IN THE NORTH GAUTENG HIGH COURT
PRETORIA

...IS NOT APPLIC...
...REPORTABLE: YES...
...OTHER JUDGES: YES...
...REVISED.
10/8/10
DATE
SIGNATURE

In the matter between:

ABSA BANK LTD Plaintiff

and

JACOBUS FRANCOIS HAVENGA Defendant

(Case No. 21558/10)

And the following other cases; 30828/10; 24530/10; 28432/10; 28796/10; 34473/10; 35431/10; 35432/10; 35698/10; 36208/10; 36213/10; 34475/10; 35426/10; 36131/10; 36133/10; 36136/10; 36209/10

10/8/2010

JUDGMENT

Horwitz AJ: The motor industry seems to be thriving, certainly as regards the leasing and sale on instalments of motor vehicles is concerned. That industry, however, has spawned in its wake, and has sustained, another flourishing industry: the repossession of those vehicles for want of payment of the monthly instalments as and when they fall due. Claims for the latter are generally initiated by way of action (in one instance that came before me, proceedings were instituted by way of motion) by the seller or lessor against the purchaser or lessee, as the case may be, depending on the nature of the agreement. Invariably, so it seems, the defendant does not defend the case and the plaintiff then seeks default judgment. Week by week, dozens of these matters appear on the motion roll and it is a painstaking and time-consuming task for the presiding judge to read each one. In issue in this judgment are numerous such cases which have occasioned me difficulty. (As aspects of the National Credit Act, No. of 34 of 2005 are relevant to this judgment, I will henceforth employ the nomenclature of that Act when referring to the parties. The seller or lessor will therefore be referred to as "the credit provider" and the purchaser or lessee as "the consumer".)

But for stylistic and cosmetic differences, the particulars of claim or founding affidavit in each instance commences with a description of the motor vehicle concerned and continues with details of what are alleged to be the terms of each agreement. Invariably, one of the terms is alleged to be one which provides that upon a breach of the agreement by the consumer, the credit provider may cancel the agreement, retake possession of the vehicle, dispose of it, retain the proceeds and recover from the consumer the outstanding amount so as to compensate the credit provider for the damages that it may have suffered as a result of the breach. Because the credit provider cannot calculate its damages until it has obtained possession of the motor vehicle and valued it, this ineluctably entails a preliminary application to court for a repossession order to enable the credit provider to value the vehicle, with a concomitant order that the remaining prayer for damages be postponed until a valuation has been obtained.

Clearly, then, what is in issue in all such cases is a cancellation of the agreement by reason of a *lex commissoria*, a term which is alleged to be express and which vests the credit provider with a right to cancel the agreement by reason of a breach of a term thereof. Because the alleged term providing for cancellation invariably refers to a breach of any term in the agreement which imposes an obligation upon the consumer, the right to cancel is not limited to material breaches only. It is a trite principle of the law of contract that the right of a party to a contract to cancel it, is not restricted to cases in which there is such an express term: generally speaking, in the absence of an express term allowing for cancellation of a contract, a party may cancel a contract by reason of the breach of a material term by the other party to the contract, or the breach of a term which the first-mentioned party has by notice to the other party made material. It is not the function of the judgment to serve as a discourse into the law of contract, but the distinction is important for reasons that will hopefully become clear.

In *Absa Bank Ltd v De Villiers and another* 2009 (5) SA 40 (C), the Court held that before a credit provider becomes entitled to claim a final order authorising attachment of a motor vehicle (and I interpolate here that this is precisely the kind of order which is sought in the cases presently under discussion) the credit provider must first cancel the relevant agreement with the consumer. (See, e.g., paras [19], [28], [32], [42] and[43] of the judgment.) Clearly (with respect) that is correct. I would, however, add an obvious rider to that: before one can cancel an agreement, there has to be right vesting in the credit provider to do so. That is precisely the difficulty which confronted me in the motion court during the last two weeks and that is the reason for this judgment.

Consonant with the rules of pleading which apply in our courts, a party claiming relief must set out its case with reasonably clarity so that the opposing party may be informed of the case which it has to meet. (See, e.g., sub-rules 18(4) and (6).) However, another reason for that is so that the court, from which relief is sought, can also know what it is that the claimant is claiming and the basis for the claim. In the cases presently under discussion, (as it was in numerous other similar matters which I disposed of) it has been an inordinately laborious task to match the allegations in the particulars of claim or founding affidavit to the particular agreement in issue. In too many cases, they do not match at all. That is because the attorneys who launch these applications on behalf of their clients (the credit providers) are clearly using a single, computerised template as a precedent for every such matter that happens to land on the table, on the simple basis that one size fits all. It has become a case of putting a square peg into a round hole.

