THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2021/12537

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

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DATE

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SIGNATURE

In the matter between:

SA TAXI FINANCE SOLUTIONS (PTY) LIMITED **PLAINTIFF**

and

MOKOBI, MOLEFI ISAAC **DEFENDANT**

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Credit agreement – Consumer credit agreement – Debt enforcement – Preliminary proceedings – Notice of default – Proof of delivery– Notice of default sent by registered mail to address chosen in agreement – Notice reached correct post office – Defendant denying receipt of notice – Plaintiff complied with requirements – Defendant to show that notice did not come to his attention and why not – Sections 129(5) and (7) of the National Credit Act 34 of 2005.

Credit agreement – Consumer credit agreement – Debt enforcement – Preliminary proceedings – Notice of default – Defendant received notice attached to summons – Defendant not taking any of the steps informed of in the notice – Requisite time periods having lapsed by the time the application for summary judgment was heard - No need for adjournment of proceedings – Conflicting judgments referred to – Sections 129(1)(a) and 130(4)(b)(ii) of the National Credit Act 34 of 2005.

Affidavit – Commissioner of oath's certification of plaintiff's affidavit in support of application for summary judgment – Requirements in terms of Regulation 4 of the Regulations Governing the Administering of an Oath or Affirmation.

Jurisdiction – Section 21(1) of the Superior Courts Act 10 of 2013.

Jurisdiction – High Court's jurisdiction not ousted by virtue of clause in credit agreement providing that defendant consents to the jurisdiction of the High Court while the magistrate's court has concurrent jurisdiction – Section 90(2)(k)(vi)(aa) of the National Credit Act 34 of 2005.

Summary judgment – Affidavit resisting summary judgment – Incumbent on defendant to deal with plaintiff's explanation as to why defence as pleaded does not raise any issue for trial.

Summary judgment – Discretion – Liability of defendant undisputed – Discretion should not be exercised against plaintiff.

Supervening impossibility of performance – Performance must be objectively impossible – Personal incapacity or subjective impossibility to perform not sufficient.

Supervening impossibility of performance – Effect of supervening impossibility is that the contract is discharged – Party performed before impossibility intervened – Other party liable to return what it received under discharged contract.

JUDGMENT

PG LOUW, AJ

Introduction

[1] In this matter the plaintiff seeks summary judgment against the defendant for the return of a 2016 Nissan NV350 minibus taxi (the minibus taxi).

[2] The parties entered into a written lease agreement during May 2016. The defendant signed the lease agreement at Boksburg. The plaintiff signed the lease agreement at Midrand. In terms of the lease agreement:

[2.1] The plaintiff leased the minibus taxi to the defendant.

[2.2] The defendant was obliged to make monthly rental payments to the plaintiff. According to the plaintiff, the monthly rentals amount to R 13 509.72 whilst the defendant alleges it to be R 11 136.65.

[2.3] Despite delivery of the minibus taxi to the defendant, ownership of the minibus taxi remains vested with the plaintiff.

[2.4] If the defendant fails to pay the rental on the due date, the plaintiff shall be entitled to *inter alia*: -

[2.4.1] cancel the lease agreement and claim return and possession of the minibus taxi;

[2.4.2] claim all expenses incurred in tracing, attaching, removing, valuing, storing and the sale of the minibus taxi, as well as costs on the attorney and client scale.

[3] The defendant admits that he fell behind with his monthly payments but alleges that he made telephonic arrangements with the plaintiff regarding the payment of the arrear amounts. According to the defendant, these payment arrangements became impossible to comply with due to no fault of his own *"as circumstances relating to covid-19 became a supervening impossibility of performance in respect of the payment arrangements"*.[1]

[1] Plea: para 6.

[4] The defendant essentially raised the following defence: During 2018, Thari Bus Services was introduced on the route on which the defendant's minibus taxi was operating, namely the Lethabong/Rustenburg route. This resulted in a substantial decline in the income of minibus taxis operating on that route in general and in the defendant's income in particular.

[5] The defendant approached the plaintiff and consulted with one Alfred Moloi (Mr Moloi) during September 2019. According to the defendant, Mr Moloi informed him that he should continue making payments to the plaintiff, even if they did not meet the full instalment and that he would be informed of a *"payment restructuring agreement"*.

[6] As a result of the substantial reduction in the defendant's income, he was mostly unable to pay the full monthly instalment, which resulted in him falling in arrears. Just before the Covid-19 hard lockdown started in March 2020, the defendant reached an oral agreement with a colleague who undertook to advance funds to the defendant to enable the defendant to settle the full outstanding balance owed to the plaintiff. This did not come to fruition.

[7] The defendant's defence is summarised thus:

> "I therefore submit that the introduction of Thari Bus Services on our route, combined with the negative impact of Covid-19, became a supervening impossibility of performance in respect of, not only I (sic) in respect of my ability to pay for the minibus taxi, but also my ability to settle the outstanding balance due to Plaintiff in full which supervening impossibility of performance was directly linked to Covid-19 and as such I submit that Plaintiff is not entitled to cancel the agreement."[2]

[8] Although denying the outstanding amount claimed by the plaintiff, the defendant admits being indebted to the plaintiff for a balance of approximately R 120 000.00.[3]

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2 Opposing affidavit: para 8.12.

