IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

Case number: **NCT/9163/2013/128(1)(P) NCA**

In the matter between:

Bonga Nkanyiso Mdletshe APPLICANT

and

Mercedes-Benz Financial Services SA (Pty) Ltd RESPONDENT

Coram:

Adv F Manamela	–	Presiding Member
Adv J Simpson	–	Panel Member
Mr X May	–	Panel Member

Date of Hearing – 21 January 2014

JUDGMENT AND REASONS

APPLICANT

1. The Applicant in this matter is Bonga Nkanyiso Mdletshe, an adult male (hereinafter referred to as "the Applicant").

2. The Applicant was represented at the hearing by an attorney, Mr Msizi Dlamini, from Ngwenya and Zwane Attorneys.

RESPONDENT

3. The Respondent is Mercedes-Benz Financial Services SA (Pty) Ltd, a company registered in terms of the Companies Act with its principal place of business in Centurion and a registered credit provider with the National Credit Regulator under registration number NCRCP80 (hereinafter referred to as "the Respondent");

4. The Respondent was represented at the hearing by Adv Willie Steyn.

APPLICATION TYPE

5. This is an application in terms of section 128(1) of the National Credit Act, 34 of 2005 (hereinafter referred to as "the NCA") for review of the sale of goods by the Respondent on the ground that the Respondent did not sell the goods at the best price reasonably obtainable.

BACKGROUND

6. The Applicant purchased a 2002 Mercedes-Benz ML 55 AMG vehicle in 2004 using finance obtained from the Respondent. During 2011 the Respondent repossessed the vehicle due to non-payment of the account. The Applicant's Attorneys contacted the Respondent's Attorneys regarding the account and the vehicle, but before the matter could proceed the Respondent advised the Applicant that the vehicle had been sold by way of public auction.

7. During May 2011 the vehicle was sold for an amount of R74 010.00 and the Applicant was held responsible for the outstanding balance of R209 403.65 still owing on the account (as at 6 July 2011).

8. In June 2013 the Attorneys acting for the Applicant lodged an application with the National Consumer Tribunal ("the Tribunal") for review of the sale of the goods by the Respondent on the ground that the Respondent did not sell the goods at the best price reasonably obtainable.

9. According to the Applicant the retail value of the vehicle in May 2011 was R224 000.00 and the trade value was R187 700.00. These values are based on an Auto Dealer Digest published by Mead and McGrouther.

APPLICABLE SECTIONS OF THE NCA

10. Section 127

"127 Surrender of goods

(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.

(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 Magistrate's Court 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 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."

11. Section 128

"128 Compensation for consumer

(1) A consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of section 127 directly with the credit provider, or through an alternative dispute resolution under Part A of Chapter 7, may apply to the Tribunal to review the sale.

(2) If the Tribunal considering an application in terms of this section is not satisfied that the credit provider sold the goods as soon as is reasonably practicable, or for the best price reasonably obtainable, the Tribunal may order the credit provider to pay the consumer an additional amount exceeding the net proceeds of the sale."

PROCEDURAL ISSUES

12. The Applicant lodged the main application with the Tribunal on 6 June 2013. The Applicant filed further supplementary documents on 14 June 2013.

13. The Respondent filed its answering affidavit on 31 July 2013.

14. The Applicant filed its replying affidavit to the Respondent's answering affidavit on 12 September 2013.

15. The Respondent filed an application for condonation of the late filing of its answering affidavit on 26 September 2013.

THE HEARING

16. At the hearing both parties first addressed the Tribunal on the preliminary aspects raised by the Respondent (points *in limine*) and then later on the merits of the main application.

17. The Respondent first addressed the Tribunal regarding its application to condone the late filing of its answering affidavit. The Applicant opposed the application for condonation.

18. At the hearing the Tribunal granted the application to condone the late filing, with reasons to be provided in this final judgment.

19. The Respondent addressed the Tribunal on the next preliminary aspect which was its argument that the same matter which is currently before the Tribunal was currently under consideration in another court and could therefore not be heard by the Tribunal (*"lis pendens"*). The Applicant made submissions to the Tribunal opposing the argument made by the Respondent.

