IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 9990/13

In the matter between:

AUDI FINANCIAL SERVICES a division of WESBANK

a division of FIRSTRAND BANK LIMITED Plaintiff

and

EBRAHIMA SAFTER Defendant

Delivered: 28 June 2017

JUDGMENT

BOQWANA, J

Introduction

[1] The plaintiff instituted action against the defendant for payment of damages arising from an instalment sale agreement, concluded between the parties after the vehicle which was the subject matter of the agreement had been repossessed by the plaintiff and sold by way of auction. It is common cause that the parties entered into a written agreement on or about 30 November 2006 at Cape Town, Barloworld Motor (Pty) Ltd t/a Audi Centre ('Audi Centre'), in terms of which the defendant purchased from Audi Centre a 2006 Audi Q7 motor vehicle ('the motor vehicle' / the vehicle') for a total purchase price of R965 269. 80 which included finance charges of R265 241. 18 and a processing fee of R3500. 00.

[2] In terms of the agreement the defendant would pay the purchase price in monthly instalments of R12 640. 33, commencing on 10 January 2007, with the final instalment of R 219 490. 33 due on 29 November 2011.

[3] It was agreed that ownership of the vehicle would remain vested in Audi Centre until the full amount owed under the agreement was paid by the defendant.

[4] It was further agreed that in the event of the defendant breaching any term of the agreement, the plaintiff would be entitled to cancel the agreement, obtain possession of the motor vehicle, sell the vehicle, keep all payments made by the defendant and claim the balance, if any, from the defendant as damages. Finally, the defendant's chosen *domicilium citandi et executandi* was *[…] F. Street,* Cape Town.

[5] Audi Centre ceded its right, title and interest in the agreement to the plaintiff, which accepted the cession of same.

[6] It is common cause that the defendant breached the agreement by falling into arrears with his payment obligations. As a result thereof the plaintiff elected to cancel the agreement and on 27 July 2011 the plaintiff issued summons against the defendant, in this Court under case number 15177/11, in which the plaintiff claimed, inter alia, cancellation of the contract as well as return of its motor vehicle.

[7] The defendant defended the action and the plaintiff applied for summary judgment, which was granted by Acting Judge Eloff on 14 October 2011. Eloff AJ confirmed the cancellation of the agreement and ordered the defendant to deliver the vehicle to the plaintiff. Leave to appeal was refused. The defendant approached the Supreme Court of Appeal ('SCA') on petition, which granted leave to appeal to the full bench of this division. An order was granted by the full court, dated 21 January 2013, which dismissed the appeal with costs, including costs relating to the application for leave to appeal and the petition to the SCA.

[8] In the intervening period prior to the finalisation of the appeal and on or about 7 January 2013, the plaintiff obtained possession of the motor vehicle when the defendant signed a notice of termination.

[9] The plaintiff alleges that the defendant had surrendered the vehicle voluntarily. It further contends that it sent to the defendant a notice in accordance with the provisions of s 127(2) of the National Credit Act 34 of 2005 ('the NCA'), informing the defendant of the value attributed to the motor vehicle. The defendant failed to respond to such notice and the vehicle was, according to the plaintiff, sold at auction at the best possible price, taking into account the state of the economy at that time. The contract balance as at the date of repossession was the sum of R434 809.56. The motor vehicle was duly appraised and valued in the sum of R 60 000.00 plus VAT and sold for R140 000.00.

[10] The plaintiff also contends that it complied with ss 127(5)(a) and (b) of the NCA, by crediting the defendant's account with the proceeds of the sale less any expenses reasonably incurred by the plaintiff in connection with the sale of the goods. As the settlement value exceeded the value obtained after the sale of goods, the plaintiff contends that written notice was sent affording the defendant 10 days in which to settle the outstanding balance, and the defendant failed to do so. The plaintiff further alleges that it sent a notice in terms of the provisions of s 129(1)(a) of the NCA, via registered mail.

[11] The amount claimed in the summons was originally R261 797.98. The plaintiff however reduced its claim to an amount of R211 984.33 in light of the fact that the legal fees were not taxed or agreed, following the decision of *Nkata v FirstRand Bank Limited* 2016 (4) SA 257 (CC). The amount claimed, including its reduction, was not contested by the defendant.

[12] The plaintiff called three witnesses in support of its claim, being, Johannes Petrus van Niekerk ('Van Niekerk'), Hasina Sonday ('Sonday') and Alistair Samuels ('Samuels'). The defendant closed his case without calling any witnesses.

Issues to be determined

[13] The defendant had initially challenged the cancellation of the contract, as one of the issues contested, on the basis that there was a debt review in place. Mr Khan for the defendant advised the court during oral argument that the defendant no longer placed the issue of cancellation in dispute; he submitted that the defendant agreed that the agreement had been cancelled. He further agreed that the appeal court dismissed the appeal on 21 January 2013. Mr Khan also submitted that the defendant no longer persisted with the contention that he did not receive the s 127(5) notice. This issue was in any event not pleaded, although it featured in cross examination of the witnesses and in the defendant's heads of argument. Finally, he submitted that the defendant was also abandoning his challenge that s 129 (1) was not complied with.

[14] The remaining issues in dispute are therefore:

(a) Firstly, whether the defendant voluntarily surrendered the vehicle to the plaintiff. This question is significant because, according to the defendant, if the surrender was not voluntary, the plaintiff would not have been entitled to repossess the vehicle, as the appeal was still pending. In those circumstances the court order would have been suspended pending the finalisation of the appeal.

