IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 31095 /2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

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SIGNATURE DATE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA Applicant

and

DREAMFAIR PROPERTIES 51 (PTY) LTD 1st Respondent

CHRISTINE MARY WHITTAKER 2nd Respondent

This judgement was delivered electronically by loading it on case lines

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JUDGEMENT

MATSEMELA AJ

[1] The applicant seeks an order against the respondent in the following terms:

1.1 For the cancellation of an installed sale agreement pertaining to a 2017 Mini F60 Cooper S Countryman (vehicle).

1.2 The respondent to return the said vehicle to the applicant.

1.3 For the cancellation of a revolving loan, overdraft facility, personal loan, personal overdraft and credit card agreements.

1.4 For the payment of liquidated damages in respect of the amount claimed to be due in terms of the credit agreements and guarantee agreements in terms of which the 2nd and 3rd respondents secured the 1st respondent's liability in terms of the sale, revolving loan and overdraft agreements.

ISSUES

[2] The respondents have raised the following issues:

(a) That the 1st and 2nd respondents are not in breach of any of the agreements.

(b) That the applicant did not comply with the terms of all of the agreements or **the narrow** contractual principles for them to be cancelled had there been breach.

(c) Any purported cancellation by the applicant was not properly brought to the respondent's attention.

(d) The agreements are not cancelled, and their belief is that what the applicant seeks is therefore premature.

FACTUAL BACKGROUND

Sale Agreement

[3] The sale agreement was concluded on 16 October 2017 and it was recorded that the applicant sold the vehicle to the 1st respondent, and that the applicant

remains the owner of the car until the final instalment payment has been made.

[4] The respondent must pay all the repayments before the payment due date throughout the duration of this agreement. A default event should be fine if the 1st respondent fails to make payment of any amount payable to the applicant in terms of the sale agreement.

[5] Paragraph 12.9 of the Founding Affidavit deals with the consequences of a default event and *inter alia* requires the applicant to give 10 days' written notice to the 1st respondent to remedy its breach or to commence legal proceedings to claim the outstanding amount, obtain possession of the goods and/or cancel the sale agreement.

[6] This implies that the applicant is entitled to initiate legal action before giving notice to the 1st respondent to remedy its default. The aforementioned paragraphs of the Founding Affidavit are informed by the clause 19 of the sale agreement. Clause 19.3 specifies that the applicant is only entitled to take any legal action, or taking possession of the goods, cancellation of the agreement or claim damages, if the 1st respondent does not remedy its default upon receiving the requisite notice. It was alleged by the respondent's counsel that this misconstrues applicant's true rights. I agree. This is inconsistent with clause 19.5 which permits the 1st respondent to reinstate the agreement at any time should it be in arrears.

DEFAULT NOTICE

[7] It is alleged by the applicant that the 1st respondent breach the sale agreement by failing to make the payments of the instalment amount is required by it. This caused that on 14 May 2020 a notice to be delivered to it to remedy such default in 10 days. The copy of such notice of default was attached and marked annexure FA4 in the Founding Affidavit.

[8] The delivery of FA4 is said to have been infected by having placed in the 1st respondent's post box at its chosen *domicilium citandi executandi* address of

number 36 Chester Road, Parkview, Johannesburg. In support thereof the applicant relies on a service of affidavit attached as FA5.

[9] Counsel for the respondent argues that FA5 does not refer to FA4, but states that the deponent served “three copies of each of the letters of demand” by placing them in the post box. The deponent is the sole verifier of this act and attaches a photograph, taken of the post box in which these letters of demand were allegedly placed. As the service affidavit, refers to three and identified letters of demand, this is in conflict to what it is stated in the founding affidavit in which he referred only to FA4 having been delivered. From the attached photograph, the fact that these letters of demand were placed inside it, cannot be ascertained, that these letters are visible or not in it.

[10] The 2nd respondent, on behalf of the 1st respondent, contends that she did not receive any such notice and also denies that such notice insofar as it purports to give effect to the applicant’s right to do so in terms of the sale agreement was not properly brought to the 1st respondent attention.

