

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: **06 JUNE 2024**

SIGNATURE: [...]

Case No: 4855/2022

In the matter between:

BMW FINANCIAL SERVICES SA (PTY) LTD

APPLICANT

And

TSHEPO SIMON MOFOMME

RESPONDENT

Coram: **ACTING JUDGE KEKANA**

Heard on: 29 APRIL 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to

the *CaseLines* system.

JUDGMENT

[1] In this matter the Applicant is applying for an order for a Summary Judgment against the Respondent for the return of a luxury vehicle. The Applicant alleges that the instalment sale agreements was cancelled due to the breach of the agreement by the Respondent. The Applicant further alleges that he complied with the provisions of section 129 of the National Credit Act 34 of 2005 (herein after referred to as "NCA").

BACKGROUND

[2] On 10 March 2021 Applicant (duly represented) and Respondent entered into a written Installment Sale Agreement. In terms of the agreement the Applicant sold a BMW M5 M DCT (F90) to the Respondent, which vehicle was delivered to the Respondent on date of concluding the agreement. Despite delivery of the vehicle to the Respondent, ownership of the vehicle remains vested within the Applicant. The Respondent breached the agreement in that the Respondent failed to pay the payments in terms of the agreement and on 7 January 2022 the Respondent was in arrears with payments in the sum of R 24 807.08

[3] On 3 November 2021, the Applicant delivered to the Respondent a notice complying with Section 129 of the National Credit Act 34 of 2005, advising the Respondent of the extent of its arrears and demanding payment of the outstanding balance. The Respondent chose this manner of service in terms of the agreement.

[4] The applicant alleges that the Respondent failed to respond to the notice in that:

- i) He has failed to pay the arrears within 20 (Twenty) business days from date of default.
- ii) He has failed to refer the agreement to either a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction to resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date
- iii) He has not surrendered the vehicle to the Plaintiff as contemplated in Section 127 of the National Credit Act.

Due to the Respondent's breach of the agreement the Applicant terminated the agreement,

[5] The Respondent argue that there was no compliance with section 129 of the National Credit Act in that, mere dispatch of notice is not enough as the track and trace only show that the documents are at the post office, it does not show if the documents were delivered to him or not. Therefore, the Applicant has not complied with section 129 of the NCA. There were payments that were later made by the Respondents, those payments consequently revived the agreement and as such the agreement is not terminated.

[6] In arriving at the correct answer to the issues raised and contended, this Court will have to consider and pronounce on the following issues:

- (i) the Applicant's compliance with the provisions of section 129 of the National Credit Act;

- (ii) the existence of the credit agreement/contract, do the payments made by the Respondent later, revive the agreement?; and
- (iii) the character of payments made by the Respondent on the dates of between June and August 2022.

[7] I will now deal with what is required from the service provider to ensure compliance with section 129 of the National Credit Act. In the Constitutional Court case of **Sebola v Standard Bank of South Africa Ltd**¹ Cameron J, who delivering the majority judgment, held that:

the NCA did not require the credit provider to prove that the default notice had actually come to the attention of the consumer or that it had been delivered to a specific address, as this would ordinarily be impossible to do. He added, that although it might be difficult for the credit provider to show that the notice came to the attention of the consumer, the credit provider had to make allegations that would satisfy the court from which enforcement was sought that the notice, on a balance of probabilities, had reached the consumer. Therefore, where the notice was posted, mere dispatch of it was not sufficient. Due to the risk of non-delivery by ordinary mail. He added that even when a registered letter was sent there was a possibility that proof of registered dispatch by itself was not enough. Thus, it was not sufficient for the credit provider to simply allege and provide proof that the notice had been sent by registered mail to the address chosen by the defaulting consumer. A credit provider also had to prove that the notice was received by the correct post office. Thus, the mere dispatch of a notice was not enough and at the very least, the credit provider "must obtain a post-dispatch 'track and trace' print-

¹ 2012 (5) SA 142 (CC) para 74.

out from the website of the South African Post Office" to show that the notice had been delivered to the relevant post office². If the notice reached the correct post office, in the absence of an indication to the contrary, a court could accept that there was adequate proof of delivery of the notice to the defaulting consumer.

[8] In the matter before me there is evidence in the form of Annexures C2 (Postal Slip) and C3 (Parcel Tracking) – which also show that the Respondent was notified when the parcel arrived at Soshanguve Post Office.

[9] In another Constitutional Court case of *Kubyana v Standard Bank of South Africa Ltd*³ the majority judgment (per Mhlantla AJ) held that:

the credit provider had shown that it had complied with the NCA by proving that the notice had been sent via registered mail to the correct post office. By doing this, the credit provider might credibly aver receipt of the notice by the consumer, and to require anything further from the credit provider would be too onerous and would allow consumers to ignore validly sent notices with impunity. that there was no need for the credit provider to prove that the notice had come to the subjective attention of the consumer, nor was it a requirement that the notice be served personally on the consumer. (paras 31 and 39).