(b) Secondly, whether there was compliance with s 127(2) of the NCA. The defendant alleges that he did not receive the notice. According to him,

had he received the notice, he would have had the opportunity to take the vehicle back instead of losing it and having to pay any further money to the plaintiff.

(c) Thirdly, whether the plaintiff complied with the Consumer Protection Act 68 of 2008 ('the Consumer Protection Act') when advertising the vehicle for the auction.

Plaintiff's case

[15] Van Niekerk testified that he works at WesBank Asset Remarketing as a sales manager. He leads a group of employees that receives vehicles that have been repossessed and brought to the store. He has been in this position for the last eight years. His department ensures that those vehicles are inspected when they come in. They are then valued and the necessary s 127(2) and (5) notices are sent to the respective clients. These vehicles are then authorised for sale, after which they are repaired and prepared for auction. The day before an auction Van Niekerk and his team would go and establish estimate sale prices, which they would use as a reserve. On the day of the auction they would ensure that the vehicles are sold for the highest possible bid. Van Niekerk did not know the defendant personally, but knew that he had an account with the plaintiff on which he had defaulted and that the plaintiff had repossessed his vehicle by means of a court order and eventually disposed of the vehicle on auction. According to Van Niekerk, the plaintiff utilised tracers from Kitshoff & Associates ('Kitshoff'/ 'the agents') to repossess the vehicle after it obtained the summary judgment. The defendant wanted to appeal and his appeal [sic] was dismissed but he later on got permission to take it to the full bench and the appeal was again [sic] dismissed with costs.

[16] The field agents from Kitshoff would go and meet with a defendant who would hand over the vehicle. When the defendant hands over the vehicle to the agents, they would inspect it together and fill out an inspection form and the defendant would also sign a notice of termination with the agent. The same

process happened in this case and the defendant signed a voluntary termination notice.

[17] The inspection report noted that there were problems with the motor and electronics of the vehicle. The vehicle had packed up and the battery was flat. The vehicle was a non-runner at the time, meaning it was not in a working condition. It also had scratches, cracks and dents. The defendant signed the inspection report to confirm what was noted therein. Because the vehicle was not in a working condition, it was towed to Auction Operations for it to be turned into a runner.

[18] Once the vehicle was towed to Auction Operations, Van Niekerk went there to inspect it in order to provide a *prima facie* valuation of the vehicle. The impression of the real value at that stage, unless disputed, was 25% of the trade price because it was a non-runner. The 'for sale' market value was R60 000.00. The plaintiff would normally expect it to be sold at a higher price at the auction. The vehicle was turned into a runner, the battery was replaced and it was fixed cosmetically and sent to the valet for cleaning. The estimated price for the vehicle, established by Van Niekerk the day before the auction was R 120 000.00. It was eventually sold for R140 000.00 excluding VAT. Compared to the estimation it was sold at a good price.

[19] The auction was advertised in numerous newspapers, namely, The Citizen, Die Burger, Cape Times, Die Beeld, The Argus, Die Rapport and The Sunday Times. Van Niekerk attended the auction on 11 April 2013 and there were 152 people present.

[20] In cross examination, he testified that the plaintiff sent the agents to collect the vehicle as it was not delivered to it as per the court order, but it was totally voluntary. When asked what the field agents would have said when asking the defendant to sign for the vehicle, he testified that he was not present when the document was signed. It was put to him that a court order could not be enforced because there was an appeal pending and therefore the defendant had given the vehicle voluntarily. His answer was that that was correct.

[21] When asked about how would the public and the defendant know that the defendant's vehicle was to be sold at an auction, he responded by saying that they would, because the newspaper advertisement contained a telephone number and website where enquiries could be made. Therefore, if a member of the public went to the website they would see the items on sale on that specific day. There were also auction lists with the description given. According to him, it is not stated anywhere in the legislation that details of a specific vehicle belonging to the defendant must be mentioned (in the newspaper advertisement). At the time of repossession the defendant was informed where his vehicle was going as indicated in the inspection report which he signed. It indicated that the vehicle was stored at Auctions Operations in Drill Road with name and contact details of a contact person. Whilst a copy of the inspection report was not given to the defendant at the time, he could be given a copy upon request. The plaintiff would have informed him, before it sold his vehicle on auction, as to which auction house the vehicle would be auctioned. The defendant would have received an SMS notification. He did not personally inform the client of the date and venue of the auction. He recalled seeing an entry that an SMS was sent to the defendant informing him of the auction of his motor vehicle. The s 127(2) and (5) letters are sent by the plaintiff's legal department.

[22] Sonday testified that she is a specialised controller working in Specialised Collections at WesBank. When a vehicle is repossessed an agreement is cancelled. If the vehicle is to be sold, her department sends out the s 127(2) letters. If the time has expired and the client is able to pay his or her arrears plus costs or negotiates a repayment arrangement, the plaintiff would reinstate the agreement. If the client, however, fails to pay or negotiate a repayment arrangement, the plaintiff would then proceed to sell the vehicle on auction. Sonday has been working in this position for 11 years.

[23] The defendant's account was allocated to her in February 2013. The agreement (with the defendant) was cancelled. It came in with a court order. The

plaintiff sent a s 127(2) notice to the defendant. It was the second time the vehicle had been repossessed and sold. The first time around the s 127(2) was system generated and sent to the defendant. He then paid the arrears plus costs and the agreement was reinstated. Because it was the second time the s 127(2) notice was sent, it was manually generated. The first time the letter is sent it goes to the client automatically, the second time it is sent off to the client manually. She manually generated the letter on the system and it was posted. The mailroom has a dropdown box in their system. She generated the letter, printed it, put it in the envelope and sent it to the mailing room. The mailing room sent it off to client.