CANCELLATION NOTICE

[11] The applicant contends that as a result of the 1st respondent not having respondent to the FA4, the sale agreement was cancelled through another notice dated 11 June 2020. The said notice was attached to their founding affidavit and it was marked FA6. This notice is said to have been delivered to the 1st respondent by registered post. The applicant attached the track and trace result in his founding affidavit as FA7.

[12] From the track and trace result, the 1st respondent’s name appears under three different reference numbers, that is RC 161450045, RC 161449952 and RC 161 4501 39. This suggests three documents were addressed to the 1st respondent with the same consignment. Only the trace and results of the 3rd document is provided in FA7. It also shows that the document was received by the Saxonwold post office and a notification of its arrival dispatched to the 1st respondent on the 22nd July 2020.

[13] Counsel for the respondents argues that there is no evidence that the document was actually received by the 1st respondent, and that there is no way of knowing that this document is the letter of termination as it is alleged by the applicant.

REVOLVING LOAN AGREEMENT

[14] This agreement was concluded on 11 August 2015 in terms of which the applicant undertook to advance to the 1st respondent an amount of R250, 000. The 1st respondent was to repay this loan amount in 64 instalments of R6271.59 per month to cover the capital loan amount and interest.

[15] On the same basis as in default judgement[1] and following the same procedure of sending notices of default by hand and termination by post[2] the applicant purported to cancel the revolving loan agreement. In paragraph 6.1 of the Founding Affidavit the applicant acknowledged that only once it has given notice to the 1st respondent to remedy any alleged default and that may proceed with a termination notice or legal action.

[16] The 1st respondent disputes that she received the notice of cancellation. The same points as to the default notice pertaining to the sale agreement served on the 1st respondent by hand and cancellation notice by registered post applies to the revolving loan agreement in that:

(a) There is no proof that the default notice was properly brought to the attention of the 1st respondent or actually delivered to it.

(b) The purported notice of cancellation is the document described as having been dispatched to the 1st respondent and track and trace results

annexure nor that the 1st respondent received the cancellation notice.

[17] It is disputed, whether a blanket reliance on a certificate of balance is sufficient to quantify that the 1st respondent's alleged indebtedness and that further evidentiary support needs to be provided.

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[1] FA PARA 30
[2] FA PARA 31

OVERDRAFT

[18] This agreement was concluded between the applicant and 1st respondent on 5 July 2015, in terms of which the applicant undertook to provide a 1st respondent with the overdraft credit facilities to the value of R104000. On 25 May 2017 the overdraft credit facility value was increased to R 600 000 and on the 5th July 2018, it was increased to R 100 0000. The 1st respondent would be liable to make at least one monthly payment to cover the finance charges in the overdraft facility.

[19] The applicant also acknowledged that it can only commence legal proceedings once it has given the 1st respondent notice to remedy any alleged default.[3] On the same basis as the sale agreement and the revolving loan agreement, the applicant purported to give it default notice by hand and notice of cancellation by registered post to the 1st respondent, upon such alleged default by the 1st respondent.

[20] The 1st respondent denies that it received the notice of default and alleges that there is no evidence that the termination notice was received by it, for the same reasons as set out against the alleged that termination of the sale agreement and the revolving loan agreement above.

[21] The reliability, on the certificate of balance of the outstanding amount in terms of the overdraft agreement, is also disputed.

GAURANTEES

[22] The 2nd and the 3rd respondent's liability in respect of the sale agreement, revolving loan and overdraft agreement, is predicated upon guarantees signed between them and the applicant on the 5th and 8 July 2018, and securing the 1st respondent's aforementioned indebtedness. The notices of default addressed to the 2nd and the 3rd respondents were allegedly sent via registered post and email. There was no physical service of them on the respondents on the chosen addresses.

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[3] FA PARA 37.8

[23] There is no indication from the track and trace report of these letters that they were sent to the 2nd and 3rd respondents. Counsel further argues that there is no indication that these notices of default were sent out from the post office at all.

[24] The veracity of the certificate of balance is also disputed.

