

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

In the matters between:

18229/2010

FIRSTRAND BANK LTD t/a WESBANK

and

ININA WELTMAN-SHMARYAHU

18230/2010

FIRSTRAND BANK LTD t/a McCARTHY FINANCE

a division of WESBANK

and

MRS ANINA WELTMAN-SHMARYAHU

18243/2010

FIRSTRAND BANK LTD t/a WESBANK

and

MRS ANINA WELTMAN-SHMARYAHU

JUDGMENT HANDED DOWN ON MONDAY, 25 OCTOBER 2010

CLEAVER J

- [1] These matters are yet further cases spawned by the National Credit Act No 34 of 2005 ("the NCA"). Although the issues in all three matters are identical, I will for the purposes of this judgment deal with the papers in case no 18229/2010. The parties agreed that a finding in this matter would result in similar findings in the other two matters.

[2] The plaintiff seeks by way of summary judgment an order for the return of a motor vehicle sold to the defendant in terms of an instalment sale agreement. The application is opposed in the main on grounds which may be termed 'technical'.

[3] On 19 October 2007 the plaintiff and the defendant entered into what is termed a 'costs of credit sale agreement' in terms whereof the defendant purchased from the plaintiff a BMW 330I CI motor vehicle for a purchase consideration of R479 000 plus certain extra charges listed in the particulars of claim. The plaintiff avers that the defendant, to whom the vehicle was duly delivered,

".....has breached the terms of the Agreement in that the Defendant has failed to maintain regular instalments on account, the arrears as at the 16th AUGUST 2010 being the sum of R66 060.85 and the balance the sum of R505 153.65. As a result of the Defendant's breach, the Plaintiff elected to cancel the agreement, alternatively, Plaintiff's election to cancel the agreement is herewith conveyed to the Defendant."

[4] Defendant's counsel submitted that the description of the rights accorded to the plaintiff in the agreement was not accurate and that the wording thereof was not to be found in the agreement. The averments made by the plaintiff in paragraph 6.5 of its particulars of claim are as follows:

"In the event of the Defendant breaching any terms of the agreement (all of which are agreed to be material) the Plaintiff shall be entitled to immediately cancel the Agreement, obtain possession of the vehicle and recover from the Defendant, as pre-estimated liquidation damages, the total amount payable, but not yet paid, less the value of the vehicle as at the date of delivery thereof to the Plaintiff;"

Defendant's counsel is correct in that the wording supplied by plaintiff does not appear in the agreement, but in my view nothing turns on this. The relevant portion of the breach clause in the agreement reads as follows:

"11. Breach

11.1 If you do not comply with any of the terms and conditions of this Agreement (all of which you agree are material), or you fail to pay any amounts due under this Agreement, or you have made misleading statements to us before signing this Agreement, or you allow any judgement that has been taken against you to remain unpaid for more than seven days, or are sequestered or liquidated, or perform an act of insolvency in terms of the Insolvency Act no 24 of 1936 or enter into a compromise with any of your creditors, or being a natural person, die, or being a juristic person undergo a material restructure, then we may (without affecting any of our other rights), proceed with the enforcement or termination of the Agreement, as set out in Chapter 6 Part C of the Act.

11.2 Should we elect to enforce the Agreement, the procedure set out hereunder will be followed:

11.2.1 A letter will be despatched to you drawing your default under the Agreement to your attention;

11.2.2 A proposal will be made in that letter that you refer this Agreement to a debt counsellor, alternative dispute resolution agent, consumer court or Ombud with jurisdiction, with the intention that we resolve any disputes or develop and agree on a plan to bring the payments under this Agreement up to date.

11.2.3 If the Agreement is under review in terms of section 86 of the Act, and the review is not finalised within 60 business days after you applied for the debt review, we will send you a notice, terminating the debt review.

11.2.4 Legal proceedings will not be commenced against you unless:

(a) You have been in default for at least 20 business days;

(b) At least 10 business days have elapsed since the default letter or notice referred to above has been delivered (which 10 day period may run concurrently with the 20 day default period);

(c) You have failed to respond to the default letter or you have responded by rejecting our proposal;

(d) You have not surrendered the Goods to us in terms of section 127 of the Act.