[24] A client is also sent SMS messages to contact the plaintiff regarding the valuation amount. These SMS messages are also system generated. They go automatically (to the client's cell phone number). The reason for the SMS is for the customer to see that the vehicle has been valued, to contact the plaintiff and to pay. The system sends the SMS when the valuation amount is loaded.

[25] She referred to the plaintiff's computer system which contains entries of what SMS messages were sent to the defendant. According to these records, on 8 January 2013 a valuation amount was sent to the defendant's cell number by Frank van Staden. An entry was also made on 13 February 2013 that a s 127(2)(b) valuation letter was sent to 'customer – customer's residential'. The system however stated that the letter was not sent. She saw this and realised it was because this was a second repossession and that is when and why she generated the s 127 (2)(b) letter manually. Another entry was made on the same date stating that saleable date was sent via SMS to client's cell number. On 13 February 2013 it was recorded that an SMS had been sent that *'YOUR VEHICLE HAS NOW BEEN FORWADED TO BE SOLD ON AUCTION – CONTACT HASINA SONDAY AT WESBANK TEL: 021 4433413'*. Another system entry recorded a saleable date SMS to client's cell number on 13 March 2013 by Sadika Mohamed.

[26] Sonday stated that a s 127(2) letter is sent (to a client) if a vehicle is taken in because of a court order or a voluntary termination. If the agreement is cancelled

with a court order the full settlement value must be paid. The plaintiff does not reinstate that agreement. The agreement in the current matter was cancelled. The arrears of R 413 480.22 had equalled the outstanding balance, because the agreement had also expired on 29 November 2011. The s 127(2) letter was sent on 13 February 2013, after the agreement had expired. The defendant never contacted the plaintiff or tendered payment of the arrear amount. The letter was sent to the address given by the defendant to the plaintiff. A s 127(5) automated letter was sent to the defendant on 20 April 2013 as per the electronic records. A further entry was made on that day by Sadika Mohamed that 'PROCEEDS SMS' was sent to the defendant's cell number.

[27] In cross examination, Sonday conceded that she did not personally post the s 127(2) letter. She gave it to the mailing room personnel to post. She testified that the mailing room personnel sent all the letters and there would be no reason why they would not send the letter to the defendant. Their job is to send letters and all the letters go. She conceded that she did not see them posting the letter. The s 127 letters, unlike the s 129 letters, are not sent by registered mail. Even though summons had been served and the agreement cancelled, they still gave a client an opportunity to pay the settlement. She conceded that whether repossession of goods was voluntary or done by a court order, a s 127(2) letter would be sent. They do not keep proof of postage of these letters. She was not aware that the defendant had signed a voluntary surrender of his vehicle; she was aware of a court order and that once summons was served on the defendant, the agreement was cancelled. She was not aware of the appeal and that the order had not yet been confirmed; she did not deal with this area (of work) at all. The SMS was system generated and was sent to the number they had on the system. The system shows the SMS was sent. When the vehicle was sold, the account went to Sadika Mohamed.

[28] In re-examination she testified that because the agreement had expired, despite the s 127(2) letter being sent, the defendant still had to pay the full settlement amount.

[29] Samuels testified that he works for the plaintiff as a team leader in the Specialised Collections department. He leads a team of people that attend to defaulting customers when their accounts have been referred for legal action. He ensures that the plaintiff complies with legislation, gives instructions to attorneys to proceed with legal action and monitors the process. He has been a team leader for three years, but has been in that Specialised Collections department for nine years. Sonday is a member of his team. He knew the defendant had an account with the plaintiff which went into arrears. The account was cancelled and the vehicle was sold on auction.

[30] The plaintiff complied with the NCA by sending the s 129 notice, dated 2 June 2011, *via* registered mail. The defendant responded to the s 129 notice by forwarding an email and, according to his recollection, the defendant also applied for debt review. They were notified that the defendant applied for debt review on 12 August 2011. Summons had been issued on 27 July 2011, which was before the defendant had applied for debt review. The defendant made several sporadic payments from August (2011) when he had applied for debt review, the last payment being on 5 April 2012. The plaintiff accepted these payments because the defendant had a balance outstanding on his account. The plaintiff would always accept the payment to reduce the losses against defendant's account. The plaintiff did not include the defendant's account in the debt review application because it had already sent a s 129 notice via registered mail and had already instituted litigation prior to the debt review application. The plaintiff was not served with any debt restructuring application and Samuels was not aware of any such application pending before the magistrate court.

[31] He testified that prior to the current litigation, the plaintiff sent ss 127(2) and 127(5) notices. The defendant was thereafter sent another s 129 notice regarding

the shortfall on his account and the amount that the plaintiff was now claiming in the summons. The s 127(3) letter was sent to the defendant on 13 February 2013. The s 127(5) letter was dated 20 April 2013. These letters are sent *via* normal mail which is why an additional s 129 letter was sent *via* registered mail informing the defendant that he needed to pay the shortfall. The defendant responded to this notice by sending an email *via* his Professional Assistant ("PA"). This email was received by the plaintiff's attorney of record on 12 June 2013. The email reads as follows:

> "Dear Sirs/Madam
>
> **RE: REF JRG/nb 3701 – MR E SAFTER – NATIONAL CREDIT REGISTRATION NUMBER – NCRCP20**
>
> I have been out of town for a few days due to work commitments and only returned on Sunday 9th June 2013. I have collected your registered letter on Tuesday 11th June 2013. I will seek legal assistance regarding this matter, with reference to (paragraph 5) of your letter, Notice in terms of section 129 (1) of the National Credit Act 35 of 2005.
>
> I trust my response to this matter is in order and please note that your (sic) have my full cooperation in this regard.
>
> Kind Regards
>
> Celeste Camphor
>
> P.A. to Mr Ebrahim Safter
>
> Jet Set VIP Protocol'

