

**OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 10417/2023

In the matter between:

SA TAXI DEVELOPMENT FINANCE (PTY) LTD

Plaintiff

and

ZUKISWA HAZEL THETHANI NO

Defendant

Coram: Joubert AJ

Date of hearing: 22 January 2024

Date of judgment: 28 February 2024

JUDGMENT DELIVERED ELECTRONICALLY

JOUBERT, AJ:

INTRODUCTION

[1] The plaintiff is a registered credit provider in terms of the National Credit Act, 34 of 2005 ("the NCA"). In this action, the plaintiff sues the defendant as cessionary of Potpale Investments (RF) (Pty) Ltd ("Potpale"), which at the relevant time was also a credit provider in terms of the NCA.

[2] The defendant is the executrix of the deceased estate of the late Mr Lalanga Peter Thethani ("the deceased"), who had purchased a vehicle from a

motor vehicle dealer, financed by Potpale in terms of an instalment sale agreement.

[3] In this action, the plaintiff seeks, primarily, an order confirming termination of the instalment sale agreement and delivery of the vehicle.

[4] The defendant entered appearance to defend and filed a Plea and the plaintiff now applies for summary judgment.

THE PARTICULARS OF CLAIM

[5] The following facts, pleaded in the Particulars of Claim, are not in dispute:

[5.1] In terms of an instalment sale agreement dated 24 June 2020 ("the ISA"), Potpale sold to the deceased a Toyota Quantum / Hi-Ace motor vehicle ("the vehicle").

[5.2] The relevant terms, in relevant parts, of the ISA for purposes of this judgment are the following:

"5. OWNERSHIP

5.1 The credit provider shall remain the owner of the Vehicle until all amounts outstanding in terms of this Agreement have been settled by you. If the credit provider cedes its rights under this Agreement to any third party, it shall be entitled to transfer ownership of the Vehicle to that third party without notice to you, in which event you agree to hold that Vehicle on behalf of that third party ('the cessionary') as owner.

25. BREACH

25.1 *An event of default will have occurred where:*

25.1.1 *you fail to make payment of any amount payable under this Agreement on the due date thereof;*

...

26. CREDIT PROVIDER'S RIGHT TO TERMINATE THE AGREEMENT

26.1 *If you are in default under this Agreement, the credit provider may terminate this Agreement before the time, provided he does to in compliance with the provisions of the NCA relating to enforcement and termination.*

26.2 *If an event of default occurs the credit provider:*

26.2.1 *may draw the default to your notice as contemplated in section 129(1) of the NCA*

...

26.2.2 *subject to the NCA, may commence legal proceedings to enforce this Agreement provided:*

26.2.2.1 *you have been in default under this Agreement for at least 20 (twenty) business days...*

26.2.2.1 *you have not responded to the notice contemplated in section 26.2.1 above...*

26.2.3 Shall be entitled, but not obliged, to perform or procure the performance of any of your obligations...

26.3 If the Vehicle is returned or repossessed by the credit provider, the credit provider shall be entitled to dispose of the Vehicle in accordance with the NCA, and as more fully set out in 15.4 to 15.6 above and in such further manner and on such further terms and conditions as it determines."

[6] As has been mentioned, the plaintiff took cession of Potpale's rights and obligations in terms of the ISA.

[7] It is not in dispute that the account fell in arrears after the deceased passed away. In law, the terms of the ISA were binding on the defendant in her capacity as executrix,¹ but she made no payments to the plaintiff.

[8] The plaintiff's attorney addressed a letter to the defendant in terms of section 129 of the NCA dated 8 September 2022, and another one dated 5 June 2023.² Both letters included a demand that the arrears be brought up to date and further that:

"6. Should you fail to respond to this notice within 10 (ten) business days from the date of it being delivered to you or sent to you by registered mail, we have been instructed by our client to take whatever legal action is necessary to protect our client's

¹ **Cilliers: Meyerowitz on the Administration of Estates and Their Taxation**, Juta, 2023 Ed, para 12.28

² It was held in **Absa Bank Ltd v Magiet NO** Saflii (15967/2007) [2018] ZAWCHC 7 (8 February 2013) that the enforcement procedures of the NCA must be followed in the case of credit agreements when an executor of a deceased estate is sued.

interests and reclaim the vehicle forming the subject matter of the Credit Agreement from you.

7. *Should you not comply with the demands contained in this letter, our client will, without further notice, cancel the Credit Agreement."*

[9] The section 129 letters were not responded to nor were the demands therein complied with.

[10] In its Particulars of Claim, the plaintiff pleaded that it "*herewith terminates the agreement*".

