IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	~~YES~~/NO
Of Interest to other Judges:	~~YES~~/NO
Circulate to Magistrates:	~~YES~~/NO

Case No.: 4715/2016

In the matter between:

NGAKA DAVID KHOKHO — Applicant

and

NEDBANK LIMITED (of which MFC is a division) — Respondent

CORAM: LEKALE, J

JUDGEMENT: LEKALE, J

HEARD ON: 24 NOVEMBER 2016

DELIVERED ON: 8 DECEMBER 2016

BACKGROUND AND INTRODUCTION

[1] On or about 15 October 2013 the applicant and the respondent concluded a written instalment sale agreement in terms of which the latter, as the seller, sold a 2013 Jaguar XF

2.0 i4 luxury motor vehicle to the former. It was a term of the agreement that applicant would pay the purchase price, inclusive of VAT, by way of 71 equal monthly instalments of R11 909,65 from 1 December 2013 to and including 1November 2019.

[2] Applicant, however, fell in arrears with monthly instalments and on 16 August 2016 respondent notified him of the default, as required by section 129 read with section 130 of the National Credit Act, 34 of 2005 ("the Act"), per registered post. On 19 August 2016 the Post Office which serves the applicant's chosen postal address dispatched the first notification to collect the registered item in question to him.

[3] On 31 August 2016 the respondent issued summons against the applicant, *inter alia*, notifying him of cancellation of the contract and claiming the return of the vehicle purchased. The summons was served per affixation by placing a copy in the post box at the applicant's chosen *domicilium citandi et executandi* on 5 September 2016.

[4] Applicant only received the section 129 notice on 6 September 2016. Summons was, in turn, only received by him on 23 September 2016 around 14h00 from a neighbour into whose post box it was placed. Applicant immediately proceeded to prepare and draft a notice of intention to defend which he served on the respondent's attorneys at about 15h45 the same day. He, unfortunately, could not file the original copy with the Registrar of this court until Monday the

26th September 2016 because the relevant section had already closed for the day. Unknown to him, when he eventually filed with the Registrar, judgment had already been entered against him by default on 23 September 2016

[5] On 26 September 2016, after entering appearance to defend with the Registrar, the applicant phoned the respondent's employee dealing with litigations in Pretoria and informed her that he deposited R20 000, 00 towards clearance of arrears of R35 602, 00 on 24 August 2016 but was told to effect a further payment of R12 000, 00 that same day and a further R3 000,00 together with his October instalment of R12 000, 00. He duly obliged but was caught by surprise on 4 October 2016 when the respondent's said employee told him that the respondent's local attorneys had already taken judgment by default and that they had also issued a warrant of delivery of the relevant motor vehicle.

[6] Applicant proceeded to contact respondent's attorneys and learnt that they were not longer interested in the settlement of the arrear amount but wanted the whole outstanding balance paid. Whilst talking to the said attorneys the sheriff arrived with the warrant to repossess the motor vehicle but same was with his wife at Kroonstad where she works.

[7] Feeling that the matter was urgent as he stood to lose the vehicle, applicant launched the instant application on an urgent basis moving for, *inter alia*, stay of the relevant warrant and rescission of the default judgment.

[8] Respondent filed opposing papers and on 6 October 2016 the motion was postponed to 24 November 2016 with costs standing over for adjudication at a later stage.

[9] The matter now serves before me for determination of the rescission application and costs of the postponement only with the parties, effectively, being in agreement that, in law, service of an application for rescission of judgment automatically stays the execution process.

ISSUES IN DISPUTE

[10] The parties are at loggerheads over whether or not applicant has a *bona fide* defence to respondent's action with the respondent effectively conceding, in argument, that applicant's explanation for his default in entering appearance to defend is acceptable and plausible while the applicant, on his part, contends that the action was instituted prematurely and contrary to the provisions of section 129 of the Act insofar as summons was issued before he could receive the relevant letter of demand.

[11] The dispute between the parties, further, extends to the question as to whether or not, in law and equity, the applicant falls to be burdened with costs occasioned by the postponement on the 6th October 2016.

DEPOSITIONS AND CONTENTIONS FOR AND ON BEHALF OF THE APPLICANT

[12] In support of the application the applicant deposed to, *inter alia*, the effect that he would be able to re-instate the relevant credit agreement by paying the outstanding default charges and costs of enforcing the agreement if the court were to rescind the impugned judgment insofar as he has already cleared the arrears on the account save for applicable default charges and costs.

[13] In argument on the papers and before the court the applicant, *inter alia*, contends that it is patent from the founding affidavit that he always intended to defend the matter because he prepared and drafted the notice of intention to defend immediately upon receipt of the summons. It is, further, his submission that the respondent issued summons against him before the expiry of the ten(10) business day period after delivery of the section 129 notice. According to him case law is to effect that the respondent was obliged to ensure that the relevant notice, in fact, came to his attention, as the defendant, before it could issue summons.

