

SOUTH AFRICA / JUDGMENT

SA Taxi Securitisation (Pty) Ltd v Campher (5081/2009) [2012] ZAECHGHC 9 (24 February 2012) [2012] ZAECHGHC 9

COURT

Eastern Cape High Court, Grahamstown

BEFORE

GG Goosen

CASE / FILE NUMBER

5081/2009

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IN THE HIGH COURT OF

SOUTH AFRICA

(EASTERN CAPE,
GRAHAMSTOWN)

CASE NO: 5081/2009

Date

Heard: 16 February 2012

Date

Delivered: 24 February 2012

NOT REPORTABLE

In the matter between:

SA TAXI SECURITISATION
(PTY) LTD

.....Plaintiff

and

ALBERT CAMPHER

.....Defendant

JUDGMENT

GOOSEN, J:

This is an application for summary judgment in which the plaintiff claims the return of a 2009 CAM Inyathi XGD 2.2l motor vehicle and an order for costs on a party and party scale. The plaintiff's claim is based on the cancellation of a credit agreement in respect of which it is alleged that the defendant is in default.

There are no issues relevant to the application for summary judgment itself, the plaintiff having complied with the provisions of Rule 32. The defendant opposed the application for summary judgment on various grounds which I will deal with hereunder. The application was opposed on a number of occasions, more recently because the defendant was ill and unable to travel to Grahamstown to represent himself, his attorney and counsel having withdrawn. At the hearing I was informed that the defendant had apparently contacted the registrar's office to inform the registrar that he was unable to attend the proceedings. I proceeded to hear the matter since heads of argument had previously been filed on behalf of the defendant and since no basis had been presented upon which a further postponement could be granted.

The defendant raises five defences to the application for summary judgment. I shall deal with each in turn.

In the first instance it is alleged that the summons commencing action was issued prematurely. The defendant alleges that the notice in terms of section 129(1) of the National Credit Act (hereinafter the "NCA") was sent by registered post on 11 December 2009 although it was not received. Summons was issued on 4 January 2010 and served on the defendant on 6 January

2010. The 10 business days provided for in section 130 of the NCA would have elapsed on 29 December 2009. To this period, so it is argued, should be added 3 days for which provision is made in the agreement for a deemed receipt of mail after the date of posting. That being so, summons, so it was contended, ought only to have been issued on or after 5 January 2010.

The argument is without merit. The defendant chose the method of delivery of notices as he was entitled to do in terms of section 65 of the NCA. This much is apparent from the credit agreement itself. In doing so he chose to receive notices by delivery by hand or by post. Clause 11.2 of the agreement provides that:

"Any notice delivered by or sent by registered post to the Lessee's domicilium shall be deemed to have been received if delivered by hand, on due date of delivery, or if sent by registered post on the 3rd day after posting."

In *Rossouw v First Rand Bank Ltd* 2010(6) SA 439 (SCA) it was found (at paragraph

- 31) that sending a document by registered mail is proper delivery in terms of section 129 of the NCA and that proof of receipt thereof is not required by the section. The 3 day period provided for contractually by the credit agreement in terms of which receipt of a notice is deemed to have occurred 3 days after posting, does not change the legislative requirement relating to delivery of notices in terms of the NCA. In this instance service of the summons occurred after the expiry of the 10 business days provided for in section 130 of the NCA. Accordingly the summons was not premature. (See *Nedbank v Mokhanoana* 2010(5) SA 551 (GNP)).

A second defence raised concerned the alleged non-compliance with section 129(1) of the NCA inasmuch as it was not proved by the plaintiff that the defendant had received the notice. In heads previously filed on behalf of the defendant reliance was placed on three judgments in which it was held that more is required merely than that a notice is dispatched to a debtor as is required by the section 129 of the NCA. The first matter relied on was *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009(2) SA 512 (D) where the court said at paragraph 55:

“The words ‘draw the default to the notice of the consumer’, ‘providing notice’ and ‘delivered a notice’

in the context in which these appear in the previous paragraph to my mind cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires much more than the mere despatching of the notice contemplated by s 129(1)(a) to the consumer in the manner prescribed in the Act and the regulations. The credit provider is required, in my view, to bring the default to the attention of the consumer in a way which provides an assurance to a court, considering whether or not there has been proper compliance with the procedural requirements of ss 129 and 130, that the default has indeed been drawn ‘to the notice of the consumer’. ‘Notice’, according to the New Oxford Dictionary, means ‘attention; observation’. In a case where the consumer has chosen as an address in the credit agreement as the

domicilium at which all notices, demands or communications may be sent, and the credit provider has accepted that address as the address chosen by the consumer; then the credit provider should ensure, if the notice is sent by mail, that the address to which the notice is posted is in every respect precisely the same as that accepted by the credit provider in the credit agreement. It cannot content itself with sending the notice to an address referred to in a notarial bond, or such other address which, because of its similarity in some respects with the address chosen by the consumer in the credit agreement, might by chance or good fortune be accepted by the post office and/or the postman as the same address as that which had been chosen by the consumer in the credit agreement.”

The decision in that matter turned on the fact that the addresses to which notices were delivered did not correspond in each instance with the chosen domicilium and there was nothing in the papers to suggest that these were the addresses chosen by the defendants. The *Prochaska* matter did not decide that section 129 requires that delivery of the notice of default be personal or that a plaintiff is required to prove receipt of such notice.

The second matter relied on is the judgment of Murphy, J in *First Rand Bank v Dhlamini* 2010(4) SA 531 (GNP) in which the learned judge agreed with the finding in *Prochaska* that the requirement of drawing the default to the notice of the consumer and the prohibition in section 129(1) against commencing legal proceedings before first providing notice to the consumer, "... cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires more than the mere dispatching of the notice to the consumer in the manner prescribed in the Act and regulations for delivery."