[10] The Constitutional Court summarised the situation as follows: (para 53)

Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office,

² Supra *Sebola* para 76.

³ 2014 (3) SA 56 (CC) para 12.

that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behavior.

[11] Relying on the above referred Constitutional Court cases, I'm satisfied that the existence of Postal Slip and Parcel Tracking proves that the Applicant has complied with section 129 of the NCA. There is no defence in law to be raised by the Respondent on the aspect of whether the Applicant complied with section 129 of the NCA. The two cases are clear on what is expected of the Applicant, and I'm satisfied that there has been compliance.

[12] I now turn to the question of whether the sale agreement/contract is terminated or not and do the payments made by the respondent later, revive the agreement. The decision taken by the Applicant to terminate the sale agreement is challenged by the Respondent on two grounds:

- (a) that there was no compliance with section 129 of the NCA, compliance thereto would have enabled the Respondent to explore the remedies provided for in the agreement under clause 16.2.1 thereof; and
- (b) payments made by the Respondents in June 2022 and August 2022 revived the contract and as a result the contract is not terminated.

[13] The sale agreement between the Applicant and the Respondent clearly defined fixed time for performance and what would happen in cases of a breach. The evidence of the issuance of summons is enough to prove cancellation of the agreement. The summons serves the purpose of proving action taken by the Applicant. No further letter of demand is required. Having established that there was compliance with section 129 of the NCA, the Applicant was within his rights to cancel the sale agreement. There is no evidence presented before of any further discussions between the Applicant and the Respondent after the Applicant has taken the decision to cancel the sale agreement. I conclude that the agreement was terminated, this aspect is closely connected with the issue about the character of the payments made by the Respondent between June 2022 and August 2022 which I will deal it immediately hereafter.

[14] I now deal with the issue about the character of payments by the Respondent on the dates of between June and August 2022 is. **Clause 6.8** of the sale agreement reads as follows:

if this agreement is terminated by us and you dispute such termination whilst remaining in possession of the Goods, you must continue to pay all amounts due in terms of the Agreement. Notwithstanding our acceptance of such payments, we will not lose any of our rights herein.”

[15] The Respondent had an obligation in terms of the agreement itself even if the agreement is terminated to continue to make payments especially as he continued to be in possession of the goods. The clause on the agreement is very clear of what obligations it imposes on the Respondent, payments per se to ensure compliance with the obligation does not revive the agreement in any way. The Respondent always had and during the times when the said payments were made being in the possession of the goods. In the absence of evidence demonstrating any revived agreement, the contract remains terminated. It is my conclusion that the contract between the Applicant and the Respondent remains terminated even as the Respondent continued making payments as this was adherence with the obligation in terms of clause 6.8 of the agreement.

[16] Since this is an application for summary Judgment one has to ask the same question which was posed by Corbett J in the case of **Maharaj v Barclays National Bank Limited**, whether the [Applicant's] claim is unimpeachable and that the [Respondents] defence is bogus and bad in law⁴.

[17] Courts are extremely loath to grant summary judgment unless satisfied that the plaintiff has an unanswerable case. This is because summary judgment is an extraordinary and very stringent remedy in that it permits a judgment to be given without trial. It closes the court for the defendant. It is only where there is no doubt that the plaintiff has an unanswerable case that it should be granted⁵.

[18] The provision of section 130 (3) of the NCA states that:

⁴ 1976 (1)SA 418 A.

⁵ Supra Maharaj.

Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

- (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;
- (b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and
- (c) that the credit provider has not approached the court-
 - (i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or
 - (ii) despite the consumer having-
 - (aa) surrendered property to the credit provider, and before that property has been sold;
 - (bb) agreed to a proposal made in terms of section 129(1)(u) and acted in good faith in fulfilment of that agreement;
 - (cc) complied with an agreed plan as contemplated in section 129(1)(a); or
 - (dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).

[19] In the circumstances I'm satisfied that Applicant has proved an unimpeachable claim against the Respondent and that the Respondent has no defence in law.

I therefore grant judgment in favour of the Applicant. I make the following order:

1. The application for summary judgment is granted.
2. The sale agreement between the Applicant and the Respondent is terminated as of the date the Applicant terminated the agreement.
3. The Respondent to return to the Applicant a BMW M5 M DCT (F90) with engine Number 21253073 and chassis Number F02010G403461 to the Applicant forthwith.
4. The Applicant is authorized to apply to the Court on the same papers, supplemented insofar as may be necessary, for judgment in respect of any damages and further expenses incurred by the Plaintiff in the repossession of the said vehicle, which amount can only be determined once the vehicle has been repossessed by the Applicant and has been sold.
5. The Applicant is awarded cost on a Party-to-Party Scale - Scale B.

HEARD ON: 29 APRIL 2024

JUDGMENT DELIVERED ON: 06 JUNE 2024

COUNSEL FOR THE APPELLANT: ADV CJ WELGEMOED

COUNSEL FOR RESPONDENT:

ADV KP LETSWALO