufficient funds; and
2. In his opposing affidavit, the respondent incorrectly indicates such reversals as a payment and/ or additional payments.

[27] Despite the respondent's bank statements confirming the applicant's version or contentions that the respondent had not been honoring his monthly installments

payments for reasons stated above, the respondent's counsel was still that all the payments were up to date.

RESULT

[28] I am satisfied that in respect of the issue regarding the arrear payments, the applicant has made out a good case and that the respondent does not have a *bona fide* defence.

[29] I find the respondent's argument that but for the applicant's attorneys not affording him enough time to respond to their letter dated 2 October 20127, this application should not have taken place not persuasive. The reason is because when takes into account that the requested information was in relation to the respondent's bank statements which are now before court, from which no *bona fide* defence arise for the respondent, it therefore becomes common cause that this application would still have taken place, even if the respondent had been afforded a much longer period. It must further be borne in mind that the period complained of as being not sufficient is one of 29 days.

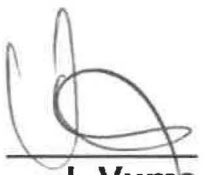
[30] Regarding the respondent's argument that the applicant continued to debit his account in *re* the installments payments and that this court should order that the applicant refund him all such payments received after the termination of the Agreement since they are unlawful given, I am of the view that this court cannot make such an order due to the fact that the respondent never made any such prayer in his opposing affidavit since all he asks for therein is an order to dismiss the applicant's claim with costs.

[31] In the premise, I make the following order:

ORDER

1. Prayers 1;2;3;4; and 5 of the Notice of Application for Summary Judgment dated 8 November 2017 are granted.

2. Prayers 6, 7 and 8 to stand over for later determination.



L Vuma
Acting Judge
Northern Cape High Court

Head on: 23 March 2018
Judgment delivered: 22 June 2018

Appearances

For Applicant: Adv. Sieberhagen
Instructed by: Kemp & Associates

For Respondent: Adv. Pillay
Instructed by: Justin Pillay & Associates