

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION: MTHATHA**

CASE NO. 468/2014

In the matter between:

STANDARD BANK SA LTD

Applicant

And

NOMZINGSI PRINCESS MNYIPIZA

Respondent

JUDGMENT

GRIFFITHS, J.:

1. This is an application for Summary Judgment. The plaintiff's claim is based upon a standardized instalment sale agreement concluded between the parties relating to the purchase of a motor vehicle. As is usual in matters of this nature the plaintiff pleaded in its particulars of claim that the defendant defaulted on her obligation to pay the premiums under the agreement on due date, the total outstanding premiums as at 13 January 2015 being R18,245.45. Consequently, so the plaintiff pleaded, it duly

cancelled the agreement, alternatively, the agreement was cancelled by service of the particulars of claim.

2. Regarding the plaintiff's right to so cancel the agreement it pleaded that the written agreement (a copy of which was annexed to the particulars of claim) provided therefor as follows:

"4.6 Furthermore, in the event of the Defendant defaulting on any of the obligations in terms of the Agreement, the Plaintiff would be entitled to:

- a. Cancel the agreement;
- b. Repossess and sell the Asset;
- c. Retain all payments already made by the Defendant to the Plaintiff."

3. On a reading of the agreement it becomes clear that it does not contain an express cancellation clause. Indeed Mr. Mtshabe, who appeared on behalf of the plaintiff, readily conceded that no such clause existed in the agreement.
4. The defendant's opposing affidavit, seen in isolation and absent the above-mentioned problem, discloses no defence whatsoever. Although that affidavit did not refer to the absence of a cancellation clause, Mr. Qina, who appeared on behalf of the defendant, argued that summary judgment should nonetheless be refused because of the absence of a cancellation clause.

5. Mr. Qina referred me to the case of **ABSA Bank Ltd v Havenga and Similar Cases**¹ in which Horwiz JA stated:

"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 that 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 that 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 eg 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, that before one can cancel an agreement, there has to be a right vesting in the credit provider to do so." ²

¹ 2010 (5) SA 533 (GNP)

² At page 535 D – G

6. In that matter, Horwitz AJ was concerned with a series of default judgments based on instalment sale contracts where the plaintiffs had relied on a "one size fits all" computer produced template allegedly representing the terms and conditions agreed upon by the parties in each of those matters. These templates, in each matter, did not contain a cancellation clause. This notwithstanding, it appears from the judgment that in each such matter the particulars of claim referred to an express provision in the contracts allowing for cancellation. He found that the careless manner of pleading these cases was sufficient to warrant a refusal of the default judgments sought and concluded that:

“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.”

7. Because this is a summary judgment application, I have a discretion to grant or refuse summary judgment³.
8. I have also been referred to a decision of Majiki J delivered on 23 April 2015 in the matter **of Standard Bank SA LTD v Mbane**⁴ which is practically on all fours with the present matter. In fact it appears from that judgment that the relevant pleadings and the written contract were very

³ Arend and Another v Astra Furnishers (PTY) LTD 1974 (1) SA 298 (C) esp. at p304-305

⁴ Case No. 58/2015 (Eastern Cape Local Division – Mthatha) delivered on 23 April 2015

similar to those in this matter. Majiki J distinguished the Havenga case on the basis that it had been pleaded that the written contracts in the various cases referred to by Horwitz AJ contained an express cancellation clause. In the matter before her, Majiki J drew attention to the fact that the particulars of claim had alleged an express, alternatively, a tacit, alternatively, an implied term in this regard.

