

SOUTH AFRICA / JUDGMENT

BMW Financial Services SA (Pty) Ltd v Jacob (36863/2016) [2017] ZAGPJHC 371 (14 July 2017) [2017] ZAGPJHC 371

COURT

South Gauteng High Court, Johannesburg

BEFORE

M Victor

CASE / FILE NUMBER

36863/2016

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG
CASE NO: 36863/2016

In the matter between: BMW FINANCIAL SERVICES SA (PTY) LTD
 APPLICANT
 And
 MANABILE MADUMETJA JACOB
 RESPONDENT

REASONS FOR JUDGMENT

VICTOR J:

[1] This application for the return of a motor vehicle was moved on the Unopposed Motion Roll of the 15th of March 2017. The following

relief was sought:

Ordering the respondent to return a 2010 BMW Gran Turismo 530d motor vehicle with engine number 0C221939 and chassis number 25647548 to the applicant and a directive to the Sheriff to remove the vehicle from wherever it may be found and return it to the Applicant in the event that the respondent failed to do so.

Postponing sine die the question of damages until after the applicant is in possession of the vehicle and is able to determine the value thereof and the amount due.

Granting leave to the applicant to approach this court on the papers filed of record supplemented by a damages affidavit once the applicant has determined its damages.

Ordering the respondent to pay the costs of this application on the attorney and client scale.

- [2] The order was granted. The respondent has since requested the reasons for the order. The reasons follow.
- [3] It is common cause that on or about the 1st of October 2012 the parties concluded a written instalment agreement at or near Polokwane, in terms of which the applicant sold and delivered to the respondent the BMW motor vehicle described above. In terms of the agreement, the respondent would pay the purchase price by way of 60 monthly instalments with the first instalment to be paid on the 30th of November 2012 and the final instalment to be paid by the 30th of October 2017.
- [4] The respondent breached the instalment sale agreement and as at the 1 September 2016 the respondent was in arrears by some R45 835.60 and the balance outstanding at that stage was R262 504.46.
- [5] It is undisputed that the agreement fell within the provisions of the National Credit Act 34 of 2005 (NCA). Thus before proceeding to court to enforce its rights, a credit provider is required to bring the default to the attention of the consumer by way of a letter in terms of s129 of the NCA. This letter must contain specific information relating to the amount of the arrears, a request to the consumer to make payment as well as advising the consumer to seek the assistance of a debt counsellor amongst others in the event that the consumer is over indebted.
- [6] On the 6 June 2016, the applicant sent the letter in terms of s129 of the NCA per registered post to the respondent calling upon the respondent to remedy its default or seek assistance from a debt counsellor amongst others, failing which, it will approach a court and enforce its rights in terms of s 130 of the NCA. The respondent had been in default for more than 20 business days. 10 days elapsed since the delivery of the 129 notice and the respondent did not respond to the notice nor did he remedy his default despite the track and trace report showing that the notice had been sent to the Bendor Park post office serving the area of the respondent's domicilium. Thereafter the applicant proceeded to launch the application. It was served at the domicilium address by the Deputy Sheriff on 4 October 2016. He could not find any response and affixed the notice motion to the main principal door. The respondents awareness and appointment of attorneys to defend the application curtails the issues raised by the judgments in *Sebola and Another v Standard Bank of South Africa Ltd* and *Another 2012 (5) SA 142 (CC)* and *Kubyana v Standard Bank of South Africa Ltd* judgments pertaining to what constitutes proper service of the 129 notice.

- [7] It is trite that before a credit provider may claim repossession or attachment of goods, it must first allege in its summons that the credit agreement under which it claims back the property is cancelled and the credit agreement must contain a *lex commissoria* authorising the credit provider to cancel the agreement and claim back the *res vendita*. See *Absa Bank v De Villiers* 2009 (5) SA (40) (C) and *Absa Bank v Havenga* 2010 (5) SA 533 (GNP).
- [8] Service of these proceedings was effected properly. The respondent should of entered an appearance to defend 5 days from receipt of the Notice of Motion on the 24th of October 2016. He did not do so. He entered his notice of intention to oppose on 24 November 2016, some 23 days late and thereafter failed to file an affidavit for condonation and did not file an opposing affidavit setting out his defence.
- [9] The applicant complied with the obligations as required by s 129 and 130 of the NCA and satisfied the court as required by s130 (3) of the NCA. In the result the applicant was entitled to the relief sought. The respondent can prove no right in law to remain in possession where it has defaulted on the agreed terms of the credit agreement and the credit provider enforces its rights.
- [10] The respondent has had opportunity to reinstate the credit agreement as envisaged by s129 (3) of the NCA but did not do so. It bears mention that an order for repossession of property is viewed by the legislature as a preventative measure to over indebtedness because the proceeds go towards decreasing the consumer's indebtedness. See *Standard Bank v Panayiotts* 2009 (3) SA 363 (W)
- [11] In the result I made an order in terms of the draft marked X.

M VICTOR

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Counsel for Applicant Adv K Meyer

Attorney for Applicant

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