REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

22/4/16

CASE NO: 15991/2015

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

22/04/16
DATE

SIGNATURE

In the matter between:

WESBANK t/a NISSAN FINANCE
A DIVISION OF FIRSTRAND BANK LTD Plaintiff

and

JOHN MACHEKE Defendant

J U D G M E N T

TEFFO, J:

INTRODUCTION

[1] The plaintiff applies for summary judgment against the defendant for payment of the sum of R138 920,16 plus interest and costs. The claim arises

from an instalment sale agreement ("*the agreement*") concluded between the parties on 15 January 2008 in terms of which the plaintiff sold to the defendant, a 2008 Nissan Hardbody 2400i SE HiRider (J22) ("*the vehicle*") for the purchase price of R367 589,52. In terms of the agreement the defendant was obliged to make an initial payment of R5 162,41 and thereafter 70 consecutive monthly instalment payments of R5 162,41 each together with a further final payment of R5 162,41. The agreement provided, as usual, that ownership of the vehicle would remain vested in the plaintiff until the full amount owed under the agreement had been paid.

[2] The plaintiff duly complied with all its obligations in terms of the agreement which included the delivery of the vehicle to the defendant.

[3] The defendant defaulted with his monthly payment obligations under the agreement. It is alleged in the plaintiff's particulars of claim that as a result of the defendant's material breach of the agreement, the plaintiff lawfully repossessed the vehicle and that the amount claimed represents the difference between the balance outstanding on the instalment agreement and the proceeds of the vehicle sold. The outstanding balance on the agreement prior to the sale of the vehicle was the sum of R212 232,15 and the amount for the proceeds of sale of the vehicle was R66 120,00.

[4] The agreement is governed by the National Credit Act 34 of 2005 ("*the Act*").

[5] The particulars of claim further allege that the plaintiff sent the defendant a notice in terms of section 127(5) of the Act by mail and prepaid registered mail, to which the defendant failed to respond. It is also alleged that a notice in terms of section 129(1)(a) of the Act was delivered to the defendant by the sheriff to the defendant's chosen address. The two notices were annexed to the summons together with the sheriff's return of service of the notice in terms of section 129(1)(a).

[6] Further allegations made were that a period of ten days had elapsed since the delivery of the section 129(1)(a) notice to the defendant and he did not pay the full outstanding amount or make suitable payment arrangements. It was also averred that the matter is not before a Tribunal or a Debt Counsellor or an alternative Dispute Resolution Agent or Consumer Court or Ombud with jurisdiction.

[7] Summons were issued in January 2015 and served upon the defendant on 10 March 2015. On 23 March 2015 the defendant filed a notice of intention to defend the action. Eventually the plaintiff applied for summary judgment.

[8] The application is opposed.

DISCUSSION

[9] In the affidavit resisting summary judgment the defendant contended that the action flows from his voluntary surrender of the vehicle to the plaintiff and that despite this the plaintiff contravened the provisions of section 127 of the Act in that it failed to give him a notice in terms of section 127(2) wherein it stated the estimated value of the vehicle and a notice in terms of section 127(5). It was pointed out that the failure by the plaintiff to give the defendant a notice in terms of section 127(2) of the Act has made him not to be able to invoke the provisions of subsections (3) and (4) of section 127 of the Act. Basically the defendant disputes that the vehicle was sold for the best price reasonably obtainable.

[10] The defendant further contended that he was unable to determine the outstanding amount under the agreement as according to him the plaintiff did not lawfully demand the remaining settlement amount as provided for in section 127(7). It was argued that the plaintiff contravened the provisions of section 127(8) of the Act and has unlawfully instituted the action in the High Court and not in the Magistrate's Court as was required of it in terms of the Act.

[11] It was also contended that the plaintiff is guilty of an offence in terms of section 127(10) and that the action should be set aside and a complaint be laid with the National Credit Regulator Tribunal (" the Tribunal"). A further submission was made on behalf of the defendant that the relief claimed defeats the purpose of the Act as contained in section 3 (d), (e), (g) and (h).

