

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Campbell (6350/2021) [2023] ZAWCHC 88 (2 May 2023)

[2023] ZAWCHC 88

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

6350/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 6350/2021

In the matter between:

NEDBANK LIMITED

Applicant

and

CARMEN-LEIGH CAMPBELL Respondent

JUDGMENT DELIVERED ON 2 MAY 2023

VAN ZYL AJ:

Introduction

1. The issue in this matter is whether the respondent is in contempt of court, or guilty of an offence in terms of section 97(5) of the National Credit Act 34 of 2005 (“the NCA”).
2. The applicant seeks, in the first instance, an order of civil contempt against the respondent. Contempt of court, in the present context, has been defined as “the deliberate, intentional (i.e. wilful), disobedience of an order granted by a court of competent jurisdiction”.^[1]
3. Wilfulness is an essential element of the act or omission alleged to constitute contempt.^[2] In addition to the element of wilfulness, there must be an element of mala fides.^[3] Once it is shown that the order was granted (and served on or otherwise came to the notice of the respondent) and that the respondent had disobeyed or neglected to comply with it, both

wilfulness and mala fides will be inferred.[4] Thus, once the applicant has proved the order, service or notice, and non-compliance, an evidentiary burden rests upon the respondent in relation to wilfulness and male fides, that is, to advance evidence that establishes a reasonable doubt as to whether non-compliance with the order was wilful and male fide.[5]

4. Even though the defaulting party may be wilful, such party may still escape liability if they can show that they were bona fide in their disobedience. Where the defaulting party has genuinely tried to carry out the order and has failed through no fault of his or her own, or has been unable but not unwilling (for example, by reason of poverty), to carry out the order, proceedings for committal will fail.[6]
5. The applicant also seeks an order under section 97 of the NCA. Sections 97(2) to 97(5) of the NCA read as follows:

“(2) Until the termination of an agreement to which this section applies, the consumer must inform the credit provider, in the prescribed time, manner and form, of any change concerning-

- (a) the consumer's residential or business address;
 - (b) the address of the premises in which any goods that are subject to the agreement are ordinarily kept; and
 - (c) the name and address of any other person to whom possession of the goods has been transferred.
- (3) On request by the credit provider, a deputy sheriff or messenger of the court, the consumer must inform that person, in the prescribed manner and form, of the address of the premises where the goods are ordinarily kept and the name and address of the landlord, if any, of those premises.
 - (4) If at the time of a request under subsection (3) the consumer is no longer in possession of the goods that are subject to the agreement, the consumer must provide the name and address of the person to whom possession of those goods has been transferred.
 - (5) A consumer who knowingly-
 - (a) provides false or misleading information to a credit provider, deputy sheriff or messenger of the court under this section; or
 - (b) acts in a manner contrary to this section with intent to frustrate or impede a credit provider exercising rights under this Act or a credit agreement, is guilty of an offence.”
6. Section 97 obliges a consumer to disclose the location of the goods in question. Throughout the relevant parts thereof, there is an obligation on a consumer such as the respondent to inform the applicant of the address of the premises in which any good that are subject to a credit agreement are ordinarily kept, and the name and address of any other person to whom possession of the goods has been transferred. If, at the time of a request, the consumer is no longer in possession of the goods, the consumer must provide the name and

address of the person to whom possession has been transferred.

7. A person who knowingly provides false or misleading information or who acts in a manner contrary to section 97 with the intention to frustrate or impede a credit provider from exercising its rights under the NCA or under a credit agreement, is guilty of an offence. Section 161 of the NCA provides generally that any person convicted of an offence in terms of the NCA is liable to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.
8. I agree with the submission by counsel for the applicant that, in order successfully to prosecute a consumer for a contravention of section 97, there needs to be a clear intent to defraud or mislead the credit provider, sheriff, or messenger, or to frustrate or impede the credit provider in the exercise of its rights under the NCA or the relevant credit agreement. This will have

to be proved beyond a reasonable doubt.

9. The facts giving rise to this application are considered against this background.

The relevant facts

10. On 14 August 2019 the applicant and the respondent concluded a written credit agreement which fell within the application of the NCA. In terms of the agreement, the applicant financed the respondent's purchase of a motor vehicle, a 2018 Hyundai Tucson. The respondent failed to keep up with the payments to be effected under the agreement. On 6 September 2021 the applicant obtained default judgment in this Court against the respondent for, inter alia, the return of the vehicle.
11. On 13 October 2021 a warrant of attachment was issued for execution by the Sheriff. The vehicle could, despite various attempts on 16 November 2021 and 27 January 2022 respectively, not be found. On 18 March 2022 the Sheriff was again instructed to attach the vehicle and to serve a notice in terms of section 97 of the NCA on the respondent. The notice was served on the respondent personally, who informed the Sheriff that she and her husband did not know in whose possession the vehicle was. They had no information as to the location thereof.
12. The applicant insists that the respondent is refusing to comply with the order.
13. In her answering affidavit in these proceedings, the respondent stated that she had given the vehicle back to the dealership, Sullivan's Auto, shortly after purchasing it, as it required mechanical repairs. Despite repeatedly seeking information on the progress of the repairs, the respondent was assured that she would get the vehicle back and that the dealership would keep the applicant updated on the issue. After the lapse of some time, and out of frustration, the respondent stopped making payments to the applicant towards the credit agreement. Her understanding was that the applicant and the dealership knew where the vehicle was, and that she would proceed with her repayments as soon as she received the

vehicle back. The non-payment, of course, led to the institution of action by the applicant and the default judgment taken against the respondent.