[32] No other information or notification was received from the defendant after this email, hence the plaintiff initiated the current action against the defendant. Before the vehicle was sold the balance was R 434 809.56. The reason being that the contract had expired over a period of time. The vehicle was then sold at an auction for an amount of R159 600.00 including VAT. The plaintiff paid over an amount of R19 600.00 to SARS in respect of VAT. The plaintiff claimed an amount of R33 158. 00 back from SARS due to the fact that it had paid VAT at the

commencement of the agreement. After taking all the transactions into account, the loss suffered by the plaintiff was R261 797. 98 which is what was claimed from the defendant. Legal fees totalled an amount of R49 813.65. These legal fees were not taxed or agreed to between the parties and in light of recent case authority the plaintiff decided to reduce its claim by deducting the amount of R49 813.65 from the R261 797.98 claim to get to the amount of R211 984.33. At this point the plaintiff moved for an amendment to its particulars of claim that the amount claimed by the plaintiff against the defendant was now R211 984.33, which I granted.

[33] According to Samuels, the agreement was no longer extant at the time the s 127(2) was sent, because the plaintiff had cancelled the agreement in the summons of the first action. The summons was served on the defendant on 4 August 2011 at 13h35. The agreement was due to expire on 29 November 2011. Therefore, on 13 February 2013, which was the date on which the s 127 (2) letter had been sent, the agreement was not in existence.

[34] In cross-examination, it was put to him that the cell number appearing in the application for debt review in 2011 is different from the one that the SMS was sent to in August 2013 regarding the valuation amount. To this he testified that the bank did not receive any notification from the defendant to update his contact details. They did not receive notification that the number they had in their records was invalid and that the one that was in the debt review application was the correct one. The address that the plaintiff had, had been provided by the defendant. The ss 127(2) and 127(5) letters were sent by ordinary mail. He indicated that he would not dispute it if the defendant were to say that he had not received the letters. They had not received an instruction that the ss 127(2) and (5) letters must be sent via registered mail, but he was aware of a recent constitutional court ruling that required these letters to be sent via registered mail. He conceded that the amount that the defendant would be liable for after the sale of the vehicle, if it was sold at R60 000 (as valued), would have been a substantial amount and therefore the s

127(2) letter was an important letter that the defendant had to receive, which was the reason why it ought to be sent by registered mail. He testified that whilst the defendant paid a substantial sum in instalments to the plaintiff and suffered loss of money, he made use of the vehicle. Samuels was not aware that the defendant had appealed the court order but he had (recently) read about it. He could not say why the vehicle was handed over when the appeal was still pending, but he could see from the trial bundle that the defendant signed a notice of termination. His department was not responsible for giving an instruction to collect the vehicle; that would come from one of the representative managers of the plaintiff. He agreed that the tracers could not take the vehicle against the defendant's will. He did not know whether the defendant had been forced or threatened to hand over the vehicle.

[35] He testified that the plaintiff did send s 127(2) letters even after a court order (had been granted), but due to a recent amendment in the NCA, they could no longer reinstate the agreements after cancellation. The s 127(2) letter was sent prior to the amendment and the plaintiff would have released the vehicle if the defendant had paid the arrears. In re-examination, however, he testified that it was not possible to reinstate something that had already expired through effluxion of time. According to him, in this case, reinstatement would not have been possible because the agreement had expired and there was no contract to reinstate.

[36] He testified further that it was incorrect that the amount outstanding had escalated by approximately R100 000, as was put to him by Mr Khan, since the initial summons was issued. This is because an amount pertaining to legal fees was taken off. He confirmed that the interest rate charged was in terms of the contract and that the plaintiff was also entitled to charge interest on instalments which had not been paid timeously.

Discussion

Lawfulness of the repossession of the vehicle of the defendant

[37] In this case we have a situation where there was a court order granted by Eloff AJ on 14 October 2011. Leave to appeal this order was granted by the SCA, to the full court of this division. That appeal was dismissed on 21 January 2013. Before the appeal was decided, the defendant signed a notice of termination dated 7 January 2013. There is a dispute as to the lawfulness of this termination notice and the repossession of the vehicle. It is submitted on behalf of the defendant that he was forced to sign the notice of termination and return the vehicle, by the agents who went to his home.

[38] Whilst some of the plaintiff's witnesses seemed to suggest that the motor vehicle was repossessed from the defendant pursuant to a court order, it is not disputed that it would have been impermissible for the plaintiff to claim possession of the vehicle whilst the appeal was pending.

[39] It is not clear what circumstances led to the defendant signing the notice of termination of agreement, as none of the persons involved in this regard were called. What is on record, however, is a document signed by the defendant which reads as follows:

> "NOTICE OF TERMINATION
>
> 1. I EBRAHIM SAFTER, the Consumer, in terms of Section 127 of the National Credit Act, No 34 of 2005 ("the NCA") hereby give written notice to (FNB) WESBANK ("the Credit Provider") of the termination of the "instalment/lease/secured loan agreement ("the Agreement") under account number […] in respect of the following goods:
>
>   (Full description of goods/secured loan) 2006 AUDI Q7 FS1V8 Reg no:
>
>   CA […]
>
>   Chassis no W[…] ("the goods")
>
> 2. I agree to hand back the Goods to the Credit Provider and require the Credit Provider to sell the goods.
> 3. I am aware that the Credit Provider will give me a written notice of the estimated value of the goods and after receiving such valuation notice, I may

unconditionally withdraw this termination notice within 10 (ten) days of receipt of the valuation notice and resume possession of the goods, provided that I am not in default of Agreement.

