REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

20/11/12

CASE NO: 70014/2011

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED.

20/11/2012
DATE

SIGNATURE

In the matter between:

STANDARD BANK OF SA LTD **APPLICANT**

and

PETRUS JACOBUS KOEKEMOER **RESPONDENT**

J U D G M E N T

KUBUSHI J

[1] This is an opposed application for summary judgment. The applicant seeks an order for: confirmation of the cancellation of the Instalment Sale Agreement entered into between the applicant and the respondent; the return of the motor vehicle

as specified in its particulars of claim; postponement *sine die* of damages and costs of suit.

[2] The facts of the matter are that the applicant and the respondent entered into an instalment sale agreement in terms of which the applicant sold a motor vehicle to the respondent. In terms of the agreement the applicant remains the owner of the motor vehicle for the duration of the agreement until such time as the final instalment shall have been paid.

[3] A further term of the agreement is that in case the respondent defaults in his obligations in terms of this agreement the applicant is to send the respondent a written notice of the default with a proposal for the respondent to refer the credit agreement to a debt counsellor, dispute resolution agent, consumer court or ombud with jurisdiction, the intent being for the parties to resolve any dispute under the agreement.

[4] The applicant alleges that the respondent has breached the terms of the agreement in that he failed to make punctual

monthly payments of the instalments. The applicant as a result elected to cancel the agreement and has issued summons against the respondent claiming confirmation of the cancellation of the agreement; return of the motor vehicle fully described as a 2008 Toyota Corolla 1.4 PROF bearing engine number 4ZZV091646 and chassis number AHTLA58E603019760; damages and costs of suit.

[5] The applicant attached copies of notices in terms of section 86 (10) of the National Credit Act 34 of 2005 (the Act) forwarded to the respondent, the National Credit Regulator and the respondent's debt counsellor, together with confirmation of their delivery, to the summons.

[6] The application was first enrolled for hearing on the 20 April 2012 and on that date Davids AJ concluded that the section 86 (10) notices were not properly delivered. The learned Judge postponed the matter *sine die* and made an order in terms of section 130 (4) (b) (ii) allowing fresh transmission of the notices before the matter is enrolled again.

[7] When the parties appeared before me on the 19 October 2012, the applicant had according to its counsel complied with the order made of the 20 April 2012. According to counsel, the applicant sent, *per* registered post, new section 86 (10) notices to the respondent, the National Credit Regulator and the respondent's debt counsellor on the 26 September 2012 and attached the respective proof of posting and the track and trace reports in respect of those notices.

[8] At the hearing of the application the respondent's counsel argued a preliminary point that the applicant has still not complied with the provisions of section 129 (1) (b) of the Act in that: firstly, the action by the applicant was premature in that the summons was issued before the respondent was provided with the section 86 (10) notice by the applicant and that the fact that the respondent has now been provided a new notice does not avail the applicant. I do not agree with him.

[9] In terms of section 130 (4) (b) of the Act, where a court finds, in proceedings before it, that a credit provider has not

complied with the requirements of section 129 of the Act, it must adjourn the proceedings and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed. See **SEBOLA & ANOTHER v STANDARD BANK OF SOUTH AFRICA LTD & ANOTHER** 2012 (5) SA 142 (CC) at para [87].

[10] In this instance, the court, correctly so, adjourned the matter on the 20 April 2012 and gave an order setting out the steps the credit provider has to complete before the matter may be resumed. It is common cause that the applicant has completed the steps set out in that order and consequently this point must be rejected.

[11] Counsel also contended, that the service of the new notices cannot be relied on because section 32 (4) of the Uniform Rules of Court (the Rules) bars the applicant from giving evidence not contained in the founding affidavit to the summary judgment application. He referred me in this respect to the judgment in **ROSSOUW v FIRSTRAND BANK LTD** 2010 (6) SA 439 (SCA) at 454A – C and

Erasmus: **SUPERIOR COURT PRACTICE** at B1 – 229. This point, in my view, has no merit as well.

[12] The new notices and their respective proof of posting and/or delivery are in my view not new evidence as contemplated in rule 32 (4) of the Rules or as discussed in the **ROSSOUW** – judgment above. This is evidence, if it can be referred to as such, that was ordered by the court. The provisions of section 130 (4) (b) are *per se* peremptory with no discretion available to the court for deviation. The court was, therefore, obliged to adjourn the matter and to give direction to the applicant as to what to do if it intended proceeding with the matter. The notices are therefore the outcome of that order. See **STANDARD BANK OF SOUTH AFRICA LTD v ROCKHILL** 2010 (5) SA 252 (GSJ) at para [18].

