Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPEHIGH COURT, CAPE TOWN)

Case No: 6981/13

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

MFC (A Division of NEDBANK LTD) Applicant

and

JAJ BOTHA Respondent

JUDGMENT: DELIVERED: 15 AUGUST 2013

BINNS-WARD J:

[1] The applicant, which is a registered bank, seeks orders,in terms of paragraphs 1 and 2 of its notice of motion, authorising it to sell a certain motor vehicle and to deal with the proceeds of the sale in accordance with s 127 of the National Credit Act 34 of 2005 ('the NCA') and the equivalent terms of an instalment sale agreement concluded in respect of the vehicle between itself and the respondent on 24 July 2012. In terms of paragraph 3 of the notice of motion, it also seeks an order confirming that the agreement 'is cancelled'.

[2] The applicant had purchased the vehicle in question from a car dealership at the instance of the respondent for the purpose of being able to sell it on to the respondent in terms of the instalment sale agreement. The instalment sale agreement is a credit agreement within the meaning of the NCA. The applicant's real role in the sale of the vehicle was thus one of credit provider, and not one of supplier of the goods in question. It is therefore unsurprising

that the agreement between the applicant and the respondent expressly excluded any warranty by the applicant as to the condition of the vehicle selected by the respondent.The respondent had nevertheless returned the vehicle to the applicant on or about 30 August 2012 because he had become dissatisfied with it on account of its allegedly defective condition.

[3] The applicant wishes to deal with the returned vehicle in terms of s 127 of the NCA, and the application has been brought on the premise that it is entitled to do so. The effect of the court acceding to this would be that the vehicle would be sold and the proceeds credited in reduction of the amount owed by the respondent to the applicant in terms of the aforementioned instalment sale agreement. The respondent on the other hand appears to consider that consenting to such a course, and not opposing the current application, would compromise what he considers to be his rights in terms of Part H of chap. 2 of the Consumer Protection Act 68 of 2008 ('the CPA'). He maintains that he returned the vehicle to the applicant in the exercise of his rights in terms of s 56(2) of the CPA, which resorts within the aforementioned Part H. It is evident that the respondent contests the application of s 127 of the NCA on the facts.

[4] Section 127 of the NCA provides:

> **Surrender of goods**
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> (1) A consumer under an instalment agreement, secured loan or lease-
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> (a) may give written notice to the credit provider to terminate the agreement; and
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> (b) if-
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> (i) the goods are in the credit provider's possession, require the credit provider to sell the goods; or
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> (ii) otherwise, return the goods that are the subject of that agreement 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 with the credit provider.
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> (2) Within 10 business days after the later of-
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> (a) receiving a notice in terms of subsection (1)(b)(i); or
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> (b) receiving goods tendered in terms of subsection (1)(b)(ii),
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> a credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information.
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> (3) 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 credit agreement.

(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 obtainable.

(5) 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 following:

(i) The settlement value of the agreement immediately before the sale;

(ii) the gross amount realised on the sale;

(iii) 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

(iv) the amount credited or debited to the consumer's account.

(6) If an amount is credited to the consumer's account and it exceeds the settlement value immediately before the sale, and-

(a) another credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the Tribunal, which may make an order for the distribution of the amount in a manner that is just and reasonable; or

(b) no other credit provider has a registered credit agreement with the same consumer in respect of the same goods, the credit provider must remit that amount to the consumer with the notice required by subsection (5)(b), and the agreement is terminated upon remittance of that amount.

(7) If an amount is credited to the consumer's account and it is less than the settlement value immediately before the sale, or an amount is debited to the consumer's account, the credit provider may demand payment from the consumer of the remaining settlement value, when issuing the notice required by subsection (5)(b).

(8) 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 Magistrates' Courts Act for judgment enforcing the credit agreement; or

(b) pays the amount demanded after receiving a demand notice at any time before judgment is obtained under paragraph (a), the agreement is terminated upon remittance of that amount.

> (9) In either event contemplated in subsection (8), interest is payable by the consumer at the rate applicable to the credit agreement on any outstanding amount demanded by the credit provider in terms of subsection (7) from the date of the demand until the date that the outstanding amount is paid.
> (10) A credit provider who acts in a manner contrary to this section is guilty of an offence.

[5] Section 56(2) of the CPA provides:

> Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, either-
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> (a) repair or replace the failed, unsafe or defective goods; or
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> (b) refund to the consumer the price paid by the consumer, for the goods.