3 Opposing affidavit: paras 8.13 and 8.15.

[9] The defendant states that he took interim steps to increase his income by entering into an oral agreement with certain employees to transport them to and from work, which transportation is referred to as a *"skof",* and that a second *"skof"* is currently in the pipeline. The *"skof"* will augment the defendant's income on the Lethabong/Rustenburg route and will enable him to afford to make payments of R 8 500.00 per month.[4]

[10] The defendant drew my attention to the fact that the minibus taxi is his only source of income and that he is a sole breadwinner with his youngest child being a mere seven years old. Should summary judgment be granted, the defendant will therefore loose his only source of income. The defendant argued that this court is not only a court of justice but also a court of equity and that it would not be just and equitable if he loses his only source of income.

[11] Before analysing the defendant's defence, I deal with the five points *in limine* raised in the defendant's opposing affidavit.

First point in limine[5]

[12] The first point *in limine* pertains to the commissioner of oath's certification of the plaintiff's affidavit in support of the application for summary judgment ("the plaintiff's affidavit"). According to the defendant, the plaintiff's affidavit

> "has not been properly commissioned by the Commissioner of Oaths in accordance with Regulation 4(1) of the Justice of Peace and Commissioners of Oaths Act (the Act), 16 of 1963, the Commissioner of Oaths failed to **certify** that Plaintiff had been sworn to, which the Commissioner of Oaths, failed to do in its certificate."

There is no indication in the commissioner's certificate that the deponent *"considers the oath as binding on her conscience and that she has no*

4 Opposing affidavit: paras 8.18 and 8.19.
5 Opposing affidavit: para 2.

objection against the taking of the prescribed oath". Finally, on the copy of the affidavit received by the defendant, neither the business address of the commissioner of oaths nor the designated area for which the commissioner of oaths holds her appointment, is indicated.

[13] During argument, I raised with Ms Stevenson, counsel for the plaintiff, that the last page of the plaintiff's affidavit appearing on Caselines[6] appears to be incomplete in that the address and other details of the commissioner of oaths, one Mariska Venter of Farinha, Ducie, Christofi Attorneys, appears to be cut off from the copy on Caselines. A better and complete copy of the plaintiff's affidavit was subsequently loaded on Caselines.[7] From this copy, the address of the commissioner of oaths and her designation as a practising attorney of the Republic of South Africa appear clearly.[8] Directly above the commissioner of oaths' signature and details appears the following certificate directly below the deponent's signature:

> "**THUS SIGNED AND SWORN** to before me at **JOHANNESBURG** on this the 13 day of **JULY 2021**, by the deponent having acknowledged that she knows and understands the contents of this Affidavit and swears positively to the truth thereof."

[14] Regulation 4 of the Regulations Governing the Administering of an Oath or Affirmation[9] provides as follows:

> "4(1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.
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> (2) The commissioner of oaths shall –
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> (a) sign the declaration and print his full name and business address below his signature; and

6 Caselines: 017-66.
7 Caselines: 017-77 onwards.
8 Caselines: 017-84.
9 GN R1258 *GG 3619* of 21 July 1972.

> *(b)* state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio."

[15] *In casu*, the commissioner of oaths complied with regulation 4. The commissioner of oaths stated the manner, place and date of taking the declaration below the deponent's signature and certified that the deponent has acknowledged that she knows and understands the contents of the affidavit. The commissioner of oaths signed the affidavit and printed her full name and business address below her signature. She also stated the office held by her *ex officio*.

[16] The first point *in limine* is accordingly without merit.

[17] Even if I am wrong in this regard, a purely technical defence of this nature, in itself, should not disentitle a plaintiff to summary judgment.[10] See in this regard *JNO G Teale & Sons (Pty) Ltd v Vrystaatse Plantediens (Pty) Ltd*[11] where Erasmus J stated:

> "The defendant knew all along that he had no bona fide defence to this portion of the plaintiff's claim and, if the application should be dismissed because of the irregularity on which reliance is being placed, the applicant might successfully bring a fresh application within a few days thereafter for the same amount. There would therefore be no point in dismissing the application if there is no prejudice or if the prejudice to the defendant is such as may be compensated by a suitable order as to costs."

[18] If I find that the defendant has no *bona fide* defence to the plaintiff's claim, this purely technical defence should not disentitle the plaintiff to summary judgment.

Second point in limine[12]

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10 Van Loggerenberg: *Erasmus Superior Court Practice*, Second Edition, RS 13, 2020 D1-413 and the authorities there cited.

11 1968 (4) SA 371 (O) at 375A.

12 Opposing affidavit: para 3.

[19] According to the defendant, the application for summary judgment was filed out of time.