4. If I do not withdraw my termination, the credit provider may sell goods as soon as practicable for the best price reasonably obtainable.
5. Thereafter, my account will be credited with the sale proceeds less any expenses reasonably incurred in respect of the sale of the goods.
6. I will be liable for any shortfall on my account and will be called upon to pay same or make a suitable payment arrangement, within 10 (ten) business days of receiving a demand notice, failing which the Credit Provider may commence legal proceedings in terms of the Magistrate's Court Act 32 of 1944.
7. Interest at the rate specified in the Agreement will be payable by me from the date of the demand notice until the outstanding amount is paid.
8. Upon payment of the amount demanded, your liability in terms of this account will be complete.

Signed at ZONNEBLOEM on the 07 date of JAN 2013

_____

Consumer " (Own emphasis)

[40] The defendant does not dispute that he signed the document; what he placed in issue, by way of the questions Mr Khan put to the plaintiff's witnesses, was that he was forced to surrender his vehicle by people who went to his home to fetch it. The plaintiff's witnesses could not comment on whether or not that was correct, as they were not there when the vehicle was repossessed from the defendant. The defendant decided not to testify. The version put by Mr Khan to the witnesses does not amount to evidence. It ought to have been repeated under oath. The court must therefore accept that the notice of termination containing the signature of the defendant, with its content that I have quoted above, is a reflection of what transpired on the date of signature.

[41] At the end of oral argument while the defendant was about to complete his argument, as Mr Khan was being quizzed by the Court about the defendant's case, he reacted by stating that he wished to amend the defendant's plea to allege that the

surrender of the vehicle was not voluntary. Apart from this being a knee-jack reaction at the late stage of the proceedings, an amendment of the plea, in my view, was not going to assist the defendant because the issue of whether or not the vehicle was surrendered voluntarily was an evidential issue and no such evidence was led and that could not be cured by means of an amendment to the plea. I indicated that to Mr Khan at which point he asked that the matter be postponed so he could call the defendant to give evidence. I declined that request on the basis that argument had almost been completed and the defendant had been observing the proceedings as they were unfolding. I was of the view that the postponement as well as allowing the defendant to testify at that stage of the trial would prejudice the plaintiff and would not be in the interests of justice. Furthermore, it did not seem to have been the intention of the defendant to apply for the re-opening of his case in the first place. This is indicated by the manner in which Mr Khan raised this request. It seemed to have been a quick reaction to what transpired during argument and appeared to have been a realisation that the defendant had made a mistake by not testifying. This occurred with the defendant having listened to the argument the entire time. Allowing this would, in my view, have been akin to permitting the defendant to conduct '*trial by ambush*'.

[42] Seeking to correct a tactical blunder late in the proceedings may in some cases cause an injustice to the other party who would not have had an opportunity to investigate and properly respond to the issues raised. See *Erasmus, Superior Court Practise,* Second Edition at D1-333 footnote 7 where reference is made to *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at 263.

[43] In my view, this was not one of those cases where the Court should have exercised its discretion in favour of the defendant by allowing him to re-open his case and testify. If allowed this would mean parties could, after having listened to the entire case and having made an election on how they would conduct their case, decide that they want to change course and restart the entire case. This approach would, in my view, be equivalent to one '*having his/her cake and eating it*'.

[44] Having been presented with the evidence of the notice, signed by the defendant, with nothing to gainsay it, I find that the termination of the agreement followed by the surrender of the vehicle was voluntary.

Applicability of s 127(2)

[45] As regards the s 127(2) point, according to the plaintiff, the notice of termination of agreement was signed after the plaintiff had cancelled the agreement and therefore s 127 (2) did not apply. Section 127 of the NCA provides that:

> " **Surrender of goods**
>
> 127. (1) A consumer under an instalment agreement, secured loan or lease –
>
> (a) may give written notice to the credit provider to terminate the agreement; and
>
> (b) if –
>
> (i) the goods are in the credit provider's possession, require the credit provider to sell the goods; or
>
> (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.
>
> (2) Within 10 business days after the later of –
>
> (a) receiving a notice in terms of subsection (1)(b)(i); or
>
> (b) receiving goods tendered in terms of subsection (1)(b)(ii),
>
> a credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information.
>
> (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 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.

…

(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).

…" (Own emphasis)

[46] Section 127 deals with a situation where the consumer wishes to terminate a credit agreement, by giving notice to the credit provider and surrendering the goods to same. Section 127(2)(b) then requires the credit provider to give the consumer written notice of the estimated value of the goods so that the consumer may, under s 127(3), consider whether or not to withdraw the written notice of termination of agreement and resume possession of the goods, if such consumer is not in default under the agreement. If the consumer does not respond to the notice sent in terms of s 127(2)(b) within the stipulated time period, then the credit provider must sell the goods for the best price reasonably obtainable as soon as possible.

[47] After selling the goods, s 127(5) provides that the credit provider must credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale and deduct its expenses in connection with the sale of the goods. Thereafter, it must give written notice to the consumer in terms of s 127(5)(b) of the settlement value before the sale and other relevant information resulting from the sale. These provisions are applicable when the consumer surrenders the goods to the credit provider voluntarily.

[48] The plaintiff's argument started from the premise that the contract between the parties had been cancelled and therefore s 127(2) did not apply. Ms Nel-Wade argued that paragraph 9 of the particulars of claim in the first action before Eloff AJ, stated that the plaintiff elected to cancel the agreement and recover possession of the vehicle following the breach of the agreement by the defendant. The cancellation became effective upon service of the summons on the defendant on 4 August 2011 at the defendant's chosen *domicilium*. Such cancellation was confirmed by Eloff AJ in his order. The appeal against Eloff JA's order was dismissed. As already stated, cancellation of the contract is no longer in issue.

