REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 39291/2012

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

....
DATE SIGNATURE

In the matter between

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

and

MTHEMBU, DAVID **DEFENDANT**

Coram: WEPENER J

Heard: **2 October 2013**

Delivered: **4 October 2013**

J U D G M E N T

WEPENER J:

[1] The plaintiff seeks summary judgment for the return of a vehicle. There is no dispute regarding the fact that the plaintiff is the owner vehicle and that the defendant was in arrears with payments pursuant to an agreement of lease between the parties. There is also no dispute that as a result of the defendant's breach that if the plaintiff cancelled the agreement of lease it would be entitled to the return of the vehicle. The matter came before Willis J in December 2012. The parties appeared and the respondent undertook to pay the arrears of some R48, 196.20. Willis J postponed the matter to 20 February 2013 to allow the respondent to comply with this undertaking to pay. In February 2013 the amount was not paid and the matter came before Mphahlele AJ who, because the respondent alleged that he did not receive the notice pursuant to s 129 of the National Credit Act 34 of 2005 ('NCA'), adjourned the proceedings to allow the applicant to serve a notice pursuant to s 129 of the NCA on the attorneys of the respondent. This duly occurred.

[2] The matter was set down before me and the plaintiff sought summary judgment for return of the vehicle. Having now had a change of heart about paying the arrears as undertaken towards Willis J the respondent filed an affidavit resisting summary judgment in which a plethora of defences were raised.

[3] At the outset of the hearing I invited counsel for the respondent to identify the defences actually relied upon and which of the 'defences' need not be entertained. Counsel for the respondent advised that the respondent relied on two defences only despite the contents of the affidavit which raised every conceivable (and inconceivable) defence.

[4] The defences to be adjudicated were identified to be firstly, a non-compliance with the notice provisions of s 129 of the NCA and secondly, there was no proper prior demand in terms of the lease which resulted in the applicant being non-suited.

[5] Counsel for the respondent argued that for purposes of summary judgment the matter must be adjudicated on the papers as they stood prior to the order of Mphahalele AJ i.e. that the papers could not be supplemented by an additional affidavit regarding the service of the notice in terms of s 129 of the NCA. If that is so, it was argued that the application for summary judgment was fatally defective as the respondent never received the original notice which was posted by registered post to him.

[6] An application for summary judgment is in terms of Rule 32A of the Uniform Rules supported by an affidavit which must comply with the rule. A plaintiff may not deal with the merits of the case and may not file replying affidavits or additional documents. If this has the effect that once the matter is postponed in terms of s 130 of the NCA in order to allow compliance with s 129, the new evidence is not permissible in a summary judgment application, then the matter is to be decided on the papers as they were prior to the service of the notice as ordered by Mphahalele AJ.

[7] On the assumption that this proposition is correct, I am of the view that, the defendant's reliance on his non-receipt of the s 129 notice does not sustain a defence.

[8] The defence of non-receipt of a s 129 notice is raised as follows 'I never received the notice in terms of s 129'. The affidavit stripped of the plethora of other defences deals with the defence of non-receipt of the s 129 notice as blandly as quoted above.

[10] In *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC), Binns-Ward J approached a rescission application by examining the materiality of a reliance

on a non –compliance with s 129 of the NCA at para 22. The learned judge said at para 25:

'In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) (2011 (3) BCLR 229; [2010] ZACC 26), in para 85, the Constitutional Court, consistently with long-established principle, mentioned the materiality of the consequences of the illegality as one of the factors weighing importantly in the balance in any decision to put certainty before legality when determining upon a just and equitable remedy in the face of a demonstrably unlawful administrative act. The averments made by the defendant in his supporting affidavit indicate that he was aware of s 129 of the NCA, and had thought about relying on the non-receipt by him of notice in terms of the provision as a basis for obtaining a rescission of the judgment. What is strikingly absent from his affidavit, however, is any indication as to what effect he could have used his rights in terms of the provision, had he received the notice, or as to how he could use them now if the court were to set aside the judgment and give directions in terms of s 130(4)(b) of the NCA, 12 of the sort given in *Mkhize*. It is equally noteworthy that his affidavit does not contain any indication of his having taken any of the steps of which a s 129 notice would have advised him were available after obtaining knowledge of the judgment, save perhaps for communicating ineffectually with the bank in the manner to be described below. He did not need to have a notice in terms of s 129 in his hand to be able to refer the credit agreement to a debt counsellor or alternative dispute resolution agent, consumer court or "ombud with jurisdiction".'

