REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

29/7/16

CASE NO: 20072/2014

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

SIGNATURE 29/7/2016 DATE

NEDBANK LIMITED PLAINTIFF

And

MATEMANE, NIKWANE VINCENT DEFENDANT

JUDGMENT

AC BASSON, J

[1] The plaintiff (Nedbank Limited) approached this court for an order confirming the cancellation of the Instalment Sale Agreement dated 5 December 2012; that the plaintiff is entitled to sell the vehicle – a Hyundai Mighty HD 72 - in terms of section 127(2) of the National Credit Act ("NCA");[1] that the plaintiff may apply for damages in an amount calculated in terms of section 127(6) – (9) of the NCA and interest on the said damages at a rate of 11.50% per annum from 4 March 2014 to date of payment and costs in the amount of R 650.00 together with the Sheriff's costs.

Relevant facts

[2] Most of the facts in this matter are common cause. The plaintiff and the defendant (Mr Matemane) entered into an Instalment Sale Agreement on 5 December 2012 ("the agreement") in terms of which the plaintiff sold a new Hyundai Mighty HD 72 vehicle (hereinafter referred to as "the vehicle") to the defendant for a total cost of R 556 228.83. In terms of the agreement the defendant had to pay the unpaid balance by way of 71 instalments of R 7 711.51 each commencing in January 2013 until the final instalment on 26 December 2018.

[3] It was common cause – and it also appears from the agreement itself – that ownership would remain vested in the plaintiff until all amounts due by the defendant in terms of the agreement had been paid in full. The defendant was also required to keep the vehicle comprehensively insured at all time. More in particular, the defendant is obliged to keep the vehicle in his

[1] Act 34 of 2005.

possession or under his control at all times. If the vehicle is not kept at the chosen *domicilium citandi et executandi* of the defendant, he must inform the plaintiff of the address at which the vehicle is kept. Furthermore, should the defendant commit a breach of contract the plaintiff would be entitled to the remedies as set out in the agreement.

[4] The defendant took delivery of the vehicle and commenced with payment as per the agreement on 26 January 2016.

[5] It is common cause that on 16 June 2013 (a Sunday) the vehicle was impounded by the South Africa Police Services ("SAPS") after it was suspected that a fraudulent permit was issued to the defendant when it collective stock at Komati Land at Sabie Nelspruit. The vehicle was taken to SAPS where it was stored.

[6] On 27 August 2013 the plaintiff removed the vehicle from SAPS for safekeeping. It was not disputed that the plaintiff removed the vehicle from SAPS without informing the defendant thereof.

[7] It was also not disputed that the plaintiff unilaterally cancelled the defendant's debit order with effect August 2013. Mr du Toit on behalf of the plaintiff explained that debit orders were automatically cancelled by the plaintiff once a matter has been handed over to the legal department (in this case to the department that investigated fraud). It is also common cause that

no payments were made towards the instalment sale agreement as from the date of the cancellation of the debit order.

[8] I interpose here to deal with the issue of immediate cancellation of the debit order once the account has been handed over the legal department. The submission on behalf of the defendant was that this smacks of highhandedness and that it amounts to unfair tactics towards the defendant who had paid at least one instalment towards the vehicle even after it had been impounded by SAPS. There is some merit in this argument particularly in light of the fact that the defendant was not in arrears at the stage when the account was handed over to the legal department and particularly in light of the fact that the defendant was not even forewarned that his debit order was about to be cancelled by the plaintiff. At the very least the plaintiff should have forewarned the defendant that his debit order was about to be cancelled.

[9] The criminal charges against the defendant were withdrawn on 21 October 2013 (four months later) and the vehicle was released. The defendant thereafter went to SAPS to retrieve his vehicle only to find that his vehicle was removed by the plaintiff for safekeeping.

[10] In October 2013 the defendant was advised by Mr Coetzee of the plaintiff that the vehicle would be released upon payment of the arrears and the storage fees. The defendant refused to make this payment.

[11] On 14 November 2013 the defendant wrote a letter to the plaintiff to complain about the fact that the vehicle was removed by the plaintiff and that he (the defendant) was now required to also pay for storage costs. He also complained about the fact that the plaintiff had cancelled his debit order facility. In the letter the defendant request the assistance of the plaintiff in order to resolve the matter.

[12] On 7 February 2014 a section 129 notice was sent to the defendant advising him of the fact that the account was in arrears in the amount of R 47 092.08 and that he may contact a debt councillor or make use of an alternative dispute resolution agent to resolve the issue of the arrears. It is common cause that the defendant received the said notice but that he made no payments pursuant to the letter.