[6] The term '*supplier*' is defined in s 1 of the CPA. It means '*a person who markets any goods or services*'. The word '*market*' is also defined in s 1 of the CPA. When used as a verb, it means '*to promote or supply any goods or services*'. In the current case it clear that the applicant did not market the vehicle; it merely financed it. Keitzman Finance is the entity identified in the contract documentation as the '*supplier*' or '*dealer*' in respect of the vehicle and it is apparent from the 'Acknowledgement of Delivery' document signed by the respondent that he took delivery of the vehicle from Keitzman Finance. The word '*consumer*' is also defined in the CPA. It includes '*a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business*'. By reason of the defined meanings of the words '*promote*' and '*supply*', the applicant and the respondent bothqualify as 'consumers' under the CPA in respect of the motor vehicle concerned.

[7] Section 5(2)(d) of the CPA provides that the Act does not apply to any transaction '*that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act*'. However, the practical import of s 5(2)(d) of the CPA in the context of a case like the current matter is far from clear. While it is plain that the instalment sale agreement between the applicant and the respondent is excluded from the operation of the CPA, the effect of the qualification retaining the subject matter of the contract (i.e. the vehicle) within the ambit of the Act is far from obvious.

[8] The apparent object of s 5(2)(d) of the CPA is to distinguish the position of a credit provider from that of a supplier and to protect the contractual rights of a credit provider which has financed the supply of goods by a supplier to a consumer, while seeking at the same time to preserve the consumer's statutory protection against the supplier. However, I have been unable to identify (and nor could counsel) any provision in the Act that facilitates the achievement of the second of the aforementioned apparent objectives in the readily conceivable context of the factsof the current case.

[9] It is not plainly evident how a consumer in the position of the respondent would be able to avail of the protection offered to consumers in terms of s 56(2) of the CPA. He could not return the vehicle to the supplier against a refund of the purchase price because ownership of the car vested in the credit provider; and it was the credit provider, and not he, that had paid the purchase price. Counsel appeared agreed in the circumstances that the only practical manner in which effect could be given to the evident legislative object would be either for the bank to cede its rights as 'consumer' against the supplier in terms of the CPA to the respondent, thus permitting the latter to return the vehicle to the dealer against a refund of the purchase price, or for the bank, at the instance and request of the respondent, to exercise its rights as 'consumer' directly against the supplier and to give the respondent the benefit of the refund of the purchase price in satisfaction or reduction of the latter's liability to it under the instalment sale agreement.

[10] Unfortunately, and no doubt due to the lack of clarity in the relevant provision and the absence of any reported judicial interpretation thereof, neither of these courses was followed, and the six months' window of opportunity for appropriate action to be taken has passed. Instead, both parties proceeded under a misapprehension as to the legal effect of the respondent's surrender of the vehicle to the applicant. The applicant treated it as a surrender within the meaning of s 127 of the NCA,while the respondent considered that he had no liability to the applicant because he thought that he had been relieved of any further obligation in respect of the purchase of the vehicle because of the protection he believed he was afforded in terms of s 56 of the CPA.

[11] The applicant was misdirected in characterising the surrender of the vehicle as having been in terms of s 127 of the NCA. That provision applies in a case of the surrender of goods by a consumer who wishes voluntarilyto terminate a credit agreement on the basis of the further provisions of the section, that is that the goods will be realised by the credit provider

and the proceeds applied in reduction of the consumer's outstanding liability under the contract. The provision is in no way the equivalent of s 56 of the CPA. The latter provision contemplates a return of *defective* goods, with a consequent termination of any pertinent contractual relationship between the supplier and consumer, effectively on the basis of a *restitutio in integrum*; whereas the former provides for a regulated basis for a credit provider to recover contractual damages upon the statutorily permitted voluntary termination of a credit agreement by a consumer. The consumer is able to effect such a voluntary terminationby giving notice in terms of s 127(1)(a) of the NCA.

[12] The respondent did not give the applicant notice in terms of s 127(1)(a) of the NCA when he surrendered the vehicle and the procedures contemplated by the further subsections in the provision therefore did not find a basis for application. The endeavour by the applicant's counsel to have the following sentence in an email sent by the respondent's legal advisors to the applicant and the supplier of the vehicle, amongst others, on 15 November 2012,

> 'Our client has been advised to cancel all debit order instructions in this regard, and we confirm that same has been done'

construed as notice in terms of s 127(1)(a) was misplaced. The email in question fell to be read in the context of the earlier correspondence therein referred to, which includes a letter addressed on behalf of the respondent to the supplier, dated 30 August 2012, which made it plain that the respondent's surrender of the vehicle purported to have occurred in terms of s 56 of the CPA – not s 127 of the NCA - and on the basis that the respondent would have no responsibility in respect of the non-payment of the purchase price. The letter of 30 August 2012 had been copied to the applicant.