PERSONAL LOAN AGREEMENT

[25] The applicant and the 2nd respondent concluded a personal loan agreement on 20th March 2015, in terms of which the applicant undertook to loan and advance an amount of R200 000 to the 2nd respondent. The applicant alleges that the 2nd respondent defaulted on her repayment obligations in terms of the personal loan agreement and on the 14th May 2020 caused a letter calling on the 2nd respondent to remedy the default, to be delivered to the 2nd respondent. In this regard the applicant relies on annexures FA 31 and F32A, in support of its allegation that this letter was delivered to the 2nd respondent's chosen address.

[26] The applicant relies on FA32 for the services of termination of the personal loan agreement. This is one and the same affidavit presented as FA5.This is a termination notice allegedly sent via registered post with the track and trace results annexed as FA33. These are the same track and trace results pertaining to the sale agreement, revolving credit and overdraft agreements and are subject to the same evidentiary shortcomings as described in respect of those notices above. The 2nd respondent denies that she received these notices and that they were properly brought to her attention, as alleged.

PERSONAL OVERDRAFT

[27] On 30 May 2014, a personal overdraft agreement was concluded between the applicant and the 2nd respondent, in terms of which the applicant undertook to provide overdraft credit facilities to the 2nd respondent to the value of R 20000. In the event of default, prior to cancelling the agreement and taking any legal action, applicant was obliged to first provide a default notice to the 2nd respondent for her to remedy her alleged default.

[28] The applicant alleges that the 2nd respondent failed to comply with her obligations in terms of the personal overdraft agreement, and that on the 14th May 2020 it addressed a default notice to the 2nd respondent which was delivered on 18 May 2020 in accordance with annexures FA37 and FA32. It is alleges that it sent a termination notice by registered post as per FA38 and FA39.

[29] The 2nd respondent denies receiving such a notice and disputes the evidentiary value of FA32, as it does with FA5, being one and the same document, as well as FA39, being the same as FA7, for the same reasons as set out above in respect of the sale agreement, revolving credit and overdraft agreement.

[30] The 2nd respondent denies that she is indebted to the amount of R 179425 in terms of personal overdraft, as alleged by the Certificate of Balance annexed as FA40.

CREDIT CARD

[31] The applicant alleges that the 2nd respondent and entered into a credit facility agreement with it. Counsel for the respondents argues that the applicant fails to state as to when and where the agreement was concluded. The applicant failed to provide a copy of such alleged agreement signed by the 2nd respondent in which accepts the terms of the agreement in writing.

[32] The applicant alleges that the 2nd respondent breached the terms of the credit agreement which the 2nd respondent denies. The applicant relies on FA32 as proof that delivered a notice of default to the 2nd respondent, and on that track and trace results (FA45) that it terminated the credit agreement.

[33] The 2nd respondent denies that it received these notices and disputes the evidentiary value of FA32 as it does with FA5, being one and the same document as well as FA39 being the same as FA7 for the same reasons as set above in respect of sale agreement, revolving and overdraft agreements.

[34] The 2nd respondent denies that the Certificate of Balance constitutes proof of her indebtedness.

THE LAW

CERTIFICATE OF BALANCE

[35] In the matter of *Thrupp Investment Holdings (Pty) Ltd And Thomas Bernard* Goldrick,[4] Van Oosten J held the following at paragraph 6

> [6] A*s regards the effect of the absence of a certificate of balance-clause in the suretyship counsel for the appellant submitted that a proper interpretation of their certificate of indebtedness-clause contained in the lease agreement leads one to conclude that the production of such a certificate in fact established the liability of the lessee for the amount certified, which in turn was sufficient to constitute prima facie proof of eligibility of sureties. The argument in my view is flawed in its premise. A certificate-clause, it has been held in a number of cases, is designed to facilitate proof of the amount of liability (See Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others 1989 (3)* SA 750 (T); *Bank of Lisbon International Ltd v Venter en Ander 1990 (4) SA 463 (A) at 478 E). The certificate is therefore is merely an evidentiary tool provided for in an agreement by one contacting party to the other to facilitate proof of the amount of indebtedness. It does not in itself establish liability. In casu the clause was only valid as between the lessor and the lessee and therefore could not be invoked against the sureties. The fact that the suretyship was referred to in and in addition to that, also annexed to the lease agreement, is of no moment. The suretyship although collateral to the lease agreement, remains a separate and independent agreement and the certificate of balance-clause therefore as correctly heard by the Judge a qou, did not by reference become incorporated into the suretyship*.(My emphasis)

