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

Case No. 15047/2020

REPORTABLE: ***NO***
OF INTEREST TO OTHER JUDGES: ***NO***
REVISED:
Date: 06/04/2022

In the matter between:

MFC (A DIVISION OF NEDBANK LIMITED)	Applicant
and	
AYANDA GOODLUCK MKHWANAZI (ID NO. [....])	First Respondent
AYANDA GOODLUCK MKHWANAZI N.O (ID NO. [....])	Second Respondent
THE MASTER OF THE HIGH COURT GAUTENG, JOHANNESBURG DECEASED ESTATES (REF: 22840/2017)	Third Respondent

JUDGMENT

MAHOMED AJ,

INTRODUCTION

This is an application for cancellation of an instalment sale agreement, ("the agreement") and an order for the return of a motor vehicle which was purchased by Mr Awnini Richard Mkhwanazi, who died on 29 September 2018. The vehicle remains in the possession of the first respondent, the deceased's son, who is also the second respondent, who holds letters of authority as "controller" of the deceased estate.

BACKGROUND

In May 2016 the applicant and the deceased concluded an agreement, in terms of which the applicant advanced a sum of R336 466,74, ("the principal debt") which was to be paid over 54 months, and ownership remained with the applicant until the final instalment is paid. The agreement sets out grounds of default, which included "death of the debtor". In terms of the agreement in the event of default, the applicant would be entitled to cancel the agreement, claim the full balance outstanding due to it, claim the arrears and damages.

1. Mr Durant appeared for the applicant and submitted, that his client has compiled with the terms of the terms of the instalment sale agreement and accordingly it is entitled to the order it seeks.

2. He submitted that the applicant elected to cancel the agreement and it was duly cancelled by letter sent to the controller.

3. The applicant prays for an order for cancellation of the agreement, the return of the vehicle and costs.

4. It will determine its damages at a later stage, depending on what the vehicle will sell for based on its condition.

5. The first respondent, who is also the second respondent, (I shall refer to him as the respondent), opposed the application. Mr Fakude, represented the respondent and he raised two points in limine:

First in limine

6. He argued that the applicant has no locus standi as it failed to annex to its papers its Credit provider certificate in terms of the National Credit Act 34 of 2005.

7. Mr Durant submitted that the applicant is a division of Nedbank Limited one of the major banks in South Africa and referred the court to the certificate attached in its replying papers.

8. He submitted that this point must be dismissed.

9. I noted the certificate as attached and am of the view that the respondent suffered no prejudice when the certificate was annexed to the reply, accordingly the point in limine is dismissed.

Second in limine

10. The respondent alleged that the applicant failed to allege or prove the arrears due in terms of the agreement.

11. Mr Durant submitted that an “event of default” occurred on the death of the deceased and accordingly the applicant is entitled to cancel the agreement. It has done so and referred the court to proof of postage thereof, to the respondent.

12. He further submitted that the deceased estate has not paid instalments since 29 September 2018, that is since the debtor was deceased and the account remains in arrears.

13. He submitted, the respondent cannot deny this and does not present evidence of payments made.

14. Counsel submitted this point is without merit and must be dismissed.

15. Respondent's attorney submitted that the agreement was a credit sale agreement and is governed by the National Credit Act 23 of 2005, which obliges the creditor to comply with the notice requirements in s128 and 129 of the Act, as per **SEBOLA AND ANOTHER v STANDARD BANK OF SOUTH AFRICA LIMITED AND ANOTHER**[1]

16. Mr Fakude quoted, "*the main issue before the High Court and the full court was whether the provisions of the National Credit Act, that entitle a debtor to written notice before a credit provider may institute action require that a debtor actually receive the notice"*.

17. He argued that the bank knew that the Respondent had been appointed the controller, who, like an executor, with powers to sue and be sued, the respondent ought to have been placed in mora and he ought to have been issued the s129 notice, which would have included the amount in arrears, thereby informing the respondent of his obligations as controller.