[20] The defendant's plea was served on the plaintiff's attorneys on 22 June 2021. The application for summary judgment was served on the defendant on 13 July 2021, that is within fifteen court days after service of the plea.[13]

[21] This point *in limine* is premised on the contention that the application for summary judgment was not properly served because it was served per electronic mail without first obtaining consent from the defendant in this regard. This contention is without merit if one has regard to the provisions of rule 4A which provides that:

> "(1) Service of all subsequent documents and notices, not falling under rule 4(1)(a), in any proceedings on any other party to the litigation may be effected by one or more of the following manners to the address or addresses provided by that party under rules …, 6(5)(d)(i), …, by –
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> …
>
> (c) facsimile or electronic mail to the respective addresses provided."

[22] The defendant's notice of intention to defend (in terms of rule 6(5)(d)(i)) sets out the same email address (krugerulrich@bdk.co.za) used by the plaintiff to serve the application for summary judgment.[14] It cannot be disputed that the defendant was served with the application for summary judgment because the defendant deposed to the opposing affidavit in response to the application for summary judgment. The defendant has raised no prejudice in this regard.

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[13] As required by Rule 32(2)(a).

[14] Notice of intention to defend: 013-35. Service of application for summary judgment: 016-58.

[23] In *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd (t/a Altech Card Solutions) and Others,*[15] Lamont J stated the following in relation to service of a summons:

> "Insofar as the substantive law is concerned, the requirement is that a person who is being sued should receive notice of the fact that he is being sued by way of delivery to him of the relevant document initiating legal proceedings. If this purpose is achieved, then, albeit not in terms of the rules, there has been proper service. In the present matter the non-compliance with the rules accordingly does not result in prejudice to the fourth defendant since the purpose of the substantive law has been fulfilled, namely that he be given notice of the process."

[24] *In casu*, the defendant has indeed been given notice of the application for summary judgment. As stated earlier, he filed an opposing affidavit in response thereto. The purpose of the substantive law has therefore been fulfilled.

[25] In the circumstances, the second point *in limine* falls to be dismissed.

Third point in limine[16]

[26] The third point *in limine* is aimed at this court's jurisdiction to entertain the matter. The defendant contends that the *"whole cause of action"* did not arise within the jurisdiction of this court. The defendant is not resident within this court's jurisdiction. Finally, on this score, the defendant submits that the notice in terms of s 129(1) of the National Credit Act 34 of 2005 ("the National Credit Act") *"was delivered outside the area of jurisdiction of the above Honourable Court and as such the cause of action did not arise within the jurisdiction of the above Honourable Court"*.

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15 2012 (5) SA 267 (GSJ) at para 21.

16 Opposing affidavit: para 4.

[27] In terms of s 21(1) of the Superior Courts Act 10 of 2013, this court has jurisdiction *"in relation to all causes arising … within, its area of jurisdiction and all other matters of which it may according to law take cognisance …"*.

[28] It is common cause that the lease agreement was concluded within this court's area of jurisdiction. This fact alone clothes this court with jurisdiction in respect of this matter.[17]

[29] The fact that the defendant does not reside within this court's area of jurisdiction, is accordingly of no moment.

[30] My reason for the finding that this court does have jurisdiction in this matter is also dispositive of the defendant's contention that the s 129(1) notice in terms of the National Credit Act was delivered outside this court's area of jurisdiction.

[31] I am satisfied that this court has jurisdiction over the defendant in this matter.

Fourth point in limine[18]

[32] Although not raised in the opposing affidavit, the allegation is raised in the defendant's special plea[19] that this court does not have jurisdiction to hear this matter because the lease agreement includes a clause in terms of which the defendant consents to the jurisdiction of the High Court while the magistrate's court has concurrent jurisdiction. Reliance is placed by the defendant on the provisions of s 90(2)(k)(vi)(aa) of the National Credit Act, which renders it unlawful for a credit agreement in terms of the Act to provide for a consumer's consent to the jurisdiction of the High Court where a magistrate's court has concurrent jurisdiction.

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17 See *Van der Walt Business Brokers (Pty) Ltd v Budget Kilometres CC and Another* 1999 (3) SA 1149 (W) at 1154A-C.

18 Opposing affidavit: para 5.

19 Caselines: 015-48.

[33] The relevant clause of the lease agreement provides as follows:

> "9.1 At the option of the Lessor, any claim against the Lessee arising in connection with this agreement and all proceedings in connection therewith may be brought in the Magistrate's Court having jurisdiction over the Lessee, notwithstanding that the amount claimed or the value of the matter in dispute exceed such jurisdiction; provided that the Lessor shall not be obliged to institute action in the Magistrate's Court… . The Lessor shall be entitled to institute all or any proceedings against the Lessee in connection with this agreement in the High Court in the event of same having jurisdiction … ."

[34] This point was not persisted with during argument, but a similar contention was rejected by the full court in *Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another*.[20] See also *Standard Bank of South Africa Ltd and Others v Mpongo and Others* .[21]

[35] The defendant's contention that, effectively, this court's jurisdiction is ousted by virtue of the provisions of s 90(2)(k)(vi)(aa) of the National Credit Act is bad in law.

