



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 15257/2022P

In the matter between:

PROP. VINCEMUS INVESTMENTS (PTY) LTD t/a

KEMPSTON FINANCE

APPLICANT

and

THOMAS JOHANNES MARTINSON

RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Applicant and Respondent entered into two instalment sale agreements in respect of a 2016 Case Puma 210 Tractor and a 2017 Case 6140 Combine Harvester. The said instalment sale agreements were cancelled by order of this court on 21 October 2021 and Respondent or anyone else being in possession thereof directed to deliver the said two implements to Applicant.

[2] On 19 August 2022 Applicant sent a notice in terms of section 127(5)(B) of the National Credit Act 34 of 2005 to Respondent stating that the proceeds from the sale of the Case Puma 210 Tractor amounted to R523 250.00 and that there was still an amount of R861 434.40 due. In respect of the Case 6140 Combine Harvester it set out that at sale an amount of R2 615 617.17 was achieved and that this was deducted and that an amount of R364 651.60 was still due. This letter was sent by registered mail but there is no track and trace report attached to the papers indicating that notification was sent to Respondent. Respondent however admits that he received it.

[3] Applicant then instituted an application claiming the sum of R1 226 086.00 from Respondent together with interest and costs. The amount is the total of the two amounts due as referred to above. This application is opposed by Respondent.

[4] In his answering affidavit Respondent denies that the National Credit Act does not apply and that section 129 of the National Credit Act had not been complied with. Further that section 127(2) to 127(9) and 1 to 8 read with section 131 of the National Credit Act had not been complied with. Further that source documentation was not provided. It is not stated when the goods were sold or how they were sold and no valuation was provided. The affidavit of Gobey was undated.

[5] In response to Respondents contention that certain information had to be supplied Applicant responded that it had no obligation to provide the information to Respondent. It contends that it is only required to provide a certificate of balance as *prima facie* evidence of the amount due after it has sold the vehicles which were repossessed.

[6] It was contended by Respondent that it was *lis pen dens* due to the order obtained on 21 October 2021 which granted Applicant leave to approach the court on

the same papers supplemented as necessary in respect of damages. In my view it is not the same cause of action as the one relates to a return of the vehicles and the other to the damages which may have been suffered by Applicant. This was accepted by Mr Chetty on behalf of Respondent and this issue was not pursued.

[7] It was submitted on behalf of Applicant that section 127(2) to 127(4) of the National Credit Act was no applicable because the agreement had already been cancelled and in support thereof I was referred to *Edwards v First Rand Bank Ltd t/a Wesbank* 2017 (1) SA 316 (SCA) at pages 328 and 329. However on my reading of the judgment that portion appears in the minority judgment and that the majority judgment held at paragraph 16 at page 323 that although sections 127(2) to 127(9) of the Act are applicable, but it was considered that they were not in that case because the agreement had already been cancelled. It set out that section 131 of the Act squarely answers the question whether section 127(2) is applicable at all in the positive. Section 131 reads:

“Repossession of goods.

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.”

In *Firststrand Bank Ltd t/a Wesbank v Davel* (2020) 1 All SA 303 (SCA) at paragraph 21:

“That of course is true. *Edwards*, however is not authority for the proposition that the processes prescribed in section 127(2) – (9) are not applicable when goods are repossessed at the instance of a credit provider. Section 131, in stark terms, states that they are.”

[8] It is accordingly clear that section 127(2) to (9) applies when the goods are attached in terms of a court order. They were thus applicable when the order was granted cancelling the agreement and the return of the said goods.

[9] The issue in the present matter is however one of damages. It was submitted that the case of Davel does not apply. It was submitted on behalf of Respondent that the decision in Davel does apply and that Applicant must prove its damages and make out a case for damages by providing the valuations of the said goods and not merely a certificate of balance. It is further submitted on behalf of Respondent that the notice in terms of section 127(5)(B) attached to the founding papers relates to after the goods had been sold and was not in compliance with section 127. It was submitted that Applicant had to show that the goods were sold for the highest possible amount and what the valuation of the goods were at the time that they were taken and when they were sold.

