**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG**
**REPUBLIC OF SOUTH AFRICA CASE NO. 47925/2011**

**In the matter between:**

**FIRSTRAND BANK LIMITED t/a WESBANK** **Plaintiff**

**and**

**EGO SPECIALISED SERVICES CC** **1ST Defendant**
**MTHEMBU, ARNOLD INNOCENENT** **2ND Defendant**
**MTHEMBU, NOXOLO GLORIA** **3RD Defendant**

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**JUDGMENT**

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**MONAMA J**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
(3) REVISED.
03/04/2012
DATE SIGNATURE

**INTRODUCTION**

[1] This is an opposed summary judgment application for the return of a 2007 Ssangyong Stavic motor vehicle, with chassis number KPTV0B1FS7P044294 and engine number 66592622532397. This application is based on an instalment sale agreement, concluded on 8 August 2007, between the plaintiff and the first defendant.

[2] The second and third defendants are sureties. They both executed a valid suretyship and indemnity agreement dated 8 August 2007.

[3] The first defendant breached the agreement by not paying certain instalments. The breach is common cause between the parties. This breach constitutes the

basis of the claim instituted by the plaintiff on 14 December 2011 for the return forthwith of the vehicle referred to in paragraph 1 above, to the plaintiff.

[4] After the delivery of the intention to defend, the plaintiff launched this application. The application is, in terms of Rule 32, supplemented by an affidavit of Ms AL Heydenrych.

[5] The defendants are opposing the application on the following grounds:-

5.1 non compliance by the plaintiff with the provisions of Section 129 of the National Credit Act, 34 of 2005;

5.2 the challenge of authority of Ms Amanda Leigh Heydenrych, the legal manager in the employ of the plaintiff, to depose to the affidavit in support of the application; and

5.3 the applicability of the National Credit Act to the sureties.

The defendants do not dispute the breach of the terms of the instalment sale agreement by failure to pay some instalments.

[6] Ms. AL Heydenrych, the deponent to the supporting affidavit, describes herself as a legal manager of the plaintiff. She has full access to all files and bank records in the legal department of the plaintiff. In respect of this matter, she testified that:

> *"The file and all relevant bank records relating to the first defendant and a certain 2007 Ssangyong Stavic motor vehicle with chasis number KPTVOBIFS7P04429 and engine number 66592622532397 ("the vehicle") are under my control and I have access thereto and have familiarised myself with all the relevant documents and facts pertaining to the plaintiff's claim against the first defendant."*

[underlining mine for emphasis]

The defendant further testified that she perused the file relating to the first defendant and the vehicle and that what she deposed to is within her personal knowledge. She alleges that she is able to swear positively thereto and states thus:

> *"I have regard to the account history on the plaintiff's computerised system which shows the complete and up to date history of the account since the credit agreement (referred to in the plaintiff's particulars of claim) had been entered in to. From the account history I have access to information such as the outstanding balance, interest, costs, the first defendant's full payment history, the amount outstanding as well as the amount in arrears in respect of the credit agreement forming the subject matter of the plaintiff's claim-".*[1]

In view of the defence raised, I must, therefore, make a factual finding as to whether the allegations referred to herein enable Ms Heydenrych to swear positively to the facts and permit her to verify the cause of action and to form an opinion that there was no *bona fide* defence to the action in terms of Rule 32(2).

[7] The summary judgment procedure should be regarded as drastic and should be granted upon the satisfaction of the requirements of Rule 32(2). This Rule provides that:

> *"The plaintiff shall... deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action... and stating that in his opinion there is no bona fide defence to*

[1] Para 4 of the affidavit in support of the application.

*the action and that notice of intention to defend has been delivered solely for the purpose of delay."*

Accordingly, the person who deposes to the affidavit in support of such judgment must be able to swear positively to the facts and can verify the cause of action and express an opinion that the defendants have no *bona fide* defence. The Rule has always been interpreted that the deponent must have personal knowledge of the facts.

[8] Since the decision of **Maharaj v Barclays National Bank Ltd**[2], the authority of the deponents of the affidavits in support of summary judgments, continue to receive considerable attention[3]. There are decisions which have indeed relaxed the requirement of personal knowledge and others which stead fastly have insisted on the personal knowledge.

