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

CASE NO: 18313/2022

1. REPORTABLE: ~~YES~~ / NO
2. OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
3. REVISED.
DATE: 31/07/2023

In the matter between:-

**WEST BANK, A DIVISION OF
FIRSTSTRAND BANK LTD**

Applicant/Plaintiff

and

KHOLOFELO MOROPYANE

Respondent/Defendant

JUDGMENT

SKOSANA AJ

[1] The applicant/plaintiff seeks summary judgment for the cancellation of an agreement, the delivery or repossession of a vehicle, being a 2019 Ford Ranger 3.2 TDCI Wild Track 4x4 with chassis no. AF[....]5 and engine no. SA[....]5 ("the vehicle") as well as the costs of suit. The plaintiff also prays for an order postponing the claim for damages.

[2] The application for summary judgment is instituted after the combined summons were issued followed by the defendant's plea. In its affidavit resisting summary judgment, the defendant raises three points namely that it did not sign the agreement relied upon by the plaintiff or that such agreement is not the one upon which the transaction was based, that the interest rate charged by the plaintiff is defective and that the defendant did not receive the section 129 notice.

SIGNATURE OF THE ELECTRONIC INSTALMENT AGREEMENT ("EIA")

[3] The plaintiffs counsel submitted as follows:

[3.1] That the EIA relied upon by the plaintiff constitute the agreement between the parties as the details contained therein are consistent with the transaction that took place between the parties including the dates reflected thereon, the account number, the capital amount, interest charged and the monthly instalment amount.

[3.2] The delivery of the vehicle took place on the date on which the EIA is alleged to have been concluded and there is no dispute that such vehicle was so delivered and is still in possession of the defendant.

[3.3] I was referred to the case **Firststrand Bank t/a West Bank v Molamugae [2018] ZAPPHC 762** to the effect that the high-water mark that is generated by the computer once the defendant accepts the terms and conditions by effecting his electronic signature is sufficient for the valid conclusion of an EIA¹.

[3.4] I was also referred to paragraph 7 of the plaintiffs particulars of claim which detail the contents of such agreement and against which the defendant pleaded only a bare denial. It was also shown that the defendant had paid monthly instalments of the same amount as contained in the EIA from 30 April 2019 until 10 June 2022.

¹ See also section 13(2) of the Electronic Communications and Transaction Act 25 of 2002

[4] The defendant on the other hand contends that the EIA is not the agreement concluded between the parties as the written agreement relating to the transaction was physically signed by the defendant on 01 April 2019. The defendant further contends that the EIA does not accord with the agreement that she signed including the interest charged in terms thereof.

[5] However, the defendant does not offer any information as to the respects in which the correct agreement would have differed with the EIA. There is no specific allegation as to what the interest amount would have been, what the instalment amount would have been and whether or not there would have been arrears in terms of that agreement and why the defendant ceased servicing the debt in June 2022. There does not seem to be any room for improvement of the defendant's 'defence' than what has already been offered.

INTEREST RATE

[6] In this regard, it suffices to state that the EIA contains the details of the interest rate to be used and the total interest amount. In addition, the plaintiff has provided details of the arrear amount that has accumulated as a result of the defendant's default. The defendant offers no explanation in this regard except for persisting that the EIA is not the correct agreement. That falls far short of the kind of grounds required to resist summary judgment.

SECTION 129 NOTICE

[7] In essence, the defendant contends in this regard that she was not aware of the section 129 notice and that such notice was not delivered as required by section 129 of the National Credit Act 34 of 2005 ("NCA"). As such, the summons are invalid. The defendant adds that although she has approached the bank with a view to rectify the default in payment, the plaintiff cannot confirm the arrear amount without the correct agreement and there can be no cancellation of a wrong agreement.

[8] In this regard, the plaintiff relied on the Constitutional Court decision in **Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC)** where the Constitutional

Court, relying on sections 65(2)(b), 96 and 168 of the NCA, concluded that the credit provider's obligation consists only in sending the notice by registered mail to the correct branch of the post office in accordance with the election of the consumer². There is no obligation on the plaintiff to ensure that the section 129 notice has actually come to the attention of the defendant.

[9] In the present case, it is clear that the notice was sent by registered mail to the correct branch of the post office as would have been elected by the defendant and such post office dispatched a notice to the defendant's address for her to collect the section 129 notice. The plaintiffs obligations are fulfilled as laid down in **Kubyana case**.

[10] Further, in **Kubyana** case, the Constitutional Court concluded as follows on this aspect:

"[39] In sum, the Act does not require a credit provider to bring the contents of a section 129 notice to the subjective attention of a consumer. Rather, delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice. Thus, a credit provider's obligation may be to make the section 129 notice available to the consumer by having it delivered to a designated address. 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 for collection and ensuring that the Post Office notifies the consumer (at her registered mail, ensuring that the notice reaches the correct branch of the Post Office designated address) that a registered item is awaiting her collection. to the narrow qualification that, if these steps would not have drawn a reasonable consumer's attention to the section 129 notice, delivery will not have been effected. The ultimate question is whether delivery as envisaged in the Act has been effected. In each case, this must be determined by evidence."

² **Kubyana case para 32**

[11] In the light of the above, it is my view that the defendant has failed to show that she has a bona fide defense which gives rise to a triable issue and that there are grounds for such defense. One may add that the asset is still in possession of the defendant and its value is deteriorating by the day.

[12] In the circumstances, I make the following order:

(a) The draft order contained on case lines 014-7 to 014-8 is made an order of court.

DT SKOSANA

Acting Judge of the High Court

Date of hearing: 27 JULY 2023

Date of Judgment: 31 JULY 2023

APPEARANCE:

Counsel for the Applicant: Adv H Salani

Instructing attorneys: Rossouws Lesie Inc

For the Respondent: Mr Pather (Attorney with right of appearance)