



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: **26 JULY 2021**

Case No: 4132 / 2019

In the matter between:

NEDBANK LIMITED

Plaintiff

and

CORNELIUS SALOMAN NIEMANN

Defendant

JUDGMENT

WILSON AJ:

- 1 This matter concerns the scope of action available to a consumer on receipt of a notice under section 129 (1) (a) of the National Credit Act 34 of 2005 (“the NCA”), and the extent to which section 129 (1) (a) shields the consumer from the enforcement of a credit agreement while that action is taken.

Mr. Niemann's dispute with Nedbank

- 2 The plaintiff ("Nedbank") seeks summary judgment against the defendant ("Mr. Niemann") in an action on an instalment sale agreement ("the agreement") for the purchase of a caravan (described in the papers as an "Afrispor Cheetah"). Nedbank alleges that Mr. Niemann is R31 898.09 in arrears and that it has cancelled the agreement in response to Mr. Niemann's breach of his repayment obligations.
- 3 The parties agree that this application falls to be determined in terms of Rule 32 of the Uniform Rules of Court as it read before its amendment on 1 July 2019 (See *Raumix Aggregates (Pty) Ltd v Richter Sand CC, and Similar Matters* 2020 (1) SA 623 (GJ)).
- 4 In its particulars of claim, Nedbank seeks "confirmation" that the agreement has been cancelled, return of the caravan, an order declaring that Mr. Niemann has forfeited "all monies" so far paid to Nedbank, leave to apply for what Nedbank describes as "damages to be calculated in accordance with section 127 (5) – (9) of the NCA", interest on the damages and costs on the attorney and client scale.
- 5 Mr. Minnaar, who appeared for Nedbank, accepted that only the claims for cancellation of the agreement, the return of the caravan and costs could properly form the subject of summary judgment proceedings, and asked only for that relief.
- 6 Mr. Niemann resists summary judgment. His reasons for doing so are set out in two affidavits drafted without the assistance of a legal representative. Mr.

Niemann was represented by Mr. Shaw at the hearing. But Mr. Shaw did not draft or settle the affidavits resisting summary judgment.

7 Mr. Niemann is accordingly a lay pleader. That being so, I am enjoined to construe his affidavits generously, in the light most favourable to him (*Xinwa v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC), para 13).

8 Mr. Minnaar submitted that I should disregard the second affidavit Mr. Niemann submitted. I am not sure that this stance can be sustained where a lay pleader submits a second affidavit in summary judgment proceedings. Be that as it may, in disposing of the application, it has only been necessary for me to have regard to the first of the two affidavits.

9 Read generously, that affidavit discloses only one defence that might lead to the rejection of Nedbank's claim at trial. That defence concerns what Mr. Niemann calls a dispute about the amount Nedbank demands to settle the agreement outright ("the settlement amount"). It is not necessary for me to outline this dispute in any detail. Suffice it to say, Mr. Niemann wished to bring an early end to the instalment sale agreement, but did not agree with the amount Nedbank said he would have to pay to do so.

10 This dispute was not resolved, and Nedbank decided to take steps to cancel the agreement. It issued a notice in terms of section 129 (1) (a) of the NCA on 28 November 2018. That notice reached Mr. Niemann's local post office on 5 December 2018. It is not clear whether and when the notice was collected.

11 Mr. Niemann says that he attempted to refer that dispute to the banking ombudsman, but was told that he first had to address his complaint to

Nedbank itself. Mr. Niemann did this, but Nedbank reaffirmed its position. In an e-mail dated 12 December 2018, Mr. Niemann remained steadfast that Nedbank's calculation was wrong, and said he would "take the matter up to try and get a resolution".

- 12 It is not clear from the papers whether Mr. Niemann then approached the ombudsman once more. What is clear is that he met Nedbank's further attempts to enforce the agreement with repeated assertions that there was a dispute about the settlement amount, and that the cancellation and enforcement of the agreement was premature before that dispute had been resolved one way or the other. Mr. Niemann took the view that he ought not to be required to deal with Nedbank's attorneys in these circumstances. Nedbank's attorney, Mr. Rowe, asserted that he had a mandate to act for Nedbank, but nonetheless accepted Mr. Niemann's reluctance to deal with him, and stated that he would advise Nedbank accordingly.
- 13 On 14 December 2018, Nedbank purported to cancel the agreement. Nedbank's particulars of claim were served on Mr. Niemann on 14 February 2019.
- 14 The question before me is whether Mr. Niemann's affidavit discloses a defence that, if sustained at trial, would defeat Nedbank's claim.
- 15 With that in mind, I raised with Mr. Minnaar whether Nedbank had not sought enforcement of the agreement prematurely, in light of the fact that Mr. Niemann had raised a dispute about the settlement amount long before the particulars of claim were served.

- 16 Mr. Minnaar argued that, whatever the nature of that dispute, Mr. Niemann had no defence to the allegation of breach, and had effectively conceded that he had failed to pay the amounts due under the agreement. He encouraged me to dismiss Mr. Niemann's reliance on the disputed settlement amount as a sham defence, and to grant summary judgment.

