Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: A 76/2010

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD **Respondent / Plaintiff**

and

CHRISTIAAN JOHAN COETZEE **Applicant / Defendant**

JUDGMENT DELIVERED : 24 NOVEMBER 2010

Before : MOOSA, J et JAMIE, AJ

Heard on : 15 October 2010

On behalf of Respondent / Plaintiff: Adv Johan Louw

Attorney(s) : Balsillies Strauss Daly

On behalf of Appellant (Applicant) / Defendant: Attorney D R Kulenkampff

Attorney(s) : Kulenkampff & Associates (c/o C & A Friedlander)

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MOOSA, J:

1] The appellant (applicant), who was the defendant in the court below, appeals against the Summary Judgment granted in favour of the respondent, who was the plaintiff in the court below. For the sake of convenience the parties will be referred to as in the court below. The Summary Judgment granted was in the following terms:

(a) Confirmation of termination of the agreement;

(b) return of the vehicle as referred to herein;
(c) forfeiture of all amounts paid by the defendant in terms of the agreement;
(d) the difference between:

(d.1) the amount of R34 404.60 (current outstanding balance) which is calculated as follows:

(i) amount outstanding as at 01.04.2009, being date of termination of the agreement: R34 404.60;

(ii) less, a rebate on finance charges for the period not yet lapsed at the termination of the contract (to be calculated);

AND

(d.2) the amount the vehicle is valued at or the re-sale value, whichever is

the greater;

(e) Interest on the amount referred to in paragraph (d), being the total recalculated balance, calculated at 16,292% per annum alternatively at the current interest rate linked to the fluctuation of the interest rate calculated from date of termination of the agreement to date of payment;

(f) Expenses incurred for removal, valuation storage and sale of the vehicle;
(g) Attorney and own client costs to be taxed;
(h) Further and/or alternative relief.

2] The defendant essentially raised two grounds of appeal, namely, that the court *a quo* erred in finding firstly, that the plaintiff had complied with the provisions of r 14 of the Magistrates' Court Rules and secondly, that the plaintiff had complied with the provisions of s 129 of the National Credit Act, 34 of 2005 ("the Act"). The defendant in his Opposing Affidavit to the Summary Judgment Application raised various technical points *in limine* but it appears that on appeal some of these issues were abandoned. The defendant did not raise any defences on the merits of the matter in the court *a quo*. I will deal with each of the two grounds which is raised on appeal.

3] In terms of r 14 of the Magistrate's Court Rules, summary judgment can be granted on one or more of the following grounds: (a) on a liquid document; (b) for a liquidated amount in money; (c) for the delivery of specified movable property; or (d) for ejectment. Clause 9 of the plaintiff's Particulars of Claim provides that should the defendant default with the payment in terms of the instalment sales agreement, the plaintiff would be entitled to obtain judgment for (i) the cancellation of the agreement; (ii) the return of the vehicle; (iii) forfeiture of all amounts paid by the Defendant; (iv) damages; (v) interest and (vi) expenses and costs.

4] The plaintiff further avers that the total damages outstanding on the date of termination of the agreement is the difference between R34 404 (less the rebate on finance charges) and the amount the vehicle is valued at or the resale value, whichever is the greater. The latter amount can only be calculated when the vehicle has been repossessed and the vehicle has been valued and sold at the best reasonable price. The question of whether the amount claimed is a liquidated amount as envisaged in r 14, is not necessary to decide for reasons that will become apparent later.

5] In the application for summary judgment, plaintiff's Collection's Manager, one Basil Louis Borain, swears positively to the claim which has been set out in the Summons and the Particulars of Claim and verifies the cause of action. Subject to compliance with the notice envisaged in s 129(1)(a) of the Act, summary judgment, at this stage of the proceedings, in my view , can only be granted for termination of the credit agreement and the return of the vehicle. The order for the return of the vehicle triggers the operation of s127 (2) to (9) read with s 128, which sets out the steps to be taken by the credit provider to deal with the repossessed property. The submission of the defendant that it could well be that after the vehicle has been returned and the necessary steps have been taken for its sale, the plaintiff may be indebted to the defendant, is not misplaced.

6] I will firstly discuss the question of compliance with s 129 of the Act, before returning to the discussion with regard to compliance with r 14. Section 129(1)(a) provides that a credit provider may not commence any legal proceedings against a defaulting consumer prior to drawing to his or her attention in writing such default and informing him that he is entitled to refer the credit agreement to a debt counsellor or alternative debt-resolution authority to resolve any dispute or make arrangement for the payment of the debt.