[9] The various divisions of the High Court are divided as regards to who, on behalf of the corporate body, such as the plaintiff, can depose to the supporting affidavit. One view, which I term the "hard" approach, is that only persons who have a personal knowledge can depose to such affidavit.[4] The contrary view, which I call the "soft" approach, is that anybody who acquires information from the records can depose to such affidavit[5]. I must immediately add that the two approaches have laid down qualifications and their views will be demonstrated below.

[10] The classic example of the "hard" approach is the decision of **Shackleton Credit Management (Pty) Ltd**[6]**. In this case** it was held that:

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[2] 1976(2) SA 418 (A)
[3] Standard Bank of South Africa v Han-rit Boerdery CC 2011 JDR 087 (GNP; Firstrand Bank v Beyer 2011 (1) SA 196 (GNP); Firstrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another 2009 (3) SA 384 (T); Standard Bank of South Africa Limited v Secatsa Investments (Pty) Ltd and Others 1999 (4) SA 229(C); Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another 2010 (5) SA 112 (KZP).
[4] Han-rit Boerdery CC, Beyers and Schalckelton decision (See note 3 above
[5] Secatsa and Carl Beck Estates decisions (see note 3 above)
[6] 2010(5) SA 112 at 119 par 15D-E

> *"However, there may be reasons connected with such a person's employment that would result in their acquiring sufficient personal knowledge of the facts to depose to an affidavit in support of an application for summary judgment. Each case will necessary depend upon its own facts."*
> [Underlining mine for emphasis]

In the Han-rit case the court held that:

> *"Ms Govender's knowledge is derived entirely from the applicant's ledgers, books of account and files pertaining to the defendant's accounts. She does not allege that she had any discussions or dealing with the defendants in connection with their accounts and the amounts claimed."*
>
> [underlining mine]

In Meyer case the court held that:

> *"-Companies, firms and other legal personae, like the plaintiff, can only speak and act through a representative, and therefore the deponent on behalf of such a company or legal persons has to state unequivocally that the facts were within his personal knowledge and furnish particulars as to how the knowledge was acquired by him so as to enable the court to assess the evidence put before it, and to be able to make a factual finding regarding the acceptability of the supporting affidavit for summary judgment purposes."*

The above statement constitutes the qualification I referred to above.

The "soft" approach is to be found in the **Firstrand Bank Ltd v Carl Beck Estates and Another** where Satchwell J held that:

*"- The deponent to the affidavit accompanying the application for summary judgment is employed by the applicant as 'operations manager arrears legal'. It was stated that the second respondent never directly dealt with the deponent but with certain 'relationship managers'. Accordingly, it was argued that the deponent to the affidavit has no personal knowledge of the facts surrounding the dispute and his affidavit could not and did not comply with the requirements of the provisions of rule 32.*

*- This submission is without merit. In the present instance the deponent to the founding affidavit is the 'operations manager arrears legal', which title clearly indicates knowledge of arrears in moneys owing to plaintiff and legal responsibility therefor. In the present case the deponent does not ask the court to rely inferences to be drawn. He states that the facts contained in the affidavit fall within his personal knowledge and are based on records and documents available to him. He is indeed pre-eminently the person who would have knowledge of the relevant facts. It may well be that the 'relationship managers' with whom the second respondent dealt created or accessed that same records and documentation to which the deponent had access and upon which he relied In deposing to the affidavit".*[7]

The view of Satchwell J finds support in the Secatsa decision wherein Van Heerden AJ (as she then was) held that:

*" It is clear from the case law that first hand knowledge of every fact which goes to make up the plaintiff's cause of action is not required and that, where the plaintiff is a corporate entity, the deponent may well legitimately rely for his or her personal knowledge of at least*

[7] 2009(3)SA 384 at 391 F-G

*certain of the relevant facts and his or her ability to swear positively to such facts, on records in the company 's possession"* [8]

The Carl Estate and Secatsa decisions are, in my view, reflecting the current enormous developments in the telecommunication technology. Telecommunication technology such as the internet technologies have so much revolutionised the field of communication. These days it is not necessary to transact in person in a bank. Banking transactions can be made from a mobile telephone handset. I agree with the view of Satchwell J and Van Heerden AJ (as she then was). Accordingly, I find the point relating to authority without merit and is rejected.