11.3 Should we elect to cancel this Agreement in terms of section 123 of the Act, the same procedure set out in paragraph 11.2 above will be followed prior thereto.

11.4 At any time before cancellation of the Agreement you are entitled to reinstate the Agreement which is in default by paying all overdue amounts, as well as our permitted default charge and reasonable costs up to the time of reinstatement.

.....”

As will be seen from the clause, 11.1 affords the plaintiff the right to proceed with the termination (cancellation) of the agreement in the event of the defendant failing to pay any amounts due under the agreement; and 11.3 provides the procedure to be adopted in the event of the plaintiff electing to cancel the agreement.

[5] The applicability of the NCA is set out in the following manner in the particulars of claim:

“9. The Plaintiff has complied with the provisions of the National Credit Act 34 of 2005 (the ‘NCA’), more particularly:

- 9.1 The Plaintiff's duly authorised Attorneys, Jeff Gowar and Associates, instructed the Sheriff of Simonstown to serve a notice in terms of the provisions of Section 129(1)(a) on the Defendant, which Notice was duly served on the Plaintiff's chosen domicilium on 27th JULY 2010. A copy of the Notice and a copy of the Sheriff's Return to the Notice is annexed as ‘E’ and ‘F’ respectively;
- 9.2 In response to the Notice in terms of Section 129(1)(a), the Plaintiff's Attorney, Mr Jeff Gowar of Jeff Gowar and Associates, received a telephone call from Mr Brendan Nielsen of Butler Blanckenberg Nielsen Safodien Incorporated, acting for the Defendant herein on the 30th July 2010, requesting suitable arrangements to liquidate the debt herein.
- 9.3 The Defendant has not surrendered the vehicle to the Plaintiff as contemplated in Section 127 of the NCA;
- 9.4 There is no matter arising under the agreement and pending before the National Credit Tribunal that could result in an order affecting the issues to be determined by the Court;

- 9.5 *The Plaintiff has not approached the Court during the time that the matter was before a Debt Counsellor, an Alternative Dispute Resolution Agent, Consumer Court or the Ombud with jurisdiction;*
- 9.6 *The Defendant has not:*
- 9.6.1 *agreed to a proposal made in terms of Section 129(1)(a) of the NCA or acted in good faith in fulfilment of such agreement as no such agreement has been reached;*
 - 9.6.2 *complied with an agreed plan as contemplated in Section 129(1)(a) of the NCA as no such plan has been agreed; or*
 - 9.6.3 *brought the payments under the credit agreement up to date, as contemplated in Section 129(1)(a) of the NCA.*
- 9.7 *More than 10 business days has passed since the delivery of the above notice;*
- 9.8 *The Defendant has been default under the agreement for more than 20 business days;*
- 9.9 *The agreement is not subject to pending debt review as contemplated in Section 86 of the NCA."*

[6] Annexure E, being the notice in terms of section 129(1) of the act, is dated 22 July and is addressed to the defendant at 7 Avenue Francaise, Fresnaye, Cape Town, her place of residence. The letter reads:

"RE: NOTICE IN TERMS OF SECTION 129(1) OF THE NATIONAL CREDIT ACT NO 34 OF 2005

WESBANK a division of FIRSTRAND BANK LIMITED / YOURSELF

ACCOUNT NR: LWC17998E

GOODS: BMW 330I CI CONVERT A/T (46) F/L

AGREEMENT CREDIT REGISTRATION NUMBER WESBANK-NCRCP20

1. *We act on behalf of Wesbank a division of Firststrand Bank Limited, at whose behest we have been instructed to proceed against you.*
2. *The abovementioned Agreement is in arrears in the sum of R63 915.37. The total balance outstanding under the agreement including arrears amounts to the sum of R452 211.79.*
3. *We must request that you effect payment of the aforementioned amount plus interest at the rate set out in your agreement within TEN (10) business days of this letter, alternatively to contact the writer's office to make an arrangement which is both suitable to our client and yourself in respect of the outstanding balance.*
4. *Kindly note that you may seek assistance from a Debt Counsellor, Alternative Dispute Resolution Agent, Consumer Court or Ombud with jurisdiction with the intent to resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.*
5. *In the event that you refer the matter to a Debt Counsellor, you shall be liable to pay an Application fee to the Debt Counsellor, as prescribed by Schedule 2 of the Regulations to the National Credit Act No. 34 of 2005, and not be able to incur any further debt until your debt review has been finalised.*
6. *Accordingly, we await to hear from you within TEN (10) business days to pay your arrears or to take action in terms of clause 4 above. Should you fail to take either action as set out above, we will have no option but to institute the necessary legal action for the return of the goods."*

