

SOUTH AFRICA / JUDGMENT

BMW Financial Services v Claassen (42227/2012) [2013] ZAGPPHC 434 (4 December 2013) [2013] ZAGPPHC 434

COURT

North Gauteng High Court, Pretoria

BEFORE

Masipa

CASE / FILE NUMBER

42227/2012

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REPUBLIC
OF SOUTH AFRICA
IN
THE NORTH GAUTENG HIGH COURT
PRETORIA
CASE
NO: 42227/2012

DATE: 4 DECEMBER 2013
NO
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
In

the matter between: BMW
FINANCIAL
SERVICES.....Applicant
and
CLAASSEN
DANIEL
GERHARDUS.....Respondent

JUDGMENT

MASIPA J

INTRODUCTION

- [1] In this application the applicant seeks the return of a motor vehicle with the postponement of any damages suffered by the applicant.
- [2] The basis of the application is that the respondent breached an instalment sale agreement ("agreement") by failing to pay the monthly instalments when they fell due. The applicant avers that it complied with the National Credit Act and delivered a Section 129 Notice to the Respondent's chosen domicillium. In addition the applicant avers that it has cancelled the agreement.

DEFENCES TO THE APPLICATION

- [3] . The respondent resists the application on various grounds namely :

- A. The applicant was not entitled to cancel the agreement
- B. The agreement has not been cancelled
- C. The respondent never received the Section 129 notice.

Was the applicant entitled to cancel the agreement and was the agreement in fact cancelled?

- [4] The respondent alleges that the applicant was not entitled to cancel the agreement. He states that in October 2009 he phoned the applicant and explained to its representative the financial challenges he had at the time. The person he spoke to promised to relay the information to his seniors. He states that he subsequently formed the impression that the applicant had given him a grace period. For that reason the applicant could not have cancelled the agreement as it was not entitled to do so, was the contention. The respondent states that another reason the applicant was not entitled to cancel the agreement is that he, the respondent, made payments into the applicant's account which the applicant accepted even after the alleged cancellation.
- [5] The applicant states that all telephone conversations are recorded. Only one conversation by the respondent with one Denzel Lyer of the applicant was recorded on 6 October 2009. The transcript does not support the version of the respondent as it is clear that the conversation took place on the 6 October not at the end of October as alleged by the respondent. The transcript of the conversation makes it clear that the reason given for non payment of instalment at the time was the fact that the respondent was waiting for monies to be released from the Reserve Bank. He had promised that he would be able to pay the instalment by 15 October 2009.

- [7] The Applicant has a poor payment history. There is a pattern of debit orders being unmet due to insufficient funds or due to payment being stopped. No explanation was forthcoming from the respondent.
- [8] The applicant was entitled to and rightly so, cancelled the agreement. This was relayed to the respondent. He ignored that information and made payments into the account of the applicant. He cannot now say that, because he made some payments, after the agreement had been cancelled, the situation has been reversed and the agreement was no longer cancelled. The following must be borne in mind:
1. The applicant does not have the means to prevent payments being made into its bank account.
 2. An agreement which has been cancelled cannot be resuscitated by making payment into the creditor's account.
- [9] The applicant in this matter explained that any payments into the bank account of the applicant, after cancellation, is allocated to the arrears or credited to the account to be set off against the damages the applicant has suffered once the vehicle has been returned.

Did the Applicant comply with the National Credit Act? ("the NCA").

[10] The applicant claims that it complied with the provisions of Section 129 of the NCA by sending such notice by registered post to an address chosen by the respondent.

[11] In the matter of *Standard Bank Ltd v Rockhill and Another* 2010 (5) SA 252 (SGJ) at 255 E-G the following was said:

"The credit provider discharges its obligation of delivering the notice by sending it to the postal address selected by the consumer..."

[12] In *Rossouw and Another v First Rand Bank Ltd* 2010 (6) SA 439 (SCA) the court also considered the meaning of delivery in section 129 and section 130 of the NCA and concluded that dispatch by registered post was sufficient for the section 129 (1) notice.