14. The respondent states that it has always been her wish to have this matter settled, as she did not want to be engaged in unnecessary and costly litigation. She accordingly attempted to find out where the vehicle was.
15. During November 2022 she contacted the sales representative of the dealership, Ms Robyn Smith, for details of the location of the vehicle. She was advised that the dealership had closed down, but that they would endeavour to provide her with feedback within a few weeks. By 30 November 2022, when she had not heard from them, the respondent contacted Ms Smith again. She was advised that the dealership required more time, until the end of December 2022, to get hold of the vehicle.
16. It was however only on 24 February 2023 that the respondent obtained an address at which, so she was informed, the vehicle might be. She was told that the vehicle had been confiscated as “security” by a third party, Mr Isaac Njembe, who would not release it until a dispute between him and the dealership had been resolved. The information did not yield the vehicle. The address was thought to be the home of Mr Njembe who, as indicated, had taken possession of the vehicle from the auto dealership after the respondent had returned it for repairs. It was also thought that this might be the address of an outfit known as Isaac’s Tailors, owned by Mr Njembe. It turned out not be Mr Njembe’s address or Isaac’s Tailors’ premises, but the location of a student hostel. The vehicle was not there.
17. It does appear from information that later came to hand that Mr Njembe had since laid criminal charges against the dealership at the Parow police station. The history of the matter is that, prior to the closing down of the dealership, it had a longstanding business relationship with Mr Njembe. They had concluded various agreements in terms whereof Mr Njembe would deliver motor vehicles (usually in batches) to the dealership. The latter would sell the vehicles on Mr Njembe’s behalf and would

then pay to Mr Njembe whatever amounts they had agreed upon.

18. According to Ms Smith, the respondent’s motor vehicle formed part of one of those agreements. In essence, Mr Njembe delivered the motor vehicle to the dealership, the dealership sold it to the respondent and arranged the financing thereof with the applicant. Ms Smith advised further that, when the respondent returned the vehicle to the dealership for it repairs, Ms Smith contacted Mr Njembe to collect the vehicle and attend to the mechanical faults.
19. While the vehicle was in Mr Njembe's possession, disputes arose regarding payments in respect of the agreements. It was at this time that Mr Njembe informed Ms Smith that he would not be returning the respondent’s vehicle to the dealership until such time as he had been paid what he claimed.

20. No further information as to the location of the vehicle has come to light. The dealership has (unsurprisingly) not been helpful, save to confirm that the vehicle is in Mr Njembe's possession. Ms Smith has confirmed the respondent's allegations by way of a confirmatory affidavit.

Is the respondent wilful in her non-compliance with the court order?

21. The applicant is quite correct that there is a valid and enforceable judgment against the respondent. She has undoubtedly failed to comply with all of the terms thereof. I cannot, however, on the papers before me find that the respondent was in wilful and mala fide default. I can also not find, for the purposes of section 97 of the NCA, that the respondent displays a clear intent to defraud or mislead the applicant, or to frustrate or impede the applicant in the exercise of its rights under the NCA. The respondent is unable to comply because she does not have the requisite information. She has tried to obtain it, with no success.
22. It is so that, as argued by the applicant, what is stated in the answering affidavit differs from what the respondent had apparently told the Sheriff when the latter sought to attach the vehicle from her residence. She had not, at that stage, stated that she had returned the vehicle to the dealership. She did, however, inform the Sheriff that she did not know where the vehicle was. There is no reason not to accept that this was, and still is, the case.
23. It is no use insisting that the respondent must provide the location of the vehicle. It is common cause that she must do so, both because of the court order and the provisions of section 97 of the NCA. On the papers, she cannot do so. The approach in respect of disputes of fact in matters of this nature is not disturbed by the evidentiary burden resting on the respondent. The respondent's version can only be rejected if, on the papers, the Court can find that such version is "fictitious or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence".[7]
24. Whilst the allegations in the answering papers are relatively sparse, there does not seem to be much more that the respondent can say in the peculiar position in which she finds herself. Mr Njembe is in possession of the vehicle, and the respondent does not know where it is being kept. I do not think that her version falls to be rejected on the papers. The respondent was the unfortunate victim of a third party dispute.

Costs

25. There is no reason to deviate from the general rule that costs follow the event.

Order

26. In the premises, it is ordered as follows:

The application is dismissed, with costs.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicant:

M. Garces, instructed by Kemp & Associates

For the respondent: P. Manyuchi, Somciza and Joni Inc. (respondent in person at the hearing)

[1] Consolidated Fish Distributors (Pty) Ltd v Zive 1968

(2) SA 517 (C) at 522B–D.

[2] Culverwell v Beira 1992

(4) SA 490 (W) at 493D–E.

[3] Jayiya v Member of the Executive Council for Welfare, Eastern Cape 2004

(2) SA 611 (SCA) at 621E.

[4]

Townsend-Turner v Morrow 2004

(2) SA 32 (C) at 49C–D.

[5] Fakie N.O. v CCII Systems (Pty) Ltd and another 2006 (SCA) at paras [42]–[43].

[6] Matjhabeng Local Municipality v Eskom Holdings Ltd and others; Mkhonto and others v Compensation Solutions (Pty) Ltd 2018 (1) SA 1 (CC) at paras [85]–[88]; and see the discussion in Erasmus Superior Court Practice Vol. 1 (revision service 18, 2022) at A2-173.

[7] Fakie N.O. supra at para [56].

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