[36] The defendant's contention that the institution of the action in this court as opposed to the magistrate's court amounts to an abuse of process cannot be sustained. Apart from what I have found in respect of this court's jurisdiction in this matter, the plaintiff can plainly not obtain the relief sought in this court in any magistrate's court because it is not competent for a magistrate to order specific performance without an alternative claim for damages. In *Alphera Financial Services, a Division of BMW Financial Services (South Africa) (Pty) Ltd v Lemmetjies,*[22] the court rejected a similar contention and found that the High Court had been correctly approached to adjudicate on the matter by virtue of the lack of jurisdiction of the magistrate's court in terms of s 46(2)(c)

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20 2008 (4) SA 276 (T) at 283I-284G.
21 2021 (6) SA 403 (SCA).
22 [2021] JOL 49891 (GP) at para 20 – 27.

of the Magistrate's Courts Act 32 of 1944, to grant specific performance in the absence of a claim for damages. I pause to mention that none of the exceptions referred to in s 46(2)(c) apply *in casu*.[23]

[37] The fourth point *in limine* also falls to be dismissed.

Fifth point in limine[24]

[38] The defendant contends that the action is premature because the plaintiff has not complied with the provisions of s 129 of the National Credit Act, in that the defendant did not receive the s 129 notice in terms of the National Credit Act, attached as annexure "E" to the summons, neither does the tracking results forming part of annexure "E" to the particulars of claim confirm that the defendant received the s 129 notice. The defendant is of the view that the plaintiff could have caused the s 129 notice to be served by the sheriff. In the circumstances, so the contention goes, the action was instituted prematurely in the absence of compliance with the *"relevant provisions"* of the National Credit Act.

[39] The approach adopted by the defendant in this regard is not novel. Judgments dealing with similar defences are legion.

[40] Subsections (5) to (7) of s 129 were introduced by an amendment which took effect on 13 March 2015.[25] Subsection (5) provides for delivery of a s 129 notice by registered mail. Subsection (7) provides that proof of delivery by registered mail is satisfied by –

> "(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
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> …".

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[23] The value of the minibus taxi exceeds R 200 000.00 (see GN217 in *GG* 37477 of 27 March 2014).

[24] Opposing affidavit: para 6.

[25] National Credit Amendment Act 19 of 2014, s 39. See Proc R10 *GG* 38557 of 13 March 2015.

[41] This amendment was introduced pursuant to the Constitutional Court judgments in *Sebola and Another v Standard Bank of South Africa Ltd and Another*[26] and *Kubyana v Standard Bank of South Africa Ltd.*[27] In *Sebola*,[28] the majority of the Constitutional Court held that:

> "[75] The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by s 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.
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> [76] In practical terms this means a credit provider must obtain a post-despatch 'track and trace' print-out from the website of the South African Post Office. …
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> [77] The credit provider's summons or particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. Coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed in the absence of contrary indication, and the credit provider may credibly aver, that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office.
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> …
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> [79] If, in contested proceedings, the consumer asserts that the notice went astray after reaching the post office, or was not collected, or not attended to once collected, the court must make a finding whether, despite the credit provider's proven efforts, the consumer's

[26] 2012 (5) SA 142 (CC).
[27] 2014 (3) SA 56 (CC).
[28] at para 75 – 77 and 79.

allegations are true, and, if so, adjourn the proceedings in terms of s 130(4)(b)."

[42] *Sebola* was followed by a line of conflicting decisions.[29] The Constitutional Court had occasion to deal with the issue again in *Kubyana.* Three features of the *Sebola* judgment were emphasised. First, the credit provider did not need to bring the s 129 notice to the subjective attention of the consumer, nor was personal service required.[30] Second, one of the acceptable modes of delivery is by means of the postal service.[31] "*Third, the steps that a credit provider must take in order to effect delivery are those that would bring the s 129 notice to the attention of a reasonable consumer."*[32]

[43] It was further held by the Constitutional Court that if the credit provider has complied with these requirements and receives no response from the consumer, nothing more can be expected of it.

> "Certainly, the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement. It deserves re-emphasis that the purpose of the Act is not only to protect consumers, but also to create a 'harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements'. Indeed, if the consumer has unreasonably failed to respond to the s 129 notice she will have eschewed reliance on the consensual dispute resolution mechanisms provided for by the Act. She will not subsequently be entitled to disrupt enforcement proceedings

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29 See for instance: *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 (5) SA 569 (WCC) at para 4 and 6 where it was held that the principles confirmed in *Rossouw and Another v FirstRand Bank Limited* 2010 (6) SA 439 (SCA) at para 8, which placed the risk of non-receipt of a s 129 notice with the consumer, were not overruled in *Sebola*; *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* 2012 (5) SA 574 (KZD) at para 53 and 58 where it was held that the majority judgement in *Sebola* held that actual notice to the consumer is indeed the standard set by s 129(1) and that the Constitutional Court has not endorsed the decision in *Rossouw* that the risk of non-delivery lies with the consumer; *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) at para 18 where the *Sebola* judgment was also interpreted to mean that the risk of non-receipt in the circumstances of the credit provider having taken "*measures to bring the notice to the attention of the consumer*" is on the consumer; *Balkind v Absa Bank* 2013 (2) SA 486 (ECG) at para 47 where the court stated that the degree of proof required by *Sebola* leaves room for a finding of fictional fulfilment of the principle that the s 129 notice had come to the attention of the consumer.