[11] These words are apposite in the present matter. In *SA Taxi Development Finance (PTY) Ltd v Phalafala* 2013 JDR 0688 (GSJ) Van Eeden AJ said para 10 to 12 as follows:

'[10] The defendant has had the notice in terms of s 129(1) since the date of the service of summons and was thus fully apprised of his rights. He has been in default under the credit agreement for at least 20 business days and at least 10 business days have elapsed since the credit provider delivered a notice as contemplated in s 129(1). The defendant has had the opportunity to do what the notice invited him to do since receipt of the summons. He is not asking for any directions in terms of s 130(4)(b)(ii), nor does he give any indication of prejudice or of what he would have done had he received the notice prior to the summons.
[11] The bar in ss 129(1)(b) and 130(3)(a) is not absolute, but dilatory, and must be read as being subject to s 130(4)(b). The latter section allows a court to adjourn a matter and to make an order setting out the steps the credit provider must complete before the matter may be resumed. It follows that non-compliance with the procedures required by s 129 is not necessarily fatal to the proceedings. In this regard I respectfully agree with the approach of Binns-Ward J in *ABSA Bank v Petersen*. He refused an application for rescission under circumstances where the defendant had not received the s 129(1)(a) notice, since the infringement of the defendant's rights to have received it prior to summons was immaterial in the circumstances of that matter.
[12] 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".'

[12] I am in agreement with the remarks of Van Eeden AJ. The non-receipt of the notice in this matter is not a defence available to the defendant and the fact that Mpahalele AJ ordered a further service of the notice is of no consequence as far as this application for summary judgment is sought without any reference to the further service of the notice.

[13] The second defence is that there was no proper demand in terms of the lease agreement. The point is succinct and it is based on a judgment of Fisher AJ in *SA Taxi Securitisation (Pty) Ltd v Mthethwa and Others* (2012/11001, 2012/17723, 2013/12927) [2013] ZAGPJHC 191 (27 July 2013).

[14] The plaintiff's right to cancel the agreement and to obtain possession of the vehicle is contained in clause 8.2 of the agreement. It reads:

'8.2 Upon an event of default or the loss, damage or destruction of the vehicle as determined in 5.1 the Lessor may, subject to the provisions of the Act and any other applicable legislation, at its election and without prejudice to any remedy which is [sic/ may have in terms of this agreement or otherwise -

8.2.1 without notice, claim immediate payment of all instalments, whether then due for payment or not, provided that if the Lessee does not make immediate payment, the lessor may, notwithstanding the election to claim immediate payment in terms of this sub-clause, claim the relief set out in clause 8.2.2 below; or

8.2.2 after due demand, cancel this agreement, obtain possession of the vehicle and recover from the Lessee, as pre-established liquidated damages, the total amount of payments not yet paid by the Lessee, whether same

are due for payment or not or the proceeds of any insurance policy paid by the Lessor in respect of the vehicle. In addition, the Lessor shall be entitled to claim from the Lessee any amount of any value added tax payable in respect of such damages. For the purpose of this sub-clause, "due demand" shall mean immediately on demand unless the Lessee is entitled to notice, in which case ''due demand'' shall mean the giving of such notice to which the Lessee is entitled". (My emphasis)'

This clause is couched in the exact words of the clause dealt with by Fisher AJ. After analysing the clause Fisher AJ concluded that:

