REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

CASE NO: 66611/2016

22/6/2016

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

22:06:2016

SIGNATURE **DATE**

THE STANDARD BANK OF SOUTH AFRICA Plaintiff/ Applicant

and

PAMSAL CONSULTING (PTY) LTD First defendant/respondent

NTHUSHENG PHASWANE MOTSHANA Second defendant/respondent

REASONS FOR JUDGMENT

AC BASSON, J

[1] This was an application for summary judgment in terms of which the plaintiff/applicant sought an order to confirm the cancellation of the agreement between the plaintiff and the first and second defendants/respondents and for the return of a 2015 Hino 300 714 LWB ("the vehicle").

[2] After having heard argument, this court granted summary judgment against the defendants confirming the cancellation of the agreement and ordered the defendants to return the vehicle. The defendants were also ordered to pay the costs.

Here are brief reasons for my order

[3] On 6 February 2015 the plaintiff and the first defendant entered into an Instalment Sale Agreement ("the agreement"). In terms of this agreement the defendant purchased a vehicle in an amount of R 469 347.48 which amount was made up of a principal debt of R 360 750.81 plus finance charges of R 108 596.67. Further in terms of this agreement, the first defendant undertook to pay the amount of R469 347.48 as follows: (i) Six fixed payments of R 16 281.63 each at one monthly intervals beginning on 15 March 2015; (ii) 53 payments of R 6 882.55 each at one monthly intervals beginning on 15 September 2015; and (iii) One final payment of R 6 882.55 on the 15th of February 2020.

[4] It is a term of the agreement that if a party fails to make a payment, the plaintiff can claim the full outstanding balance owing in terms of the said agreement, alternatively, the plaintiff may elect to cancel the agreement, take possession of the goods and claim damages.

[5] The first defendant did not make punctual payments. In fact, as at 31 December 2015 the first defendant is in arrears in the amount of R 38 983.54. As will be pointed out herein below, instead of raising a *bona fide* defence against their indebtedness towards the plaintiff, the defendants have elected to raise technical defences in their affidavit resisting summary

judgment. I will revert to the fact that the defendants have not raised a *bona fide* defence herein below.

Section 129 notice in terms of the National Credit Act

[6] The first defence raised is the allegation that the section 129 notice as required by the National Credit Act[1] did not come to the knowledge of the defendants and therefore the plaintiff was not entitled to issue and serve the summons. In this regard the defendants referred to the postage slips to make out an argument that the said notice was sent to an incorrect address.

[7] At the outset I must point out that there is no merit in this submission. Apart from the fact, as will be pointed out herein below, that a section 129 notice was not a requirement as the National Credit Act does not apply to this particular agreement, I am not persuaded that the section 129 notice (even assuming that it was a requirement) was sent to the incorrect address.

[8] In respect of the section 129 notice, it appears from the papers that the notice in terms of section 129 of the National Credit Act was sent twice by registered post to the first respondent's chosen *domicilium citandi et executandi.* The registered posting slips reflect the correct address. From the Parcel Tracking Results attached to the papers it further appears that the Post Office did indeed send a notification to the first defendant.

[9] Is there an obligation on the plaintiff to ensure that notice did actually come to the attention of the first defendant? According to the court in *Kubyana v Standard Bank of South Africa Ltd*[2]. No such obligation exists:

> "[34] I now consider the purpose of the s 129 notice and the obligations of a reasonable consumer. Section 129 aims to establish a framework within which the parties to the credit agreement, in circumstances where the consumer has defaulted on her obligations, can come together and resolve their dispute without expensive,

[1] Act 34 of 2005.
[2] 2014 (3) SA 56 (CC).

acrimonious and time-consuming recourse to the courts. However, this form of dispute resolution is possible only if both parties come to the table: the credit provider must avoid hasty recourse to litigation and the consumer must seek to rectify her default in a reasonable and responsible manner.

[35] If the credit provider complies with the requirements set out in [31] – [33] above and receives no response from the consumer within the period designated by the Act, I fail to see what more can be expected of it. Certainly, the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement. It deserves re-emphasis that the purpose of the Act is not only to protect consumers, but also to create a 'harmonised system of debt restructuring, enforcement and judgment, *which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements*'. Indeed, if the consumer has unreasonably failed to respond to the s 129 notice, she will have eschewed reliance on the consensual dispute resolution mechanisms provided for by the Act. She will not subsequently be entitled to disrupt enforcement proceedings by claiming that the credit provider has failed to discharge its statutory notice obligations.

[36] As set out earlier, even if the s 129 notice has been dispatched by registered mail and the Post Office has delivered the notification to the consumer's designated address, valid delivery will not take place if the notice would nevertheless not have come to the attention of a reasonable consumer. *But if the credit provider has complied with the requirements set out above, it will be up to the consumer to show that the notice did not come to her attention and the reasons why it did not.*'"[3]

[10] The deponent to the affidavit resisting summary judgment merely states that he did not receive the notices from the Post Office. I am not persuaded on the papers that the notice was sent to an incorrect address and therefore do

[3] My emphasis.

not accept the bold allegation that the notice did not came to the attention of the defendant.