30 *Kubyana* at para 31.

31 *Kubyana* at para 32.

32 *Kubyana* at para 33.

by claiming that a credit provider has failed to discharge its statutory notice obligations.

…

But if the credit provider has complied with the requirements set out above, it will be up to the consumer to show that the notice did not come to her attention and the reasons why it did not."[33] [Underlining added.]

[44] I am satisfied that the s 129 notice in this matter was sent by registered mail to the address chosen by the defendant in the lease agreement, and that the s 129 notice was delivered to the relevant post office. This much is evinced by annexures "E" and "G" to the particulars of claim. The plaintiff has accordingly complied with the provisions of s 129(5) and (7). It is accordingly up to the defendant to show that the s 129 notice did not come to his attention *"and the reasons why it had not"*.[34] In this regard, the defendant's case is scant to say the least. He simply stated that *"I did not receive the Notice"* and the plaintiff could have caused the sheriff to serve the s 129 notice – *"having regard of the unreliability of the post office"*.

[45] Ms Stevenson submitted that, in any event, the s 129 notice is attached to the summons, which the defendant had received, but that the defendant has not exercised any of the rights he was informed of in the s 129 notice. Absent from the defendant's opposing affidavit, is any indication that he has taken or intends to take any of the steps of which the s 129 notice advised him of.[35]

[46] Ms Stevenson referred me to a line of cases in this division where a similar defence was rejected and where it was held that non-receipt of the s 129 notice prior to receiving the summons does not constitute a defence to the plaintiff's claim.

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33 *Kubyana* at para 35 and 36.
34 *Kubyana* at para 36.
35 *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) at para 25.

[47] In *SA Taxi Development Finance (Pty) Limited v Phalafala,*[36] the defendant had notice of the s 129 notice since the date of the service of summons. He was thus fully apprised of his rights in terms of s 129 of the National Credit Act and had the opportunity to do what the s 129 notice invited him to do since receipt of the summons. In that matter, the defendant also did not give any indication of prejudice or of what he would have done had he received the s 129 notice prior to service of the summons.[37] Van Eeden AJ held that:[38]

> "Non-receipt of the notice prior to receiving the summons is not a defence, dilatory or otherwise, to the plaintiff's claim in this matter. The subsequent receipt of notice at the time of service of the summons and the defendant's reaction thereto, entitle the plaintiff to approach the court for an order to enforce the credit agreement. No purpose would be served to give him the notice for a second time – it would be placing form above substance to require a further notice to be sent to the defendant. It is accordingly unnecessary to adjourn the matter or to make any orders in terms of s 130(4)(b), since the defendant actually received the notice and since the time periods of s 130(1) and (1)(a) have actually expired. I consequently find that the fact that the defendant did not receive the notice prior to service of summons 'does not render the notice invalid and the issue of summons premature'." [Underlining added.]

[48] These remarks are equally apt *in casu*. The judgment in *Phalafala* has been followed in this division.[39] Contradictory views are to be found in *Land and Agricultural Development Bank of South Africa v Chidawaya and Another;*[40] *FirstRand Bank Ltd t/a First National Bank v Moonsammy t/a Synka Liquors;*[41] and *Wesbank v Ralushe*.[42]

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36 2013 JDR 0688 (GSJ).

37 *Phalafala* at para 10.

38 *Phalafala* at para 12.

39 *SA Taxi Finance Solutions (Pty) Ltd v Mthembu* [2013] ZAGPJHC 238 (4 October 2013) at para 8 - 12; *SA Taxi Finance Solutions (Pty) Ltd v Ringani* [2013] ZAGPJHC 307 (15 October 2013) at para 4 - 10; *Standard Bank Ltd v Jardine* [2014] ZAGPPHC 790 (15 October 2014) at para 31; *Shongwe v FirstRand Bank Ltd t/a Land Rover Financial Services* 2017 JDR 0453 (GJ) at para 26.

40 2016 (2) SA 115 (GP) at para 21 – 22.

41 2021 (1) SA 225 (GJ) at para 47.

42 2022 (2) SA 626 (ECG) at para 26 – 30.

