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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 19875/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 27/01/2023

SIGNATURE:

In the matter between:

FIRSTRAND AUTO RECEIVABLES (RF) LIMITED

Plaintiff

and

ANDREW ZUNGUNDE

Defendant

Delivered: This judgment was handed down electronically by circulation to the Plaintiff's legal representatives and the Defendant by e-mail. The date for the handing down of the judgment shall be deemed to be 27 January 2023

JUDGMENT

LG KILMARTIN, AJ:

[1] This is an opposed summary judgment application brought in terms of Rule 32 of the Uniform Rules of Court.

[2] The Defendant, Andrew Zungunde, delivered an answering affidavit and heads of argument and also appeared in person to present oral argument at the hearing.

[3] On 20 April 2021, the Plaintiff, FirstRand Auto Receivables (RF) Limited, instituted action against the Defendant, based on his breach of a written instalment sale agreement (“the credit agreement”) which was concluded on 21 December 2016 between FirstRand Bank Limited t/a WesBank, represented by a duly authorised employee, and the Defendant, personally.

[4] The credit agreement is an agreement as defined in the National Credit Act, 34 of 2005 (“the National Credit Act”).

[5] In terms of the credit agreement, the Defendant purchased a 2016 Ford Ranger 2.2 TDCI XLT P/U D/C with engine number Q[...] and chassis number A[...] (“the vehicle”).

[6] The material express terms of the credit agreement included *inter alia*:

[6.1] the Plaintiff would advance an amount of R513 711.76 on behalf of the Defendant (“the loan”);

[6.2] the Defendant would repay the loan in terms of the credit agreement in monthly instalments of R5 654.59;

[6.3] the first instalment would be payable by the Defendant on 1 February 2017;

[6.4] the finance charges would be calculated from the date of signature of the credit agreement and would be calculated daily on the amount outstanding at the end of each day and would be compounded and debited monthly;

[6.5] the nature and amount of the Defendant’s indebtedness at any time may be determined and proved by a written certificate purporting to have been signed on behalf of WesBank and the certificate would be *prima facie* proof of the contents thereof and the fact that such amount was due and payable;

[6.6] the Defendant would be liable for all legal costs, as permissible, incurred by WesBank to enforce its rights arising from the credit agreement in the event of any default by the Defendant;

[6.7] ownership of the vehicle would remain vested in WesBank until all amounts due to WesBank by the Defendant in terms of the credit agreement had been paid in full;

[6.8] the Defendant acknowledged that WesBank could cede all of its right, title and interest in and to the credit agreement to a third party; and

[6.9] the Defendant agreed that should he commit any breach of the credit agreement, then WesBank would be entitled, without prejudice to any rights it may have against him, to:

[6.9.1] enforce the credit agreement; and

[6.9.2] cancel the credit agreement, take repossession of the vehicle as the lawful owner of the vehicle, immediately sell the vehicle, retain all payments made by the Defendant to date and claim damages of the difference between the outstanding balance in terms of the credit agreement and the net proceeds after the sale of vehicle and after deducting the permitted default charges and reasonable costs allowed in connection with the sale of a vehicle.

[7] On 30 July 2015 and at Sandton, WesBank and the Plaintiff, both parties being represented by duly authorised employees, entered into a written cession and sale agreement ("the cession agreement") in terms of which the Plaintiff purchased from WesBank, who sold to the Plaintiff, WesBank's right, title and interest in various instalment sale agreements entered into between WesBank and general members of the public, including the related security which relates to such instalment agreements ("the participating assets"). The Plaintiff, in terms of the cession agreement, became the owner of all of the participating assets (i.e. the vehicles). On 27 February 2019, WesBank and the

Plaintiff entered into a written sale supplement agreement in terms of which the credit agreement and vehicle of the Defendant was identified, sold, ceded and assigned to the Plaintiff as being one of the instalment sale agreements.

[8] WesBank and the Plaintiff complied with their obligations towards each other in terms of the cession agreement and sale supplement agreement and also complied with their obligations towards the Defendant under the credit agreement, which included delivery of the vehicle to the Defendant.

[9] The Defendant breached the credit agreement by failing to make full and punctual payments of the monthly instalments.