18. Mr Durant argued that his client has an obligation to the "contracting party" only, and that since Mr Mkhwanazi had passed on, it was an event of default, as per clause 14.3.3 of the agreement, which entitled his client to cancel, demand return of the vehicle, payment of the arrears and any shortfall in the principal debt.

19. Mr Durant further informed the court that the National Credit Act refers to a "consumer" and the definition does not include a reference to "a controller" and therefore his client was not required to place the respondent in mora or to render any notice of arrears.

20. I agree with the applicant's submissions in that the Act does not include in its definition of consumer "a controller". The applicant is obliged to comply with that Act only if it were dealing with "a consumer" as defined in the Act.

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[1] 2012 (5) SA 142 (CC) at [46]

21. Accordingly, this point is dismissed.

THE EVIDENCE

22. Counsel for the applicant reminded the court that his client had cancelled the agreement and there is no chance that it could be revived. Furthermore, the respondent had known of the vehicle and was directed “to take control” of it and two bank accounts, in terms of his official appointment by the Master, however, he failed to make any payments toward this debt and refuses to return the vehicle.

23. He further submitted that if the respondent had approached his client, the applicant would have considered concluding another agreement with the respondent if it was feasible for his client.

24. He proffered the respondent, refuses to return the vehicle and he alleged that “he does not know the whereabouts of this vehicle.” It was proffered that the respondent has “hijacked” the vehicle for his own use.

25. Mr Durant submitted that the respondent’s behaviour not only prejudices his client, as the vehicle depreciates in the hands of the respondent, it prejudices the deceased estate as well, which will be indebted to his client for the difference between the depreciated value and the balance outstanding on the principal debt, plus interest to date of payment.

26. He argued that the vehicle is his client’s property for as long as the debt is not fully paid up. There is not merit in the respondent’s opposition to the order sought.

27. Mr Fakude argued that the respondent must be seen as an executor of an estate, with the authority to sue and be sued. A controller he submits must be treated as if he too has “stepped into the shoes of the deceased.” He submitted his client ought to have been served with the s129 notice to enable him to ultimately continue to own the vehicle, which generates an income for his family.

28. His client is issued a taxi license and operates on a route for which he pays subscription fees as a member of the taxi association.

29. He explained that deceased estates, in the value of less than R280 000, are considered “small estates” and “a controller” is appointed by the Master to administer the estate, like an executor. However, a controller does not have to compile and file a liquidation and distribution account or advertise the accounts, as in larger estates, it is a simpler reporting procedure.

30. He argued that the late Mr Mhkwanazi for all intents and purposes was a “debtor” and a “consumer of credit”, in the books of the applicant. He was not treated any differently when he was charged interest or administration charges, he had the same obligations as any other debtor, however he was not afforded the same protections of a debtor.

31. Mr Fakude explained that his client was contacted by the applicant’s representative a while ago regarding the return of the vehicle when he attempted to persuade the representative not to cancel the agreement and to instead furnish him with the amount outstanding whereupon he could make an informed decision as to his interest in purchasing the vehicle. He alleged that he was ignored by the bank officials.

32. The respondent’s attorney proffered that his client tried to make payment into the account but discovered that the account had been “frozen/blocked.”

33. He submitted that the applicant was being obstructionist in its attitude to his client and it was clear that it was not willing to even consider “another contract” as submitted by Mr Durant.

34. He conceded that his client is in possession of the vehicle and is continuing to use same as a taxi. He submitted that his client would have been able to settle the arrears but was refused access to the account or details of the arrears.

35. Mr Fakude informed this court that his client’s family business owns several such vehicles and that they are an established “small business” which has effectively, been denied an opportunity to grow its business.

36. He stated further that the vehicle is sought after in the used car market as a taxi and that his client currently holds valid licenses to operate the vehicle on identified routes. The vehicle is generating an income and his client could have paid off the arrears and continued as owner, even if in terms of a new agreement.