20. The Tribunal reserved judgment on the "*lis pendens*" argument raised and both parties proceeded to address the Tribunal on the merits of the main application.

Consideration of the preliminary aspects raised *(in limine)*

Application for condonation

21. Rule 13 (1) states:

"Any person required by these Rules to be notified of an application or referral to the Tribunal may oppose the application or referral by serving an answering affidavit on:

(a) the Applicant; and
(b) every other person on whom the application was served."

13(2) An answering affidavit to an application or referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of the date of the application".

22. Rule 34 (1) states:

"A party may apply to the Tribunal in Form TI r.34 for an order to:-
(a) condone late filing of a document or application;
(b) extend or reduce the time allowed for filing or serving;
(c) condone the non-payment of a fee; or
(d) condone any other departure from the rules or procedures."

23. Rule 34 (2) states "*The Tribunal may grant the order on good cause shown*".

24. Based on the record contained in the case file, the Application was signed by the Applicant on 4 June 2013 and sent to the Respondent by registered post on 5 June 2013. Subsequent to the Applicant's first filing attempt, he Registrar of the Tribunal issued a notice of incomplete filing to the Applicant and after these defects were cured, issued a notice of complete filing to both parties on 3 July 2013.

25. The notice by the Registrar states that the Respondent may oppose the application by filing an answer within 15 business days of the notice. Based on the date of this notice, the 15 business days lapsed on 24 July 2013.

26. The Respondent's answering affidavit was however only filed on 31 July 2013.

27. In terms of Rule 13 an answering affidavit must be served by the Respondent within 15 business days of the date of the application.

28. On a strict interpretation of Rule 13 the Respondent therefore had to file the answering affidavit by 25 June 2013.

29. However, the Registrar only deemed the application as complete on 3 June 2013 and gave notice to the Respondent that the answering affidavit was due within 15 business days of the date of the notice. The date of 24 July 2013 is therefore used as the due date for the answering affidavit.

30. Rule 34 provides for the Tribunal to grant condonation provided that the Applicant for condonation is able to show that it has good cause for such condonation to be granted.

31. To *condone* means to *"accept or forgive an offence or wrongdoing"*. The word stems from the Latin term *condonare*, which means to *"refrain from punishing"*[1]. It can also be defined to mean *"overlook or forgive (wrongdoing)"*[2].

32. In *Head of Department, Department of Education, Limpopo Province v Settlers Agriculture High School and Others*[3] it was held that the standard of considering an application of this nature is the interests of justice.

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1 Oxford English Dictionary, Second Edition at pg 151.
2 Collins English Dictionary and Thesaurus, Fourth Edition 2011, at pg170.

33. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. It requires the exercise of the Tribunal's discretion on an objective evaluation of all the facts. Factors that are relevant include but are not limited to:

1. the nature of the relief sought;
2. the extent and cause of the delay;
3. the effect of the delay on the administration of justice and other litigants;
4. the reasonableness of the explanation for the delay;
5. the importance of the issue to be raised in the intended appeal; and
6. the prospects of success[4]

34. In *Melane v Santam Insurance Company Limited*[5] it was held that:

"The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are inter-related: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused...cf Chetty v Law Society of the Transvaal 1985(2) SA 756 (A) at 765 A-C; National Union of Mineworkers and Others v Western Holdings Gold Mine 1994 15 ILJ 610 (LAC) at 613E. The courts have traditionally demonstrated their reluctance to penalize a litigant on account of the conduct of his representative but it emphasized that there is a limit beyond which a litigant cannot escape the results of the representative's lack of diligence or the insufficiency of the information tendered. (Salojee & Another NNO v Minister of Community Development 1965 (2) A 135 (A) 140H-141B; Buthelezi & Others v Eclipse Foundries Ltd 18 ILJ 633 (A) at 6381-639A)."

35. From the *dictum* in the *Melane*-matter it was held that these factors are interrelated and should not be considered separately.