[14] In the applicant's view he was not afforded an opportunity to exhaust the remedies provided by section 129(1) of the Act before action was instituted against him.

DEPOSITIONS AND CONTENTIONS FOR AND ON BEHALF OF THE RESPONDENT

[15] In opposition to the application, the respondent's Manager: Specialised Support and Litigation deposed to, *inter alia*, the effect that prior to launching the instant application on an urgent basis the applicant did not engage the respondent's attorneys and, had he done so, the respondent would have given him an undertaking not to sell the vehicle, as it usually does where the applicant party commits, with its consent, to a date for filing the rescission application. In the respondent's view the urgency was self-made insofar as the rescission application automatically suspends enforcement of impugned judgments.

[16] The respondent's position is, further, that section 129 notice was sent to the applicant on the16th August 2016 but he failed to respond to the same and was still in arrears as at 31 August 2016 when summons was issued. As at 4 October 2016, after further payment of R15 000,00, the applicant was still in arrears in the amount of R12 684,79.

[17] In argument Mr Van Aswegen, for the respondent submits to, *inter alia*, the effect that the novel relief of re-instatement of the credit agreement provided for by sections 129(3) and 129(4) of the Act is not available to the applicant because the agreement was cancelled before the applicant had cleared all the arrears. The aforegoing prevails because the high-water mark of the applicant's alleged *bona fide* defence is that he can re-instate the instalment sale agreement by paying arrears once the default judgment is rescinded. In his view

the agreement was cancelled by way of summons which, *inter alia*, communicated the cancellation to the applicant.

[18] In Mr Van Aswegen's understanding of the applicant's founding papers, it is not the applicant's case that the cancellation was ineffectual for want of compliance with sections 129 and 130 of the Act. The relevant issue, he contends, is only apparent in replying papers and, in law, the applicant stands and falls by what is contained in his founding papers.

[19] Mr Van Aswegen, further, reminds the court that according to the Constitutional Court all that the credit provider, in the position of the respondent, has to do to satisfy the requirement **"to deliver**" the section 129 notice in the context of enforcing the credit agreement is to **"aver and proof that the notice was delivered to the consumer**". The applicant's assertion that summons was issued prematurely is fallacious. Notice of cancellation of the instalment sale agreement contained in the summons reached the applicant, on his own admission, on 23 September 2016. More than 10 business days had, as such, elapsed between delivery of the section 129 notice and the date on which cancellation of the agreement was communicated to the applicant.

[20] It is, further, contended for the respondent party that the application should be dismissed with costs including reserved costs.

APPLICABLE LEGAL POSITION

[21] An application for rescission of judgment, like an application for leave to appeal, suspends the impugned judgment and its execution. (See **Uniform Rule of Court** 49(11) and **Peniel Development (Pty) Ltd and Another v Pietersen and Others** 2014 (2) SA 503 (GSJ) at para [5])

[22] The credit provider is, in terms of section 129 read with section 130 of the Act, obliged to prove that the section 129 notice reached the correct post office serving the address chosen by the consumer and to aver that same was made available to the consumer insofar as delivery is effected when the document is made available to the consumer as the recipient. Once the relevant averments are apparent from the credit provider's papers before the court, the default position is that the section 129 notice was delivered on the date it was made available to the consumer. (See **Sebola and Another v Standard Bank of South Africa and Another** 2012 (5) SA 142 (CC) at par [77])

[23] Clause 14 read with clause 16 of the Instalment Sale Agreement between the parties dated the 15th October 2013 effectively provides for a section 129(1) notice to be send to the applicant, as the consumer, before the agreement may be cancelled on grounds of default by the respondent, as a credit provider, and only upon failure by the applicant to respond to such notice within 10 business days. (See Clauses 14.2 and 16.1.4 of the Agreement in question)

[24] Section 129(3) of the Act, before its amendment and as it stood when it was considered by the Constitutional Court recently, permitted "**a consumer, at any time before the credit provider has cancelled the agreement, to re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue. The provision adds that the consumer must also pay 'the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement**". (See <u>**Nkata v First Rand Bank**</u> 2016 (4) SA 257 (CC) at par [77])

[25] In its amended form with effect from 13 March 2015 section 129(3) of the Act provides that:

> **"A consumer may, at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying ... all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied."**

[26] Where there exists no proof that the section 129 notice reached the correct post office, consumers are granted rescission of the impugned default judgment and the proceedings against them get adjourned in terms of section 130(4)(b) of the Act to allow the credit provider "**to rectify the omission in regard to the notice**". (See <u>**Sebola and**</u>

<u>Another v Standard Bank of South Africa and Another</u> (*supra)* at par [81])

APPLICATION OF LEGAL POSITION TO THE FACTS AND FINDINGS

[27] The parties are, effectively, at variance on whether or not summons was issued before 10 business days had elapsed from the date of delivery of the section 129 notice to the applicant, as the consumer. The parties are *ad idem* that summons was issued on 31 August 2016 while the relevant notice was scanned at the correct post office serving the applicant on 19 August 2016. The notice in question was, at the very earliest, made available for collection by the applicant and, as such, delivered when the first notification of its availability was dispatched to him on the same date.