[49] The court in *Moonsammy* referred to *inter alia Chidawaya,* where it was held that:

> "[21] To my mind, the reasoning in both the *Phalafala* and the *Jardine* decisions is flawed and should be rejected. It is flawed because it does not take into account one of the basic purposes for which the NCA was brought into existence. That purpose is captured succinctly in *Sebola* …
>
> [22] A s 129 notice may be attached to a summons as proof of compliance with the Act but not as constituting compliance. It is clear from the wording of the Act that it is a pre-litigation step and must accordingly precede litigation. If litigation is embarked upon without compliance with s 129 then s 130(4) provides the procedural mechanism to remedy this defect. To hold otherwise would render s 130(4) irrelevant and would ignore the directives of the legislature, as well as undermine the purpose of the Act as set out in s 3, namely to address issues such as overindebtedness and debt-restructuring. These would be undermined if the pre-litigation notice is dispensed with."

[50] In *Ralushe***,** the court agreed with the reasoning of the court in *Moonsammy* for disagreeing with the court in *Phalafala.* In light of my finding below that I am bound by the full court decision in *Benson and Another v Standard Bank of South Africa (Pty) Ltd and Others*,[43] I need not discuss at length the judgments which are at odds with the remarks in *Phalafala* – which, as I have already found apt *in casu*. I do, however, deem it prudent to distinguish the facts of the matter before me from the facts in *Moonsammy.*

[51] In *Moonsammy,* De Villiers AJ held that non-compliance with s 129 is not cured by attaching proof of purported compliance with s 129 to a summons.[44] The court in *Moonsammy* held that it did not have to follow the full court decision in *Benson* because the matter is distinguishable on the basis that in

[43] 2019 (5) SA 152 (GJ).
[44] *Moonsammy* at para 47.

Moonsammy, a defence was raised that the summons is excipiable and such a defence was not addressed in *Benson*.[45]

[52] On the facts of the matter before me, I am of the view that this court is bound by the full court decision in *Benson*. The defendant's fifth point *in limine* is premised on the allegation that he did not receive the s 129 notice and that the plaintiff could have had the sheriff deliver it to him. The defendant *in casu* did not raise the defence that the summons is excipiable.

[53] The facts of this matter are distinguishable from the facts in *Moonsammy*. In *Moonsammy*, the overdraft facility agreement between the parties included a clause in terms of which a breach notice to the defendant was required before it could be alleged that the defendant was in breach of the repayment obligation entitling the plaintiff to call up the loan. Such notice was not pleaded.[46] As such, the defendant in *Moonsammy* contended that the plaintiff did not plead a completed cause of action, that such a cause of action was not verified, and that the particulars of claim are excipiable. Added thereto, the defendant in *Moonsammy* was not alleged to have been in default when the s 129 notice was attached to the summons.[47] Another distinguishing fact is that in *Moonsammy*, the defence of non-compliance with s 129 was that the s 129 notice was sent to the incorrect post office. I have already held that *in casu,* the s 129 notice was sent to the correct post office.

[54] The full court held the following in *Benson*:[48]

> "[18] What the *Sebola* decision did not have to decide is whether any non-compliance with the provisions of the NCA that is cured prior to the hearing of the application for judgment by default nevertheless requires an adjournment of the application. The answer to this question flows from the provisions of s 130(4)(b)(ii). If there are no further steps that are required of the credit provider, there can be no

45 *Moonsammy* at para 48.
46 *Moonsammy* at para 6.
47 *Moonsammy* at para 8.
48 at para 18 – 19.

purpose served in adjourning the proceedings. Further delay would serve no purpose, and, as Sebola makes plain, any non-compliance does not invalidate the proceedings but simply delays their finalisation to ensure that due process is followed and the credit receiver can enjoy his or her rights. Of course, the non-compliance must be properly cured, and the credit receiver must be given the statutory time to consider his or her position. But if that is done between the time that the non-compliance is cured and the time that the matter is heard in court, to require an adjournment for its own sake has no point and is inconsistent with the scheme of ss 129 and 130. Insofar as the decision in Kgomo suggests otherwise, I am in respectful disagreement with it.

[19] On the facts in this appeal, the appellants obtained actual notice of their rights as required in terms s 129. The appellants take no issue with the contents of the letter from the attorneys of the Standard Bank advising them of their rights under the NCA. That being so, no further steps were required to give notice under s 129 to the appellants. The Standard Bank application was served on the appellants on 5 May 2011. The Standard Bank application was heard on 1 June 2011. By that time, the appellants had been in default under their credit agreements for at least 20 days, and 10 business days had elapsed since delivery of the s 129 notice on 5 May 2011. By my calculation, some 18 business days had elapsed. There was accordingly compliance by the Standard Bank with the requirement of ss 129 and 130 at the time the Standard Bank application was heard on 1 June 2011. The default judgment was thus not erroneously sought and granted. And for these reasons also the appeal must fail." [Underlining added.]

[55] I pause to mention that *in casu*, when the application for summary judgment served before me, the defendant had been in default for more than 20 business days and more than 10 business days had elapsed since the

defendant has been placed in possession of the s 129 notice.[49] The provisions of s 130(1) have been complied with.