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3 2003 (11) BCLR 1212 (CC) at para(11).
4 *Van Wyk v Unitas Hospital and Others* 2008(4) BCLR 442 (CC) at para 20 as applied in *Camagu v Lupondwana* Case No 328/2008 HC Bisho.
5 1962 (4) SA 531 (A) at 532C-F.

36. The Tribunal takes note of the oral and written submissions made by both parties regarding the condonation application but the Tribunal does not consider it necessary that they be repeated herein. In evaluating the application for condonation the Tribunal considered the following factors as the most important:

a) The Respondent filed the answering affidavit 5 business days after the due date. This is not an unreasonable or excessive period of time.
b) The defence raised in the answering affidavit discloses good prospects of success and therefore the interests of justice require that the Tribunal consider it.
c) There is no evidence of substantial prejudice suffered by the Applicant due to the late filing of the Respondent's answering affidavit.

37. As stated at the hearing and confirmed in this judgment – the application to condone the late filing of the Respondent's answering affidavit is granted.

Submission regarding "*Lis pendens*"

38. The Applicant conceded that the Respondent had lodged a claim in the High Court against the Applicant regarding the outstanding balance on the vehicle loan. This matter was currently before the High Court and the Applicant had raised a defence in that matter regarding the value of the vehicle. The Respondent therefore submitted that the Tribunal was barred from hearing this matter.

39. This same submission was made and considered in the matter of *Yako v Mercedes-Benz Financial Services*[6]. The Tribunal held that it does have jurisdiction to hear the matter as the NCA specifically allows[7] an application for a review of the sale of goods to be made despite the fact that a court has ordered an attachment of the goods. Whilst this Tribunal is not bound by the finding made in the *Yako*-matter it does have substantial persuasive value.

40. In the matter of *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite CC* the court considered the nature of the doctrine *lis alibi pendens*. The court held that:

> *"As its name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is*

[6] NCT/4044/2012/128(1).
[7] (741/12)(2013) ZASCA 129 (26 September 2013).

litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years."

The court went on further to state:

"[12]Voet said that there are three requirements for a successful reliance on a plea of lis pendens. They are that the litigation is between the same parties; that the cause of action is the same; and, that the same relief is sought in both. In Hassan & another v Berrange NO,[8] Zulman JA expressed these requirements in the following terms:

'Fundamental to the plea of lis alibi pendens is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause.'"

41. When applying the three requirements for a successful defence of *lis pendens* it is clear that the same parties are involved in the High Court matter and the Tribunal matter. However the cause of action and the relief being sought cannot be said to be the same. It appears from the evidence presented that the Respondent in this matter instituted action against the Applicant for the outstanding balance on the vehicle finance loan agreement. The Applicant is defending the matter on a number of grounds, one of which is related to the value of the vehicle and the amount it was sold for. The application before the Tribunal in terms of section 128 of the NCA is very specific and focussed on a very specific result. While it can be argued that there is a certain overlap between the two matters in this instance it is not to the degree envisaged by the *lis pendens* doctrine.

42. Section 130(3)(b) of the Act states as follows:

"(3) 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)...

(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court..."

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[8] *Hassan & another v Berrange NO* 2012 (6) SA 329 (SCA) para 19 – the judgment was delivered in 2006 but only reported in 2012.

The matter before the High court can therefore only be determined once the matter before the Tribunal has been finalised.

43. The Tribunal therefore finds that it has jurisdiction to hear the matter.

THE MAIN APPLICATION

Submissions by the Applicant

44. The Applicant did not submit an affidavit in support of its application. The Applicant merely attached various documents to the application form. The most relevant of these documents is a copy of an extract from an Auto Dealer Digest by Mead and McGrouther for the month of May 2011. This extract shows the retail value of the Applicant's vehicle to have been R224 000.00 and the trade value R187 700.00.

45. The Applicant's Attorney made various submissions to the Tribunal but only the most relevant aspects will be mentioned and considered.