[13] In relation to the main action, the respondent, firstly, contended that the cancellation of the agreement was premature in that the applicant did not comply with clause 12.2 of the agreement which obliged the applicant to serve the respondent with a letter of demand before taking action against him. The applicant's counsel, on the other hand,

submitted that proper notice of default had been given to the respondent and that it took effect from the time it was communicated.

[14] In terms of rule 32 (3) (b) of the Rules a respondent resisting summary judgment application must set out in his or her affidavit facts which if proved at the trial, will constitute an answer to the applicant's claim. See **BREITENBACH v FIAT SA (EDMS) BPK** 1976 (2) SA 226 (T) at 227G - H.

[15] It is correct, as argued by the respondent's counsel, that where an agreement lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective. See **BEKKER v SCHMIDT BOU ONTWIKKELINGS CC & OTHERS** [2007] 4 All SA 1231 (C) at paras [13] – [17].

[16] It is, however, not the case in this instance. A thorough perusal of the agreement does not reveal any cancellation clause that the applicant should have followed in order to cancel the agreement. Clause 12.2 of the agreement,

which the respondent relies on for his defence, states as follows:

> "Indien u wanpresteer wat betref u verpligtinge ingevolge hierdie Ooreenkoms, sal ons u skriftelik kennis gee van sodanige wanprestasie waarin u versoek sal word om die wanprestasie reg te stel en u verwittig word dat u hierdie Ooreenkoms kan verwys na 'n skuldberader (as u 'n natuurlike persoon is), 'n alternatiewe geskilbeslegtingsagent, die verbruikershof of 'n ombudsman met jurisdiksie, met die oog daarop om enige geskil ingevolge hierdie Ooreenkoms op te los, of om in te stem tot 'n plan om die terugbetalings wat betaalbaar is ingevolge hierdie Ooreenkoms by te bring."

[17] As is apparent the above clause does not have anything to do with the cancellation of the agreement and the respondent is thus wrong to rely on it. This clause clearly relates to the requirements of section 129 (1) (a) of the Act which requires a credit provider to notify a consumer of the steps the consumer should take to remedy a default emanating from a credit agreement. Section 129 (1) (a) is the first step which a credit provider should take in order to enforce a credit agreement.

[18] Even if the conclusion I made in the above paragraph is wrong, I take a view that in the circumstances of this case it would have been unnecessary for the applicant to proceed in terms of clause 12.2 of the agreement when the respondent had already applied for a review of his debts. Section 130 (1) (a) of the Act, *inter alia* provides that a credit provider may approach a court to enforce a credit agreement if at least 10 business days have elapsed after the credit provider delivered a section 86 (10) notice to the consumer. In my understanding of this provision, in order for a credit provider to enforce a credit agreement where a consumer has applied for a debt review, the credit provider need not start the court process by issuing a section 129 notice. The credit provider is entitled after 10 business days after the delivery of the section 86 (10) notice to directly approach a court for enforcement. See **FIRST NATIONAL BANK LTD v JP STEENKAMP** case number 57644/2011 (GNP) (11 May 2012) unreported.

[19] What remains to be determined is whether the agreement has been cancelled or not and if so whether the applicant

was entitled to cancel it. In respect of these issues the applicant's counsel referred me to the following judgments: **SWART v VOSLOO** 1965 (1) SA 100 (A); **MIDDELBURGSE STADSRAAD v TRANS-NATAL STEEN KOOL KORPORASIE BPK** 1987 (2) SA 244 (T) at 249A – G; **DU PLESSIS v GOVERNMENT OF THE REPUBLIC OF NAMIBIA** 1995 (1) SA 603 (Nm) at 605C – F **SINGH v McCARTHY RETAIL LTD t/a McINTOSH MOTORS** 2000 (4) SA 795 (SCA); **WIN TWICE PROPERTIES (PTY) LTD v BINOS** 2004 (4) SA 436 (W) and **ENGELBRECHT v MERRY HILL (PTY) LTD** 2006 (3) SA 238 (E) at 244G.

[20] The right to cancel an agreement arises out of an application of the rules of the law of contract. It is a trite principle of the law of contract that the right of a party to cancel an agreement, is not only restricted to cases in which there is a contractually agreed procedure. In the absence of such an express term allowing for cancellation of a contract, the common law may avail the party seeking to cancel.