7] What constitutes to *"draw the default to the notice of the consumer in writing*" has been the subject of conflicting decisions by our courts *(***First Rand Bank Ltd v Dhlamini** 2010 (4*)* SA 531 (GNP), **Starita v Absa Bank Ltd and Another** 2010 (3) SA 443 (GSJ), **Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors** 2009 (2) SA 512 (D) and **Munien v BMW Financial Services (SA) (Pty) Ltd and Another** 2010 (1) SA 549 (KZD).

8] This section does not mention how such notice is to be drawn to the attention of the consumer or how it should be delivered to him or her. However, various sections of the Act provide for different methods of delivery and/or service. Section 65 provides how a document required to be delivered to a consumer must be delivered. It provides that it should be delivered in the prescribed manner, but if no method has been prescribed it could be delivered in person, by ordinary mail, by fax, by e-mail or by web-page or in the manner chosen by the consumer from the various options hereinbefore mentioned.

9] Section 96 provides for a party to an agreement to give the other party notice by delivering that notice to that party at the address set out in the agreement or the most recent address provided by that party. Section 168 of the Act provides that a notice will have been properly served if it has either been delivered to that person or sent by registered mail. The regulations mention that *"delivery"* is the sending of a document by *hand*, *by fax, by e-mail or registered mail* to an address chosen in the agreement by the consumer.

10] With that background, I return to the conflicting court decisions referred to earlier. The conflicting decisions have been put to rest by a recent, as yet unpublished judgment of the Supreme Court of Appeal in the matter of **Rossouw v First Rand Bank Ltd** (640/09) [2010] ZASCA 130 (30 September 2010). The heart of the issue in that case is similar to the issue in the present case namely, whether a letter sent by registered post to the *domicilium* address without proof of receipt complies with the requirements of s 129.

11] **Maya, JA** writing for the court in the **Rossouw** matter (*supra*) at para 31 says the following:

> "*It appears to me that the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders. With every choice lies a responsibility and it is after all within a consumer's sole knowledge which means of communication will reasonably ensure delivery to him. It is entirely fair in the circumstances to conclude from the legislature's express language in s 65(2) that it considered despatch of a notice in the*

manner chosen by the appellants in this matter sufficient for the purposes of s 129 (1) (a) and that actual receipt is the consumer's responsibility."
Even if I differ with that finding, I am bound by that decision by virtue of the doctrine of *stare decisis.*

12] In his opposing affidavit, the defendant states that he has not received the s 129 notice and in the circumstances the plaintiff has not complied with the particular section. The letter was sent by registered post to the *domicilium citandi et executandi* at 12 Baxter Street, Durbanville, Western Cape. The defendant, by accepting the mode of service at such chosen address, accepted responsibility for the receipt of such notice as found in the **Rossouw** case *(supra)* irrespective of whether he had in fact received such notice or not. In the circumstances I conclude that proper service of the s 129 notice was effected on the defendant in terms of the Act and there was accordingly proper compliance with the provisions of s 129 of the Act.

13] I now return to the first ground of appeal, namely compliance with r 14. Section 131 of the Act provides:

> "If a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127 (2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached in terms of that order."

Section 127 (2) to (9) sets out the steps to be taken by the credit provider to deal with the repossessed property: firstly, in terms of s 127(2)(b), the credit provider must give the consumer written notice setting out the estimated value of the repossessed property and other prescribed information; secondly, in terms of s 127(4)(b), the credit provider must sell the repossessed property as soon as practicable for the best price reasonably obtainable; thirdly, after the property has been sold, the credit provider must account to the consumer in writing in terms of s 127(5); fourthly, if the consumer disputes the outcome of the sale, he may apply to the National Consumer Tribunal to review the sale and fifthly, the credit provider can approach the court, in terms of s 130(2), for an order enforcing the remaining obligations of a consumer under the credit agreement. In the circumstances it is not necessary to decide whether the amount claimed is a liquidated amount or not, as the issue is resolved *ex lege*.

14] For reasons set out above, I conclude that there has been compliance with s 129 of the Act and there has been partial compliance with r 14 of the Magistrates' Court Rules. The partial compliance of r 14 is based on the fact that the plaintiff is entitled to an order for the return of the vehicle, but is not entitled to judgment for damages until the plaintiff has implemented the prescribed procedure as set out in s 127(2) to (9). In the circumstances the appeal succeeds partially and no order is made in respect of the costs of the appeal. As far as the cost of the proceedings in the lower court is concerned, the plaintiff was substantially successful and is awarded party and party costs. The order of the lower court is substituted as follows:

"Summary Judgment is granted for:

(i) Confirmation of termination of the credit agreement;

(ii) Return of the vehicle which forms the subject-matter of the credit agreement; and

(iii) Costs on a party and party scale."

E MOOSA

JAMIE, AJ: I agree.

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I JAMIE