46. The Applicant's Attorney submitted that the value of the vehicle would have been somewhere between these two amounts but was sold for a much lesser amount. This leads to the Applicant's conclusion that the price obtained was not the best price reasonably obtainable.

47. The Applicant's Attorney confirmed that the Applicant was not in any position to provide any expert evidence as to the value of the vehicle as it was not in his possession.

48. Regarding the valuation placed on the vehicle by the Respondent he submitted that another valuator might have reached a different conclusion as to the value.

Submissions by the Respondent

49. The Respondent's submissions (as supported by documents supplied) can be summarised as follows:

    48.1 Default judgment was obtained against the Applicant in the Kwazulu Natal High Court on 14 April 2010.

48.2 A warrant for delivery of the goods was issued by the court and the vehicle was subsequently attached by the Sheriff.

48.3 The vehicle was valued by MA Ferreira Appraisers during February 2011 for an amount of R65 000.00

48.4 The valuator described the vehicle as having high mileage (over 200 000 kilometres), a "non-runner" with the main V-belt missing.

48.5 The vehicle was sold at a public auction for an amount of R74 010.00.

Requirements in terms of section 128 of the NCA

49. Section 128 of the NCA states that a consumer who has unsuccessfully tried to resolve a disputed sale of goods directly with the credit provider may apply to the Tribunal to review the sale.

50. The section therefore makes it clear that a consumer may only approach the Tribunal after having attempted to resolve the dispute with the credit provider. The extent or nature of the attempt required is not defined but it is reasonable to require some evidence of the attempt being made – either verbally or in writing.

51. In this matter the only evidence before the Tribunal is that the Applicant's Attorneys sent letters and e-mails to the Respondent's Attorneys from February to May 2011. The copies of the correspondence are attached to the application. The Respondent's correspondence generally raises the possibility of the matter being settled and requests further information from the Respondent's Attorneys. After the Applicant's Attorney is informed that the vehicle was sold, the correspondence ceases.

52. There is no evidence of the Applicant disputing the sale of the goods or the price obtained.

53. It was held in *Kasture Pillay v Wesbank*[9] that an Applicant must first prove that he/she attempted to resolve the dispute with the other party or through alternative dispute resolution before the complaint is referred to the Tribunal. In the particular matter the Applicant did not meet this requirement and the Applicant's application to the Tribunal was dismissed.

54. In the circumstances the Tribunal finds that the Applicant did not comply with the requirements of section 128 and the Tribunal is unable to consider the application.

[9] NCT/867/2010/128(1)(P).

Consideration of "the best price reasonably obtainable"

55. Even though a finding is made that the requirement in terms of section 128 has not been complied with, the Tribunal regards it as prudent to briefly deal with the merits of the main application.

56. In *Thirlwell v Johannesburg Building Society*[10] it was held that the best evidence of the fair value of an article is the price which the highest bidder offers for it at a properly conducted auction sale; and "a fair value" means "a fair market price".

57. The NCA does not require that goods be sold for "a fair market price" but instead uses the term "the best price reasonably obtainable". As yet there is no case law which further defines or describes this term.

58. The Oxford English Dictionary[11] provides the following descriptions for the respective words used by the NCA:

- *Best* – "that which is the most excellent, outstanding, or desirable"
- *Price* – "the amount of money expected, required, or given in payment for something"
- *Reasonably* – "to a moderate or acceptable degree; fairly"
- *Obtainable* – "able to be obtained"

59. Section 2(2) of the Act provides that, any person, court or tribunal interpreting or applying the Act may consider appropriate foreign and international law. The following English law matters (although they relate to the sale of immovable property) are cited for guidance:

> In *Tse Kwong Lam v Wong Chit Sen* and others[12] it was held that *"it had to be shown that the sale was made in good faith and that the mortgagee had taken reasonable precautions to obtain the best price reasonably obtainable at the time, namely by taking expert advice as to the method of sale, the steps which ought reasonably to be taken to make the sale a success and the amount of the reserve. The mortgagee was not bound to postpone the sale in the hope of obtaining a better price. Of course all the*

[10] 1962 (4) SA 581 (D).
[11] Oxford English Dictionary 2nd ed (2010).
[12] [1983] 3 All ER 54.

circumstances of the case must be looked at. On behalf of the mortgagee it was submitted that all reasonable steps were taken when the mortgagee, with adequate advertisement, sold the property at a properly conducted auction to the highest bidder. The submission assumes that such an auction must produce the best price reasonably obtainable or, as Salmon LJ expressed the test, the true market value.."