A similar view was expressed in the yet unreported judgment of Pillay, J in this division in *Changing Tides 17 (Pty) Ltd v Elizabeth Koekemoer* (case no. 2025/2009).

The controversy regarding the actual receipt of a notice delivered in terms of section 129 of the NCA has been authoritatively decided by the Supreme Court of Appeal in *Rossouw & Another v First Rand Bank Ltd* 2010(6) SA 439 (SCA) where the court, after considering the import and proper interpretation of the relevant provisions of the NCA concluded, at paragraph 32 that:

"It appears to me that the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders. With every choice lies a responsibility, and it is after all within a consumer's sole knowledge as to which means of communication will reasonably ensure delivery to him. It is entirely fair in the circumstances to conclude from the legislature's express language in section 65(2) that it considered dispatch of a notice in the manner chosen by the appellants in this matter sufficient for purposes of section 129(1)(a), and that actual receipt is the consumer's responsibility."

In the circumstances the defendant's defence based on alleged non-receipt of the notice does not avail him.

Two further defences raised by the defendant are inter-related. It is alleged that in terms of section 85 of the NCA the court has a discretion to either refer the matter to a debt counsellor, where it is alleged that the debtor is over-indebted, or to declare the debtor so over-indebted. On this basis such declaration would, so it is argued, afford the defendant a defence against the claim prosecuted by the plaintiff. It is also alleged that the plaintiff did not conduct a mandatory credit assessment at the time that the credit was extended to the defendant and that had the plaintiff conducted such credit assessment the plaintiff would have determined that the defendant was over-indebted. Accordingly, so it is suggested, the grant of credit to the defendant constitutes reckless credit.

Section 85 confers a discretion upon a court which is dealing with proceedings in which a credit agreement is being considered and where it is alleged that the debtor is over-indebted to either refer the matter to a debt counsellor so that such counsellor may evaluate the consumer's circumstances and make recommendations to the court or to declare the consumer to be over-indebted and make any order appropriate to alleviate the over-indebtedness.

The circumstances in which a court will exercise its discretion and the basis upon which such discretion can be exercised have been considered in a number of matters, including *First Rand Bank Ltd v Olivier* 2009(3) SA 353 (SE), *Standard Bank v Panyiotts* 2009(3) SA 363 (W) and *Standard Bank v Hales* 2009(3) SA 315 (D). I need not consider whether an appropriate case has been made out for the exercise of such discretion in this matter. This is so because the plaintiff's claim is for the return of a motor vehicle, the ownership of which vests in the plaintiff in accordance with the terms of the credit agreement and which serves as security for the payment of the amounts due in terms of that agreement. A defence based on the over-indebtedness of the debtor does not avail the debtor in circumstances where the creditor seeks return of goods in which ownership vests in the creditor.

In *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011(1) SA 310 (GSJ) the question of a defence based on reckless credit was considered. In analysing the purpose and effect of the relevant provisions of the NCA Levenberg, AJ came to the conclusion that the NCA did not contemplate that a debtor who is over-indebted or who has been recklessly provided with credit can retain goods acquired by such credit. The purpose of the Act is to alleviate a state of over-indebtedness and, in the case of reckless credit, to protect the debtor from penalties and interest charges incurred in consequence of the default on a credit agreement recklessly entered into. The NCA does not, as the learned judge remarked, contemplate that the consumer should have both "the money and the box". This analysis of the Act has been endorsed in this division by Plasket, J in *SA Taxi Securitisation (Pty) Ltd v Booi & Others* (as yet unreported, case no. 4077/2009, delivered 20 May 2010), a conclusion with which I agree. The approach adopted in regard to reckless credit is of equal application to the defence of an alleged over-indebtedness raised in terms of section 85 of the

NCA.

As indicated the defendant also sought to raise a defence based on an alleged failure by the plaintiff to conduct a credit assessment thereby alleging that the extension of credit to him was reckless. That defence to a claim for summary judgment in which return of the motor vehicle is sought must, for the reasons already explained, also fail.

The final defence raised by the defendant concerns an allegation regarding the alleged defectiveness of the motor vehicle. The allegation made by the defendant is that the battery in the vehicle did not work properly and that the right wheel bearing "popped". All this occurred some time after delivery of the vehicle was taken. As a result of this the vehicle was inoperative for a period of 7 days. Apart from this allegation there is the bald assertion on the papers that the vehicle is "again inoperative", although no details at all are provided. These allegations fall woefully short of establishing that the vehicle is defective or that it was not fit for the purpose for which it was acquired. At best for the defendant the allegations establish (assuming that these facts are proved at trial) that the vehicle had certain mechanical difficulties which resulted in it being inoperative for a few days. That does not constitute, in my view, a bona fide defence to the plaintiff's claims, particularly to a claim for cancellation of the agreement and return of the motor vehicle.

It follows therefore that the plaintiff is entitled to summary judgment in this matter.

Accordingly summary judgment is granted in favour of the plaintiff for:

The return of a 2009 CAM Inyathi XGD 2.2l High Roof motor vehicle with engine number SF491QE071161713A and chassis number LFZBBAGC47A012558 to the plaintiff forthwith; and

Party and party costs, such costs to include the reserved costs occasioned by the previous postponements of the application.

GG GOOSEN

JUDGE OF THE HIGH COURT

APPEARANCE:

FOR THE PLAINTIFF: Mr Voultsos, instructed by

Borman & Botha Attorneys

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Prepared on 11 October 2026 · Esheria