As frustrating as it has been to seek correlation between the terms alleged in the founding affidavit or particulars of claim and the actual agreement in those cases (and there are many of them) in which the agreement contains a cancellation clause (because the formulation of the term in the founding affidavit or particulars of claim by the draftsman thereof differs *toto caelo* from the actual wording of the relevant agreement) so much more exasperating has it been to waste time reading the entire agreement, only to find that it contains no cancellation clause at all. To allege that such agreement contains one of the standardised, hackneyed cancellation provisions that is embodied in the template amounts to careless pleading. It is enough that judges have to wade through numerous other files with which they have to deal in the motion court, without having to also read unnecessary nonsense in an affidavit or particulars of claim, only because someone who created that document did not take the trouble to ensure that it accurately reflected what it was supposed to reflect. It reveals discourtesy to the court. The motion roll is therefore cluttered up with cases in which the plaintiff or applicant credit provider is simply not entitled to relief. I hesitate to believe that pleaders draft their pleadings in the belief, or hope, that the judge will not read them but will merely rubber stamp the relief that is sought.

What reinforced my view that those responsible for drafting the papers have opted for wholesale standardisation and generalisation, instead of individualisation, is the following: In each case which commenced with the issue of summons, there is an affidavit by someone to confirm that the plaintiff has complied with the provisions of section 129 of the Act. Aside for one or two exceptions, each affidavit contains the following allegation, or one in almost identical terms:

"In the case of an instalment agreement or lease, the defendant has not surrendered the property to the plaintiff as contemplated in section 127 [section 130(1)(c)]".

The deponent does therefore not bother to state the nature of the particular agreement in issue; he merely contents himself with a hypothetical statement as to what the facts should be, if the agreement is an instalment agreement or a lease. The juxtaposing of the two sections of the Act in the manner that it has been done is also unacceptable.

Legal practitioners would do well to bear in mind that the type of relief that they seek on behalf of their clients is of the nature of specific performance and therefore discretionary. If they insist upon imposing on judges the effort to wade through file after file containing incorrect allegations, they should not be surprised that the court exercises its discretion to refuse relief. Certainly it should be refused if the agreement is alleged to contain an express cancellation provision in circumstances in which it contains none.

As regards the latter point, and as I have indicated above, the fact that an agreement does not contain an express cancellation provision is not to say that cancellation is therefore never possible: the common law may well avail the credit provider. But in that instance, the appropriate allegations must be made in the founding papers; not some absurd allegation, based on a template, that the agreement contains an express provision to that effect. As regards this category of cases (where the agreement contains no cancellation clause) it was submitted to me that the allegations in the particulars of claim or founding affidavit that the credit provider had complied with the provisions of sections 123 and 129 of the National Credit Act were sufficient to found an action for cancellation because, so the submission went, those provisions created, and afforded the credit provider, a right of cancellation. Those provisions of the Act do no such thing. The right to cancel an agreement arises out of an application of the rules of the law of contract. Sections 123 and 129 are procedural in their nature. They prescribe the procedure that the credit provider must follow in those instances in which the latter enjoys a right of cancellation, no matter how that right arises. I think that that much was also made clear in *Absa Bank*, *supra*.

With those general observations in mind, I direct my attention now to specific cases. In each one, the plaintiff seeks an order confirming its cancellation of the relevant agreement, an order that it be authorised to repossess the motor vehicle which was the subject of the sale or lease to enable to plaintiff to have it valued and an order that its prayer for default judgment be postponed, pending the valuation and calculation of what the defendant owes the plaintiff.

Case Number 21558/10

Miss *Van Niekerk* appeared on behalf of the plaintiff. She very properly conceded that the agreement in this matter did not contain an express cancellation clause. In sub-paragraph 6.3 of the particulars of claim, however, the allegation is made that the agreement contains the following "express term and condition":

> "6.3 .... in the event of the Defendant failing to make any payment in terms of the AGREEMENT or fail (*sic*) to comply with any other provision of the AGREEMENT or any legal provision applicable in respect of the said transaction, the Plaintiff would be entitled to terminate the AGREEMENT in which event, the Plaintiff shall further be entitled, subject to the provisions of Section 129(1)(a) and (b)(i) of the National Credit Act No 34 of 2005, to return and possession of the GOODS and the Defendant shall be obliged to deliver the GOODS to the Plaintiff at his own costs (*sic*) at such address as the Plaintiff may have notified or may notify the Defendant of (*sic*) in writing and further, the Plaintiff shall be entitled to demand immediate payment from the Defendant of the following amount:
>
> 6.3.1 All arrear instalments plus additional finance charges thereon up to the date of payment thereof; plus
>
> 6.3.2 All amounts payable by the Defendant to the Plaintiff in terms of the provisions of the AGREEMENT, as amended; plus
>
> 6.3.3 The balance of the PRINCIPAL DEBT owing by the Defendant to the Plaintiff on the date of termination plus additional Finance Charges in respect thereof, calculated from the date of termination up to the date of payment thereof."

(There does not appear to have been any amendment to the agreement, as postulated in 6.3.2.)

The agreement contains nothing like this term. There is one provision which gives the plaintiff the right to

> "enforce this agreement including retaking possession of the goods and recover collection costs and default administration charges from the Purchaser ...."

That provision could refer to a temporary attachment order pending compliance by the defendant (the consumer) with his obligations under the agreement. It is does not imply a right to cancel the agreement.

