IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 2021/35830

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: ~~YES~~/NO

In the matter between:-

ABSA BANK LIMITED (PTY) LTD **APPLICANT**

and

RALITABO TSELISO ESAIA **RESPONDENT**

JUDGMENT

Mazibuko AJ

Introduction

1. The applicant seeks relief for confirmation of cancellation of the instalment sale agreement (the agreement) and the return of a motor vehicle (described below) and leave to approach the court for judgment regarding the damages suffered by the applicant.

2. The summary judgment is contested on the following grounds:

 2.1. The respondent did not fail to make his monthly instalments,

 2.2. The plaintiff did not comply with the requirements of Section 129 of the National Credit Act and

 2.3. The agreement was not cancelled.

Common cause facts

3. On 30 September 2016, the parties concluded the agreement. In terms of this, the defendant purchased a motor vehicle, a 2015 BMW X5 XDRIVE 30D M-SPORT A/T (F15) with engine number: [….], vehicle identification number (VIN): [….]. The motor vehicle was delivered to the respondent.

4. In terms of the agreement, the respondent had to pay a monthly repayment instalment of R15 624.51. The applicant reserved ownership of the motor vehicle until all amounts payable in terms of the agreement had been made. The respondent would be in default if, inter alia, he failed to pay any sum payable on the due date.

5. The respondent’s monthly instalments were deferred for three months, from May 2020 to July 2020. During August 2020, the respondent was in arrears in the amount of R10 392.59. The parties arranged that the respondent would pay R3 500 towards his arrears from August to October 2020 whilst continuing with his monthly instalment during these three months. The parties agreed that the applicant would, in August 2020, debit R19 172.82 and, for September and October 2020, R19 124.51. Between August and October 2020, the applicant debited the respondent’s account with R3 500, which was an amount only towards the arrears. The monthly instalment of R15 624.51 was not debited.

6. The respondent is in arrears of R183 924.36 with an outstanding balance of R382 125.33.

Issues

7. The court must decide whether the respondent has disclosed fully the nature and ground of a bona fide defence and material facts relied upon, entitling him to leave to defend the matter.

The Law

8. Rule 32 of the Uniform Rules provides:

> *"(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only-*
>
> *(c) for delivery of specified movable property, together with any claim for interest and costs.*
>
> *(2) (b) The plaintiff shall, in the affidavit referred to in subrule (2)(a) verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.*
>
> *(3) The defendant may—*
>
> *(a) …*
>
> *(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard) or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence, and the material facts relied upon therefor."*

The respondent's defences

<u>The monthly instalments</u>

9. The respondent contends that in terms of the agreement, the applicant had to debit his bank account with R19 172.82 for August and R19 124.51 for September and October 2020. The amounts were computed as follows; R3 500 towards the arrears and the rest being the monthly instalment. However, the applicant only debited R3 500.

10. The respondent averred that:

10.1. In terms of the agreement, his monthly instalments were due and payable on 01st day of every month until the loan amount was fully paid. However, after the payment holiday, the applicant debited his account 20 days from the 01st day of the month without notifying him and giving reasons for such unilateral change of the agreement.

10.2. The applicant froze his account without any justification. The queries regarding his frozen account were not resolved even with the assistance of his newly assigned private banker, as she could not access any information relating to his accounts before her arrival. She also could not ascertain the reasons thereof.

10.3. Consequently, the respondent closed his accounts with the applicant and opened a new FNB bank account to access his monthly salary. He advised his private banker at the applicant that he had opened an account at FNB to enable the applicant to debit his account for the monthly instalment, which the applicant failed to do.

10.4. Before the freezing of his account, his payments were up to date.

10.5. The respondent admitted that he was indebted to the applicant but denied that the breach was due to his negligence or omission. Further, his attempts to settle the issues with the applicant bore no fruit.

11. In terms of the agreement, where the applicant needed to change the date of instalments, it had to notify the respondent at least five business days before the date on which the change would occur. There were no facts presented before the court disputing these averments. There are triable issues on the face of it that would be well-ventilated during the hearing of the main matter. The summary judgment can not succeed.

<u>Section 129</u>

12. The respondent stated that the applicant did not comply with the requirements of Section 129 of the National Credit Act 20 0f 2005 (The NCA) and that he was not permitted to institute the claim against him. The section 129 notice was not delivered to the chosen *domicillium citandi et executandi* or point of collection by the respondent on 26 April 2021, as contended by the applicant. The respondent further averred that the agreement was not terminated as he did not receive the section 129 notice.

13. The applicant argued that there was compliance with provisions of section 129 of the NCA. The applicant asserts that the respondent's defence in this regard is not a bona fide defence. Also, if it is found that there has been non-compliance, the Court must, in terms of section 130(4)(b) of the NCA, issue directions as to compliance and adjourn any proceedings accordingly until there has been compliance.

14. Section 129 provides:

"(1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130(2), may not commence any legal proceedings

to enforce the agreement before-

(i) first, providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt

restructuring order, or to proceedings in a court that could result in such an order.

(3) Subject to subsection (4), a consumer may-

(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement; and-

(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.

(4) A consumer may not re-instate a credit agreement after-

(a) the sale of any property pursuant to-

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123.

15. Section 130(4)(b) provides:

"(4) In any proceedings contemplated in this section, if the court determines that-

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c); the court must-

(i) adjourn the matter before it; and

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed."

