

SOUTH AFRICA / JUDGMENT

Absa Bank Ltd v Walker (2307/14) [2014] ZAWCHC 92 (17 June 2014) [2014] ZAWCHC 92

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward

CASE / FILE NUMBER

2307/14

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REPUBLIC
OF SOUTH AFRICA
IN THE
HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE
DIVISION)
Case
No.2307/14

DATE: 17 JUNE 2014
Before: The
Hon. Mr Justice Binns-Ward
In the matter

between: ABSA
BANK
LTD.....Plaintiff
And
CLAUDINE
LEIGH WALKER.....Defendant

JUDGMENT

DELIVERED: 17 JUNE 2014

BINNS-WARD J:

- [1] The defendant entered into an instalment agreement with the plaintiff bank for the purchase of a motor vehicle. The contract provided that ownership of the vehicle would vest in the plaintiff until the defendant had discharged all of her obligations under the agreement. It also provided that in the event of the defendant defaulting on her instalment payments the plaintiff would be entitled to cancel the agreement and repossess the vehicle.
- [2] The defendant fell into arrears with her instalment payments. She referred the agreement to a debt counsellor for debt review in terms of s 86 of the National Credit Act 34 of 2005 ('the NCA').^[1] A period of more than 60 business days having elapsed after the date of the referral for debt review, and no debt rearrangement order having been made, the plaintiff terminated the debt review of the agreement by notice in terms of s 86(10) of the NCA. The plaintiff thereafter instituted an action claiming various heads of relief, including a declaration confirming the termination of the agreement and return of the vehicle. The summons included a notice of cancellation of the agreement.
- [3] The defendant entered notice to defend the action, whereupon the plaintiff applied for summary judgment for delivery up of the vehicle. The defendant delivered an affidavit opposing the summary judgment application.
- [4] The defendant raised a number of issues in her opposition to the summary judgment application. I shall address each of them in turn.
- [5] The first contention advanced by the defendant was that it did not appear sufficiently from the supporting affidavit that the deponent had direct knowledge of the facts so as to be able to confirm the cause of action, as required by rule 32(2). The deponent averred that he was a legal manager in the plaintiff bank's legal retail collections division. He stated that by virtue of that position he had in his possession and under his control the files and records pertaining to the plaintiff's dealings with the defendant, with which he had familiarised himself. The defendant contended that those averments were insufficient to comply with the sub-rule.
- [6] The issue raised in the defendant's first contention has enjoyed attention in two judgments of the appeal court given earlier in the year; viz. *Dean Gillian Rees v Investec Bank Limited*
- [2014] ZASCA 38 (28 March 2014) and *Stamford Sales & Distribution v Metraclark*
- [2014] ZASCA 79 (29 May 2014). The supporting affidavit considered in the latter matter contained averments by the plaintiff's national credit manager to the effect that '[t]he Applicant's file pertaining to the above-captioned matter which contains, inter alia, a cession of book debts in favour of the Applicant, proof of the Applicant's claim against Quali Cool CC and

all correspondence entered into by the Applicant and/or its attorney with the Respondent, is currently in my possession and under my control and I am fully conversant with the content thereof'. That was held to be sufficient to comply with the requirement of rule 32(2) of the Uniform Rules of Court that the supporting affidavit must be made by a person 'who can swear positively to the facts verifying the cause of action'.

[7] At para 10-12 of the court's judgment in *Stamford Sales, Swain AJA* stated:

[10] This court in *Dean Gillian Rees v Investec Bank Limited* (330/13) [2014] ZASCA 38 (28 March 2014), in dealing with the issue of whether personal knowledge of all of the facts forming the basis for the cause of action, had to be possessed by the deponent to the verifying affidavit, said the following in para 15:

'As stated in *Maharaj* [1976 1 SA 418 (A)], "undue formalism in procedural matters is always to be eschewed" and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in *Maharaj*.' (My emphasis.)

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 of the documentation, that is sufficient.

[11] The enquiry, which is fact-based, considers the contents of the verifying affidavit together with the other documents properly before the court. The object is to decide whether the positive affirmation of the facts forming the basis for the cause of action, by the deponent to the verifying affidavit, is sufficiently reliable to justify the grant of summary judgment. Those high court decisions which have required personal knowledge of all of the material facts on the part of the deponent to the verifying affidavit are accordingly not in accordance with the principles laid down by this court in *Maharaj*.

[12] An insistence upon personal knowledge by a deponent to a verifying affidavit of all of the material facts forming the basis for the cause of action, where the cessionary of a claim seeks summary judgment against the debtor, in most cases would effectively preclude the grant of summary judgment. The consequences of this narrow approach is illustrated by the decision in *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 447 (W). It was held that it had to appear from the verifying affidavit that the facts relating to the claim of the cedent against the debtor were within the knowledge of the deponent who was able to swear positively thereto. The deponent in such a case was *prima facie* making the affidavit on behalf of a cessionary and there was nothing in the affidavit to indicate that the deponent had any connection with the cedent, which presumably would have enabled him to acquire this knowledge. To insist on personal knowledge by the deponent to the verifying affidavit

on behalf of the cessionary of all of the material facts of the claim of the cedent against the debtor, emphasises formalism in procedural matters at the expense of commercial pragmatism.