[10] Pursuant to the Defendant's breach, the Plaintiff instituted proceedings, claiming:

[10.1] cancellation of the credit agreement;

[10.2] the return of the vehicle to the Plaintiff;

[10.3] leave to return to this Court on the same papers, duly supplemented, to obtain judgment in respect of damages suffered by the Plaintiff once the vehicle has been sold; and

[10.4] costs of suit.

[11] The Defendant file a notice of intention to defend and, thereafter, a plea.

[11] Rule 32 of the Uniform Rules of Court is titled "**Summary judgment**" and provides *inter alia* as follows:

"(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only —

- (a) *on a liquid document;*
- (b) *for a liquidated amount in money;*
- (c) *for delivery of specified movable property; or*
- (d) *for ejectment;*

together with any claim for interest and costs.

(2)(a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) ...

(3) The defendant may —

(a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit

or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

...

(5) If the defendant does not find security or satisfy the court as provided in paragraph (b) of subrule (3), the court may enter summary judgment for the plaintiff.

...

(9) The court may at the hearing of such application make such order as to costs as to it may seem just: Provided that if —

(a) the plaintiff makes an application under this rule, where the case is not within the terms of subrule (1) or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle such defendant to leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client; and

(b) in any case in which summary judgment was refused and in which the court after trial gives judgment for the plaintiff substantially as prayed, and the court finds that summary judgment should have been granted had the defendant not raised a defence which in its opinion was unreasonable, the court may order the plaintiff's costs of the action to be taxed as between attorney and client."

[12] As was correctly explained by the Plaintiff's counsel, Ms Bhabha, Rule 32(2)(a) and (b) provides details of what the Plaintiff is required to do in summary judgment applications and Rule 32(3)(b) describes what is required of the Defendant in such applications.

[13] I am satisfied that the Plaintiff complied with the requirements of Rule 32(2)(a) and (b).

[14] Summary judgment is only to be granted where the Plaintiff can establish its claim clearly and the Defendant fails to set up a *bona fide* defence.¹

[15] In the plea and affidavit opposing summary judgment, the following was raised by the Defendant in defence to the Plaintiff's claim:

[15.1] he had not breached the loan agreement "*substantially to warrant the issuance of summons*";

[15.2] the Lockdown imposed by the Government in term of the Disaster Management Act "*made it practically impossible [for the Defendant] to earn anything as all the avenues of earning an income were virtually closed*" and the COVID-19 pandemic should be regarded as *force majeure* which made performance in terms of the credit agreement objectively impossible;

[15.3] the section 129 notice issued in terms of the National Credit Act was not received by him; and

[15.4] only Magistrate Court's costs should have been claimed.

[16] Insofar as the first defence is concerned, i.e. that the breach was not substantial enough to warrant the issuing of summons. I was referred by the Plaintiff's counsel to clause 13 of the credit agreement which is titled "*Breach*" and provides *inter alia* that:

"13. *Breach*

13.1 *If:*

13.1.1 *you do not comply with **any of the terms and conditions of this agreement (all of which you agree are material)**; or*

¹ Erasmus Superior Court Practice, RS 17, 2021, D1- 383.

13.1.2 ***you fail to pay any amounts due under this agreement;*** or
 ..., then we may (without affecting any of our other rights) proceed with the enforcement or termination of the agreement as set out in the Act.

13.2 Upon the occurrence of the aforementioned events, we shall be entitled, at our election and without prejudice to:

13.2.1 claim immediate repayment of the outstanding balance together with the interest and all amounts owing or claimable by us, irrespective of whether or not such amounts are due at that stage; or

13.2.2 take repossession of the Goods in terms of an attachment order, retain all payments already made in terms hereof by yourself and to claim as liquidated damages, payment of the difference between the balance outstanding and the market value of the goods determined in accordance with clause

11.5.2.3, which amount shall be immediately due and payable.” (emphasis added)

[17] It is clear from clause 13 of the credit agreement that there will be a breach where there is non-compliance with “***any of the terms and conditions of this agreement***” and that the Defendant accepted that all terms and conditions are material. Furthermore it is clear that the failure to pay “***any amounts due under this agreement***” amounts to a breach thereof which would entitle the Plaintiff to institute proceedings for the relief it seeks.