[10] In the case of Davel, referred to above, it was held in paragraph 19:

“It is clear from these provisions that the legislature was intent on insuring that sufficient protections are provided to ensure that upon termination of a credit agreement, a consumer is protected. The Act provides mechanisms for a consumer to challenge the estimated values and the price realised upon a sale of goods after either a surrender of the goods by a consumer or the repossession of the goods after action has been taken by the credit provider. As can be seen from the provisions set out above the Act also provides enforcement of the rights of credit providers. Its purpose is directed to ensuring as far as practically possible an equality of arms.”

[11] It is thus clear from this paragraph that there should be protection to both parties upon termination of the credit agreement even if it is repossessed. It specifically states that the Act provides mechanisms to challenge the estimated values and the price realised upon sale of the goods. The Act intends to protect a consumer when a credit agreement is terminated.

[12] It is clear that Applicant at no stage provided Respondent with a valuation of the goods after they had been repossessed. Therefore Respondent was not granted an opportunity to challenge the valuation nor could he establish whether the price which was allegedly paid at the sale was fair in the circumstances. Applicant also failed to set out how the said goods were sold and when this was done. The certificates of indebtedness are dated 18 July 2022 and provides the outstanding balance as at 30 June 2022. The section 127(5) letter is dated 19 August 2022. The date of sale of the goods is not provided. Was this before 30 June 2022 or thereafter. In my view this information should have been provided to Respondent and not merely an answer as given by Applicant that it was not obliged to do so. It would have cost Applicant nothing to provide such information which it should have had.

[13] In my view the procedure as set out in paragraph 20.3.1 of the order in Davel's case is applicable which states:

“Upon the return of each of the vehicles described in paragraph 20.1.2 (a), 20.1.2 (b) and 20.2.2 to each respective plaintiff 20.3.1 the plaintiff shall, within Ten (10) business days from the date of receiving return of the vehicle give the defendant written notice:

- (a) Setting out the estimated value of the returned vehicle;
- (b) Informing the defendant that it intends to sell the returned vehicle as soon as practical for the best price reasonably obtainable; and
- (c) Informing the defendant that the price obtained for the returned vehicle upon its sale may be higher or lower than the estimated value.”

[14] The letter of Applicant dated 19 August 2022 also does not set out what is required in terms of paragraph 20.3.4 of the Davel judgment, relating to a dispute of the amount realised at the sale.

[15] It is indeed so that in the present case the goods have already been sold and the amounts deducted from that is alleged to have been the outstanding amount. In my view the clause that the certificate of balance in the agreement would be *prima facie* proof of the amount owing in terms of the agreement as appears in clause 18.11 of the agreement does not exclude the requirement that the valuation of the goods and when it was sold be provided to Respondent.

[16] As the goods have already been sold it would serve no purpose in now providing the notices in terms of section 127(2) – (9). However what is required in terms of paragraph 20.3.4 of the order in Davel still remains.

[17] Applicant will be entitled to any shortfall that there may be after the sale of the said goods. However due to the conclusion that I have reached it would not be in the interests of the parties if the application is dismissed at this stage, nor would it protect the consumer. In my view, the order which I make will be just and equitable in the circumstances and be in the best interests of the parties so that the requirements set out in the order of Davel referred to above can be complied with. The following order is therefore made.

Order:

1. The matter is adjourned *sine die*.
2. Applicant and Respondent are granted leave to supplement their papers.
3. Applicant is to pay the costs of the opposed hearing on 29 January 2024.

P C BEZUIDENHOUT J.

JUDGMENT HEARD: 29 JANUARY 2024

JUDGMENT HANDED DOWN: 13 FEBRUARY 2024

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