60. In *McHugh v Union Bank of Canada*[13]Lord Moulton in tendering the advice of the Privy Council said: *"It is well settled law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold."*

61. In *Silven Properties Ltd and another v Royal Bank of Scotland plc and others*[14] it was held to be *"common ground that a mortgagee who exercises his power of sale owes a duty to take reasonable precautions to obtain the true market value or a proper price for the property at the time when he comes to sell: see [Cuckmere Brick Co Ltd v Mutual Finance Ltd, Mutual Finance Ltd v Cuckmere Brick Co Ltd [1971] 2 All ER 633, [1971] Ch 949]. A mortgagee is bound to have regard to the interests of the mortgagor, but he is entitled to give priority to his own interests, and may insist on an immediate sale whether or not that is calculated to realise the best price; he must 'take reasonable care to obtain the true value of the property at the moment he chooses to sell it': see [the Cuckmere case]. In this context it is clear that the property must be fairly and properly exposed to the market, absent perhaps cases of real urgency. Similarly, as part of this duty of care, the receiver may be required to take positive steps to maintain the value of the property. [Knight v Lawrence [1993] BCLC 215] is an example of this."*

62. Based on the available case law and guidance on this issue it can be concluded that there appears to be no general obligation on a credit provider to engage in the business of a dealer who specialises in selling particular goods at the highest price that can possibly be obtained. The credit provider is therefore not generally expected to obtain prices for repossessed goods which are equivalent to, or even similar to, the price that a dealer in such goods would obtain where there is a normal "willing buyer"" and "willing seller" situation.

63. Whilst the values indicated in the Mead and McGrouther Digest can be regarded as a very general guide as to the value of a vehicle, they appear to represent values which could be obtained under

[13] [1913] AC 299 at 311.
[14] [2004] 4 All ER 484.

normal market circumstances by a dealer in motor vehicles for a vehicle in a good overall condition. It would be unreasonable to expect a credit provider to obtain prices matching these values.

64. Further, in order to assign these values, one must assume that the vehicle is in a good overall condition which, in the context of a review in terms of section 128, would generally require a physical inspection or some other evidence of its condition. In the absence of evidence relating to the condition of the vehicle it would amount to pure speculation to say that a particular vehicle could be assigned these values.

65. The Applicant's mere submission that the vehicle's value should be based on the Mead and McGrouther Digest is therefore purely speculative and of little value in determining compliance with section 128.

66. In the matter before us the Respondent has submitted evidence that the vehicle was valued by a registered appraiser for R65 000.00 and ultimately sold at a public auction for R74 010.00. On the evidence available the vehicle was not in a good or even a running condition and it therefore does not appear unreasonable that the vehicle was valued and ultimately sold for a much lower amount than indicated by the Mead and McGrouther Digest.

67. Therefore, even if it could be found that the Applicant has complied with the procedural requirements of section 128, the Tribunal cannot find any basis for a conclusion that the goods were not sold for the best price reasonably obtainable.

ORDER

Accordingly, the Tribunal makes the following order:

68. The application to the Tribunal for a finding that the credit provider did not sell the goods at the best price reasonably obtainable is dismissed.

69. No order is made as to costs.

DATED ON THIS 30TH DAY OF JANUARY 2014

[signed]

Adv. J Simpson

Member

Adv. F Manemela (Presiding Member) and Mr X May concurring

Authorised for issue by the National Consumer Tribunal

Case number

Date 2014 / 05 / 27
Ccyy / mm / dd

National Consumer Tribunal
Ground Floor Building B
Lakefield Office Park
272 West Avenue Centurion 0157
www.thenct.org.za