[12] I find it necessary to deal with the question whether the jurisdiction of the High Court has been ousted by the provisions of section 127(8)(a) of the Act. The section reads as follows:

> "*If a consumer –*
>
> > *(a) fails to pay an amount demanded in terms of subsection (7) within 10 business days after receiving a demand notice, the credit provider may commence proceedings in terms of the Magistrate's Court Act for judgment enforcing the credit agreement; or ...*"

[13] This issue has been the subject of debate in our division. There has been conflicting decisions regarding this aspect and ultimately a decision of the full court in *Nedbank Ltd v Mateman, Nedbank Ltd v Stringer* 2008 JOL 21210 (T) settled it. Two separate matters were heard by the full court of this division after the plaintiff, Nedbank Ltd, sued the defendants, Mateman and Stringer, for payment of money and also sought an order declaring certain properties in each case executable. The defendants in both matters failed to enter appearance to defend the actions and the plaintiff applied for default judgment. The registrar referred both matters to court in terms of Rule 31(5)(b)(iv). The full court had to determine whether the registrar had jurisdiction to entertain applications for default judgments governed by the Act in cases where the defendants are resident or employed or the subject property is situated in the jurisdiction of another court, whether a High Court had concurrent jurisdiction with the Magistrate's Court. In a similar matter, ABSA Bank Ltd v Myburgh 2009 (3) SA 340 (T), my brother Bertelsman transferred the matter to the Magistrate's Court after finding that the registrar

correctly refused to grant default judgment. The full court differed and held that there was nothing in the Act that indicates that there was an intention to oust the High Court's jurisdiction. It is clear that section 127 of the Act creates a special process in terms of which it grants a consumer a right to surrender goods under a credit agreement. It does not deal and was not intended to deal, with the jurisdiction of the High Court or the ousting thereof. It is settled law that the High Court has concurrent jurisdiction with any Magistrate's Court in its area of jurisdiction (see *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W)). It is, however, also settled law that the plaintiff runs a risk if he/she sues in the High Court on a claim justiciable in the Magistrate's Court of only being allowed to recover costs on the Magistrate's Court scale. Under the circumstances it is my view that the contention by the defendant that the plaintiff contravened the provisions of section 127(8) and has unlawfully instituted the claim in the High Court, has no merit.

[14] I turn to the merits. In terms of the provisions of section 127(1)(a) and (b) of the Act a consumer under an instalment agreement, secured loan or lease of movable goods may give written notice to the credit provider to terminate the agreement. If the goods are in the credit provider's possession, the consumer may require the credit provider to sell the goods. Alternatively, if the goods are in the possession of the consumer he or she may return the goods to the credit provider's place of business during ordinary business hours, within five business days after the date of the notice, or within such other period or at such other time or place as may be agreed to with the credit provider.

[15] Section 127 of the Act grants to a consumer who has purchased goods pursuant to an instalment sale agreement, a right to unilaterally terminate a credit agreement by deciding to return the goods to the credit provider so that the credit provider may sell the goods so returned in order to settle the account of the consumer. The obligations imposed upon a credit provider by section 127 essentially require the credit provider to undertake the sale of the goods returned to it and to settle the consumer's indebtedness to it out of the proceeds of such sale.

[16] Section 127(2)(a) and (b) requires the credit provider within 10 business days after receiving a notice in terms of section (1)(b)(i), or receiving goods tendered in terms of section (1)(b)(ii), to give the consumer written notice setting out the estimated value of the goods and any other prescribed information.

[17] Section 127(3) provides that within 10 business days after receiving a notice under subsection (2), the consumer may unconditionally withdraw the notice to terminate the agreement in terms of subsection (1)(a) and resume possession of any goods that are in the credit provider's possession, unless the consumer is in default under the agreement (my emphasis).

[18] In terms of the provisions of section 127(4) if the consumer (a) responds to a notice as contemplated in subsection (3), the credit provider must return the goods to the consumer unless the consumer is in default

under the credit agreement; or (b) does not respond to a notice as contemplated in subsection (3), the credit provider must sell the goods as soon as practicable for the best price reasonably possible.

[19] On his own version the defendant avers that these proceedings flow from his voluntary surrender of the vehicle to the credit provider. It is common cause between the parties that the vehicle was returned to the credit provider because the consumer was in default of his monthly payments in terms of the agreement. The effect of the voluntary surrender is to terminate the agreement between the parties (*Maqeda v Toyota Financial Services and Others* [2014] JOL 32532 (EDM)). When the consumer returns the goods to the credit provider, he/she does not only lose possession of the goods but he/she brings an end the right that he or she held over the property. It was argued that at the time the vehicle was sold, the defendant was many months in arrears. It is common cause between the parties that the plaintiff did not send the section 127(2)(b) notice to the defendant. No allegation is made that the defendant as consumer, gave written notice to the plaintiff, as credit provider, of the termination of the agreement as provided for in section 127(1)(a) of the Act. In *Sebola and Another v Standard Bank of SA Ltd* 2012 (5) SA 142 (CC) it was pointed out that the main objective of the Act is to protect consumers and that an interpretation of the Act calls for a careful balancing of the competing interests of consumers and credit provides (see also *Kubyana v Standard Bank of SA* 2014 (3) SA 56 (CC)).