- [8] In the circumstances I am not persuaded that there is any merit in the defendant's allegation of 'technical shortcomings' in the supporting affidavit. (I would suggest, however, that the argument to which compliance with rule 32(2) by large financial institutions applying for summary judgment frequently gives rise in respect of the reliance on the content of electronic records by deponents to the supporting affidavit could be avoided if appropriate resort were had to the provisions of s 15 of the Electronic Communications and Transactions Act 25 of 2002; see *Absa Bank Ltd v Le Roux and Others* 2014 (1) SA 475 (WCC), at para 19-21. As is apparent from the review of the relevant jurisprudence in *Le Roux*, the judgments of the superior courts, including those most recently given in the appeal court, still leave open for debate precisely what is required short of 'personal knowledge of all of the material facts on the part of the deponent' for the purposes of the necessary 'facts-based enquiry'.)
- [9] The second point taken by the defendant is that the plaintiff did not attach a certificate of balance to its summons. The agreement provided that the plaintiff could prove the amount owed to it by the defendant under the contract by means of a certificate of balance signed by a designated officer of the bank and could use such a certificate for the purpose of obtaining default or summary judgment. The provision is one that operates exclusively for the benefit of the bank. If the bank avails of

the provision it casts an evidential onus on the debtor to displace the prima facie evidential effect of the certificate; cf. *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A), at 382H - 383A. A purposeless reference to the provision was contained in the plaintiff's particulars of claim. The reference was purposeless because the plaintiff did not attach a certificate of balance. The defendant's reliance on the omission as being in any way material was misconceived, however, because the production of such certificate does not form part of the plaintiff's cause of action. The plaintiff alleged in its summons that the defendant was in arrears with her instalment payments in the amount of R36 534,07 as at 13 January 2014. The defendant has not denied the allegation. On the undisputed allegations the bank was therefore entitled, in terms of s 123(2) of the NCA, and subject to the provisions thereof, to cancel the agreement.[2]

- [10] The third point taken by the defendant was that the plaintiff's termination of the debt review process had been incompetent. The essence of the defendant's argument in this regard was that the plaintiff had been bound to respond constructively to the debt restructuring proposal put to it for consideration by the debt counsellor in terms of s 86(7)(c)(ii) of the NCA. The contention, as I understood it, was that as the plaintiff had failed to respond to the proposal it had fallen short of the obligation on it in terms of the Act to treat with the debtor in good faith, and was thus prohibited from availing of the right of termination provided in terms of s 86(10) of the NCA.[3]

[11] The defendant's submission that the plaintiff was bound to respond to the debt re-arrangement proposal in good faith is supported by authority; see *Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA), at para 13 and 15. The judgment in *Collett*, however, also makes it clear that a credit provider is entitled, without qualification, to have resort to s 86(10) in any case in which the consumer is in default of his contractual obligations at the time he makes application for debt review. The defendant has not contended that that was not the position in her application for debt review, or that she was not still in default when the plaintiff gave notice of termination in terms of s 86(10). The consumer's remedy, when a credit provider has terminated a debt review in circumstances in which it has failed to treat with the consumer's debt re-arrangement proposals in good faith, is to apply, in terms of s 86(11) of the NCA, for a resumption of the debt review, or, in the context of a summary judgment application, to ask the court, in the exercise of its overriding discretion, to refuse the application for summary judgment; see *Collett* at para 15, 16 and 18. It seems to me that there would be little purpose served in the exercise of the court's discretion

in favour of a defendant in a summary judgment application if the refusal of judgment were not attended by an order directing a

resumption of the debt review, either in terms of s 86(11) or by way of a 'general review' in terms of s 85 of the NCA. As the appeal court noted at para 18 of its judgment in *Collett*, 'Of course, sufficient information on which the request for a resumption of the debt review is based must be placed before the court.' I turn next to deal with the issue of a postulated resumption of the debt review.

[12] The defendant's debt restructuring proposal contemplates that the defendant will retain possession of the plaintiff's vehicle, while extending the period for the payment of instalments to 98 months; some 26 months longer than the parties had originally agreed. A significant feature inherent in the defendant's proposal was the partial negation of the plaintiff's right of security in the asset and a relative reduction of the value provided by the security in the asset during the extended payment period because of the effect of depreciation. Doubt has been expressed in a number of judgments whether such a result is contemplated by the NCA, which requires a balanced approach to the rights and interests of both the creditor and the debtor.