[11] In my view, Ms Heydenrych is well qualified to have the relevant facts. She is still the legal manager who takes vital decisions affecting the business of the plaintiff. She has to make sure that before instituting any action there is indeed a breach. To hold otherwise would hamstring the plaintiff's business operation and would negate the positive contribution by the advancement of telecommunication technology. The other important factor is labour mobility in the banking industry. Personnel get either promoted or deployed. The "hard" approach does not consider all these developments. This approach makes it impossible for the plaintiff to obtain summary judgment unless the deponent has dealt personally with the matter.

**Section 129- Notification The position of a juristic person**

[12] It is common cause that the first defendant is a juristic person and that the plaintiff did not comply with the procedure of section 129 of the National Credit Act 34 of 2005, as amended. It is also common cause that the main agreement is between the plaintiff and the first defendant, and that the transaction between the parties is a credit transaction. The second and third defendants are co-principal debtors in terms of their suretyship agreements.

[8] 1999(4) SA 229 CPD at 235B

The National Credit Act applies to every credit agreement except agreements specified in Section 4 thereof.

[13] The plaintiff contends that the said provisions do not apply and notice in terms of section 29 of Act 34 of 2004 was unnecessary. The second and third respondents are mere guarantors. Therefore, the second and third defendants cannot rely on the said provisions. They are not the "customers" within the meaning of the Act. The Act does not apply to the sureties. Accordingly, this argument is devoid of any merits and must be rejected.

[14] Finally, I now deal with the alleged failure by the plaintiff to annex the certificate of indebtedness to the documents. In my view, such a point, is technical in nature. The court has power to condone a mere technical non-compliance as such. In this regard Harms opined as follows"

> *"Although the application must formally fall squarely within the scope of the rule, any technicality that may be set up by way of abjection ought not to succeed. Substantial compliance will suffice since the court has the power to condone non-compliance, especially where the objections are purely technical and the defendant is not prejudice."*[9]

[15] It is common cause that the plaintiff did not annex the certificate of indebtedness. However, the defendants admit a non-payment of an unspecified instalment. The first defendant in its opposing affidavit states that:

> *"-I deny that the arrears are what is said by the plaintiff".*

In my view such a statement, by implication, concede to a breach by non-payment. It is my understanding that the deponents disputed the amount owing and are aware that they are in arrears. This view is fortified by the defendants' contention that the certificate of balance is not attached. It is not in dispute that such certificate is not attached.

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[9] Civil Procedure in the Supreme Court [B-212(1)

[16] The plaintiff's claim is based on the breach by non payment of monthly instalment. Clause 10 of the Agreement provides:

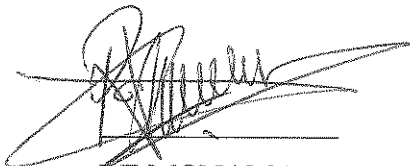
> *"-If you [the defendant] fail to comply with any of the terms and conditions [payment] of this agreement... the seller [plaintiff] will be entitled to cancel the Agreement, to take the goods back, sell the goods, keep the instalment you[the defendants] have made and claim any balance (if any) from you as damages."*

The plaintiff's claim is unambiguous. It is for the cancellation and the return of the merx. Failure to attach the certificate of balance is not fatal. This is even so because the arrears are not in dispute. The only dispute relates to the actual amount of the arrears.

[17] I accordingly grant summary judgment as prayed for. The following order is granted

1. The agreement between the parties is hereby cancelled.
2. The defendants are ordered to return forthwith to the plaintiff a certain 2007 Ssangyong Stavic motor vehicle with chassis number KPTV0B1FS7P044294 and engine number 66592622532397, failing which the sheriff is directed and authorised to attach the vehicle wherever it may be found and hand same to the plaintiff.

3. Costs of suit on the attorney and client scale.



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JUDGE OF THE HIGH COURT

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