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

CASE NO. 4588/12

THE STANDARD BANK OF SOUTH AFRICA LTD PLAINTIFF

and

ARTLAYK TRADING CC 1ST DEFENDANT

ASHANTH SURESH 2ND DEFENDANT

JUDGMENT Delivered on 03 June 2013

STRETCH AJ:

[1] On 3 February 2011 the plaintiff (hereinafter referred to as "the bank") entered into an instalment sale credit agreement ("the agreement") with the first defendant ("the CC") in terms of which the bank sold to the CC a Tata Novus truck ("the vehicle") for the sum of R433 002,24 to be paid off in agreed monthly instalments. On the same day the second defendant ("the surety") bound himself in favour of the bank as surety and co-principal debtor *in solidum* with the CC for all amounts owed by the CC to the bank in terms of the agreement.

[2] Subsequent to this, the CC defaulted with respect to the monthly instalment payments in terms of the agreement.

[3] The bank issued summons against the CC for cancellation of the agreement and the return of the vehicle, together with a claim against both the CC and the surety for payment of the outstanding balance owed to it, which according to the bank's certificate of balance, was R324 753,39 as at 17 May 2012.

[4] The CC and the surety delivered a notice of intention to defend, whereafter the bank filed an application for summary judgment in terms of rule 32 of the uniform rules of this court ("the rules").

[5] The CC and the surety are opposing the application on the following grounds:

(a) that the bank has failed to comply with the provisions of section 129 of the National Credit Act 34 of 2005 ("the Act");

(b) that as at 1 June 2012 (when the bank issued summons), the CC had made good its arrears with the bank in terms of an arrangement which it had entered into with the bank during May 2012;

(c) that the bank was reckless when it lent money to the CC as the CC was, at all times material to the conclusion of the agreement, over-indebted.

[6] For the reasons which follow I do not deem it necessary to traverse the first and third grounds raised by the defendants. They are in any event spurious and opportunistic.

[7] I now turn to deal with the contention that the CC had made good its arrears in terms of an arrangement.

[8] In brief, the history of this matter is the following:

(a) The bank's notice in terms of section 129 of the Act avers that as at 26 April 2012, the CC was in arrears with its instalment payments to the tune of R27 233,64. The notice invites the CC to inter alia contact the bank telephonically to resolve any dispute or to develop an acceptable plan to make good the arrears. The notice also states that should the CC not respond to the invitation within ten business days of it having been delivered to the CC or of it having been sent to the CC by way of registered mail, the bank "may" approach the court to enforce the agreement.

(b) A further notice, dated the same day, again invites the CC to telephone the bank "at the number shown above" (notwithstanding the fact that *ex facie* the document, there is no number "shown

above"), to make arrangements to settle the arrears. The letter further states that the outstanding arrears amount (the total of which is not clear at all but purports to be R27 233,64) could be settled at any branch of the bank, or the CC could contact the bank to arrange a new payment plan.

(c) It appears that both of these notices were posted by way of registered mail to the defendants at both 33 Swallow Road and 33 Swallow Street, Mountview, Pietermaritzburg. According to the bank's track and trace reports the two notices posted to the Swallow Street address were delivered to the surety (also being the sole member of the CC), on 7 May 2012. The surety denies having taken delivery of the notice in terms of section 129 of the Act. He is silent with respect to the second notice which, although it purports to be a notice in terms of section 72 of the Act, advising the CC that it may be blacklisted if it does not pay up or make a plan within 20 days, again draws to the CC's attention the fact and the amount of the arrears.

(d) Despite having denied receiving the notice in terms of section 129 of the Act, the CC, in its affidavit deposed to by the surety as its only member, admits that it fell into arrears during May 2012. The member avers that during or about this time, he contacted the bank's local branch (I would imagine that would be the Pietermaritzburg one), with a view to making representations to it for a moratorium on the monthly instalments with the intention of updating the arrears upon the expiry of the moratorium period. He avers that the manager of the local branch referred him to the

bank's debt review department, which department in turn referred him to the legal department. An employee at the bank's collections call centre advised him, so he says, that his account was in arrears in the sum of R24 233,64 and that he was to settle this amount by no later than 31 May 2012 in order to stave off the issue of summons.

(e) He says that he thereafter borrowed R25 000,00 from a friend and settled the arrears before the cut-off date in two instalments, the first being R10 000,00 on 9 May 2012 and a second payment of R15 00,00 on 30 May 2012. Annexed to his affidavit resisting summary judgment is what I deem to be *prima facie* proof of these payments as per a Nedbank printout reflecting two items of a beneficiary payment history.

(f) The respondents accordingly contend that they had in any event, been part of the development of an acceptable plan to bring the payments up to date and/or to arrange a new payment plan as coincidentally envisaged in the section 129 and the section 72 notices.

[9] In its practice note for purposes of this application, the bank refers to the aforesaid as being "bold unsubstantiated statements that there was an agreement, entered into with an employee of the plaintiff, to settle the arrears." In its heads of argument, the bank criticises the defendants for failing to state who they made the averred arrangements with and whether this person was authorised

to vary the agreement entered into between the bank and the CC (an agreement which, as contended for by the bank, contains a no variation clause and as such any verbal agreement would be of no force or effect).