[49] Ms Nel-Wade referred to the decision of *Edwards v Firstrand Bank Ltd t/a Wesbank* 2017 (1) SA 316 (SCA), involving the same plaintiff, which she

submitted was on all fours with this matter. In that case Shongwe JA held the following at para 16:

> "[16] Whilst generally I am inclined to agree with the proposition that ss 127(2) – 127(9) of the Act are applicable, I however consider that they are not applicable in the present case because the agreement had already been cancelled. Section 131 of the Act squarely answers the question whether s 127(2) is applicable at all in the positive. The purposes of the NCA are set out in s 3 of the Act and are, inter alia, to promote and advance the socio-economic welfare of South Africans, to promote and advance the socioeconomic welfare of South Africans, to protect the consumer's rights most of all, and to harmonise the system of debt enforcement." (Own emphasis)

[50] In a separate concurring judgment, Cachalia JA at paragraphs 41- 43 took the point further by holding that:

> "[41] The first thing to be observed is that s 129(3), as it read at the time of these proceedings, permitted a consumer, *before* the credit provider has cancelled agreement, to reinstate it by paying the overdue amount and resume possession of the property. In its judgment refusing leave to appeal against the summary judgment ruling, the court held that Wesbank had cancelled the agreement. This means that Mr Edwards was not entitled to reinstate the agreement and resume possession of the car, which is what the s 127(2) notice sent to him on 12 June 2012 invited him to consider doing. Mr Edwards was of course also in default under the agreement before the cancellation, which meant that he could not take repossession of the goods after having received the estimated value of the goods in terms of ss 127(3) and 127(4) either. Counsel for Mr Edwards was constrained to concede this during the hearing. Counsel for Wesbank argued that the section does not apply in these circumstances, precisely because Mr Edwards was not entitled to reinstate the agreement and resume possession of the goods.
>
> [42] However, counsel for Mr Edwards maintained that s 127(2)(b) nevertheless applied in the present circumstances. He argued that before the attached car was sold, Mr Edwards should still have been given notice so that he had the opportunity to consider whether or not he wished to object to the estimated valuation of the car. The contention does not withstand scrutiny.

> [43] Section 127(4) imposes an obligation on the credit provider to sell the goods at the best price reasonably obtainable if the consumer has not responded to the s 127(2) notice. The credit provider's estimated value of the goods plays no part in determining whether or not the best price was obtained, as is evident from this matter, where the estimated value of the car in the s 127(2) notice was R500 000 but it was sold for considerably more, ie R763 800. The clear purpose of a s 127(2) notice, as I have mentioned, is to place the consumer in a position to consider whether to withdraw the termination notice and resume possession of the goods, which is what the s 127(2) notice invited Mr Edwards to do. But this option was simply not available to Mr Edwards once the agreement had been cancelled and the court had ordered the attachment of the car. So, in this case, no purpose was served by sending the notice to him. Section 127(2) simply did not apply." (Own emphasis)

[51] It was accepted by Mr Khan for the defendant that the agreement in the present case had been cancelled and that issue is no longer in contention. I do not see how one can get around the findings of the SCA in the *Edwards* matter. Because of the fact that the agreement in the present case was cancelled, the defendant was not entitled to reinstate the agreement and resume possession of the vehicle, which is what is envisaged in s 127(2) of the NCA. There appears to be neither ambiguity to the finding of the SCA on this matter nor any factor distinguishing the present case from *Edwards* on this aspect. I am therefore bound to find that s 127(2) was not applicable in this matter.

[52] Section 131 provides:

> "If a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127(2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached in terms of that order." (Own Emphasis)

[53] According to the Court in *Edwards* supra at para 40, s 131 requires the application of ss 127(2) – 127 (9) and 128, read with the changes that the context requires. The context in the present matter is analogous to *Edwards* in that the

agreement had been cancelled and therefore the defendant was not entitled to reinstate the agreement and resume possession of the vehicle.

[54] Both Shongwe JA and Cachalia JA nevertheless considered the issue of whether there was any merit in the contention that the defendant in that case did not receive the s 127(2) notice. In the first instance Shongwe JA, at para 11, confirmed "…*[a] registered mail is not what the legislature had in mind when it used the words 'give the consumer written notice'. It may be advisable to send the notice in terms of s 127(2) by registered mail but that is not what the law requires."* Cachalia JA found at para 44 that the contention that the defendant did not receive the s 127(2) notice, had no merit. He remarked that "*Once it was proved that the notice was sent to Mr Edwards, he had to explain why it was not reasonable to have expected the notice to reach his attention*."

[55] I do not need to decide this issue, but to the extent required, the defendant in the present matter also alleged in his plea that he did not receive the s 127(2) notice. The notice was addressed to the defendant's chosen *domicilium*. Mr Khan contended on behalf of the defendant that the plaintiff has not been able to show that the notice was actually sent. Its case on this issue stops where Sonday left the letter in the mailing room. She did not see it being posted and no one was called to confirm that it was. Other than to say that Sonday had no reason to believe that the letter was not sent by those responsible for posting the mail, there was no evidence to show that it was posted. Whilst considerate of Ms Nel-Wade's point that it would be very difficult for the plaintiff to ordinarily show the actual posting when a letter is sent by ordinary mail or even to call those responsible for posting, as they may not recall a particular document sent, taking into account that they deal with volumes of correspondence on a daily basis, the plaintiff still needs to prove that the letter was sent. No record was produced that this letter was posted. Each case must obviously be dealt with on its merits. The evidence placed on record by the plaintiff in this case left a vacuum.

