

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 33468/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

In the matter between:

BMW FINANCIAL SERVICES (SOUTH AFRICA) PTV LTD

[Registration Number: 1990/004670/07]

APPLICANT/

PLAINTIFF

And

MOOSA: SARFARAAZ SIKANDER

RESPONDENT

JUDGMENT

ALLYAJ

[1] This is an application for summary judgement wherein the following relief is claimed:

1.1. Confirmation of cancellation of the agreement;

1.2. That the Sheriff of the Court is authorised to attach, seize and return to the Plaintiff the motor vehicle 2015 BMW 330D M SPORTLINE A/T (F30)

with engine number [...] and chassis number [...];

1.3. Costs of suit on an attorney and client scale;

1.4. That the Plaintiff is granted leave to approach this honourable court for the relief claimed under Claim B which is postponed *sine die*.

[2] Applicant was represented by Adv. F. Storm and the Respondent by Adv. M. Karolia.

[3] The Applicant sold the abovementioned motor vehicle to the Respondent in terms of an instalment sale agreement¹.

[4] It is common cause that the Respondent fell into arrears and the Applicant issued summons against the Respondent who entered an appearance to defend and, subsequent to filing a plea, the Applicant launched these proceedings.

[5] It is also further common cause that the Respondent was under debt review in terms of 'the Act'.

[6] The Supreme Court of Appeal, then the Appellate Division² held:

"All that a Court enquires into is: (a). Whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b). Whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary Judgment either wholly or in part, as the case may be."

[7] Accordingly, this Court is enjoined to determine whether the Respondent has satisfied the requirements of Rule 32 as adumbrated by the Appellate Division.

¹ Caselines: 004-16; Annexure "B"

² Maharaj v Barclays National Bank 1976 (1) SA 418 (A) at 426B-C

[8] The Respondent contends in a nutshell that the Applicant has failed to comply with the provisions of 'the Act' which are jurisdictional requirements for success in this application for summary judgement.

[9] In this regard, the Respondent contends that the Applicant has only now, in the affidavit supporting summary judgement attached notices in terms of Section 86 (10) of 'the Act' and submits because no transmission record accompanies the attached notices, there is no proof by the Applicant that the said notices were actually received.

[10] As I understand the submission of the Respondent, if there is no notice given to the Debt Counsellor and the National Credit Regulator. In other words, notice to the Debt Counsellor and the National Regulator, is a *sine qua non*, to any action brought by a person such as the Applicant.

[11] This contention obviously deserves further scrutiny. In this regard Section 129 of 'the Act' needs outlining:

“(1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and .

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) *meeting any further requirements set out in section 130.*

(2) *Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order;*

(3) *Subject to subsection (4), a consumer may-*

(a) *at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and-*

(b) *after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.*

(4) *A consumer may not re-instate a credit agreement after-*

(a) *the sale of any property pursuant to-*

(i) *an attachment order; or*

(ii) *surrender of property in terms of section 127;*

(b) *the execution of any other court order enforcing that agreement; or*

(c) *the termination thereof in accordance with section 123".*

[12] For the reason that Section 129 of 'the Act' makes reference to Section 130, it is imperative that this Section insofar as relevant, in this case, is also quoted:

"130. (1) Subject to subsection (2), a credit provider may approach the court

for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;

(b) in the case of a notice contemplated in section 129(1), the consumer has-

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

(2) In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if-

(a) all relevant property has been sold pursuant to-

(i) an attachment order; or

(ii) surrender of property in terms of section 127; and

(b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.

(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(c) that the credit provider has not approached the court-

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or the court; and

(ii) despite the consumer having-

(aa) surrendered property to the credit provider, and before that property has been sold;

(bb) agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in section 129(1)(a); or

(dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).

[13] Now the two sections quoted above confirm the Respondent's submission that where no notice has been given in terms of Section 129, then a credit provider,

such as the Applicant is prohibited from launching court proceedings against the consumer such as the Respondent.

[14] However, the Applicant contends that whilst that might be so, Section 88 (3) permits a credit provider in the situation such as the Applicant, to proceed with court proceedings where a consumer such as the Respondent is in breach or default of the terms of the credit agreement or where the consumer defaults on any obligation in terms of the re-arrangement agreed between the parties.

[15] In this regard, the Applicant quotes Section 88 (3) of the Act wherein it is stated:

“(3) Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until-

(a) the consumer is in default under the credit agreement; and

(b) one of the following has occurred:

(i) An event contemplated in subsection (1)(a) through (c); or

(ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

[16] The Applicant relies specifically on Section 88(3) (b) (ii) for the proposition that a credit provider is legally permitted to exercise or enforce, by litigation its rights in terms of the credit agreement. The Applicant submits that the Respondent was in breach or default of his obligations under the re-arrangement and in those circumstances, entitled it to launch these proceedings without complying with Section 129 of ‘the Act’.

[17] The Respondent's counter-submission to the Applicant's reliance on Section 83(3) of 'the Act' is, in a nutshell, that the credit agreement itself demands of a credit provider to give notice of cancellation and such notice was never delivered. In fact, the Respondent submits that this Court has been requested to confirm the cancellation of the agreement as contained in the Combined summons.

[18] The Respondent submits further that cancellation of the credit agreement in this manner is premature and is not available to the Applicant.

[19] The 'defences' raised by the Respondent, in my view, can be described as technical and do not go to the source of the claim by the Applicant. The Respondent does not deny that he was in arrears, does not deny that he breached or defaulted on his obligations in terms of the re-arrangement structured in terms of the debt review process. Such conduct has been described by this Court³ and the Supreme Court of Appeal as undeserving of support and only serves to delay the inevitable.

[20] I can find no merit in the contentions by the Respondent and accordingly must find that the Applicant has satisfied the requirements summary judgement and is accordingly entitled to the relief claimed in the Notice of Motion.

[21] In respect of the costs of this application, I see no reason why the Applicant should not be awarded their costs. The scale of the costs have been agreed upon in the agreement and I see no reason why the costs should not on an attorney and client scale.

[22] Accordingly, an Order in the following terms shall issue:

- a). Termination of the Credit Agreement between the parties is hereby confirmed;
- b). The Sheriff of the Court is authorised to attach, seize and return to the Applicant/Plaintiff, the motor vehicle described as 2015 **BMW 330D M**

³ FNB v Seyffert & Another 2010 GSJ; Seyffert & Another v FNB 2012 SCA

SPORTLINE Alf (F30) with engine number [...] and chassis number [...];

c). That the Respondent/Defendant pay the costs of this application on an attorney and client scale;

d). That the Applicant/Plaintiff is granted leave to approach this Honourable Court for the relief claimed under Claim B which claim is postponed *sine die*.

G ALLY
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **17 February 2023**.

Date of virtual hearing: 18 August 2022

Date of judgment: 17 February 2023

Appearances:

Attorneys for the Applicant: **THOMPSON WILKS INC**

nick@thompsonwilks.co.za

Counsel for the Applicant: **Adv. F. Storm [heads having been**

drafted by Adv. T. Ferreira]

Attorney for the Respondents: **AFZAL LAHREE ATTORNEYS INC**

secretary@alahree.co.za

Counsel for the Respondents: **Adv. M. Karolia**