[18] In the matter of *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785B, the Appellate Division (as it was then known) confirmed that where a party, by virtue of a clause in the contract, explicitly reserves the right to cancel the contract if there is a breach of a material condition of the contract,

once there is a breach, the materiality thereof is irrelevant and the Court will not enquire into the conscionableness or unconscionableness thereof.²

[19] In the circumstances, I find that there is no merit in the first defence.

[20] Insofar as the second defence is concerned, i.e. that Lockdown “*made it practically impossible for [the Defendant] to earn anything as all the avenues of earning an income were virtually closed*” and that the COVID-19 pandemic should be regarded as *force majeure* which made performance in terms of the credit agreement objectively impossible, although *force majeure* may in certain circumstances discharge a contract where performance in terms thereof has become impossible, the test is an objective one and not personal to the Defendant.

[21] In the matter of *Frajenron (Pty) Ltd v Metcash Trading Ltd and Others* 2020 (3) SA 2010 (GJ), the following was stated by Vally J at para [13] about impossibility of performance (footnotes omitted):

“[13] Our law on the impossibility of performance evolved on a similar footing. As noted above, it commenced with the dictum (quoted in [10] above) in *Peters, Flamman & Co*. By that dictum the two factors or circumstances that would excuse the non-performance are *vis major* and *casus fortuitous*. As the law evolved it was clarified that not every *vis major* or *casus fortuitous* will excuse the non-performance. Facts specific to a case will determine whether the non-performance should be excused. These would include the nature, terms and context of the contract, the nature of the parties, their relationship and the nature of the impossibility relied upon. No party is allowed to rely on an impossibility caused by its own act or omission – there should be no fault or neglect on its part in the creation of the impossibility. The impossibility must be absolute and not relative and it must be applicable to everyone and not personal to the defendant, i.e. it must be objective.”

² See 785 B – C.

[22] The facts of a specific case determine whether the non-performance of a party should be excused. Only where the impossibility is absolute and not relative, i.e. in respect of everyone and not personal to the defendant, can it be found that a defendant is excused from his non-performance.

[23] At the hearing, the Plaintiff's counsel referred to the matter of *WesBank, A Division of FirstRand Bank Limited v PSG Haulers CC* (an unreported judgment of the Gauteng Local Division under case no. 38511/2020 by Dippenaar J, dated 25 August 2022). Paragraphs 14, 18 and 19 thereof read as follows (footnotes omitted):

"[14] As held in Glencore Grain Africa (Pty) Ltd v Du Plessis NO and Others, if provision is not made contractually by way of a force majeure clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement. Performance is not excused in all cases of force majeure.

...

[18] It is apposite to refer to Scoin Trading (Pty) Ltd v Bernstein NO, wherein Pillay JA held:

'The law does not regard personal incapability to perform as consulting impossibility.'

[19] In LAWSA it is explained as follows:

'The contract is void on the ground of impossibility of performance only [if] the impossibility is absolute (objective). This means, in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a peculiar contracting party because of his personal situation, that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract.'"

[24] The Plaintiff's counsel also referred to the matter of *WesBank Division of FirstRand v Dladla* (an unreported decision of the Gauteng Local Division under case no. 0932/2021 of Mahalelo J, dated 2 August 2022 – “the *Dladla* case”) which dealt with the same cause of action and defences based on section 129 of the National Credit Act and the COVID-19 Pandemic making performance in terms of a credit agreement impossible. In the *Dladla* case, the Court found, correctly in my view, that the Defendant's difficulty to raise finances was specific to him and was not absolute. Hence, there was no objective impossibility to perform.

[25] As it was not objectively impossible for all persons to pay their vehicle instalments during Lockdown, I find that any impossibility is relative to the Defendant because of his personal situation. Therefore, the Defendant cannot rely on the common law doctrine of supervening impossibility of performance. I therefore find that there is no merit in the second defence.

[26] Insofar as the third defence is concerned, namely that the Defendant did not “receive” the section 129 notice, there is no requirement that the notice must come to the physical attention of the Defendant.

[27] In the matter of *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC), the Constitutional Court confirmed that the credit provider need not bring the section 129 notice to the subjective attention of a consumer, nor was personal service required and that the steps the credit provider had to take were those that would bring the notice to the attention of a reasonable consumer.³

[28] The Constitutional Court provided the following guidance on a credit provider's duties in respect of the 129 notice in paragraph [39] at 71G – 72A of the *Kubyana* judgment:

³ See paras [26] at 67 F-H; and [31] – [33] and [39] at 69A – 70C and 71G- 72B.

