IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 2216/10

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD. APPLICANT

and

DEEPCHUN SIAMNATH MAHARAJ
t/a SANROW TRANSPORT RESPONDENT

JUDGMENT Delivered on 06 August 2010

SWAIN J

[1] The applicant and the respondent concluded a credit transaction instalment agreement (the Credit Agreement) in respect of a MAN truck tractor (the vehicle) on 15 February 2008, in terms of which the applicant financed the purchase by the respondent of the vehicle, which would be owned by the applicant, until the respondent had paid in full, the amount owed by the respondent to the applicant.

[2] The Credit Agreement provided that the respondent would be in default if the respondent failed to pay any of the monthly instalments payable in the amount of R10,702.59 on the due date.

[3] It is not disputed by the respondent that as at 20 October 2008, the balance due under the Credit Agreement was the sum of R598,785.90 and the respondent was in breach of the Credit Agreement, in that he was in arrears with his instalments in the amount of R21,877.34. As a consequence, the applicant seeks an order directing the respondent to return the vehicle to the applicant, to be held by the applicant, pending the final decision of the Stanger Magistrates' Court in the action instituted by the applicant against the respondent, for the return of the vehicle.

[4] As a consequence of the respondent's default, the applicant despatched to the respondent a notice in terms of Section 129 (1) of the National Credit Act No. 34 of 2005 (the Act) by pre-paid registered post to the *domicilium* address chosen by the respondent, in terms of the Credit Agreement.

[5] It is in the context of this notice in terms of Section 129 of the Act, that the respondent has raised two defences to the claim of the applicant:

[5.1] The notice is defective in that it did not contain a "proposal" as required by Section 129 of the Act and

[5.2] The respondent did not receive the notice. As service of the notice upon the respondent was a prerequisite to the applicant's

application, the applicant bore the onus of proving service and had failed on the papers to do so.

[6] As regards the first defence, Mr. Khan, who appeared for the respondent, referred me to the decision in

BMW Financial Services (South Africa) (Pty) Limited

v

Dr. M.B. Mulaudzi Incorporated

2009 (3) SA 348 (BPD) at 351 D – F

in support of his argument.

[7] In this case, Mogoeng J P held that it was not the intention of the lawmaker merely to have the credit provider reproduce Section 129 (1) (a) of the Act

"without any flesh being added to the skeleton that it appears to be"

***Supra* at 351 E**

Mogoeng J P at 351 E - F held further that

"Clearly the intention was to propose, which presupposes bringing some thinking to bear upon the Section rather than a dry and mechanical reproduction of the Section. The Section is about the credit provider's proposals, as stated in Section 130 (1) (b) (ii)"

[8] Section 129 (1) (a) of the Act provides as follows:

"129. Required procedures before debt enforcement.-

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 a debt counsellor, alternative 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"

[9] Section 130 (1) (b) of the Act provides that a credit provider may approach the court for an order to enforce a credit agreement only, if at that time, the consumer is in default and has been in default under that credit agreement for at least twenty business days and

"(b) in the case of a notice contemplated in section 129 (1), the consumer has-

(i) not responded to that notice; or

ii) responded to the notice by rejecting the credit provider's proposals; "

[10] In my view, what is intended in Section 129 (1) (a) is that the first objective is to bring to the attention of the consumer the default complained of. The second objective is to propose to the consumer that the consumer seeks the assistance of one of the entities enumerated in the Section, in order to attain the third objective, being a resolution of the dispute under the agreement, or the

development and agreement of a plan to bring the payments under the Agreement up to date.

[11] It is clear that the "proposal" envisaged in the Section, is to engage the services of one of the named entities "with the intent" to achieve a resolution of the dispute. The fact that Section 130 (1) (b) (ii) provides for a rejection of "the credit provider's proposals" does not imply that the proposal must be something more than is expressly provided for in Section 129 (1) (a) of the Act.

[12] The fact that it may be desirable for the credit provider not to:

"merely reproduce the provisions of this subsection and add no flesh or substance to them, to make them alive and understandable to their clients"

BMW Financial Services at 351B and that

"a message to the effect that, if the debtor cannot cope with the current instalment, he/she should approach the credit provider or a credit counsellor to talk about what could be done to prevent drastic action like repossession and a lawsuit being taken against it/him/her, would possibly be considered more as a proposal than the mere regurgitation of a portion of Section 129 (1) (a)"

BMW Financial Services at 351 C

cannot result in the elevation of such an approach to that of a legal requirement, in the face of the clear wording of the Act to the contrary.

[13] Consequently, and in so far as the learned Judge intended to lay down a legal requirement, that the proposal by a credit provider in terms of Section 129 (1) (a), contain more information than what is expressly provided for in the Section, I respectfully disagree with such a conclusion.

[14] The relevant Section 129 notice, in the present case, sets out clearly the requirements of the Section. In the premises there is no basis for this ground of defence.