[11] The relief sought by the plaintiff is:

[11.1] Confirmation of cancellation of the agreement;

[11.2] Return of the motor vehicle;

[11.3] Expenses incurred for removal, valuation, storage and sale of the vehicle;

[11.4] Costs on the scale as between attorney and client.

THE DEFENDANT'S PLEA

[12] In her Plea, the defendant pleads the following defences, paraphrased:

[12.1] A special plea of non-joinder, alleging that the Master of the High Court has a direct and substantial interest in the matter and ought to have been joined, as well as the "other estate heirs";

[12.2] That clause 23 of the ISA provides for compulsory life insurance cover and that this clause served to extinguish the debt owed by the deceased;

[12.3] That the defendant did not receive a notice in terms of section 129 of the NCA;

[12.4] That the plaintiff ought to have lodged a claim against the estate of the deceased in terms of section 29 of the Administration of Estates Act, 66 of 1965 ("the Estates Act").

THE SUMMARY JUDGMENT APPLICATION

[13] In its affidavit in support of the summary judgment application, the plaintiff makes the following averments:

[13.1] Due to the reservation of ownership, the vehicle does not form part of the deceased estate and that for that same reason the Master is not a necessary party.

[13.2] The defendant misinterpreted and/or misled the terms relating to credit life insurance but, in any event, Guardrisk Insurance Co Ltd ("Guardrisk"), with whom the deceased concluded a credit life insurance policy, repudiated the insurance claim. A letter from Guardrisk to the deceased's surviving spouse is attached from which it appears that the claim was repudiated due to the fact that the deceased passed away within the 4-month "waiting period" provided for in the policy.

[13.3] It complied with the provisions of section 129 of the NCA, with reference to a “track-and-trace” report by the Post Office as well as a return of service by the Sheriff.

[14] Accordingly, the plaintiff contends that no *bona fide* defence has been put up by the defendant.

THE DEFENDANT’S OPPOSING AFFIDAVIT

[15] In her opposing affidavit, the defendant raises the following issues:

[15.1] She objects to hearsay evidence in the plaintiff’s affidavit regarding repudiation by Guardrisk of the credit life insurance claim.

[15.2] She objects to new facts or allegations being made for the first time in the plaintiff’s affidavit in support of the summary judgment.

[15.3] She persists with the plea of non-joinder of the Master of the High Court and, in response to the point that the vehicle does not belong to the estate of the deceased, stated that the vehicle generates an income for the benefit of the estate and argued that for those reasons the joinder of the Master is vital.

[15.4] As regards the section 129 Notices, she simply maintains her stance as pleaded.

[15.5] She persists in arguing that the plaintiff ought to have submitted a claim in terms of section 29 of the Estates Act and that she could not have paid any debt of the estate outside of those provisions.

RELEVANT PRINCIPLES RELATING TO SUMMARY JUDGMENT

[16] In terms of Uniform Rule 32(3)(b) a defendant can resist summary judgment by satisfying the Court on affidavit that it has a *bona fide* defence to the action. The affidavit must disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

[17] It is not required of a defendant to satisfy the Court that its defences will ultimately prove to be successful. All that the Court enquires into is (a) whether the defendant has “fully” disclosed the nature and grounds of its defence and (b) whether on the facts so disclosed the defendant appears to have a defence which is both *bona fide* and good in law.³ In short, summary judgment proceedings are “*not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court*”.⁴

[18] Even if the defendant’s case has not been set out with sufficient particularity to enable the Court to assess the defendant’s *bona fides*, the Court retains a discretion to refuse summary judgment if there is doubt whether the plaintiff’s claim is unanswerable.⁵

³ **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (AD) at 426B-C

⁴ **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture** 2009 (5) SA 1 (SCA) at para [32]

⁵ **First National Bank of SA Ltd v Myburgh NO and Another** 2002 (4) SA 176 (CPD) at para [9]

THE ISSUES

[19] In his first written Note on Argument, the defendant's attorney crystallised the issues to be decided as follows:

[19.1] The issue of compliance with section 129 of the NCA;

[19.2] Whether the vehicle in issue forms part of the deceased estate;

[19.3] Whether the Court may admit Annexure "YN2", being the letter from Guardrisk regarding repudiation, in the light of the defendant's objection that it is non-admissible hearsay evidence;

[19.4] The issue of non-joinder of the Master of the High Court.

[20] I deal with the defendant's defences as articulated by the defendant's attorney in turn, albeit not in the same order.