37. Mr Fakude argued that his client as controller is treated differently due only to the fact that his late father left a “small estate”, and therefore he as “controller” is not identified as a “executor who steps into the shoes of the deceased.”

38. He directed the court to the official document issued to his client which directs that his client “take control of the vehicle, 2 bank accounts, as identified” and to report to the Master and await direction from the Master on managing the assets. This is no different to the official duties of an executor.

39. He argued further that the National Credit Act failed his client, a controller, who is not considered “a consumer” in that he is not afforded the specific protections afforded other consumers of credit.

40. He referred the court specifically to the provisions in s129,

41. Section 129 provides:

> *“(1) if the consumer is in default under a credit agreement, the credit provider-*
>
> *(a) May draw the default to the notice of the consumer in writing* and propose that the consumer refer the credit agreement to the debt counsellor*, alternatively 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, and*
> *(b) Subject to section 130(2), may not commence any legal proceedings to enforce the agreement before*

(i) *First providing notice to the consumer, as contemplated in paragraph (a) or in Section 86(10), as the case may be, and…".*

Emphasis added.

42. The respondent has not been afforded the protections and opportunities to reconsider and adopt a repayment plan.

43. It is common cause that the agreement provides a "grace period of 3 months" to negotiate a payment plan to take over debt. The respondent was not afforded this time or opportunity to negotiate a settlement with the applicant.

44. Mr Fakude, submitted that his client would have pursued the remedies afforded in s129, if the bank had served his client with the s129 notice.

45. He submitted that the court ought to pend the proceedings and order the applicant to issue and serve the s129 notice and thereby afford the respondent an opportunity to decide if he wishes to pay the arrears and continue with the agreement, if not, his client will then return the vehicle to the applicant.

46. In reply, Mr Durant submitted, that his client had opted in terms of the agreement to cancel it and that there is no opportunity to "revive" this agreement. He persists with his argument that for as long as the controller is not included in the definition of "a consumer" in the Act, his client was not obliged to place the respondent in mora or to serve him with notices in terms of s 129 of the Act.

47. He further submitted that the respondent fails to tell this court the basis on which he continues to use the vehicle, which is his client's property until the full price is paid.

48. Furthermore, he submitted that the respondent uses the vehicle in contravention of the Administration of Estates Act, he is obliged to collect, report, and follow the Master's direction. The respondent has incorrectly report to the Master an asset for R90 000, when the vehicle is still his client's property, it does not form part of the deceased estate.

49. Mr Durant further submitted that the agreement has also lapsed with the effluxion of time, where the last instalment was due on 30 December 2020.

50. He submitted the respondent has simply hijacked the vehicle for his use, there is also no evidence that the monies he generated from the use of the vehicle has been paid into the estate, or toward repayment of the debt.

JUDGMENT

51. In terms of clause 14.3.3 of the agreement concluded between the applicant and the late Mr Awinini Richard Mkhwanazi, the applicant may elect to cancel the agreement on the happening of an "event of default". Mr Mkhwanazi's demise, constituted an event of default.

52. The applicant cancelled the agreement as per the letter it sent to the controller.

53. It is entitled to demand return of the vehicle.

54. The respondent's reliance on s129 of the National Credit Act of 2005 is misplaced.

55. I agree with Mr Durant that the definition of "a consumer" does not include a "controller" and therefore the applicant, as credit provider is not obliged to comply with the procedural requirements of that Act.

56. Section 18(3) of the Administration of Estates Act 66 of 1965 provides:

> *"If the value of any estate does not exceed the amount determined by the Minister by notice in the Gazette, the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed."*

57. The respondent submitted an official document granted by the Master which identified the vehicle and two bank accounts for the respondent as controller to

“collect/gather” obviously to provide its office’s direction as to the next step to realisation of the value of the “deceased estate.”

58. There is no evidence before this court of any directions by the Master, certainly nothing that entitles the respondent to the continued possession and use of the applicant’s property.

59. The applicant has demonstrated by the terms of the agreement that the property remains its property until the full purchase price including interest and administration costs are fully paid up within the time agreed upon by the parties, or as varied by the parties in writing.