[15] As regards the second defence raised it was decided by Wallis J in

Munien

v

BMW Financial Services (South Africa) (Pty) Ltd. & another

2010 (1) SA 549 (KZD) at 558 D – G

that Section 129 (1) (a) of the Act did not require that the notice be received by the consumer. The credit provider discharged its obligations of delivering notice, by sending it to the postal address selected by the consumer. Provided the credit provider delivered the notice in the manner chosen by the consumer and such manner was one specified in Section 65 (2) (a) of the Act, it was irrelevant whether the notice in fact came to the attention of the consumer.

[16] In the present case, as in Munien's case, the method of delivery chosen was by way of registered post. Section 65 (2) (a) (i) of the Act only makes provision for delivery by way of "ordinary mail". However, I agree with the view of Wallis J at paragraph 26, that this does not constitute a material departure from the provisions of the Section and the fact that a letter is registered makes it more, not less, likely to reach its destination.

[17] The respondent chose as his *domicilium citandi et executandi* the address of 30 Rose Road, Stanger Manor, Stanger, in terms of Clause 16.1 of the Credit Agreement. Clause 16.4.1 of the Credit Agreement provided that any notice sent by pre-paid registered post "will be deemed to have been received on the fifth business day after posting".

[18] Mr. Kapp, on behalf of the applicant, states that the Section 129 notice was despatched to the respondent at the chosen address by pre-paid registered post. A copy of the notice, together with the registered posting slip is annexed to his affidavit. The response of the respondent to this averment is to note the allegation by the applicant that it despatched a notice in terms of Section 129 (1) of the Act to the respondent and to note that the applicant annexes a copy of the "purported notice" to its founding affidavit. The respondent also alleges that he never received the notice. At the end of his answering affidavit, the respondent says the following in part:

"Save to admit;……18.2 The correspondences and other documentation the applicant alleges are annexed to its founding affidavit are indeed annexed

thereto….. I deny the remaining allegations contained in the founding affidavit to the extent of their inconsistency with the aforegoing"

[19] The registered posting slip forms part of the documentation which the applicant alleges is annexed to its founding affidavit. Nowhere in the respondent's answering affidavit does the respondent deny that the applicant sent the relevant notice by way of pre-paid registered post. I accordingly do not agree with the submission of Mr. Khan that this aspect was denied by the respondent. In any event, even if this aspect was denied by the respondent, I disagree with the submission of Mr. Khan, that the applicant was obliged to put up an affidavit by the person who actually effected the registered posting of the notice, as proof of this fact. In my view, proof of this issue is established by the statement of Mr. Kapp that the notice was despatched by pre-paid registered post, together with the registered posting slip evidencing the same.

[20] A further defence raised by the respondent is that the respondent was placed under debt review by Your Debt Helpline on 15 January 2009, and the applicant was thereby precluded from seeking the return of the vehicle and was obliged to participate in the debt review procedure.

[21] It is however clear that the applicant gave notice to the respondent of intended proceedings in terms of the Section 129 notice, referred to above, on 24 October 2008. Section 86 (2) of the Act however provides that an application for debt review may not be

made in respect of, and does not apply to, a particular Credit Agreement, if at the time of that application, the credit provider under that Credit Agreement has proceeded to take the steps contemplated in Section 129, to enforce that Agreement. There is accordingly no basis for this defence.

[22] The remaining issue is a claim for rectification by the applicant, of the Credit Agreement to substitute the correct engine number and chassis number of the vehicle. The parties are *ad idem* as to the identity of the vehicle, which is the subject matter of the Credit Agreement, but Mr. Khan submits that the applicant is obliged to seek rectification by way of action and not by way of application. Although this is the general rule, it is clear that where there is no dispute of fact as to the common intention of the parties, procedure by way of application may be appropriate

Fouries Poultry Farm v KwaNatal Food Distributors
1991 (4) SA 514 (N) at 527 E

There is accordingly no basis for this argument.

The order I make is the following:

1. The written Credit Transaction Instalment Agreement concluded between the applicant and the respondent at Stanger on 14 February 2008 is rectified by the substitution of the engine number 53508871290894 for the engine number currently reflected thereon being

5350887290844 and by the substitution of the chassis number AAMH620174PX13315 for the chassis number currently reflected thereon being AAMH02074420335.

2. The Sheriff of the Court be and is hereby authorised to attach and remover and thereafter hand over to the applicant, or its agent for storage, the truck described as a 2005 model MAN TGA 6 x 4, bearing the engine number 53508871290894 and chassis number AAMH620174PX13315, and that the aforesaid truck continue to be held by the applicant, pending the final decision of the Stanger Magistrates' Court action, Case No. 36/2009, brought by the applicant against the respondent for the return of the aforesaid truck and other relief.

3. The respondent is hereby directed to pay the costs of this application.

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SWAIN J.

Appearances: /

Appearances:

For the Applicant	:	Mr. A. Camp
Instructed by	:	Easton-Berry Incorporated C/o Hay & Scott Attorneys Pietermaritzburg
For Respondent	:	Mr. M.S. Khan
Instructed by	:	Rakesh Maharaj & Company C/o Govindasamy & Pillay Attorneys Pietermaritzburg
Date of Hearing	:	29 July 2010
Date of Filing of Judgment	:	06 August 2010