



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

CASE NO:004269/2022

- (1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

19/05/23

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Date

ML TWALA

In the matter between:

VELOCITY FINANCE (RF) LIMITED
PLAINTIFF/APPLICANT

And

NTHABISENG MARTHA THANDEKA

**MOLEF
DEFENDANT/RESPONDENT**

Neutral Citation: *VELOCITY FINANCE (RF) LIMITED v NTHABISENG MARTHA THANDEKA MOLEF* (Case No: 004269/2022) [2023] ZAGPJHC 521 (19 May 2023)

JUDGMENT

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 19th of May 2023.

Summary: *Application for summary Judgment–s129 of the National Credit Act, 34 of 2005–requirement to furnish notice complied with by the creditor—Cession – creditor entitled to cede its rights without notifying debtor – s116 and s117 of National Credit Act – cession did not effect or alter the credit agreement - therefore not a valid defence for the defendant– defendant has no bona fide defence against the claim of the plaintiff–summary judgment granted–the defendant to pay the costs of suit.*

TWALA J

[1] Before this court is an application by the plaintiff that judgment be summarily entered against the defendant in the following terms:

1. Cancellation of the agreement,
2. Delivery of: 2013 Volkswagen Golf VII 1.4 TSI Comfortline
Chassis Number: WVVZZZAUZDW098984
Engine Number: CMB124530.
3. Costs of suit.

[2] The genesis of this case arose on the 19th of May 2017 when an Electronic Instalment Sale Agreement (“*the agreement*”) was concluded between Volkswagen Financial Services South Africa (Pty) Ltd (“*VW FINANCIAL SERVICES*”) and the defendant whereby the defendant purchased a Volkswagen Golf VII motor vehicle for the sum of R229 949.99. It was a term of the agreement that VW Financial Service shall remain the owner of the vehicle until the whole amount of R229 949.99 together with interests and the finance charges is paid in full. The defendant took delivery of the vehicle and continued to pay the instalments as agreed.

[3] On the 20th of July 2017 VW Financial Service ceded all its rights, title and interest in and to the instalment sale agreement to the plaintiff, Velocity Finance (RF) Limited. However, the defendant breached the terms of the agreement and fell into arrears with its instalments. As at the 17th of June 2022, the defendant was in arrears with its instalments to the tune of R124 255.60 and the total balance outstanding of the contract being the sum of R241 183.41. As a result of the defendant’s breach of the contract, the plaintiff sent a letter in terms of s129 of the National Credit Act, 34 of 2005 (“*the Act*”) notifying the defendant of its breach and thereafter instituted these proceedings.

- [4] Counsel for the defendant contended that the defendant did not receive the notice in terms of section 129 and if it did, it would have exercised its rights to engage the plaintiff and attempt other means available to it in terms of the act to resolve the matter. Furthermore, so the argument went, the agreement was concluded between defendant and VW Financial Services and not the plaintiff. It was submitted further that the defendant was not informed of the cession between VW Financial Service and the plaintiff, and it was entitled to be so informed in terms of the act.
- [5] It was submitted by counsel for the plaintiff that the plaintiff dispatched the notice in terms of s129 to the address as provided for by the defendant in the agreement. The plaintiff did not have any other address of the defendant except the one provided in the agreement. Furthermore, there was no reason, so it was contended, for VW Financial Service to inform the defendant of the cession of its rights to the plaintiff because the agreement between the parties provided for such cession and the cession did not effect any change or amendment to the agreement.
- [6] To put matters in the proper context, it is useful to restate the provisions of the National Credit Act that are relevant to this case which provide as follows:

“Alteration of original or amended agreement document:

116. Any change to a document and recording a credit agreement or an amended credit agreement, after it is signed by the consumer, if applicable, or delivered to the consumer, is void unless:-

- (a) the change reduces the consumer 's liabilities under the agreement;*

- (b) *after the change is made, unless the change is affected in terms of section 119 (1) (c), the consumer signs or initials in the margin opposite they change;*
- (c) *the change is recorded in writing and signed by the parties; or*
- (d) *any oral change is recorded electromagnetically and subsequently reduced to writing.*

Changes by agreement

117.(1)if the parties to a credit agreement agree to change its terms, the credit provider must, not later than 20 business days after the date of the agreement, deliver to the consumer a document that –

- (a) *reflects their amended agreement; and*
- (b) *complies with the requirements set out in section 93*

(2)

Required procedures before debt enforcement:

129. (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)”

[7] Counsel for the defendant referred this Court to *Sebola and Another v Standard Bank of South Africa and Another 2012 (5) SA 142 (CC)* where the Constitutional Court, dealing with the provisions of s 129 stated the following:

“Paragraph 87: To sum up. The requirement that a credit provider provide notice in terms of section 129(1)(a) to the consumer must be understood in conjunction with section 130, which requires delivery of the notice. The statute call mom through giving no clear meaning to ‘deliver’, requires that the credit providers seeking to enforce a credit agreement aware and prove that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered dispatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute

sufficient proof of delivery. If in contested proceedings the consumer of avers that the notice did not reach her, the court must establish the truth of the claim first. 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.”