Annexure F, being the return of the deputy sheriff relating to service of the letter of demand reads:

"On this 27th day of July 2010 at 12:51 I served a copy of the LETTER OF DEMAND in this matter upon ININA WELTMAN SHMARYAHU by affixing a copy thereof to the outer or principal door of the place of RESIDENCE of the DEFENDANT at 7 AVENUE FRANCAISE, FRESNAYE CAPE TOWN. No other service possible after a diligent search. (Rule 9(6))"

- [7] Clause 20 of the agreement deals with the *domicilium* address chosen by the defendant for the purpose of receiving communications from the plaintiff. The clause reads as follows:

20 Addresses

20.1 You agree that the postal address / e-mail address that you have provided on the Quotation is the address where we must send all post and other communication to you and that such communication shall be binding on you.

20.2 You agree that the physical address that you have provided on the Quotation is the address that you have selected as the address that we must send all legal notices to you.

20.3 You must let us know in writing of any change to either of your addresses as well as your e-mail address and telephone number. If you fail to give notice of a change of address, we may use the last address we have for you, even if you are no longer there.

20.4 You accept that you will be deemed to have received a notice or letter 5 days after we have posted it to either of the addresses you have given."

On the front page of the agreement the following appears:

"DOMICILIUM PHYSICAL
ADDRESS:"

7 AVENUE FRANCAIS FRESNAYE 8005

- [8] Relying on the judgment of the SCA in *Rossouw*¹, counsel for the defendant submitted that the only manner in which section 129(1) of the NCA can be complied with is for delivery of the notice to be effected in the manner prescribed in terms of section 65 of the NCA and that since this had not been done, the issue of summons was premature with the result that the plaintiff's action cannot succeed. The submission was further that since the provisions in paragraphs 11.2 and 20.1 of the agreement presuppose the despatch of letters to the defendant by ordinary mail, service of the section 129 notice by the sheriff was insufficient as such service was not one of the methods of service chosen by the

¹ *Benjamin Rossouw and Another v FirstRand Bank Limited t/a FNB Homes* Supreme Court of Appeal case no 640/2009 delivered on 30 September 2010.

defendant as prescribed by section 65 of the NCA.² Counsel's submission went even further for it was to the effect that even had the notice come to the attention of the defendant, such notice would still have been irregular because it was not delivered in terms of a manner prescribed in section 65. In my view there is no merit in this latter submission.

[9] As was made clear in *Rossouw*,

*"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 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 s 65(2) that is considered despatch of a notice in this manner chosen by the appellants in this matter sufficient for purposes of a s 129(1)(a) and that actual receipt is the consumer's responsibility."*³

In the present case the plaintiff went to the trouble of ensuring that the notice would come to the attention of the defendant by having the notice served by the deputy sheriff at the *domicilium* address chosen by the defendant, which address was also her residential address. Although one may deduce from the wording of clause 20.4 that the defendant chose that communications could be addressed to her by ordinary mail at her place of residence, it would to my mind be over-

² "(1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.

(2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must –

(a) make the document available to the consumer through one of the following mechanisms—

(i) in person at the business premises of the credit provider, or at any location designated by the consumer but at the consumer's expense, or by ordinary mail;

(ii) by fax;

(iii) by e-mail; or

(iv) by printable web-page; and

(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)."

³ At paragraph [31].

technical and unfair to the plaintiff to rule that delivery of the notice by the deputy sheriff to the defendant at her residential address, being the *domicilium* chosen by her, does constitute delivery of the notice as required by section 130(1)(a) of the NCA. The form of the notice complies in all respects with the requirements of section 129(1)(a) of the act.