The NCA

- 17 I do not think that this case is that easy. It seems to me that the fact of Mr. Niemann's default is the beginning of the enquiry in this case, not the end.
- 18 Once Mr. Niemann fell into arrears, Nedbank was required, by section 129 (1) of the NCA, to draw the default to Mr. Niemann's attention in writing and propose that he "refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date".
- 19 Section 130 (3) (c) (ii) (bb) forbids a court from enforcing a credit agreement if it is established that Mr. Niemann has "agreed to a proposal made in terms of section 129 (1) (a) and acted in good faith in fulfilment of that agreement".
- 20 The proposals referred to in section 129 (1) (a) are the credit provider's proposal that the dispute be referred "to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under the agreement" and the proposal that the parties "develop and agree on a plan to bring the payments under the agreement up to date".

- 21 I do not think that there is any reasonable interpretation of Mr. Niemann's conduct in this case other than that he seeks the referral of the matter to the banking ombudsman. There is nothing on the papers that suggests that Mr. Niemann has taken this stance in bad faith. I would be slow, in any event, to draw an inference of this nature about Mr. Niemann's conduct on the papers in summary judgment proceedings, especially since not a word is said in Nedbank's particulars of claim about what it must have known was Mr. Niemann's desire to have the ombudsman consider the dispute he had raised. Nedbank's particulars of claim make various standard form allegations about the delivery of the section 129 notice, but are silent on Mr. Niemann's attempts to activate the ombudsman. Nedbank must have appreciated that these efforts are material to whether section 129 (1) (a) has been engaged on the facts of this case.
- 22 In these circumstances, there is a genuine prospect that Mr. Niemann will be able to demonstrate at trial that sections 129 and 130 of the NCA have not been complied with. If he can demonstrate that, Nedbank's claim will not succeed, at least until the ombudsman has been able to consider and resolve any dispute about the settlement amount due on the agreement.
- 23 In resisting this conclusion, Mr. Minnaar advanced two further arguments which it is necessary for me to address. First, Mr. Minnaar said that sections 129 and 130 of the NCA cannot prevent the enforcement of a credit agreement where there is no dispute that a consumer is in default, does not take issue with the nature and extent of the default alleged, and does not respond to the

credit provider's proposal that a plan to bring the arrears up-to-date be developed.

24 However, I do not think the text of section 129 (1) (a) can sustain such an interpretation. The statutorily mandated proposal a credit provider must make is not limited to the agreement of a plan to eliminate the arrears. Section 129 (1) (a) makes quite clear that the credit provider must propose either that the consumer refers a dispute under the agreement to an appropriate body or that a plan to eliminate the arrears be developed. In response, the consumer may do either or both of these things. It is accordingly clear that the declaration of a dispute on the agreement that does not directly concern the nature and extent of a consumer's arrears will prevent the enforcement of the credit agreement, so long as the dispute is declared in good faith, and the consumer pursues the resolution of the dispute in good faith.

25 In any event, the resolution of the dispute about the settlement amount due, and its payment, would likely clear Mr. Niemann's arrears. In that sense, I cannot conclude that the dispute Mr. Niemann has raised is entirely distinct from the nature and extent of his default on the agreement.

26 Mr. Minnaar's second argument relies on the assertion that it was Mr. Niemann's duty to actually refer his dispute to the banking ombudsman, after Nedbank rejected his complaint, and that his failure to allege in his affidavits that he had escalated the matter to the banking ombudsman at that point means that there is no bar to the enforcement of the agreement.

27 Mr. Minnaar is correct to point out that Mr. Niemann does not tell us whether he referred the matter to the banking ombudsman after Nedbank rebuffed his

complaint. However, I do not think that this automatically means that I can be “satisfied”, as section 130 (3) (c) (ii) (bb) requires me to be before I can grant summary judgment, that Mr. Niemann has not responded to the section 129 notice by agreeing to Nedbank’s proposal that he refer his dispute to the banking ombudsman.

28 Section 130 (3) (c) (ii) (bb) does not require a consumer to have actually referred a dispute under the agreement to a dispute resolution body. It states simply that a court may not determine a matter if a credit provider has approached it despite a consumer having “agreed” to a proposal made in terms of section 129 (1) (a).

29 What counts as having “agreed” to the proposal? It seems to me that agreement to a proposal to refer a matter in the manner envisaged in section 129 (1) (a) covers a much wider range of potential conduct on the part of Mr. Niemann than him having actually referred the matter to the ombudsman himself.

30 I must construe Mr. Niemann’s affidavit generously. The least that seems to me to require is an acceptance, at least *prima facie*, that there is a dispute suitable for referral to the banking ombudsman, that Mr. Niemann has attempted to refer the dispute once, only for the dispute to be referred back to Nedbank, and that Mr. Niemann may well have taken steps to refer the dispute again, or at least conducted himself in a manner that left Nedbank in no doubt that he has agreed to do so.

31 The factual nature and legal consequences of Mr. Niemann’s actions seem to me to be matters for trial.

32 In all of these circumstances, it seems to me that Mr. Niemann has succeeded in outlining a *bona fide* defence that could succeed at trial. Simply put, that defence is that he has agreed to Nedbank's proposal that the dispute be referred to an appropriate body in terms of section 129 (1) (a) of the NCA, and that he has acted in good faith in attempting to bring about that result.

33 Accordingly, I refuse the application for summary judgment. Mr. Niemann is granted leave to defend the action, and I direct that costs in this application be costs in the trial.



S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 26 July 2021.

HEARD ON: 19 July 2021

DECIDED ON: 26 July 2021

For the Applicant:

J Minnaar

Instructed by DRSM Attorneys

For the Respondent:

D Shaw

Trust Account Advocate