[20] I find the contention by the defendant strange that failure by the plaintiff to give him notice in terms of section 127(2) made him not to be able to invoke the provisions of subsections (3) and (4). He does not allege that after he had voluntarily surrendered the vehicle he enquired about the estimated value of the vehicle or any other relevant prescribed information and/or showed any interest of settling the arrears which were more than R200 000,00. One would have expected that a consumer surrendering the vehicle does this because he is in default with his monthly payments and must realise that the vehicle will probably be resold. The defendant did nothing after voluntarily surrendering the vehicle and only after the sale of the vehicle he alleges that had he been served with the section 127(2) notice he would have considered the options available in terms of subsections (3) and (4).

[21] The provisions of sections 127(3) and 127(4) make it clear that the election to withdraw the notice to terminate the credit agreement can only be done by a consumer who is not in default under the agreement. Although I do not condone the failure of the plaintiff to give notice to the defendant in terms of section 127(2), I cannot see how the defendant could have invoked the provisions of section 127(3) and section 127(4) given the fact that he has been in default of his payment obligations under the agreement and is still in default. Nothing is said in his affidavit resisting the summary judgment regarding the default of his obligations under the agreement. He does not allege that the agreement between him and the plaintiff is still alive. Accordingly it is my view that the delivery of the section 127(2) notice to the defendant would not have made any difference.

[22] The defendant further disputed that he was served with the notice in terms of section 127(5). The notice in terms of section 127(5) of the Act has been annexed to the summons. It was submitted on behalf of the defendant that there is no proof that the notice was sent to the defendant. Counsel for the plaintiff argued that the notice was sent to the same address where the section 129(1)(a) notice was delivered. The notice in terms of section 129(1) was delivered at the address of the defendant through the sheriff. The same address appears on the section 127(5) notice which was allegedly sent to the defendant by ordinary mail on 30 April 2014, a day after the sale of the property.

[23] Section 127(5) provides that after selling any goods in terms of this section, a credit provider must –

(a) credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit provider in connection with the sale of the goods; and

(b) give the consumer a written notice stating the settlement value of the agreement immediately before the sale, the gross amount realised on the sale, the net proceeds of the sale after deducting the credit provider's permitted default charges, if applicable, and

reasonable costs allowed under paragraph (a), and the amount credited or debited to the consumer's account.

It is significant that section 65(2)(a)(i) of the Act provides that '*delivery*' includes the making available of the document to the consumer by ordinary mail. Unlike in sections 129 and 130 of the Act there is no requirement in section 127(5) that anything must be drawn to the notice of the consumer or that the notice must be '*delivered*' to the consumer (compare *Sebola* paras [61] to [66] at 162C to 164D).

[24] It is my view that the sending of the section 127(5) notice to the defendant by ordinary mail was sufficient. I further find that the plaintiff complied with the provisions of the Act. In terms of section 130(3)(a) of the Act, the court may only determine a matter in respect of proceedings to which section 127 of the Act applies, if the procedures required by section 127 have been complied with. Section 130(4)(b) further provides that in the event of the credit provider not having complied with the provisions of the Act as contemplated in section 30(3)(a), the court must adjourn the matter and make an appropriate order setting out the steps that the credit provider must take before the matter may be resumed.

[25] I have already ruled that there has not been any contravention of the provisions of section 127(8) of the Act. I therefore do not find any basis for the postponement of this matter. The defendant is not without a remedy. If he is not satisfied with the sale of the goods and believes that the vehicle was not

sold as reasonably practicable or for the best price reasonably obtainable, he can approach the Tribunal for the review of the sale in terms of the provisions of section 128 of the Act.

[26] I am satisfied under the circumstances that the defendant does not have a *bona fide* defence to the plaintiff's claim. The plaintiff is therefore entitled to the relief sought.

[27] In the result I make the following order:

27.1 I grant summary judgment against the defendant for payment of the amount of R138 920,16 to the plaintiff with costs together with interest on the aforesaid amount of R138 920,16 calculated at a fixed interest rate of 18% per annum from 30 April 2014 to the date of final payment.

27.2 The defendant is ordered to pay the costs of this application on the scale applicable in the Magistrate's Court.

M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

FOR THE PLAINTIFF	J H GROENEWALD
INSTRUCTED BY	HACK STUPEL & ROSS ATTORNEYS

FOR THE DEFENDANT	L DU PREEZ
INSTRUCTED BY	LOMBARD ATTORNEYS
HEARD ON	18 MAY 2015
HANDED DOWN ON	22 APRIL 2016