60. Section 102 of the Administration of Estates Act 66 of 1965 sets out penalties for contraventions by appointed persons, in particular,

> *S 102 (1) Any person who-*
>
> *… (c) wilfully submits to or lodges with a Master any false account under this Act, or*
>
> *(d) wilfully makes any false valuation for the purposes of this Act, ...*
>
> *shall be guilty of an offence and liable on conviction, -*
>
> *In the case of an offence referred to paragraph (b), (c) ...*
>
> *to a fine or to imprisonment for a period not exceeding 5 years.”*

61. The evidence is that the applicant has submitted to the Master the vehicle as part of the estate property, whereas it still belongs to the applicant and cannot form part of the estate property.

62. The respondent’s attorney has conceded that his client is in possession of the vehicle and is using it for his business.

63. The respondent is indeed in unlawful possession of the vehicle, and I agree with Mr Durant that the continued use of the vehicle prejudices both the applicant and the estate he is appointed to manage.

64. It is unfortunate that the law appears to treat *"a controller in charge of a small estate"* differently.

65. It is noteworthy that the preamble to the National Credit Act 34 of 2005, sets out its purpose is

> *"To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information, to promote black economic empowerment and ownership within the consumer credit industry; …"*
>
> Emphasis added.

66. I agree with the respondent's attorney Mr Fakude, the Act fails his client in promoting the empowerment of large numbers in our society. The "small estate" must be afforded the same protections as other estates.

> 66.1. The consumer is afforded access to credit, as was the late Mr Mkhwanazi, however it failed to offer the beneficiaries of his estate the necessary protections of notice to cancel, an opportunity to negotiate with the credit provider, an opportunity to make any informed decisions on the viability of continuing with the credit agreement, an opportunity to approach a debt review counsellor, like other consumers of credit.

67. The applicant correctly argues that it acts in terms of the agreement concluded between the "contracting parties" however in this instance the party is now late, and his beneficiaries have had no opportunity to "salvage" any of the monies paid toward the vehicle. Furthermore, this small estate may possibly be liable

for damages should the vehicle not realise the full outstanding value on resale as any other estate.

68. I am of the view that the office of the National Credit Regulator must investigate the consumer protections available for “small estates” and in fact there ought to be no difference in the position of a controller to that of an executor, and the definition of “consumer” in the Act must include “a controller” as appointed by the Master to manage the property of a small, deceased estate.

69. In casu, the applicant is not obliged to comply with the requirements of s 129 as argued by the respondent and the applicant is entitled to return of the vehicle having cancelled the agreement.

69.1. Given that the agreement has lapsed with the effluxion of time I see no value in directing the applicant to afford the respondent the “grace period”.

70. Accordingly, the vehicle ought to be returned forthwith and the respondent must appreciate the risks he has assumed in continuing to retain the vehicle and the prejudice to the estate he is appointed to control.

I make the following order

1. The cancellation of the instalment sale agreement is confirmed.

2. The Second respondent, alternatively the First Respondent is ordered to forthwith return to the Applicant a **2016 TOYOTA QUANTUM 2.5d-4d SESFIKILE 16S with engine number [....] and Chassis Number [....]**.

3. In the event that the Second Respondent alternatively the first respondent, fails and/ or refuses to forthwith return the vehicle to the Applicant, the Sheriff of the Above Honourable Court or his Deputy is hereby authorised and directed to enter upon the First Respondent’s premises, or wherever the vehicle may be kept, to attach the vehicle and return it to the Applicant.

4. The First and Second Respondents are ordered to pay the costs of the application, jointly and severally.

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S MAHOMED
ACTING JUDGE OF THE HIGH COURT

This judgment was prepared and authored by Acting Judge Mahomed. 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 Case lines. The date for hand-down is deemed to be 6 April 2022.

Date Heard: 20 January 2022
Date of Judgment: 6 April 2022

Appearances

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