An innocent party may thus cancel a contract by reason of a breach of a material term by the other party to the contract,

or the breach of a term that the innocent party has by notice to the defaulting party made material. See **ABSA BANK v HAVENGA & SIMILAR CASES** 2010 (5) SA 533 (GNP) at 535D – H.

[21] Therefore, before a credit provider becomes entitled to claim a final order authorising attachment of a motor vehicle, as is in this instance, the repossession of the motor vehicle, that credit provider must first cancel the relevant agreement with the consumer. The credit provider must have that right to cancel the agreement.

[22] A summons in this instance was served on the respondent on the 11 December 2011. The applicant in paragraph 4.4 of its particulars of claim set out what it purports to be the cancellation clause of the agreement between it and the respondent. After a thorough perusal of the agreement, as already alluded, I could not come across any cancellation clause in the agreement correlating to this paragraph. On this discrepancy on the part of the applicant I respectfully align myself with the strong sentiments expressed by Horwitz

AJ in **ABSA BANK v HAVENGA & SIMILAR CASES** above at 535I – 536J.

[23] Where the innocent party seeks to rely on the common law for the cancellation of the agreement, such allegation must be made in the founding papers. In this instance, the applicant alleged the following in paragraph 7 of its particulars of claim:

> "The plaintiff has accordingly cancelled the Agreement alternatively elects to cancel the Agreement herewith."

Based on the above, I am of the view that, to the extent that a notice of cancellation was required, the service of the summons on the respondent and the fact that the election to cancel the agreement was expressly stated therein, served that purpose.

[24] The applicant was also entitled to cancel the agreement due to the seriousness of the default. In terms of the agreement the respondent was to pay a monthly instalment of R3 985.35. At the time of the issue of the summons he

was in arrears in the amount of R172 659.06 together with interest thereon at the rate of 10.69% per annum from 18 September 2011 to date of payment. This is as *per* the Certificate of Balance attached to the summons and dated the 21 October 2011. The amount in arrears was quiet substantial and justified the cancellation of the agreement. See **SINGH v McCARTHY RETAIL LTD t/a McINTOSH MOTORS** above at paras [11] – [14].

[25] Based on the aforesaid, I am of the opinion that, the respondent's defence falls short of the requirements of rule 32 (3) (b) of the Rules and must therefore be rejected.

[26] The agreement having been cancelled, it follows that the applicant is entitled to the return of the motor vehicle.

[27] Debt relief in terms of the Act is meant to alleviate a consumer's indebtedness, and in circumstances like the present one, where the creditor seeks return of goods in which ownership vests in the creditor, the relief should be applicable only in respect of a claim where there is outstanding deficiency after the realisation of a credit

provider's security and not in respect of a claim for the return of the security. See **SA TAXI SECURITISATION (PTY) LTD v ALBERT CAMPHER** unreported ECG case no. 5081/2009 at para 14 and **SA TAXI SECURITISATION (PTY) LTD v MBATHA** 2011 (1) SA 310 (GSJ) at para [35].

[28] That being the case, the respondent in this instance, can therefore not avail himself of the defence based on over-indebtedness. As a result all the other technical defences in terms of the Act, which he relies on, cannot, in my view, find application in this instance. The defences may be raised should the applicant proceed with its claim for damages against him.

[29] Consequently I grant summary judgment against the respondent in favour of the applicant in the following terms:

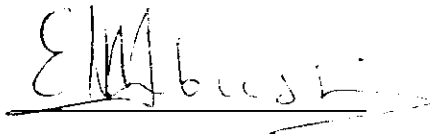
29.1 The cancellation of the Instalment Sale Agreement between the applicant and the respondent is confirmed.

29.2 The respondent is ordered to immediately return to the applicant the motor vehicle fully described as a 2008 Toyota Corolla 1.4 PROF bearing

engine number 4ZZV091646 and chassis number AHTLA58E603019760.

29.3 The damages claim is postponed *sine die*.

29.4 The respondent to pay costs of suit on an attorney and client scale.



E.M. KUBUSHI,
JUDGE OF THE HIGH COURT

HEARD ON THE	**: 19 OCTOBER 2012**
DATE OF JUDGMENT	**: 20 NOVEMBER 2012**
APPLICANTS' COUNSEL	**: ADV J VAN DER MERWE**
APPLICANTS' ATTORNEYS	**: VEZI & DE BEER INC**
RESPONDENT'S COUNSEL	**: ADV C J VAN EEDEN**
RESPONDENT'S ATTORNEYS	**: VAN DER HOVEN ATTORNEYS C/O ERNS DU PLESSIS ATTORNEYS**