- [8] It is undisputed that the plaintiff did issue the notice in terms of s 129 of the act and forwarded same to the address as given by the defendant when the agreement was concluded. The notice in terms of s 129 reached the post office as designated by the defendant in terms of the address she furnished to the plaintiff when the agreement was entered into. The defendant has failed to testify in its affidavit resisting summary judgment on how it furnished a wrong postal code to the applicant which is a code for another neighboring post office. There is no reason furnished why the plaintiff should have doubted the correctness of the address given by the defendant as her domicilium address at the conclusion of the agreement.
- [9] Nothing turns on the contention that there were exchanges of e-mail communication between the parties before the institution of these proceedings. That did not alter the position that, to comply with s 129, the plaintiff decided to send the notice by registered post to the address furnished by the defendant when she concluded the agreement. As stated in the *Sebola* decision, the registered notice reached the designated post office and therefore it is presumed to have reached the defendant. It is my respectful view therefore that the plaintiff has complied with the provisions of s 129 by dispatching the notice to the address and the notice reached the designated post office as per the details furnished by the defendant in the agreement.

- [10] It has long been established that a contractual right may be ceded by the cedent to the cessionary without the consent of the debtor. Put in another way, a creditor may cede his contractual rights to the cessionary without informing the debtor if the main contract between the parties is not altered or amended. Moreover, if the debtor carries on dealing with the original creditor, the cedent, in good faith, the cessionary, which is the new creditor, is bound if no notice of the cession was given.
- [11] It is not the case of the defendant that it continued to pay its instalment to the cedent but only alleges that it was supposed to be informed of the cession. It is clear from the reading of sections 116 and 117 of the act that the defendant is entitled to be informed and to be furnished with a copy of the agreement only if there is an amendment or alteration in the agreement between the parties. In this case, the cession did not effect any amendment or alter the terms of the agreement but ceded all the rights in and to the agreement to the cessionary.
- [12] It is not in dispute that VW Financial Services ceded its rights in terms of the agreement to the plaintiff on the 20th of July 2019 and the defendant continued to make payments of its instalments until it defaulted and fell into arrears which in June 2022 amounted to over R124 000. When the cession occurred in July 2022, no changes were made to the agreement between the parties. The rights and obligations of the parties remained the same in terms of the agreement and therefore there was no reason for the plaintiff or VW Financial Services to inform the defendant of the cession nor to send it a copy thereof because it did not change or affect any of the terms of the agreement. I hold the view therefore that the defendant's interpretation of sections 116 and 117 is misplaced.

[13] It is trite that for a defendant to succeed in resisting an application for summary judgment, it must show that it has a bona fide defence to the claim of the applicant. Although the respondent does not have to establish such a defence as it would normally in a plea, but it must place certain facts before the Court which demonstrate that such defence may succeed in the trial that might ensue.

[14] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)*, the Court stated the following:

“The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425 G-426E, Corbett JA, was keen to ensure first, an examination of whether here has been sufficient disclosure by the defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of the defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.”

[15] In its affidavit resisting summary judgment the defendant did not dispute that it is indebted to the plaintiff and that it was in arrears with its monthly instalments as contended for by the plaintiff. The defendant did not deny that it was in breach of the terms of the instalment sale agreement which culminated in the plaintiff launching these proceedings. The ineluctable conclusion therefore is that, except for the technical defences raised above, the defendant does not have a bona fide defence to the claim of the plaintiff. The unavoidable conclusion is that the plaintiff has established an unassailable case against the defendant and is therefore entitled to the relief as prayed for in the notice of motion.

[16] In the circumstances, I make the following order:

1. The agreement between the parties is hereby cancelled,
2. The defendant is to deliver the 2013 Volkswagen Golf VII 1.4 TSI Comfortline; Chassis Number: WVVZZZAUZDW098984
Engine Number: CMB124530.
3. The defendant is to pay the costs of suit.

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 15th of May 2023

Date of Judgment: 19th of May 2023

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