Does the National Credit Act apply?

[11] I have already referred to the fact that the point has been raised that the National Credit Act is, in any event, not applicable to the agreement.

[12] In the present matter the first defendant is identified as a closed corporation duly registered in terms of the Company Laws of the Republic of South Africa.

[13] In general, the National Credit Act does apply to juristic persons in their capacity as consumers but only to a very limited extent. More in particular, the National Credit Act does not apply if the juristic person concludes a "large agreement". A "large agreement" refers to a mortgage agreement (regardless of the amount involved) and also refers to other credit agreements in terms of which the principal debt is R250 000 or more. The National Credit Act does not apply to a juristic person with an asset value or annual turnover of R1 million or more. The National Credit Act will also not apply if a juristic person - with an asset value or annual turnover below R1 million when the agreement is made - concludes a *large credit agreement* (see s 4(1)*(b)* of the NCA). (See also *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others.*[4])

[14] In the present case this court is unaware of whether the first defendant has an assent value or annual turnover of R 1 million or more. But, on the facts before the court, the agreement in the present instance qualifies as a large agreement" in light of the fact that it is a credit agreement in terms of which the principle debt is more than R 250 000.00: In terms of s 4(1)*(b)* of the National Credit Act, the Act does not apply to a credit agreement where the agreement qualifies as a large agreement as envisaged in s 9(4)*(b)* read with s 7(1)*(b)* of the National Credit Act (namely where the "principal debt" under

[4] 2010 (5) SA 523 (GSJ.

the transaction equals or exceeds the amount of R250 000, as determined in GN 713 of 1 June 2006).

[15] In light of the fact that the defendants (assuming that the first defendant/respondent has an assent value or annual turnover of less than R 1 million) have concluded a large credit agreement, the provisions of the National Credit Act are not applicable to the transaction. The plaintiff was therefore not required to dispatch a section 129 notice to the defendants. Consequently the defence raised by the defendants in respect of the section 129 notice is rendered academic.

Bona fide defence

[16] Apart from the aforegoing, and more importantly, no defence is put forward in the affidavit resisting summary judgment. Where a defendant fails to set out a *bona fide* defence in its papers, an application for summary judgment will be granted. See in this regard *ABSA Bank Limited v EFM Investments CC*[5] where the Court emphasised this point:

> "[2] I do not propose to go back over the reasons why summary judgment was granted against the defendants anymore than is strictly necessary. Those reasons were fully set out in the principal judgment. The essential reason why the defendants' opposition to the application for summary judgment was unsuccessful was that they failed, in my judgment, to meet the threshold requirement of setting out a bona fide defence. The classical statement of the requirements in this respect is that given in Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A), at 425G-426E. *The remedy of summary judgment is not intended to shut out defendants who are able to demonstrate a bona fide intention to defend the action. It does require them, however to show what their intended defences are. It must appear from what they say in this respect that the defences are legally sustainable and that they are maintained in good faith. They are expected to do this by setting out in*

[5] Case No.s: 11461/2012 and 11463/2012. 26 October 2012. Western Cape High Court.

their opposing affidavits the nature and grounds of the defence and the material facts upon which it is founded. If the averments made by a defendant in the opposing affidavit are vague, or markedly lacking in the particularity that might be expected in the circumstances of the case, then the court is likely to hold that a bona fide defence has not been disclosed, and summary judgment will follow."

[17] Nowhere in the affidavit resitting summary judgment does the defendants disclose, apart from technical defences, what their defence is against the averment made on behalf of the plaintiff that the first defendant had breached the agreement by not making punctual payments. More in particular, there is no denial in the affidavit resisting summary judgment that the first defendant is in arrears in the amount of R 38 983.54. In fact, there is not even an averment that the first defendant/respondent has in fact been making payments towards the vehicle.

[18] I am therefore in agreement with the submission on behalf of plaintiff that the defendants have entered an appearance to defend merely in order to delay the plaintiffs claim. If the defendants had made any payments to the plaintiff since 31 December 2015 it would have been expected of them to have attached, at the very least, proof of payment to the plaintiff (since December 2015). In the circumstances it is therefore concluded that the defendants have not disclosed a *bona fide* defence in their papers. Furthermore, the irresistible conclusion on the papers is that the defendants do not have a defence, that the first defendant is currently utilising a vehicle for which no payments have been made, and that the defendant have merely entered an appearance to defend in order to delay the plaintiff's claim.

[19] I am therefore of the view that it would be appropriate to exercise my discretion in favour of the plaintiff especially in light of the facts deposed to in the affidavit opposing summary judgment that do not suggest a reasonable possibility that the defendants may have a defence against the monetary claim of the plaintiff.

[20] In the event the application for summary judgment is granted with costs.

AC BASSON

JUDGE OF THE HIGH COURT