(10) The bank further avers that upon the default of the CC in respect of any instalment payment, the bank (in terms of the agreement) is entitled to cancel the agreement and to claim the full balance outstanding. This is of course perfectly correct. However, I have some reservations regarding the bank's admitted conduct in this regard.

(11) It is contended on the respondents' behalf that the various invitations to –

- contact the bank to make settlement arrangements
- contact the bank to arrange a new payment plan
- contact the bank (amongst others) to resolve any dispute
- allowing the CC a period of 20 days to make good the default before blacklisting would be considered
- allowing the CC a period of ten days to "respond" to the section 129 notice (as opposed to allowing the CC a period of ten days to actually make good the default itself)

– are capable of being construed as invitations in various forms to digress from the non-variation clause reflected in the agreement.

[12] I am inclined to agree.

[13] A further concern which I have regarding the bank's application at this stage of the proceedings is whether the affidavit of the bank's "collections legal manager, legal, credit rehabilitations and recoveries, personal and business banking credit" (as he describes himself) not only meets the requirements of rule 32(2) of the rules, but whether (regard being had to the respondents' claims of substantial further payments) it is such that it can safely be accepted that the amount which the deponent avers is due, is due as a result not only of non-compliance with the agreement but also that no payments had been effected during the month of May as contended for by the respondents. I would, for example, in an application of this nature have expected the deponent to make a factual averment in his affidavit (regard being had to the information he says is reliable and readily available) as to the number of instalments the CC was in arrears with at the time he deposed to the affidavit, and to give a brief overview of the CC's payment history as at that date (being 7 September 2012 and a substantial period of time after the issue of the certificate of balance).

[14] In deciding whether or not to grant summary judgment (and whether to accept the affidavit of the bank's deponent), I am guided by the principle that I should look at the matter on all the documents which are properly before me. See:

Maharaj v Barclays National Bank Ltd
1976 (1) SA 418 (A) at 423;

Trust Bank van Afrika Bpk v Haarhoff
1986 (4) SA 446 (NC)

[15] I cannot ignore the averment made on oath (supported by a printout) that the CC had duly complied with a telephonic instruction given by one of the bank's employees in order to stave off summons as at 31 May 2012. In this regard I refer to the case of ***FirstRand Bank Ltd v Huganel Trust 2012 (3) SA 167 (WCC) at 178A-C.*** In this matter, the bank official who had deposed to the affidavit in support of the application for summary judgment had been employed by the bank as a litigation administrator. In his affidavit he not only said that he had knowledge of the facts set out in the summons and in the particulars of claim, but also stated that:

(a) all the records, documentation and files were under his control;

(b) he had studied and examined all the aforesaid documents and had personal knowledge of their contents;

(c) the aforesaid matters had been allocated to him by the bank by virtue of the fact that he was personally in control of them (*sic*).

[16] Davis J, after a careful analysis of the relevant cases, found that the bank official's averment of sufficient knowledge (as in the affidavit before me) fell short of the requirements of subrule (2). Regarding this, the learned judge inter alia stated:

'By contrast, there will be cases where, given the defence raised, some further knowledge is required beyond an examination of the documentation. In other words, knowledge of a personal nature may be required if it is relevant to the contractual relationship as alleged by the defendant and, if the defendant's version is proved, could constitute an adequate defence to the claim.'

[17] I am of the view that this is one of those cases. Even if my view errs on the side of caution, the bank cannot overcome the hurdle of what I believe to be a fatal defect in its affidavit, *viz* the using of the words "I verily believe that the defendant does not have a bona fide defence", instead of the words "in my opinion there is no bona fide defence" as required by virtue of the provisions of rule 32(2).

[18] This averment is essential and in my view a failure to make it can in a case of this nature result in summary judgment being refused. See:

Group Areas Development Board v Hassim

1964 (2) 327 (T)

[19] In ***Afcol Manufacturing Ltd v Pillay; Afcol Manufacturing Ltd v Buo [1996] 1 All SA 426 (SE) at 432d*** it was indeed held that the wording of the rule must be strictly adhered to and that the words “I verily believe” are not sufficient. Applied to the facts and circumstances of the case before me, I adhere to this view.

[20] I am in any event satisfied that the respondents have substantially complied with the requirements of rule 32(3)(b) in that they have adequately disclosed the nature and grounds for their defence and the material facts relied upon for what I deem to be a defence which is triable on the basis that it appears to be both bona fide and good in law.

[21] In the premises the order which I make is as follows:

ORDER:

1. The application for summary judgment is refused.

2. The defendants are granted leave to defend.

3. Costs are reserved.

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STRETCH AJ

Appearances /

Appearances

For the Plaintiff	:	Mr. A. Flemming
Instructed by	:	Stupel & Berman Inc C/o Stowell & Co. Pietermaritzburg
For the Defendants	:	Mr.K. Chetty
Instructed by	:	Swaleh Mahomed Attorneys. Pietermaritzburg
Date of Hearing	:	11 December 2012
Date of Filing of Judgment	:	03 June 2013