FIRST ISSUE – COMPLIANCE WITH SECTION 129 OF THE NCA

[21] As appears from the Particulars of Claim, the first section 129 Notice was sent per registered mail to the *domicilium citandi et executandi* of the deceased, and a track-and-trace report of the Post Office showing the status of the letter as being "in delivery office" at Elonwabeni Post Office as at 6 January 2023 is attached.

[22] The defendant takes the point that, having decided that she, as executrix, is the defendant in this matter, the notice should have been brought to her attention and not simply sent to the *domicilium* address of the deceased.

[23] However, the plaintiff's second section 129 letter was served by the Sheriff at the residential address of the defendant, on 8 June 2023. According to the Return of Service, it was served on a certain Thabisa Maskoka, a tenant at the residential address of the defendant at A198 Primrose Street, Ikwezi Park, Cape Town, being a person not less than 16 years of age residing there, after explaining the nature and content thereof to the said person. In her Plea, the defendant simply states that the letter was not served on her.

[24] It is to be noted that in her Plea the defendant did not deny her address as the one on which service took place. The section 129 Notice was accordingly properly served on the defendant and there is no triable issue in this regard.

SECOND ISSUE – HEARSAY LETTER OF REPUDIATION FROM GUARDRISK

[25] From the plaintiff's affidavit it appears that the deceased concluded a credit life insurance agreement with Guardrisk before passing away. After his death, his surviving spouse, Mrs Thembeke Lillian Thethani, submitted the claim, together with an affidavit explaining that she only found out about the policy four months after the death of the deceased. The repudiation letter from Guardrisk is addressed to her. In a written note in response to defendant's

argument, the plaintiff requests that the letter be accepted in the interest of justice given the fact that the content is not expressly in dispute. I assume that this request is with reference to section 3 of the Law of Evidence Amendment Act, 45 of 1988.

[26] I am of the view that there is no merit in this defence irrespective of whether the repudiation letter is accepted into evidence. The reason for this is that, *contra* to the averment in paragraph 5.2 of the defendant's Plea, it was, in terms of clause 23 of the ISA, the duty of the deceased to take out and maintain a credit life insurance policy. in terms of clause 23.7, the plaintiff merely obtained cession of the right, title and interest to such credit life insurance policy. The fact that the deceased unfortunately passed away within the 4-month period, which resulted in the claim being repudiated, can certainly not render the plaintiff liable in any manner.

[27] In any event, to the extent necessary, given the nature of the proceedings and the evidence, the purpose for which it is tendered, the probative value thereof and the lack of real prejudice to the defendant, I consider it just and equitable to accept the letter of repudiation. It is simply an uncontestable fact that the deceased passed away within the four months waiting period under the policy, in which case the policy does not pay out.

[28] This defence accordingly also does not present a triable issue.

THIRD ISSUE – DID THE VEHICLE FORM PART OF THE DECEASED ESTATE?

[29] As has been mentioned, the plaintiff submits that the vehicle fell outside of the deceased estate.

[30] The plaintiff finds support in judgment in the case of **Struwig NO v Marais** 1999 (2) SA 214 (OPA). In that case, the executor of a deceased estate sought an order for the delivery of a motor vehicle that had been purchased by the deceased in terms of a hire purchase agreement. Before passing away the deceased concluded an agreement with the respondent in terms of which the respondent was placed in possession of the vehicle on the basis that he would pay the instalments. In terms of the hire purchase agreement, Bankfin, the seller/credit giver, retained ownership of the vehicle until payment of the last instalment.

[31] Edeling J dismissed the application on the basis that the vehicle was not an asset in the deceased estate since it remained the property of Bankfin and that there was accordingly no duty on the executor to attempt to attach the vehicle as an asset in the estate. According to the learned judge, the correct position was that the executor was bound to give effect to the terms of the agreement between the deceased and the respondent / possessor.⁶

[32] Although the defendant's attorney ultimately (in a Supplementary Note, which is dealt with in more detail below) indicated that the defendant accepts the correctness of the proposition that the vehicle fell outside of the deceased estate, I do consider it necessary to refer to another case in which, on the face of it, a contrary view was expressed.

⁶ At 220B-C

[33] In the case of **Harrison NO v McClelland** 1955 (3) SA 20 (N), Caney J granted an interdict in favour of an executor of a deceased estate against a respondent who had been placed in possession of a vehicle that the deceased had purchased in terms of a hire-purchase agreement. The respondent contended that she had paid the instalments under the hire purchase agreement in order to preserve it for the estate and also that she enjoyed a lien in respect of expenses incurred by her to preserve the vehicle for the estate. She also stated that she knew that the vehicle was an asset in the estate, but that she had to pay the instalments to prevent the bank from repossessing it.