[13] Clause 5.4 of the agreement states that the defendant is required to keep the vehicle in a position or under his control at all times. If the vehicle is no longer kept at the defendant's stated address, the defendant must inform the plaintiff thereof. A failure to inform the plaintiff of the location of the vehicle may be a criminal offense. It is common cause that the defendant did not inform the plaintiff that the vehicle was impounded by SAPS.

[14] Was the defendant in breach of clause 5.3 once the vehicle was impounded by SAPS which entitled the plaintiff to cancel the agreement? I am in agreement with the submission on behalf of the plaintiff that the defendant was in breach of the agreement from the moment the vehicle was

impounded by SAPS. Once the vehicle was impounded by SAPS the defendant had no access to the vehicle, he could not remove the vehicle and he could not operate the vehicle. In fact, on his own version, he only returned to SAPS to claim the vehicle after the vehicle was formally released four months later after criminal charges against him were ithdrawn. The defendant was therefore in breach of the agreement not only because he lost control and possession of the vehicle but also because he failed to inform the plaintiff that the vehicle was impounded by SAPS and no longer in his possession or under his control. This, in my view, constitutes a breach of the agreement entitling the plaintiff to cancel the agreement.

[15] Although some criticism may be expressed against the conduct of the plaintiff in unilaterally cancelling the defendant's debit order, the fact remains that the contract was breached entitling the plaintiff to cancel the contract.

[16] This breach of the contract should, however, not be viewed in isolation and it cannot be ignored what had happened after the criminal charges were withdrawn against the defendant and after the vehicle was released. Despite the fact that the defendant was in breach as at June 2013, the plaintiff only issued a formal section 129 notice some months later on 7 February 2014 and only cancelled the contract on 3 March 2014. Furthermore, by his own admission, the defendant was contacted by Mr Coetzee from the plaintiff in October 2013 and was informed that he should pay the arrears together with storage and towing fees. Despite having been informed to pay the arrears the defendant made no effort to make any payments towards the arrears. In

fact, it was his evidence that he could not make any payments because he could not earn any money a result of the fact that his vehicle was impounded by SAPS. He also conceded that the plaintiff could not be blamed for the fact that the vehicle was impounded by SAPS.

[17] I have pointed out in argument to counsel that the Court does have a measure of sympathy with the defendant who was caught up in a fraudulent scheme which resulted in his vehicle being impounded by SAPS. However, the court cannot lose sight of the fact that the defendant did not – and as a matter of fact by his own admission could not – make any payments towards settling the arrears when he was first required to do so by Mr Coetzee as far back as October 2013. Even after a formal opportunity was granted to the defendant in terms of the section 129 notice to settle the arrears no efforts were made by him to do so.

[18] On 3 March 2014 the defendant was informed that the contract was cancelled *inter alia* on the basis that the defendant had failed to maintain possession of the truck as well as failed to pay the monthly instalments due to the plaintiff. The arrears as at 7 February 2014 was R 47 092.08.

[19] I am therefore satisfied that the defendant was in breach of the agreement and that the plaintiff is entitled to cancel the agreement.

Counterclaim

[20] The defendant filed a notice to amend its plea and counter-claim on the eleventh hour. Despite the lateness thereof the amendment was not opposed and the amendment was granted. In terms of the amendment the defendant claim the return of the vehicle and an order that the vehicle should be restored to the condition it was in before the plaintiff's repossession thereof. The defendant further claim payment of any expenses or cost that may have been accumulated after the goods were removed from the plaintiff. The defendant also seeks an order that the entire agreement be reconstructed.

[21] At the outset I must point out that no case is made out in the counterclaim for the (amended) relief sought. Furthermore, no evidence whatsoever was placed before the court to substantiate the counter-claim. In fact, it was conceded by the defendant that no evidence was placed before the court to substantiate the counter-claim. I should also point out that counsel on behalf of the defendant during closing argument withdrew the counter-claim. In light of the fact that the counter-claim is without any merit whatsoever it is dismissed with costs.

Order

[22] In the event the following order is made:

1. The Instalment Sale Agreement concluded on 5 December 2012 between the plaintiff and the defendant has been cancelled.

2. The plaintiff is entitled to sell the vehicle identified as a New Hyundai Mighty HD72 F/C CC (Engine number: D4DBC514535 and KMFGA17BRCC205594) in terms of section 127(2) of the National Credit Act.
3. The plaintiff is granted leave to apply for damages in an amount calculated in terms of section 127(6) – (9) of the National Credit Act and interest on the said damages at a rate of 11.50% per annum from 4 March 2014 to date.
4. Costs in the amount of R 650.00 together with the Sheriff's costs.
5. The defendant's counter-claim is dismissed with costs.

AC BASSON
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff	:	Adv J Minnaar
Instructed by	:	DRSM Attorneys
For the defendant	:	Adv BM Motshwane
Instructed by	:	Dale Attorneys c/o Seabi Attorneys