[36] It is clear from the above that where there is not a dispute of indebtedness and only the amount of such indebtedness falls to be determined, a Certificate of Balance can be used as evidentiary proof. However where liability is denied, the applicant is required to go further in proving the breach and

[4] Witwatersrand Local Division (A5027/05) [2007] ZAGPHC 23

ensuing liability if it elects to prosecute it on the motion proceedings. It must proof such liability before it can rely upon a certificate of balance for evidentiary purposes in proving the amount.

[37] In *casu,* we have two mutually destructive counter-allegations of breach and the complaint of compliance. The applicant cannot simply rely on Certificate of Balance that the respondents have breached and are liable in terms of their agreement. The applicant has to proof liability before it can rely on the certificate of balance.

NOTICE OF BREACH

[38] The applicant's case is that it provided notice of breach of the agreements in the following manner:

(a) The sale of credit agreements, by means of physical delivery of the requisite notices in terms of FA5 and FA32 and

(b) The guarantees by registered post, as supported by track and trace report annexure FA28.

[39] As I have discussed above, the service affidavit makes mention of three copies of the letters of demand and does not specify any of them. They have further not been annexed to the service affidavit in the verification of what exactly was served, nor do they appear as having been in the photograph attached to them.

[40] The respondents deny that they have received them. There is insufficient evidence that each of these notices where actually delivered and brought to their attention.

[41] The agreements herein are six in total. On the interpretation of the service affidavit there insufficient number of letters delivered.

[42] Coming to the guarantees there is no evidence that a notification of their availability at the post office was brought to the attention of the respondents.

[43] In the case of *Sebola v Standard Bank of South Africa Ltd*[5] at paragraph 87 the following was said:

"*To sum up. The requirement that a credit provider provide notice in terms of section 129 (1) (a) to the consumer must to be understood in conjunction with section 130, which requires delivery of the notice. The statute, though giving no clear meaning to "deliver", requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider post the notice, proof of registered dispatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivering to the consumer, when in the absence of contrary indication constitutes sufficient proof of delivery. If in contested proceedings the consumer avers that the notice did not reach her, the court must establish the truth of the claim. If it finds that the credit provider has not complied with section 129 (1), it must in terms of section 130 (4) (b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed*."

[44] The respondents deny that there were notified about the arrival of the guarantees at the post office which means that they were not properly brought to their attention as required by law. Therefore the applicant was not at liberty to commence legal action in accordance with the terms of the guarantee agreements.

[45] The applicant chose not to deliver default notices by registered post but rely on affidavit of service in which these notices are not specified to have been delivered specifically, nor is there evidence provided that in their way in effect properly delivered, which the respondents deny having received them. The applicant was not at liberty to commence legal action in terms of these agreements.

[46] Since the delivery is contested, it will fall upon the court to decide whether these notices were in fact received, to establish the truth of the matter. If it is brought into question whether the applicant has met the

[5] 2012 (5) SA 142 (CC)

requisite standard as set out in *Sebola* above, then the matter must be referred to trial to establish whether the applicant was entitled to commence legal action in the circumstances. Having said that, I therefore make the following order.

Order

(a) The application for summary judgement is refused.

(b) The respondents are granted leave to defend.

(c) The costs are in the cause.

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MOLEFE MATSEMELA

Acting Judge of the South Gauteng Local Division

Heard on	3 May 2022
Delivered on	27 MAY 2022
For applicant	Adv AJ Venter
Instructed by	Martin Weir-Smith
For the respondents	Adv S Cohen
Instructed by	Thomson Wilks Inc