- [10] The defendant denies receipt of the notice and says the following in her opposing affidavit:

"I emphatically state that at no stage did I receive the alleged section 129 notice ('the notice'). I respectfully submit that the Plaintiff as per annexure 'E' merely attended to having these documents attached to what it deemed to be my premises' 'front door'. I at this stage need to make mention of the fact that my front door is located in the main road and as such it is in all likelihood possible that any documentation attached thereto could quite easily be blown off by the wind.

I am advised that in the light of the fact that the notice did not come to my attention, I was not able to exercise my rights as provided for in the NCA in particular sections 127, 129 and 130 thereof."

Although the defendant denies receipt of the notice, she fails to answer the averment in the particulars of claim which clearly suggests that she did receive the notice. As indicated in paragraph [5] the averment is:-

"In response to the Notice in terms of Section 129(1)(a), the Plaintiff's Attorney, Mr Jeff Gowar of Jeff Gowar and Associates, received a telephone call from Mr Brendan Nielsen of Butler Blanckenberg Nielsen Safodien Incorporated, acting for the Defendant herein on the 30th July 2010, requesting suitable arrangements to liquidate the debt herein."

Not only does the defendant not deny this averment, she also fails to deal with it in any way. Interestingly, her denial of receipt of the notice in case no 18243/2010 is in exactly the same terms as is set out in the beginning of this paragraph. That response is difficult to reconcile with the return of the sheriff which reads

*"On this 23rd day of July 2010 at 10:32 I served the LETTER in this matter upon MR BRITE * EMPLOYEE apparently a responsible person and apparently not less than 16 years of age, of and in control of and at the place of residence of ININA WELTMAN SHMAYAHU at 7 AVENUE FRANCAISE, FRESNAYE, CAPE TOWN, the DEFENDANT being temporarily absent, and by handing to the PARTY SERVED a copy thereof after explaining the nature and exigency of the said process. RULE 4(1)(a)(ii)."*

The sheriff's return is not dealt with in any way.

It is perhaps necessary to add that although appearance to defend the action on behalf of the defendant was filed by the firm of attorneys referred to in the particulars of claim and indeed signed by the attorney referred to, that firm subsequently withdrew and the defendant is now represented by a different firm of attorneys.

Having regard to the defendant's failure to deal properly with the return of service referred to above and her failure to deal in any manner with the averments to the effect that her previous attorney had communicated with the plaintiff's attorney in response to the notice in terms of section 129(1)(a), the defendant's bare denial that she received the notice is in my view insufficient and her *bona fides* cannot be accepted in this regard.

- [11] On behalf of the defendant it was also submitted that since the agreement relied upon did not contain a provision to the effect that upon a breach of the agreement by the defendant the plaintiff would be entitled to cancel the agreement, the contention that the plaintiff had cancelled the agreement was of no force and effect. In making this submission counsel relied heavily on the judgment in *Absa Bank v Havenga and similar cases*⁴. That was a case in which the learned judge

⁴ 2010 (5) SA 533 (in North Gauteng)

found that although the particulars of claim contained the necessary averments as to the plaintiff's right to terminate the agreement on default of payment by the defendant, no right to terminate the agreement upon default was contained in the agreement. In the case before me, the plaintiff's right to terminate the agreement in the event of the defendant failing to pay any amount due is contained in clause 11.1 and the notice given to the defendant in terms of section 129(1) of the act advised the defendant that should she fail to pay the arrears or seek assistance from a debt counsellor within ten business days, the plaintiff would have no option but to institute "*the necessary legal action for the return of the goods*". In my view these clauses constitute a *lex commissoria*. The defendant also appears to take issue with the fact that in the plaintiff's summons it is recorded that

"As a result of the defendant's breach, the Plaintiff elected to cancel the agreement, alternatively, Plaintiff's election to cancel the agreement is herewith conveyed to the Defendant."

There is no difference in law as to whether the cancellation of an agreement is conveyed to the defendant prior to the service of summons or by the service of summons. In the circumstances I am satisfied that the necessary averments in respect of cancellation are present and that the cancellation of the agreement was conveyed to the defendant, at least when the summons was served on her.