“When the consumer has elected to receive notices by way of the postal service, the credit provider’s obligation to deliver generally consists of dispatching the notice by registered mail, ensuring that the notice reaches the correct branch of the Post Office for collection and ensuring that the Post Office notifies the consumer that a registered item is awaiting her collection.”

[29] In paragraph [11] of the *Dladla* case, the following was stated in relation to the same defence:

“[11] There is no merit in the defendant’s defence that he had not received a section 129 notice because it is evident from the papers that a written notice in terms of section 129(1)(a) was sent by registered mail to the address nominated by the defendant as his domicilium address. It is also abundantly clear that the abovementioned notice has reached the appropriate post office for delivery to the defendant. A post-despatch track and trace print indicating delivery to the relevant post office is attached to the papers as annexure ‘F’. It is sufficient for the plaintiff to have shown that it had sent the notice to the defendant’s address. It does not really matter if the defendant had not fetched the notice from the relevant post office.”

[30] In paragraph [53] of the *Kubanya* judgment at 75 H/I to 76 C, the Constitutional Court further stated that:

“Once a credit provider has produced the track and trace report indicating that the s 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the

inference of deliver, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the s 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour."

[31] In this instance, the Plaintiff provided evidence that the section 129 notice had been properly delivered and that it had discharged its obligations under section 129 of the National Credit Act. No evidence was produced by the Defendant to rebut the inference of delivery. In the circumstances, I find that there is no merit in the third defence.

[32] Lastly, the Defendant states that only Magistrate's Court costs should have been claimed by the Plaintiff. In this regard, the Defendant alleges that the value of the vehicle or the claim falls within the jurisdiction of the Magistrate's Court and refers to clause 17 of the credit agreement in support of this submission.

[33] Clause 17.3 of the credit agreement reads as follows:

"You will also be liable for the default administration and collection costs arising from your failure to comply with any of the terms and conditions of this agreement and for legal costs and collection commission on all payments made by you if the matter is referred to an external debt collection company or attorney. Default administration costs will be charged for every necessary letter that we address to you at the rate of the undefended tariff set out in the Magistrate's Courts Act 32 of 1944, plus the cost of postage or delivery, and collection costs will be limited to the amounts incurred by us in the collection of amounts due to us under the Agreement as set out in Chapter 6, Part C of the Act."

[34] It is evident from the express wording of clause 17.3 of the credit agreement that it only imposes a limit on recovering “*collection costs*” on the Magistrate’s Court scale. Our Courts have over many years drawn a distinction between “*collections costs*” and “*litigation costs*” and the SCA confirmed this distinction in the matter of *Bayport Securitisation Limited and Another v University of Stellenbosch Law Clinic and Others* 2022 (2) SA 344 (see paras [15 to [19] at 350 – 351). There is no limit to the litigation costs being awarded on the Magistrate’s Court scale. It is clear from Rule 32(9) that the awarding of costs in summary judgment applications is within the discretion of the Court. Bearing in mind the nature of the relief sought, I do not see why costs should not follow the result and be awarded on the High Court scale.

[35] Having considered all of the papers and submissions made by the Plaintiff and the Defendant, I am of the view that the Defendant has no *bona fide* defence to the Plaintiff’s claim and the Plaintiff has made out a proper case for summary judgment. I accordingly grant summary judgment in the following terms:

- (a) The credit agreement is cancelled;
- (b) The Defendant is ordered to return the 2016 Ford Ranger 2.2 TDCI XLT P/U D/C with engine number Q[...] and chassis number A[...] vehicle to the Plaintiff;
- (c) The Plaintiff is granted leave to return to the Court on the same papers, duly supplemented, to obtain judgment in respect of damages suffered by the Plaintiff once the vehicle has been sold; and
- (d) The Defendant is ordered to pay the costs of suit, including the costs of the opposed summary judgment application.

LG KILMARTIN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION
PRETORIA

Hearing date:	21 November 2022
Judgment date:	27 January 2023
Counsel for the Plaintiff:	Adv B Bhabha
Plaintiff's Attorneys:	Glover Kannieappan Incorporated
Counsel for the Defendant:	Defendant appeared in person