[56] It cannot be assumed that the letter was actually sent nor can it be inferred without more, from what Sonday said. One cannot come to a conclusion that it was sent without some kind of confirmation that the letter was posted. It would have gone a long way, in my view, in this case to, for example, call personnel responsible for posting of letters on the day or the period that Sonday alleged to have left the letter in the mail room for posting, to confirm at the very minimum that letters that they received that day were posted, as they would normally do in the course of their duties or as Mr Khan suggested, to present some record or entry indicating letters sent on that day, even if by ordinary mail. Whilst it is not a requirement to send the 127 (2) letters by registered mail, the plaintiff still has to prove that the letter was sent, as gleaned from Cachalia JA's words in *Edwards* supra at para 44 that: "*Once it was proved that the notice was sent to Mr Edwards, he had to explain why it was not reasonable to have expected the notice to reach his attention*."

[57] I take note of the fact that the defendant did not testify, the issue was simply raised in his plea. Even before one gets to the question of him having to explain why it was not reasonable to have expected the letter to reach his attention, the plaintiff must first demonstrate that the letter was sent. I have to agree with Mr Khan that the plaintiff has not been able to show that the letter left the mailing room and was actually posted.

[58] The issue, however, does not end there. The defendant was sent an SMS containing the valuation amount. Could it be said that the SMS amounted to a written notice sufficient to satisfy the requirements of s 127(2)(b)? In this regard, Mr Khan firstly submitted that the SMS notification could not be classified as 'written notice' required in terms of s 127(2)(b) of the NCA. In his view, what is envisaged in that section is a written letter. Whilst I agree that ordinarily 'written notice' would be in the form of a printed document, understandably because it is easier to demonstrate that it was served on the chosen *domicilium* of a party, there does not seem to be a prescription in the section as to what form 'written notice'

should take. One could argue that an email or SMS (if such were chosen by the party concerned beforehand) may constitute written notice, as long as it conforms to the relevant provision and contains information stipulated in that section. It is not clear in this case whether the SMS was also chosen as one of the mechanisms to convey information as contemplated in s 127(2). At the end of the day though, notification was sent to the defendant containing the valuation amount. He could have reacted to this, taking into account that paragraph 3 of the notice of termination he signed on 07 January 2013 stated that after receiving such valuation notice, he may unconditionally withdraw this termination notice within 10 (ten) days of receipt of the valuation notice and resume possession of the goods, provided that he was not in default of the agreement. Considering the implications that followed if there was no reaction as stated in the notice of termination, the defendant should have contacted the plaintiff, after having received the SMS message. It is worth noting that another SMS was sent to the defendant that his vehicle had been sent for auction and that he must contact Sonday at the telephone number provided. There is no suggestion that he did that.

[59] Mr Khan sought to suggest that the cell phone number of the defendant had changed, pointing out a cell phone number that appeared on the application for debt review. This argument cannot stand because according to the plaintiff's witnesses the defendant had not given them any notification that his cell phone number had changed and there was no way for the plaintiff to know that the defendant had not received the SMS notification.

[60] Ms Nel-Wade also submitted that by the time the s 127(2) was sent, the agreement between the plaintiff and the defendant had expired through the effluxion of time on 29 November 2011. Therefore, in order for the defendant to have resumed possession of the vehicle in terms of s 127, he would have had to pay the full amount outstanding as all the instalments would have been due. There was no evidence that the defendant tendered payment towards the outstanding

instalment or any other amount. According to her, it is doubtful that he would have been able to pay in any event as papers show that he was under debt review.

Has there been compliance with the Consumer Protection Act?

[61] As to the Consumer Protection Act, it is alleged that the plaintiff did not properly advertise as required by the Regulations of the relevant statute and in particular Regulations 19 and 20. Regulation 19 of the Consumer Protection Act stipulates that:

> " **Mandatory advertising of auctions**
>
> 19 (1) Subject to regulation 33, no goods may under any circumstance whatsoever be sold by auction unless the inclusion of such a particular item or lot or service in that auction has been advertised in compliance with these regulations in such a manner that the general public has had a reasonable opportunity to become aware of the auction, the goods on offer and of the rules governing the auction.
>
> (2) The onus to prove that an auction was advertised as contemplated in subregulation (1) rests on the auctioneer.
>
> (3) An auctioneer must for purposes of subregulation (1) advertised the auction of a particular item or lot at least 24 hours prior to the commencement of the auction, but –
>
> (a) any goods may be withdrawn at any time prior to the commencement of the auction;
>
> (b) in the event of an auction where goods offered for sale include immovable property, this period must exceed five business days.
>
> (4) If an auction or part thereof relates to goods sold in execution or by order of court, the advertisement must clearly state that fact.
>
> **General rules on advertising of auctions**
>
> 20 (1) Despite the rules and rulings of any advertising standards body, all advertising of auctions must –
>
> (a) be accurate; and

(b) provide sufficient information for a reasonable consumer to –

(i) understand that it relates to an auction; and

(ii) be able to find the place where the auction is to be held.

(2) Advertising relating to an auction must subject to subregulation (3) –

(a) be in a legible format and size;

(b) contain a reference to these regulations, together with the URL of an operational internet site where a copy of these regulations can be obtained;

(c) state the date, place and time of the auction;

(d) state the name of the auctioneer and the auction house, if any, and if registration or licensing of auctioneers or auction houses after the commencement of these regulations becomes mandatory, such registration or licensing number;

(e) state where the rules of auction can be obtained;

(f) state the particulars of the goods offered on auction;

...