'[4] Thus, the notice provisions in the NCA, which the Plaintiff is obliged to comply with before it may approach the Court for an order to enforce a credit agreement, have been expressly incorporated into the agreement so that they operate in this

context as a lex commissoria. Accordingly, the right to cancel accrues only after the notices to which the Defendants are entitled in terms of the NCA (and thus the agreement) are given. The Plaintiff was not entitled to institute action before this cause of action had accrued (See *Chesterfield Investments (Pty) Ltd v Venter* 1972 (2) SA 19 (W); *De Wet NO v Ace NO* 1998 (4) SA 694 (T) at 706; *Kragga Kamma Estates CC v Flanagan* [1994] ZASCA 137; 1995 (2) SA 367 (A).)'

[15] Levenberg AJ came to an opposite conclusions regarding the interpretation of a clause in the same terms. In *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar cases* 2011 (1) SA 310 (GSJ) Levenberg AJ said:

'[20] Based upon the language of clause 9.2.2, the defendant maintains that there should have been a demand before the plaintiff could terminate the agreement. As far as I can understand the defendant's argument, it appears to be that two steps are required for the termination of the agreement. First, demand must be made and, thereafter, notice of default must be given. In other words, there must be an interpellatio before the plaintiff can claim.

[21] I see nothing in the language of the lease agreements that justifies such an interpretation. On the contrary, the language of clause 9.2.2 makes it clear that, as soon as demand is made, the plaintiff is entitled to return of the vehicle. In this respect, the allegation is made in paras 15 and 27 of the particulars of claim in the first action that the agreement has been terminated, "alternatively the agreement is terminated herewith". As a matter of law, to the extent that demand is required, summons constitutes demand.'

It appears that Fisher AJ was not referred to the judgment of Levenberg AJ as there is no reference in her judgment to the *Mbatha* case.

[16] Clause 8.2.2, adapted to include the definition of 'due demand', should read:

'After the giving of a notice to which the lessee is entitled, cancel this agreement, obtain possession of the vehicle and recover from the Lessee…'

[17] The clause gives the right to obtain possession immediately after the giving of the notice. The right is not exercisable only once the consumer receives the notice. Fisher AJ held that:

'[5] On the basis that the notices have been found by Foulks-Jones AJ not to have been <u>delivered</u> in the *Mthethwa* and *Meseko* matters, the causes of action in each matter had not yet accrued as at the date of the institution of the actions…'

(My underlining)

[18] I do not agree with the conclusion reached by the learned judge based on the delivery of the notice but agree with Levenberg AJ that the right to the possession of the vehicle was contracted to arise upon the giving of the notice pursuant to s 129 of the NCA.

[19] The plaintiff gave the notice required to be given by the NCA and cancelled the agreement of lease when the summons was issued, which cancellation it was entitled to convey by service of the summons.

[20] Pursuant to clause 9.1 of the agreement the defendant agreed that the plaintiff would be entitled to costs on the High Court scale as between an attorney and own client in the event of legal proceedings being instituted.

[21] Having regard to the aforegoing the defences argued on behalf of the defendant must fail.

[22] In the circumstances I grant summary judgment in favour of the plaintiff against the defendant for:

1. Return of the 2010 TOYOTA QUANTUM SESFIKILE 15 SEATER WITH ROOF HATCH with engine number 2TR8297004 and chassis number JTFSX22P706093114 to the plaintiff;

2. Costs on the attorney and client scale.

WEPENER J

JUDGE OF THE SOUTH GAUTENG

HIGH COURT

APPEARANCES

PLAINTIFF'S COUNSEL:	Ms R. Stevenson Instructed by Marie-Lou Bester Inc Johannesburg
DEFENDANT'S COUNSEL:	Mr K. Lavine Instructed by Larry Marks Attorneys Alberton

DATE OF HEARING: *2 October 2013*

DATE OF JUDGMENT: *4 October 2013*