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

Case no: 8843/21P

In the matter between:

POTPALE INVESTMENTS (PTY) LIMITED

APPLICANT/PLAINTIFF

and

BEAUTY FLORENCE ZONDI

RESPONDENT/DEFENDANT

Coram: Koen J

Heard: 18 August 2022

Delivered: 30 August 2022

ORDER

Summary judgment is granted against the defendant in the following terms:

1. The termination of the credit agreement between the parties is confirmed.
2. The defendant is directed to return the 2017 Toyota Quantum 2.5 D.4D Sesfikile 16S with engine number [...] and chassis number [...] to the plaintiff forthwith.
3. The defendant is directed to pay the plaintiff's costs on an attorney and client scale, as taxed or agreed.
4. The plaintiff is directed to allege and prove, in the action for any outstanding damages, that it has complied with the requirements set out in paragraph 20.3 of the order in *FirstRand Bank Limited t/a Wesbank v Davel* (1229/2018) [2019] ZASCA 168 (29 November 2019).

JUDGMENT

Koen J

[1] The plaintiff applies for summary judgement against the defendant for:

- (a) Confirmation of termination of the credit agreement between the parties.
- (b) Return of a 2017 Toyota Quantum 2.5 D.4D Sesfikile 16S with engine number [...] and chassis number [...] to the plaintiff forthwith.
- (c) Attorney and client costs to be taxed.
- (d) The plaintiff shall allege and prove, in the action for any outstanding damages, that it has complied with the requirements set out in paragraph 20.3 of the order in *FirstRand Bank Limited t/a Wesbank v Davel*.¹

[2] It is not in dispute that the defendant concluded a credit agreement with the plaintiff in respect of the Toyota Quantum vehicle. In her plea she further admits not having paid all the instalments when due. In terms of the agreement, the failure by the defendant to make any payment under the agreement on due date thereof, will amount to an event of default which would entitle the plaintiff to terminate the agreement, provided it does so in compliance with the provisions of the National Credit Act 34 of 2005 (the Act). The exact amount which the defendant owes is not an issue for determination in regard to the relief claimed for the return of the vehicle. The fact that she has defaulted in payments is sufficient to cancel the agreement. The plaintiff has cancelled the agreement as alleged in the summons.

[3] In opposition to the application for summary judgement, the defendant has raised a number of grounds. For convenience, and based on what came to be argued, these possible defences can conveniently be categorised as follows:

- (a) That the application for summary judgment was brought out of time;

¹ *FirstRand Bank Limited t/a Wesbank v Davel* [2019] ZASCA 168; [2020] 1 All SA 303 (SCA).

- (b) Whether the deponent to the affidavit in support of the application for summary judgement is a person who can swear positively to the facts, as required by rule 32(2)(a);
- (c) Whether the plaintiff has charged interest in excess of what is recoverable in terms of the agreement;
- (d) Whether the plaintiff was entitled to charge certain insurance charges;
- (e) Whether the plaintiff has complied with the provisions of the Act, notably sections 86 (10), 129 and 130.

These categories will be discussed seriatim.

The application for summary judgment being brought out of time

[4] The application for summary judgment was brought out of time. In an application for condonation the plaintiff explains that the application for summary judgement had to be served on or before 28 December 2021, but that due to a high volume of affidavits received from the plaintiff's representative, and during the absence of the attorney who dealt with the matter from her office during the festive season, the affidavit which had been received was misfiled and placed in a different file. The affidavit was in fact deposited to on 13 December 2021, well before the date on which the application for summary judgment had to be served. Steps were immediately taken on the attorney's return from leave on 10 January 2022 and the application for summary judgment was served on the defendant's attorneys on 11 January 2022.

[5] This point was expressly abandoned by the defendant in argument. It accordingly need not be dealt with further. The defendant clearly had not suffered any prejudice.

The knowledge of the deponent to the affidavit in support of the application for summary judgement.