I requested Miss *Van Niekerk* to obtain an explanation from the draftsman for this inconsistency. She obliged and provided me with an affidavit by the attorney dealing with the matter. With remarkable candour, he stated the following:

"I place on record that the Terms and Conditions of our client's contracts are not always available as same is stored electronically due to lack of storage space, and therefore we use a pro-forma Combined Summons as almost all the Instalment Sale Agreements are in principle the same. I attach hereto marked as Annexure "A" an affidavit of Stephan Strauss, the Credit Manager of the Plaintiff."

"In this specific matter the Terms and Conditions became available after issuing of the Summons and due to an administrative oversight the Particulars of Claim was not amended accordingly."

This says it all and other than for expressing my surprise at what appears to be a rather *laissez faire* attitude, there really remains nothing for me to say, other than this: in this electronic age, if the plaintiff is unable to electronically marry the terms of its agreement to the allegations in the particulars of claim, then it will simply have to revert to the tried and tested old-fashioned method of doing so.

The affidavit of the credit manager adds nothing to the matter. Aside from informing me of the lack of storage space, he merely requested the court "to accept the copy as a true copy of the original." I am not sure that he understood what I had wanted.

Miss Van Niekerk sought a postponement to enable the plaintiff to effect an amendment to its particulars of claim. I have no good reason to grant that application. The application for default judgment is therefore dismissed.

<u>Case Number 30828/10</u>

In this matter the credit provider (who was represented by Mr *Minnaar*) instituted motion proceedings supported by affidavit to recover the motor vehicle which it had sold the consumer, and damages. It also claims an order confirming cancellation of the agreement. Here, too, the deponent to the founding affidavit alleges a whole host of material terms, one of which is alleged to be a right to cancel the agreement in the event that the purchaser committed any breach and, as in the other matters, no such right is to be found recorded in the written instalment sale agreement. Curiously, whilst clause 12.3 provides that the credit provider may approach a court for an order to enforce the agreement if certain conditions (such as a the commission of a breach) are fulfilled, clause 12.6 provides that at any time prior to the credit provider "cancelling this Agreement" the consumer may reinstate the terms thereof by paying, *inter alia*, all overdue amounts. The only right of cancellation that can possibly be in issue here is one in terms of the common law. The applicant, however, does not rely on such a cancellation. The applicant is therefore not entitled to either of the orders which it claims at this stage, namely, confirmation of the cancellation of the agreement and a repossession order. As for the further order which it seeks, namely, that it be granted leave to supplement its papers with a claim for the balance outstanding after it has established the market value of the vehicle and made an allowance therefor in its calculation of what the consumer owes it, two points are to be made. Firstly, the prayer is foursquare dependent upon a valid cancellation of the agreement and the applicant has failed on that score. Secondly, as the claim is dependent upon a cancellation of the agreement, the nature of the claim is none other than a claim for damages and motion proceedings are not appropriate for such a claim.

Before finally disposing of this matter, I draw attention to an allegation in the founding affidavit which, as in other matters, displays an antipathy towards individualisation. The allegation reads as follows:

"In the event of the word "fixed" not appearing next to the finance charges on the face of the agreement, then the following conditions would apply : ...."

The deponent speaks hypothetically, not troubling to ascertain the true facts and state them in so many words.

The application is therefore dismissed.

<u>Case Numbers 24530/10; 28432/10; 28796/10; 34473/10; 35431/10; 35432/10; 35698/10; 36208/10; 36213/10; 34475/10; 35426/10; 36131/10; 36133/10; 36136/10; 36209/10</u>

In all these matters, the credit provider was represented by Mr *Van der Schyff*. As in the case of the previously mentioned matters, the claims are identical. In each there is a claim for confirmation of the purported cancellation of the agreement, repossession of the motor vehicle and a prayer that the claim for damages be postponed until after the motor vehicle has been valued. None of the agreements in these matters contains a cancellation provision and for the reasons stated above, the claims for default judgment cannot be granted. Mr *Van der Schyff* provided me with heads of argument wherein he embarked upon a discussion of the law relating to the cancellation of contracts. The argument does not avail him because the issue is not what rights each of the credit providers may in each instance theoretically have had. The question is: what case did each one make out on the papers before the court and it is on this score that they failed.

The other point that he made was that none of the consumers had defended the actions that his clients has instituted and that that was sufficient reason for me to grant the credit providers default judgment. Here, too, the argument founders because I have to be satisfied that in each instance, a proper case has been made out on the papers for the relief sought.

In all these matters, the claim for default judgment is dismissed.

A.J. Horwitz
Acting Judge of the High Court

Date of judgment : 10 August 2010

For the plaintiff in case number 21558/10 :

Counsel	:	Miss A Van Niekerk
Attorneys	:	Hack, Stupel & Ross Pretoria

For the applicant in case number 30828/10 :

Counsel	:	Mr J Minnaar
Attorneys	:	Hammond, Pole Majola Inc Pretoria

For the plaintiff in all other cases	:	Mr O Van der Schyff of the firm Vesi & De Beer Inc c/o Ehlers & Fakude Inc Pretoria

No appearance on behalf of any of the defendants/respondents