[34] In rejecting the argument that the respondent had to pay the instalments to prevent the bank (the “seller” in the quoted passage below) from repossessing the vehicle, the Court held that:

“The party with whom he (the seller) had contracted having died, the seller’s only proper course was to present a claim against his estate under the terms of the Administration of Estates Act.”⁷

[35] However, It does not appear from the judgment whether the hire-purchase agreement contained a clause reserving ownership of the vehicle and the existence of such a clause cannot simply be presumed. The weight of the quoted passage is further reduced by the absence of any discussion of the issue.

[36] In considering this issue, regard should also be had to the provisions of the Estates Act itself, of which the following have relevance:

[36.1] Section 26(1), in terms of which the executor must take into his custody or under his control

“all the property, books and documents in the estate not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment”.

[36.2] The definition of “property” in the Estates Act namely that it *“includes any contingent interest in property”*.

[37] Although it cannot be disputed that the purchaser of a motor vehicle in terms of an instalment sale agreement possesses an existing as well as a contingent interest in the vehicle, namely the right to possession thereof while the agreement is extant and the right to full ownership once the full purchase price has been paid, those rights and interests are subject to continued payment of the instalments and are to be distinguished from the physical object to which they pertain, being the vehicle, and the ownership thereof.

[38] Indeed, as the plaintiff’s counsel submitted, the defendant is bound by the rights and obligations contained in the ISA and does not possess more rights than those held by the deceased.

[39] To the extent that the judgment in **Harrison NO** is at odds with the judgment in **Struwig NO**, I am of the view that the latter is correct.

[40] As alluded to above, the defendant’s attorney somewhat changed tack in a supplementary note filed by him subsequent to the hearing of the matter,

⁷ At 23 C-D

pursuant to an invitation from me to both parties to do so. In that note, he submits that “*it is not necessary to engage in any debate about whether the motor vehicle in question forms part of the deceased or not*”, and supports the finding in **Struwig NO**.

[41] Instead, he submits that the real question is “*whether the alleged debt which gave rise to these proceedings forms part of the deceased estate*”.

[42] In developing this argument, the defendant’s attorney refers to the fact that the contractual rights and obligations of the deceased in terms of ISA are devolved to the defendant as executor and then submits that “*The key question is how a debt against the estate should be dealt with*”. The argument then emphasises the duties of an executor in relation to publication of notices for claims, considering same and the legal processes and procedures set out in sections 29 and 35 of the Estates Act.

[43] What this line of reasoning overlooks is the distinction between ownership of the vehicle and the parties’ contractual rights and obligations flowing from the ISA. The plaintiff does not in this action claim payment of any arrears or damages, which claims would undoubtedly have to be lodged against the deceased estate in terms of the relevant provisions of the Estates Act.

[44] I accordingly find no merit in the defendant’s new line of attack either.

[45] Accordingly, in my view, the third issue also does not raise a triable issue.

FOURTH ISSUE – NON-JOINDER OF THE MASTER OF THE HIGH COURT

[46] Given my finding in respect of the third issue, it follows that no question of joinder of the Master arises.

[47] As regards joinder of the heirs, it is trite that an executor is not a procurator or agent for the heirs and is legally vested with the administration of the deceased estate, and this point is also in my view without any merit.⁸

CONCLUSION AND RELIEF

[48] As set out in paragraph 11 above, the plaintiff, in addition to the return of the motor vehicle, also seeks an order confirming cancellation of the ISA, an order for the expenses incurred for removal, valuation, storage and sale of the vehicle, as well as an order for attorney and client costs. Those claims do not fall to be treated on the same basis as the claim for delivery of the vehicle, which succeeds as a *rei vindicatio* based on the retention of ownership by the plaintiff. Those claims arise out of the provisions of the ISA, and would have to be lodged as claims against the deceased estate in terms of the relevant provisions of the ISA. The defendant must accordingly be given leave to defend those claims, should they be persisted with.

[49] The plaintiff was substantially successful in this summary judgment application and is entitled to the costs thereof, albeit not the attorney and client costs provided for in the ISA.

[50] In the premises I grant summary judgment in the following terms:

⁸ Cilliers (*supra*) at para 12.14

[50.1] The defendant shall return to the plaintiff the **2020 Toyota Quantum / Hi-Ace 2.5 D-4D Sesfikle 16S motor vehicle** with engin number 2KD[...] and chassis number AHT[...] forthwith.

[50.2] The defendant is given leave to defend all other claims contained in the Particulars of Claim.

[50.3] The defendant shall pay the plaintiff's costs of suit.

JOUBERT, AJ

For the Plaintiff: Adv C Tait

For the Defendant: Mr K Lingani