It has been remarked that debt re-arrangement is directed at the settlement of a debtor's financial obligations, and not at facilitating the ability of a purchaser of goods in terms of an instalment agreement to keep and use the goods on more favourable

terms of payment; cf. e.g. *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W) at para 77; *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011

(1) SA 310 (GSJ) at para 35-36 and 46-50; *Pelzer v Nedbank Ltd* 2011 (4) SA 388 (GNP), at para 6.3-6.4; *Standard Bank of South Africa Ltd v Newman* [2011] ZAWCHC 91, at para 11; *Absa Bank Ltd v O'Connor*

[2012] ZAWCHC 152 at para 3; Nedbank Ltd v Jaars

[2012] ZAWCHC 270, at para 22-23; and SA Taxi Securitisation (Pty) Ltd v Melaphi

[2014] ZAWCHC 47, at para 11.

[13] More pertinently, however, in the circumstances of the current case a resumption of the debt review with the object of obliging the plaintiff to accept the proposed debt rearrangement would negate the right of cancellation conferred upon, and exercised by, the plaintiff in terms of s 123(2) of the NCA. There is nothing in the NCA that would permit the extraordinary measure of the involuntary reinstatement of a lawfully cancelled agreement as part of a debt re-arrangement order. On the contrary, s 129(4)(c) of the NCA expressly provides that a consumer may not reinstate a credit agreement after the termination thereof in terms of s 123. Upon the cancellation of the agreement, the defendant ceased to have any right to possess the vehicle. There is no merit in the defendant's contention that the cancellation was invalid. The provisions of s 123(2) of the NCA were complied with. Notice of cancellation was given when the defendant was in default of her obligations under the agreement and after the plaintiff had effectively terminated the debt review in terms of s 86(10) of the NCA.

[14] The defendant's counsel sought in argument to invoke the provisions of s 88(3)(b)(ii) of the NCA to contend that the plaintiff was not entitled to enforce its security after receiving notice of the debt review application. The reliance on this provision had not been adumbrated in the defendant's opposing affidavit. In my view it is without merit. The provision is expressly subject to the credit provider's right of termination in terms of s 86(10). That means that the provision does not operate when the debt review has been terminated in terms of s 86(10). (It also does not operate when the debt counsellor has rejected the debt review application – hence the reference in s 88(3) also to s 86(9).)

[15] The only matter then outstanding that might arguably fall to be regulated in terms of the Act and its debt review procedures would be payment of any amount that might remain due after the realisation of the vehicle.

[16] The defendant incorporated a contingent application for a resumption of the debt review in terms of s 86(11), alternatively for a general debt review in terms of s 85 of the NCA, in her opposing affidavit. The application was predicated on the existence of a power in the court determining the contemplated debt re-arrangement to reinstate the cancelled agreement. As already noted, however, the courts have no such power.

[17] Finally, the defendant set out her personal and family circumstances in some detail in her opposing affidavit. The purpose of providing this information was to explain why she had fallen into arrears with her instalment payments and to describe the hardships to which she would be subject were she required to surrender the vehicle. I accept that circumstances have conspired against the defendant and that it will be difficult for her to manage without the vehicle, but those considerations do not afford a proper reason for the plaintiff's

proprietary right in the vehicle to be subordinated. The court's discretion to refuse summary judgment when a case for it has been made out has to be exercised judicially. The institution of the action was not

an abuse of process, there is nothing to send to trial and debt re-arrangement relief of the nature sought by the defendant is not available. In the circumstances there are no cognisable grounds for the exercise of the court's discretion in favour of the defendant.

[18] This application should not have been postponed for hearing in the Fourth Division. It is the practice of this Court that opposed summary judgment applications should, save in exceptional circumstances, be determined in the Third Division. There is nothing exceptional about the current matter, and my attention was not directed to any circumstances which would have justified a judge in the Third Division to decline to deal with the case. It would be unjust in the circumstances to burden the defendant with the increased costs involved in a hearing in the Fourth Division.

[19] The following order is made:

Termination of the agreement is confirmed and summary judgment is consequently granted in favour of the plaintiff against the defendant for delivery up of certain 2009 Dodge Caliber 2.0 CRD SXT motor vehicle with engine number 8D689814 and chassis number 1B3H348A58D689814 and costs of suit, which shall be taxable as if the application had been argued and determined in the Third Division court.

A.G. BINNS-WARD

Judge of the High Court

Date of hearing:

17 June 2014

Judgment

delivered: 17 June 2014

Judge:

Mr Justice Binns-Ward

Plaintiff's counsel: Johan Louw

Defendant's counsel: Craig Cutler

Plaintiff's attorneys: Strauss Daly Inc., Cape Town

Defendant's attorneys: Van der Hoven Attorneys, c/o Shepstone & Wylie Attorneys, Cape Town

[1] The summons erroneously alleges that the reference to the debt counsellor occurred in terms of s 129 of the Act.

[2] Section 123(2) of the NCA provides: 'If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to

enforce and terminate that agreement'.

[3] Section 86(10) of the NCA provides: 'If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to- a)the consumer; b)the debt counsellor; and c)the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review.'

[3] Section 86(10) of the NCA provides: 'If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to-

a)the consumer;

b)the debt counsellor; and

c)the National Credit Regulator,

at any time at least 60 business days after the date on which the consumer applied for the debt review.'

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