[6] The deponent to the affidavit describes herself as a legal manager employed by SA Taxi Development Finance (Pty) Ltd (SA Taxi). She states that she is duly

authorised by the plaintiff, Potpale Investments (Pty) Limited, to represent it in the summary judgment proceedings. She explains that the plaintiff and SA Taxi are part of the same group of companies and that SA Taxi renders several management functions to the group, including the plaintiff, most significantly that it undertakes a credit vetting process which follows on a potential customers application (such as the defendant's application for finance) and administers the credit agreements concluded between the plaintiff (as credit provider) and various credit receivers such as the defendant. Her allegations in this regard are also consistent with the express terms of clause 31.5 of the credit agreement. She further confirms having the plaintiff's files and records relevant to the matter and to the defendant's relationship with the plaintiff in her possession and under her control, and that she is well acquainted with the contents of the files and the records of the plaintiff relevant to the defendant, has perused all the files and records relevant to the matter prior to deposing to the affidavit, that she therefore has personal knowledge of the facts and can confirm that she is a person who can, as she does, swear positively to the facts.

[7] The defendant with reference to the decisions in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC*² and *Nedbank Limited v Peterson*³ maintained that this was insufficient.

[8] I am satisfied that the allegations by the deponent to the affidavit in support of the application for summary judgement, based on what she has alleged her involvement in the matter to be, has the required personal knowledge to depose to the affidavit in compliance with the provisions of rule 32(2)(a).

Has the plaintiff charged interest in excess of what is recoverable in terms of the agreement

² *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and another* 2010 (5) SA 112 (KZP) paras 13 to 16.

³ *Nedbank Limited v Peterson* [2021] ZAGPPHC 534.

[9] As the plaintiff's claim is for the return of the vehicle following the failure to pay any instalment timeously, and it is admitted by the defendant that she has failed to pay all instalments when due, the quantum of the balance owing is irrelevant to the claim for summary judgement for the return of the vehicle.

[10] In so far as the interest charge might have relevance, the deponent to the affidavit in support of the application for summary judgement dismisses the contention that the interest rate charged was not in compliance with the provisions of the Act. The deponent explains that as a registered developmental credit provider, the plaintiff is lawfully entitled to charge interest in terms of the formula (repo rate +27%) per year as provided in item 4 of table A to regulation 42 of the National Credit Regulations.⁴

[11] The defendant's objection then was that it was not alleged in the particulars of claim that the plaintiff is a registered developmental credit provider. Although not expressly alleged in the body of the particulars of claim, the particulars do set out that at the time of entering into the credit agreement with the defendant, the plaintiff was a duly registered credit provider as defined in section 40 of the Act, and it annexes its registration certificates as annexures A and B to the particulars of claim. Both these documents refer to the plaintiff being registered as a credit provider 'in terms of section 40 of the National Credit Act 34 of 2005, as amended and in terms of section 41 of the Act, *registered to provide developmental credit.*' (emphasis added).

[12] In my view that is sufficient to establish that the plaintiff would be entitled to claim interest as a developmental credit provider.

Was the plaintiff entitled to raise the insurance charges

[13] Similarly, in so far as the insurance charges might have relevance to the relief claimed at this stage, Part C: Finance Instalment Payable, item A of the agreement, clearly makes provision for an additional monthly payment in respect of short-term

⁴ 'Regulations made in terms of the National Credit Act, 2005' GG 28864, GN R489 of 31 May 2006.

insurance. The defendant furthermore agreed in clause 22.7 to pay any insurance premiums due under the policy to the plaintiff, that these could be included in the monthly instalments payable under the credit agreement, and she authorised the plaintiff to pay any premiums due on her behalf. Her contention for a lower monthly instalment is furthermore flawed when regard is had to the fact that the credit agreement expressly reflects the monthly repayment and it distinguishes between the finance instalment and additional charges, such as insurance.

Sections 86(1), 129 and 130 of the Act.