[13] The respondent was equally misdirected in conceiving that he was covered by s 56 of the CPA because the contract between himself and the applicant, being a credit agreement within the meaning of the NCA, was excluded in terms of s 5(2)(d) of the CPA from the application of that Act. Moreover, the applicant was in any event not the 'supplier' of the vehicle within the definition of that term in the CPA.

[14] When confronted during argument with the applicant's difficulties in purporting to rely on s 127, the applicant's counsel argued in the alternative that on any approach the respondent had repudiated the agreement and that the applicant by accepting the repudiation had terminated the contract and should thus be entitled to sell the vehicle. He submitted that

the claim against the respondent for payment of any shortfall that might thereafter exist should not be a matter to concern the court at this stage. Apart from the consideration that the argument ran counter to the relief sought in terms of paragraph 2 of the applicant's notice of motion, it also overlooked the statutory formalities applicable in terms of the debt enforcement provisions of the NCA.

[15] Section 129(1) of the NCA provides:

> If the consumer is in default under a credit agreement, the credit provider-
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> (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; and
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> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-
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> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
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> (ii) meeting any further requirements set out in section 130.

Proceedings to confirm the cancellation of a credit agreement, or to claim relief consequent upon such a cancellation have been characterised as enforcement proceedings within the meaning of s 129(1) of the NCA; see the judgment of the full court in *Absa Bank Ltd v De Villiers and Another* 2009 (5) SA 40 (C) and compare the observations made *en passant*thereanent in *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA), at para 8. (The characterisation is paradoxical having regard to the common law principle that holds contractual enforcement to be the very antithesis of cancellation, but it seems to be supported by the peculiar language of the relevant provisions of the statute read contextually; cf. *Standard Bank of South Africa Ltd v Newman* [2011] ZAWCHC 91 (15 April 2011) at para 7.)

[16] The applicant has not complied with the provisions of s 129(1) of the NCA.

[17] In the result, and inasmuch as the relief sought in terms of paragraphs 1 and 2 of the notice of motion was predicated on the supposed application of s 127 of the NCA, the applicant has failed to make out a case. It is also not entitled at this stage to an order in terms of paragraph 3 in terms of the alternative argument advanced on its behalf because it has not

complied with s 129(1) of the Act. In that regard the proceedings are thus of the character contemplated by s 130(3)(a) of the NCA.[1] The applicant's counsel requested that should I arrive at such a conclusion the proceedings should be adjourned in terms of s 130(4)(b) of the Act[2] with directions to be given on the appropriate steps to be taken before their resumption.I shall accede to that request.

[18] There remains the issue of the costs occasioned in connection with the hearing before me at this stage. The applicant's counsel submitted that costs should stand over to be decided by the court which might deal with the matter further after the applicant has complied with the terms of the adjournment order. There is no good reason to accede to that request. The adjournment has been necessitated by the applicant's misconception of the case as being one arising from the provisions of s 127 of the Act, and its consequent failure to comply with s 129(1). The respondent was fully justified in coming to court to oppose the relief sought against it on the basis of s 127 of the NCA and the provisions of clause 15 of the credit agreement that mirrored that section. It is only right that the applicant should bear the costs associated with this stage of the proceedings.

[19] The following order is made:

1. The application for relief in terms of paragraphs 1 and 2 of the notice of motion is refused.

2. Save as provided in paragraph 3 hereof, the hearing of the application for relief in terms of paragraphs 3, 4 and 5 of the notice of motion is adjourned *sine die* and it is directed that the proceedings may be resumed on notice to the respondent only after the applicant has complied with the provisions of s 129(1) of the National Credit Act

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[1] Section 130(3)(a) of the NCA provides:
Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-
(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;
(b)

[2] Section 130(4)(b) of the NCA provides:
In any proceedings contemplated in this section, if the court determines that-
(a)…
(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c) the court must-
(i) adjourn the matter before it; and
(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.

34 of 2005 and the period of at least ten business days provided in terms of s 130(1)(a) of the Act hasthereafter elapsed.

3. The applicant shall pay the respondent's costs of suit incurred in respect of the hearing on 14 August 2013 and the noting of this judgment on 15 August 2013.

A.G. BINNS-WARD

Judge of the High Court