[56] I find that the plaintiff has complied with the requirements of ss 129(1)(a) and s 130(1). Nothing more can be expected of the plaintiff in this matter. In any event, the defendant actually received the s 129 notice when the summons was served on him and the relevant time periods in terms of s 130(1) have actually expired. In the words of the full court in *Benson*, by which this court is bound,[50] if non-compliance has been properly cured by the time the matter is heard: "*to require an adjournment for its own sake has no point and is inconsistent with the scheme of ss 129 and 130*."

[57] In the circumstances, the fifth point *in limine* falls to be dismissed.

Bona fide defence

[58] In order to avoid summary judgment, the defendant may satisfy the court that he has a *bona fide* defence to the plaintiff's claim by filing an affidavit which discloses fully the nature and grounds of the defence and the material facts relied upon therefor.[51]

[59] In order to meet the requirements of this subrule, there must be a sufficiently full disclosure of the material facts to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim.[52] The defence must be *bona fide* and good in law.[53]

[60] It is also incumbent on the defendant to engage meaningfully with the material in the plaintiff's affidavit supporting the application for summary judgment.[54] The defendant must deal with the plaintiff's explanation as to why the defence,

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49 The defendant's account with the plaintiff has been in arrears since 2017. The s 129 notice was delivered to the relevant post office in December 2020. Summons was served on the defendant in March 2021. The application for summary judgment was heard in May 2023.

50 *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at para 28 - 30.

51 Rule 32(3)(b).

52 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228D; Van Loggerenberg at B1-409.

53 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426B-C.

as pleaded, does not raise any issue for trial. A defendant's failure to do so in his opposing affidavit is done at his peril.[55]

[61] The defendant's denial that he is indebted to the plaintiff for the amount claimed does not constitute a defence in law to the plaintiff's claim for the return of the minibus taxi. On the respondent's own version, he is in arrears and he owes the plaintiff approximately R 120 000.00.

[62] Even if I accept, as I am obliged to,[56] that an official of the plaintiff advised the defendant that he should continue making payments, even if they do not meet the full requisite instalment, the defendant does not rely on any agreement in terms of which the terms and conditions of the lease agreement were varied or novated. In any event, any such a defence would probably be unsuccessful in light of the non-variation clause of the lease agreement.[57]

[63] The defence of supervening impossibility of performance cannot succeed either. The defendant relies on the *"introduction of Thari Bus Services on our route, combined with the negative impact of Covid-19"* as constituting a defence of supervening impossibility of performance in respect of not only his *"ability to pay for the minibus taxi, but also [his] ability to settle the outstanding balance due to the Plaintiff in full"*.[58]

[64] On a factual level, the defence cannot succeed because from a statement of the defendant's account with the plaintiff, it is evident that his account has been in arrears since 2017, long before the advent of the Covid-19 pandemic. The defendant chose not to deal with this allegation in his opposing affidavit at his peril.

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54 *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at para 55; *Standard Bank of South Africa Ltd v Five Strand Media (Pty) Ltd* (745/2020) [2020] ZAECPHC 33 (7 September 2020) at para 12.

55 *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at para 41.

56 *Maharaj* at 426A-C.

57 Clause 12.

58 Opposing affidavit: para 8.12.

[65] Objective impossibility is a requirement of the very stringent provisions of the common law doctrine of supervening impossibility of performance.[59] The impossibility relied on by the defendant is not objective, it is subjective to the defendant himself.

[66] In *Unibank Savings and Loans Ltd (formerly Community Bank) v Absa Bank Ltd,*[60] this court held that:

> "Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable… ."

[67] This is because: -

> "[d]eteriorations of that nature are foreseeable in the business world at the time when the contract is concluded".[61]

[68] Performance must be absolutely or objectively impossible. Mere personal incapacity to perform (or subjective impossibility) does not render performance impossible.[62]

[69] In *Scoin Trading (Pty) Ltd v Bernstein NO,*[63] the Supreme Court of Appeal held that the law *"does not regard mere personal incapacity to perform as constituting impossibility"*.

[70] The effect of supervening impossibility is that the contract is discharged. If one of the parties has performed before impossibility supervenes, the other party

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59 *Mhlonipheni v Mezepoli Melrose Arch (Pty) Ltd* 2020 JDR 1033 (GJ) at para 36.
60 2000 (4) SA 191 (W) at para 9.3.1.
61 *Unibank* at para 9.3.1.
62 *Mhlonipheni* at para 37; *Quinella Trading (Pty) Ltd v Minister of Rural Development* 2010 (4) SA 308 (LCC) at para 27 - 29.
63 2011 (2) SA 118 (SCA) at para 22.

is liable to the former in enrichment, to return what it has received under the discharged contract.[64]

[71] Our courts have repeatedly rejected the contention that the restrictions imposed pursuant to the Covid-19 pandemic constitute supervening impossibility of performance.[65] It stands to reason that this is so: payment under the lease agreement is not objectively impossible. The fact that the defendant does not have money to pay his dues, or that it may be uneconomical or unaffordable, does not amount to objective impossibility.