[14] The defendant contends that the provisions of s 86 (1), 129 and 130 of the Act required to be complied with, and that they were not complied with. The relevant context in which these defences must be evaluated, and the applicable legal principles, are as follows:

- (a) The defendant applied for debt review, to have herself declared over indebted, as contemplated in section 86(1) of the Act.
- (b) Her debt counsellor delivered a notice, as required by s 86(4)(b)(i) of the Act to the plaintiff, as credit provider, on 13 July 2020. That notice had the effect that no rights could be enforced by the plaintiff under the credit agreement in the circumstances contemplated in s 88(3), which would extend inter alia, depending on the circumstances, until the defendant might default on any obligation as agreed or ordered by a court.
- (c) In response thereto the plaintiff on 14 July 2020 delivered to the debt counsellor a certificate of balance, and on 21 July 2020 the debt counsellor delivered to the plaintiff a notice in terms of form 17.2, recording that the debt counsellor found the defendant to be over indebted.
- (d) On 17 August 2020 the debt counsellor delivered a proposal to the plaintiff which resulted in a counter proposal by the plaintiff on 27 August 2020, neither being acceptable and leading to any re-arrangement between the plaintiff and the defendant.

(e) On 22 October 2020 the defendant's debt counsellor emailed an application in terms of s 86(8)(b) of the Act to the plaintiff. That application was filed with the Pinetown Magistrate's Court, under case number 7880/2020, with the debt counsellor as applicant, the defendant as first respondent, SA Taxi Securitisation (Pty) Ltd as second respondent, Truworths Limited as fourth respondent and DMC Debt Management (Pty) Ltd as fifth respondent. The heading to the court order annexed to the particulars of claim as annexure 'E' contains no reference to a third respondent, but from a manuscript inscription at the end thereof, it might have been FNB (First National Bank). The reference to SA Taxi Securitisation (Pty) Ltd is furthermore clearly incorrect, and should be a reference to the plaintiff. That much is accepted by the defendant as the allegation that the plaintiff was subsequently excluded from the application was admitted by the defendant in her plea, although the inscription on the court order in the manuscript (again) erroneously referring to 'SA Taxi Securitisation (Pty) Ltd' when recording that it was excluded from the court order by consent between the debt counsellor and the plaintiff;

(f) On 23 April 2021 an order for debt review in terms of sections 86(7)(c) or 86(8)(b) read together with sections 85 and 87 of the Act was granted by the Pinetown Magistrate's Court under case number 7880/2020. A copy of the order was annexed to the plaintiff's particulars of claim as annexure 'E'. In accordance with s 87 an order was made that the defendant was over indebted. The order also dealt with other matters incidental thereto and provided that 'the period for payment in respect of each credit agreement with each Respondent be extended and the amounts payable per month be reduced in accordance with the debt restructuring proposal prepared by the debt counsellor'.

(g) Significantly however in regard to the plaintiff (erroneously referred to as SA Taxi Securitisation (Pty) Ltd as the second respondent), the order recorded that it and FNB were 'excluded by consent', that is excluded from the operation of the order and hence the referral by the debt counsellor to the court for adjudication.

(h) The claims of FNB and the plaintiff accordingly remained part of the application for debt review before the debt counsellor, not ruled on by the court, or at least reverted to that status, for a plan of debt rearrangement to be voluntarily considered and agreed between the defendant and FNB and the plaintiff, as credit providers, but no longer as part of an application that was filed in a court.

(i) Section 86(10)(b)⁵ accordingly presented no obstacle to the termination of the debt review insofar as it concerned the plaintiff's claim in terms of the credit agreement.

(j) On 4 May 2021 and again on 2 August 2021, the latter date being clearly more than 60 days after the debt owing to the plaintiff had been removed by the exclusion of the plaintiff's claim by consent from the referral to the court, the plaintiff gave notice to the defendant, the debt counsellor and the National Credit Regulator, in the prescribed manner of its election to terminate the debt review, in terms of s 86(10) of the Act.⁶ Copies of these notices were annexed as annexures 'F' and 'K' to the particulars of claim. These notices on the plaintiff's letterhead, in identical terms, informed the addressees that the plaintiff terminated the debt review which commenced more than 60 business days previously on 13 July 2020, as she was in default with the payments, the account being then R175 201,48 in arrears for more than 20 business days, and advised that should she not make payment of all the outstanding instalments within 7 days of the posting of the letter, the plaintiff will without further notice, cancel the credit agreement.