16. In clarifying the issues relating to the delivery of section 129 notice, it was stated in Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 CC, para 54,

"[54] The Act prescribes obligations that credit providers must discharge in order to bring section 129 notices to the attention of consumers. When delivery

occurs through the postal service, proof that these obligations have been discharged entails proof that—

(a) *the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;*

(b) *the Post Office issued a notification to the consumer that a registered item was available for her collection;*

(c) *the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and*

(d) *a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a)-(c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer."*

17. In Amardien v The Registrar of Deeds and Others [2018] ZACC, para 56, the Constitutional court clarified the purpose of section 129 and held:

"[56] The purposes of section 129 of the NCA are as follows:

(a) It brings to the attention of the consumer the default status of her credit agreement.

(b) It provides the consumer with an opportunity to rectify the default status of the credit agreement in order to avoid legal action being instituted on the credit agreement or to regain possession of the asset subject to the credit agreement.

(c) It is the only gateway for a credit provider to be able to institute legal action against a consumer who is in default under a credit agreement.

[57] This section reveals that in the event of the consumer being in default of

her repayments of the loan, the credit provider is obliged to draw the default to the attention of the consumer. It prescribes that the notice given to the consumer must be in writing and specifies what the notice must contain. The notice must propose the options available to the consumer who is in financial distress and unable to purge the default. It must point out that the consumer has the option to refer the credit agreement to a debt counsellor, dispute resolution agent, consumer court or ombudsman. The purpose of the referral must also be stated in the notice.

[58] There are two statutory conditions which must be met before the credit provider may institute litigation under section 129. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before (a) providing notice to the consumer; and (b) meeting further requirements set out in section 130.

[59] The reference to section 130 reveals a strong link between the two Provisions; hence they are required to be read together. When a credit provider seeks to enforce the agreement by means of litigation, it must first show compliance with section 130, which, by extension, refers back to section 129. The application of these sections is triggered by the consumer's failure to repay the loan. These sections suspend the credit provider's rights under the credit agreement until certain steps have been taken. The credit provider is not entitled to exercise its rights immediately under the agreement. It is first required to notify the consumer of the specific default and demand that the arrears be paid. If the consumer pays up the arrears, then the dispute is settled."

18. In *casu*, according to the Post office tracing record, on 26 April 2021, the tracking parcel results indicated that the section 129 notice was with the Post office at Westgate, Roodepoort and read, "First notification to recipient". It, therefore, cannot be correct that the respondent was served with the notice on 26 April 2021 since the notice was still at Roodepoort, not with the respondent

as asserted by the applicant. I find that the respondent was not served with the section 129 notice based on the averments by the applicant.

19. Section 129 places an obligation upon the credit provider to draw the default to the attention of the consumer. No legal proceedings may commence before (a) providing notice to the consumer and (b) meeting further requirements set out in section 130. No facts support the applicant's assertion that it complied with the section 129 provisions. The peremptory requirements were not met as the section 129 notice was not served upon the respondent. It follows then that the legal proceedings to enforce the credit agreement were not justified to commence against the respondent.

Cancellation of the agreement

20. It was argued on behalf of the respondent that he did not receive the section 129 notice. Paragraph 4 of the section 129 notice sent by the applicant read: "*Accordingly, and as per the credit agreement, you are in default under the credit agreement, and our client hereby cancels its agreement with yourself and claims recovery of the vehicle."*

21. Considering that it has been established that the section 129 notice, which part of it meant to terminate the agreement, was not served on the respondent. It cannot be said that the agreement was cancelled.

22. The applicant submitted that should the court find that it did not comply with section 129 as contemplated by the act. The court should act within s130(4)(b) and adjourn the proceedings to allow compliance. No legal proceedings could commence without the service of the section 129 notice on the respondent. Thus the request to adjourn what does not exist and should not have been initiated is not possible. Therefore, the proceedings cannot be adjourned in terms of section 130(4)(b) since the legal proceedings commenced before the service of the section 129 notice.

23. In conclusion, it is settled law that whilst the respondent is not required to prove his defence, he must at least provide sufficient detail to enable the court

to ascertain that his opposing affidavit discloses a bona fide defence. He must go beyond the mere formulation of disputes and take the court into his confidence. (See *Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoors (Edms) Bpk)***,** *1997 (1) SA 244 (T) at 249 F-G.*

24. The respondent has provided sufficient details to enable this court to determine whether he has a bona fide defence. The nature and grounds of the defence and the material facts relied upon have been disclosed. The application for summary judgment is, therefore, not justified to succeed.

Costs

25. In Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others, 1996 (2) SA 621 (CC) Para 3, it was stated:

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. …."

26. The applicant brought these proceedings in terms of Uniform Rule 32 (1). I find no ground on why costs should not be awarded against the applicant on the attorney and client scale. Such costs are also provided for in the

agreement signed by the parties. It is justifiable to award costs on an attorney and client scale.

27. Consequently, the following order is made.

Order:

1. The application for summary judgment is dismissed.

2. The applicant is to pay the costs of suit on an attorney and client scale.

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N. MAZIBUKO

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email being uploaded to Case Lines.

Representation

For the applicant:	Advocate AJ Reyneke
Instructed by:	Poswa Incorporated
For the respondent:	Advocate K Maserumula
Instructed by:	Nyakale Attorneys
Hearing date:	2 February 2023
Delivery date:	8 March 2023