- [12] Defendant's counsel also took issue with the citation of the plaintiff alleging that its *locus standi* had not been established. In the summons, the plaintiff is cited as FirstRand Bank Limited t/a Wesbank. It would seem that the defendant's objection stems from the emphasis placed on the trading style of "*Wesbank*" in the agreement. In the agreement and also in the particulars of claim it is recorded that the agreement is between "*Wesbank*" and the defendant. The first

page of the agreement is a letterhead on which the name "*Wesbank*" appears prominently followed by the wording in the next line "*a division of FirstRand Bank Limited*". A few lines lower there is a heading "*TERMS AND CONDITIONS FOR THIS INSTALMENT SALE AGREEMENT*". Immediately thereunder it is reflected that the agreement is between Wesbank (the company registration and VAT registration number of FirstRand Bank being quoted) and the buyer whose name is then reflected as that of the defendant. In my view it is clear therefore that the agreement is recorded as being between Wesbank and the defendant and that Wesbank is a division of FirstRand Bank Limited. In *Wesbank (a division of FirstRand Bank Ltd) v Anwar Smith and Others*⁵, Griesel J held in this division on 17 August 2010 that it was competent to cite the plaintiff as "*Wesbank a division of FirstRand Bank Limited*" because the company FirstRand Bank Limited traded through the medium of the business known as Wesbank. In the case before me Wesbank is not cited as the plaintiff; FirstRand Bank is cited as the plaintiff, but it is made clear that it trades as Wesbank. In my view there is no merit in the objection.

The citation of the plaintiff in case no 18230/2010 is somewhat different but is perfectly acceptable for the reasons I have already given. In that case the plaintiff is cited as "*FirstRand Bank Ltd t/a McCarthy Finance, a division of Wesbank*". There is no reason in my view why one division of the plaintiff cannot trade under another name. Both the particulars of claim and the agreement in question make it clear that while the agreement is concluded between McCarthy Finance and the defendant, McCarthy Finance is a division of Wesbank which in turn is a division of FirstRand Bank Limited.

⁵ Unreported judgment in case numbers 12203/2010 and others.

- [13] No attempt is made by the defendant to invoke the provisions of the NCA in order to provide debt relief for herself. All that she does is to deny that the relevant provisions of the act have been complied with.
- [14] The defendant's defence on the merits which is set out in vague terms was not advanced with any vigour during the course of argument. In her opposing affidavit, the defendant merely denies "*that the above agreement (sic) is in arrears in the sum as alleged in the notice*" and alleges that according to the notice she would have been unaware as to whether she had to pay the amount in arrears or effect payment of the total balance outstanding. The notice makes it clear as to the amount of her arrears at the time. In order to resist a claim for summary judgment a defendant is required to satisfy the court that he / she has a *bona fide* defence to a plaintiff's claim. In order to do so a defendant must fully disclose the nature and grounds of the defence and the material facts upon which the defence is founded. In the case under consideration, the defendant is silent as to what she contends the position to be in respect of arrear payments. She does not deny that she is in arrear but rather that the specific amounts are due. In my view this does not satisfy the requirements of Rule 32(3) of the Rules of Court. The defendant's averment that she requires further documents, presumably to establish whether she might have a defence in terms of section 83 or section 90(4)(b) of the NCA is also not a defence to an application for summary judgment.

[15] In all the circumstances I conclude that the defendant has failed to make out a *bona fide* defence to the plaintiff's claim and that summary judgment against her should follow.

[16] The following orders are made:

1. In case no 18229/2010 summary judgment is granted in favour of the plaintiff for:
 - 1.1 The return of the BMW 330i CI convert A/T (E46) F/L, engine no 74374102 to the plaintiff forthwith;
 - 1.2 Costs of suit.
2. In case no 18230/2010 summary judgment is granted in favour of the plaintiff for:
 - 2.1 The return of the Land Rover Range Rover Sport 4.2i V8 SC, engine no 260608B23273428PS to the plaintiff forthwith;
 - 2.2 Costs of suit.
3. In case no 18243/2010 summary judgment is granted in favour of the plaintiff for:
 - 3.1 The return of the BMW X5 4.8 A/T (E70), engine no 53134012 to the plaintiff forthwith;
 - 3.2 Costs of suit.



R B CLEAVER