[13] The above seem to indicate that as long as the Section 129 notice was dispatched to the address furnished by the consumer the credit provider is entitled to approach the court for an order to enforce a credit agreement. However, this would not be the correct

interpretation as courts are required to apply their minds properly to the matter at hand before granting the order.

[14] In *Absa Bank Ltd v Mkhize* and two similar cases 2012 (5) SA 574 (KZD) the court had to deal with instances where, notwithstanding delivery of the Section 129 notices to the consumers' addresses, there were indications that the notices concerned had not come to the attention of the consumers. There the court was dealing with

applications for default judgment against four defendants (respondents). There was evidence that although the credit provider,

Absa, had, in each case, dispatched by registered post, to the correct post offices, notification to the consumers, the notices had not been collected. The learned judge, Olsen AJ, concluded that he could not ignore this fact and postponed the application for default judgment and required Absa to take further steps before setting the matter down again for hearing.

[17] The reasoning in the Mkhize matter, *supra*, was in line with *Sebola v Standard Bank* 2012 (5) SA 142 (CC). There the court dealt with section 129 and section 130. The correct approach was set out as follows per Cameron J:

"As pointed out earlier, the statute does not demand that the credit provider prove that the notice actually came to the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address. But given the high significance of the section 129 notice, it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on a balance of probabilities, reached the consumer".

[18] In the present case the applicant/ credit provider cannot satisfy the court that on the balance of probabilities the notice reached the consumer as there is evidence that the notice never came to the attention of the respondent as it was not collected from the post office.

[19] What is also clear in the present case is that the credit provider complied with the provisions of the NCA. For that reason there is no basis on which the application can be dismissed as counsel for the applicant, correctly argued. It seems to me that the correct order in the circumstances would be one similar to the order in *Mkhize supra*.

[20] I pause to state that unlike in the *Mkhize* matter where the respondents were not aware of a pending case against them, as they

were not legally represented, the respondent in the present case was represented and therefore knows that there is an application pending before this court. Notwithstanding the distinguishing features between the two cases no harm can be done by adopting, in the present case, the format used in the matter of *Mkhize*.

In the result I grant the following order:

1. The application is postponed *sine die*;
2. The applicant is afforded an opportunity to provide a notice to the respondent as contemplated in section 129 (1) of the National Credit Act of 2005 through one or more of the mechanisms listed in section 65 (2) (a) of the Act and also by registered post directed to the respondent's chosen address.
3. Such notice must, in addition to meeting the requirements of section 129 (1) (a) of the Act, also draw to the respondent's attention to –

the fact that there is a pending application against the respondent in this court, the relevant case number and the fact that the application was postponed sine die

- (b) the capital outstanding amount owed,
 - (c) the current amount of arrears
 - (d) the fact that the respondent's rights in terms of the Act, and in particular those contemplated by section 129 (1) (a) are unaffected by the fact that application proceedings against are pending against the respondent.
4. the applicant is granted leave to set down the same application on notice to the respondent but may not do so until at least 10 business days shall have elapsed since delivery of the notice referred to in para (2) of this order, or if that date is unknown, since the date by which the applicant contends that such delivery must have been effected.
5. The application shall be accompanied by an affidavit setting out the following:
- (a) that the notice required by para (2) of this order was delivered to the respondent and setting out the respondent's choice of mode of delivery of the notice; and
 - (b) dealing with matters referred to in section 130 (1) (b) of the Act.
6. Costs are reserved.

TM MASIPA JUDGE OF THE NORTH GAUTENG

HIGH COURT

Counsel for the Applicant: Van Reenen

Instructed by: Smit Jones and Pratt Attorneys

Counsel for the Respondent: Greyling DJ

Instructed by Smith & Vosloo Attorneys

Date of Hearing: 20/11/2013

Date of Judgment: 04/12/2013

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