[72] On the defendant's own version, performance is not impossible. He contends that the *"'skof' will therefore augment the income I am currently generating on the Lethabong to Rustenburg route and that will enable me to afford to make monthly payments of R8,500.00 per month"*.[66] This allegation sounds the death knell for the defendant's reliance on supervening impossibility.

[73] The Supreme Court of Appeal recently dealt with a similar defence based on the Covid-19 pandemic in *Post Office Retirement Fund v South African Post SOC Ltd and Others*.[67] The Supreme Court of Appeal referred, with apparent approval, to *Unlocked Properties 4 (Pty) Ltd v A Commercial Properties CC*[68] where Meyer J, in circumstances where a debtor was unable to pay a debt, held that when the impossibility on which a seller relied was *"peculiar to itself because of its personal financial situation and incapability of securing payment of the full debt owed to the bank"*, it was not absolute and so the seller's *"incapability does not render the contract void"* on account of impossibility of performance.

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64 *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at para 15.

65 *Nedbank Ltd v Wesley Groenewald Familie Trust* 2021 JDR 1054 (FB) at para 13 - 17; *FirstRand Bank v Pillay* 2021 JDR 1815 (GP) at para 10 - 15; *Acrewood Property Investments (Pty) Ltd v Pelo Chicken (Pty) Ltd* 2021 JDR 2928 (WCC) at para 30 - 32; *Costann Investments (Pty) Ltd v Alpha Dynamics (Pty) Ltd* 2021 JDR 2950 (GJ) at para 6 - 7.

66 Opposing affidavit: para 8.19.

67 [2021] JOL 51918 (SCA) at para 71-85.

68 (18549/2015) [2016] ZAGPJHC 373 (29 July 2016) at para 13.

[74] In the circumstances, I am satisfied that the defendant has not disclosed a *bona fide* defence which is valid in law. Put differently, the defendant has not set out the facts in the opposing affidavit which, if proved at a trial, will constitute an answer to the plaintiff's claim.

[75] Even if I am wrong in this regard and the defendant's defence of supervening impossibility has prospects of success, the plaintiff performed by delivering the minibus taxi to the defendant before the impossibility supervened. Accordingly, even if successful with this defence, the defendant will be obliged to return the minibus taxi to the plaintiff.[69]

Discretion

[76] In considering whether I should exercise my discretion in favour of the defendant, not to grant summary judgment, I have also considered whether there is a reasonable possibility that the defences raised by the defendant carry no reasonable possibility of eventually succeeding. In this regard, it was held in *Jili v FirstRand Bank Ltd t/a Wesbank*[70] that:

> "[13] Insofar as the question of the High Court's discretion to grant or refuse the application for summary judgment is concerned, the critically relevant fact is that it is common cause that the appellant had no defence, recognised in law, to the fact that she was indebted to the bank. It is indeed trite that a court has a discretion as to whether to grant or refuse an application for summary judgment. Although Breytenbach v Fiat SA (Edms) Bpk has made it plain that a court should exercise a discretion against granting such an order where it appears that there exists 'a reasonable possibility that an injustice may be done if summary judgment is granted', the context in which that was said indicates that this precaution applies in situations where the court is not persuaded that the plaintiff has an unanswerable case.

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69 *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at para 15.

70 2015 (3) SA 586 (SCA) at para 13 – 14.

> [14] It is a different matter where the liability of the defendant is undisputed: the discretion should not be exercised against a plaintiff so as to deprive it of the relief to which it is entitled. Where it is clear from the defendant's affidavit resisting summary judgment that the defence which has been advanced carries no reasonable possibility of succeeding in the trial action, a discretion should not be exercised against granting summary judgment. The discretion should also not be exercised against a plaintiff on the basis of mere conjecture or speculation. The consequences of refusing summary judgment in this particular case are entirely speculative." [Underlining added.]

[77] As a result, I find that the defendant's points *in limine* are without merit. The defendant's points *in limine* are all dismissed. The defendant has not satisfied the court that he has a *bona fide* defence to the plaintiff's claim. The plaintiff is entitled to summary judgment and I am not persuaded that I should exercise my discretion against the plaintiff in this matter.

Order

[78] In the premises, summary judgment is granted against the defendant, in favour of the plaintiff, in the following terms:

1. The termination of the agreement attached to the particulars of claim as annexure "C" is confirmed.

2. The defendant is ordered to return the **2016 NISSAN NV350 MINIBUS TAXI**, with engine number **QR25604364Q** and chassis number **JN1UB4E26Z0006071** to the plaintiff forthwith.

3. The defendant is directed to pay the plaintiff's costs of summary judgment on the scale as between attorney and client.

4. The remainder of the relief is postponed *sine die*.

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PG LOUW
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Counsel for Applicant:	Ms R S Stevenson
Instructed by:	Marie-Lou Bester Inc
Counsel for Respondent:	Self-represented.
Instructed by:	
Date of hearing:	16 May 2023
Date of judgment:	30 June 2023