(3) The requirements of subregulation (2) do not apply to roadside advertising or classified advertising in printed newspapers, but such advertising must –

(a) at the top of the advertising prominently display the word "auction".

(b) indicate where a full advertisement as contemplated in subregulation (2)(b) can be obtained; and

(c) state the date, place and time of the auction.

…"

[62] Mr Khan's submission under this topic is that Regulations 19(1) and 20(2) are peremptory in requiring that there should be inclusion of a particular item in the advertisement. He argues that in this case that was not done by the plaintiff -

members of the public and the defendant would not have known that his vehicle was being sold on auction on the date advertised.

[63] Van Niekerk testified that the plaintiff advertised the auction in newspapers. In this regard and as correctly stated by Ms Nel-Wade, Regulation 20(2) is subject to Regulation 20(3). Regulation 20(3) clearly stipulates that the requirements in subregulation 2 do not apply to classified advertising in printed newspapers. I agree with that contention. What remains to look at is whether subregulation 3 was complied with.

[64] In so far as subregulation 3(a) is concerned the first requirement is that at the top of the advertising the word 'auction' must be displayed. Mr Khan submits that the word 'auction' does not appear on the newspaper adverts. What appears is the name of an entity called 'Auction Operations'. If regard is to be had to the object of the requirement, which is to make sure that the general public has the reasonable opportunity to become aware of the auction as stipulated in Regulation 19, the appearance of the word 'auction' in the advertisement, although it is made with reference to an entity, sufficiently draws attention to the fact that an auction is being advertised, in my view.

[65] The second requirement contained in subregulation (3)(b) is that the advertising must indicate where a full advertisement as contemplated in sub regulation (2)(b) can be found. That requirement has also been fulfilled in my view. It will be recalled that subregulation (2)(b) requires that the advertising contains reference to the regulations, together with the URL of an operational Internet site where a copy of these regulations can be obtained. Subregulation (3)(b) does not require the newspaper advert itself to contain the information in subregulation (2)(b), it must just state where the full advertisement containing the information required in subregulation (2)(b) may be obtained. In this case, the advertising in the newspaper contained the telephone number as well as the website on which enquiries could be made. Mr Khan submits that there is no evidence to suggest that there was a full advertisement done, where members of

the public and the defendant could have access and find this information. Van Niekerk testified that details of each motor vehicle on auction were displayed on the plaintiff's website and the website of Auctions Operations as required by Regulations 19(1) and 20(f). Furthermore, the list of details of the auction was emailed to the plaintiff's mailing list of 350 motor vehicle dealers. According to Van Niekerk, the defendant was informed of where the vehicle was stored and about the auction of his vehicle. A system entry indicates that the defendant was sent an SMS that his vehicle had been forwarded to be sold on auction, he was also advised to contact Sonday and a telephone number was provided. Another entry shows that a saleable date was SMSed to the defendant.

[66] As regards the third requirement in subregulation (3)(c), on perusal of the advertisements it is evident that the date, place and time of the auction is stipulated as Thursday 11 April at 11:00 am, 3 Bofors Circle, Epping 2, Cape Town. In my view, the plaintiff was able to discharge its onus that it complied with the Consumer Protection Act.

Costs

[67] As to costs, Ms Nel-Wade argued that costs should be awarded on attorney and client scale and in relation to costs for the postponements of 10 October 2016 and 27 March 2017, awarding costs *de bonis propiis* would be appropriate. The matter was postponed on these two dates after the court received sick notes regarding Mr Khan's ill-health. Whilst I was not entirely satisfied with the manner in which the postponements were sought on these two occasions on behalf of the defendant, having considered the record and listened to the parties, I find no basis to award costs *de bonis propiis*.

[68] I invited the parties to file supplementary notes on whether costs on the High Court scale were justified, the basis of the collection charges and interest claimed. Only the plaintiff filed a supplementary note. Ms Nel-Wade pointed out that clause 14.1 of the instalment agreement makes provision for costs on attorney

and client scale. I, however, noted that the plaintiff did not ask for costs under this scale in its particulars of claim, I will therefore not grant costs on this basis.

[69] She also pointed to clause 15 of the instalment agreement which provides that the Magistrate Court shall have jurisdiction over any proceedings unless the plaintiff chooses the High Court. In this regard, she submitted that the plaintiff's election was justified, taking into account the history of the matter and the complexity of the defences raised.

[70] The fact that the plaintiff may elect to bring the action to the High Court in terms of the agreement does not, in my view, entitle it to costs on the High Court tariff. The discretion still lies with the Court in this regard. I doubt that the plaintiff would have known what kind of defences would be raised by the defendant when instituting action. Even if that was not the case, I am persuaded that despite reasons given by Ms Nel-Wade in the supplementary note, costs should be awarded on the Regional Court scale.

[71] I am satisfied that collection charges and interest claimed are permitted in the instalment agreement.

[72] For those reasons, I make an order in the following terms:

1. The defendant is to make payment to the plaintiff as follows:
    1.1 Damages in the amount of R 211 984. 33;
    1.2 Interest at the rate of prime less .884% per annum with effect from 9 April 2013;
    1.3 Costs of suit including the wasted costs of 10 October 2016 and 27 March 2017 on the Regional Court scale;
    1.4 Collection charges.

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N P BOQWANA

Judge of the High Court

APPEARANCES

For the Plaintiff: Adv E Nel-Wade

Instructed by: Jeff Gowar & Associates, Cape Town

For the Defendant: Mr M R Khan of M R Khan & Associates, Claremont