[28] The 10 business day period after the delivery of the relevant notice expired, at the very earliest, on 2 September 2016 if one excludes Saturdays and calculates the period from the 19^{th} August 2016. In terms of section 129(1)(b) read with section 130(2) of the Act no legal proceedings could, thus, be commenced in *casu* to enforce the credit agreement between the parties before the 3rd September 2016.

[29] Summons was, therefore, issued 3(three) days too early on common cause facts insofar as it was issued on 31 August 2016. The evidentiary burden was generally on the applicant party, as the consumer, to adduce evidence showing that the

relevant notice was, in fact, delivered to him later than the 19th August 2016 where he did not, as the case is in the instant matter, agree with the default position in paragraph [28] above. The applicant deposed to the effect that the notice in question was delivered to him on 6 September 2016.

[30] I am, however, satisfied that the default position prevails because there exists no explanation whatsoever, on the papers, as to why the applicant only received such a notice on 6 September 2016 when the notice notifying him of its availability was, admittedly, first dispatched to him on 19 August 2016. The applicant, further, conceded in argument before the court that, in line with the generally accepted practice of South African Post Office, the relevant notice, as a registered item, could not reasonably possibly have been delivered to his place by the relevant post office serving his area as alleged in his papers. He attributed the mistake to the haste involved in preparing the motion on an urgent basis. Rejecting his evidence in this regard as unacceptable and including Saturdays in the calculation of the relevant period, the 10 business day period contemplated in section 130(2) of the Act expired on 31 August 2016 at the very earliest for the respondent. Even on this generous calculation of the relevant period summons was clearly issued one (1) day too early.

[31] On the preceding findings alone the application stands to succeed in order to afford the applicant an opportunity to avail himself of consumer rights provided by section 129 of the Act.

(See **Sebola and Others v Standard Bank of South Africa and Another** (*supra)* at par [81].

[32] The respondent's position is that the applicant has no *bona fide* defence because he was notified of cancellation of the credit agreement when he received summons on 23 September 2016, while he received the section 129 notice on 6 September 2016. In the respondent's view the applicant can, as such, not revive the agreement by paying outstanding costs because the agreement was already cancelled as at 23 September 2016.

[33] I am, however, satisfied from the reading of the relevant clauses of the credit agreement which, in any event, accord with the Act, that the determinative date for the purposes of sections 129 and 130 of the Act is the date on which summons is issued and not the date of service or receipt of the same by the consumer. In my judgment cancellation of the contract, which is communicated through premature summons, is not efficacious for the purposes of section 129(3) of the Act for it is unilateral, by its very nature, and takes place when it is effected and not when it is communicated. In the instant matter it is expressly clear from the particulars of claim that cancellation purportedly took place before summons was issued insofar as summons served, *inter alia*, to notify the applicant of the same *ex post facto*. Such cancellation is, as such, as premature as the summons itself.

[34] It is contended for the respondent party that the issue of prematurity of summons in relation to section 129 notice is not apparent *ex facie* the applicant's founding papers and is only contained in his reply. In the respondent's view the appellant must stand and fall by his papers and the issue must, *stricto senso*, not be entertained by the court. I am, however, persuaded by the papers that the issue in question is properly before the court insofar as the dates on which the relevant notice was dispatched and summons was issued are all apparent from the launching papers.

COSTS

[35] The applicant prays for punitive costs against the respondent. I am, however, not satisfied that there exists cause for such a special costs order to be made regard being had to the fact that the respondent was clearly, in law, entitled to oppose the application in circumstances where, in its view, there existed no urgency entitling the applicant to jump the queue for the matter to be heard out of turn.

[36] I am, further, persuaded by undisputed facts before me that in the light of the fact that the applicant was in arrears as at the date of the default judgment, the respondent, at least, had cause, in law and equity, to oppose the application.

[37] As far as reserved costs are concerned, I am satisfied that it is only fair to saddle the applicant with the same regard being

had to the prevailing legal position as per Uniform Rules of Court.

ORDER

[38] In the result the application for rescission of judgment is granted with costs.

[39] The applicant is ordered to pay the costs relating to the postponement of the 6th October 2016.

L. J. LEKALE, J

On behalf of the applicant: In person
C/O Rampai Attorneys
Bloemfontein

On behalf of the respondents: Adv. W. A. van Aswegen
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

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