(k) The defendant did not thereafter make payment of all the instalments.

⁵ Section 86(10)(b) of the National Credit Act 34 of 2005 provides:

'No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.'

⁶ Section 86(10)(a) of the National Credit Act 34 of 2005 provides:

'If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may, at any time at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review in the prescribed manner to—

- (i) the consumer;
- (ii) the debt counsellor; and
- (iii) the National Credit Regulator'.

(l) Accordingly, the plaintiff terminated the credit agreement by service of the summons on or after 8 October 2021.

[15] As regards the application of sections 129 and 130, the position is as follows: The relevant provisions of s 129 of the Act provides:

‘(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; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before —

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.’

[16] The relevant portion of s 130 of the Act provides:

‘(1) Subject to subsection (2), 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 20 business days and—

- (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10), or section 129 (1), as the case may be;
- (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; and
- (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.’

[17] The defendant has argued that following the exclusion of the plaintiff’s claim from the debt review, the provisions of sections 129 and 130 had to be complied with. Accordingly, that the plaintiff should (contrast the word ‘may’) have resorted to any of the avenues referred to in s 129(1)(a) of the Act, before enforcing the agreement, including enforcing it to the extent of cancelling the agreement due to non-payment of instalments, to claim the return of the vehicle, and that a notice to the defendant as contemplated in paragraph (a) or in s 86(10), as the case may be, first had to be provided to the defendant.

[18] At the time that the notice, annexure ‘K’, was sent on 2 August 2021, the plaintiff’s claim had already been excluded from the ambit of a debt review before a court, dated 23 April 2021. It was still part of the debt review lodged with the debt counsellor in terms of the Act, but was not part of an application for debt review filed, even on an extended meaning of word ‘filed’, in a court. To free the plaintiff’s claim from the restrictions in s 88(3) would require that the debt review in respect of the plaintiff’s claim be terminated. Section 86(10) would therefore find application.

[19] As regards the provisions of s 129(1)(a), the debt owing to the plaintiff had already been referred to and was being considered by the debt counsellor. The parties had furthermore attempted to resolve their disputes under the agreement or to develop and agree on a plan to bring the payments under the agreement up to date, without success. There would have been no point in providing any further notice, if indeed required to the defendant, that she could refer the credit agreement to a debt counsellor, or to attempt to resolve their disputes under the agreement or to develop and agree on a plan to bring the payments under the agreement up to date.

[20] As regards the provisions of s 129(1)(b)(i), the plaintiff complied with the provisions of s 86(10), at the very least by dispatching the notice of 2 August 2021. The notice was duly dispatched to the parties required to be notified in accordance with the mode of communication chosen by the parties at the designated addresses. The notice reached the appropriate post office for delivery to the defendant, but despite notification being sent to her, it was not collected. Non delivery of the notice(s) is not a defence to the plaintiff's claim.⁷

[21] As regards the provisions of s 129(b)(i) and (ii), the defendant has been in default under the credit agreement for at least 20 business days, at least 10 business days had elapsed since the plaintiff delivered the notice to the defendant as contemplated in s 86(10), and the defendant had not responded to that notice.

[22] Accordingly, the defendant has not established a defence to the plaintiff's claim for the return of the vehicle. It follows that summary judgement must be granted.

Order

[23] Summary judgement is granted in favour of the plaintiff against the defendant as follows:

⁷ *Kubyana v Standard Bank of South Africa Limited* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) paras 39 and 40.

1. The termination of the credit agreement between the parties is confirmed.
2. The defendant is directed to return the 2017 Toyota Quantum 2.5 D.4D Sesfikile 16S with engine number [...] and chassis number [...] to the plaintiff forthwith.
3. The defendant is directed to pay the plaintiff's costs on an attorney and client scale, as taxed or agreed.
4. The plaintiff is directed to allege and prove, in the action for any outstanding damages, that it has complied with the requirements set out in paragraph 20.3 of the order in *FirstRand Bank Limited t/a Wesbank v Davel* (1229/2018) [2019] ZASCA 168 (29 November 2019).

KOEN J

APPEARANCES

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