9. In the present matter, the pleadings are, in this regard, exactly the same. The plaintiff has pleaded in paragraph 4.6 as set out in paragraph 2 of this judgment.
10. Majiki J continued, in effect, to find that because the plaintiff had pleaded a tacit, alternatively, an implied term in the alternative to an express term, this opened the way for the plaintiff to cancel the agreement in terms of the common law, notwithstanding the fact that the agreement did not include an express cancellation clause. Because of the similarity of the two cases I am bound, unless I find that she was clearly wrong, to follow her reasoning and conclusion.
11. Having studied the judgment in that matter I am of the view that the conclusions were correct or, stated another way, I am unable to find that she was clearly wrong. The only matter which comes to mind and which was not fully dealt with in that judgment is the question as to whether or not, a time for performance having been specified in the agreement (that is, for payment of the instalments on or before the 15th of each month), a breach thereof by failing to pay an instalment on due date would entitle the plaintiff to cancel the contract at common law. It seems that the plaintiff would have been entitled to cancel the agreement forthwith if time was of the essence and if the breach was a material breach of the

agreement which went to the root of the contract. Where time is not of the essence of the contract but the breach is indeed a material breach, it seems that the plaintiff could make time of the essence by placing the defendant in *mora* by way of a letter of demand giving the defendant a reasonable time within which to rectify her default. The law in this regard has been set out in the case of **Kangisser and Another v Rieton (PTY) Ltd.**⁵ at page 428 as follows:

“For the purpose of this judgment contracts of sale may be divided into two main classes:

A. Where time is of the essence of the contract either on account of the surrounding circumstance affecting the business of the parties or the nature of the merx, or on account of an express term making time of the essence of the contract.

B Where time is not of the essence. This latter class may be divided into two further sub-classes as follows:

- (1) Where the time for the performance is stipulated.
- (2) Where the time for performance is not stipulated.

In sub-class (1) where the stipulated time for performance has arrived the promisee can sue for performance without prior demand. In sub-class (2) where the time for performance has not been stipulated, but a reasonable time within which performance should have taken place has elapsed, the promisee can also sue for performance, but he runs the risk that, if he had made no prior demand and the promisor pays when summons is served on him, he may not be awarded his costs. Such prior demand is one form of placing the promisor in *mora*.

The right to resile from the contract in class B is limited to those failures to perform which go to the root of the contract; that is where the failure is such as to amount to a repudiation of the contract. Where

⁵ 1952 (4) SA 424 (T)

this failure consists in excessive delay in performing, the authorities and decided cases show that before the promisee is entitled to resile from the contract he must give the promisor notice to perform on or before a certain date, being a reasonable time under the circumstances, and that failure to perform within the period stated will be taken to be a repudiation by the promisor of his obligation under the contract."

12. On a reading of the agreement in this matter, whilst I cannot say that time was of the essence with regard to payment of the instalments, it seems to me that there is little doubt that a failure to pay the instalments on due date would be regarded as a material breach of the agreement. Not only is such a default specifically included as being a breach of the agreement, it is further stated that clause 18.4 that:

"In the event of default, we may, at our election and without affecting any other rights that we may have in terms of this Agreement, or otherwise, recover from you payment of all amounts owing under this Agreement by adhering to the default procedure described above."

13. It seems to be clear from this, and various other clauses of the agreement, that failure to pay any one of the instalments on due date was to be regarded by the parties as a sufficiently serious breach of the agreement as to accelerate payment of the full amount due under the agreement and, hence, such a default must surely have been intended to be a material breach of the contract thereby paving the way for the plaintiff, in compliance with the default procedures (particularly by giving notice of its intention to cancel), to cancel the agreement at common law.

14. The plaintiff duly gave notice both pursuant to section 129 read with section 130 of the National Credit Act⁶ and in consonance with its obligations under the agreement, to the defendant. In that notice, the plaintiff specifically stated:

"Please take further notice that should you fail to respond as per paragraphs two, three and four above before the expiry of ten (10) business days, the Agreement will be cancelled and same will result in judgment being obtained against you for the return of the asset..."

15. It is clear that the defendant does not dispute that she received this notice at a time when she was in arrears and that she failed to make good on such arrears before the plaintiff cancelled the agreement, either before the issue of summons or by way of the particulars of claim. In my view therefore, the plaintiff validly cancelled the agreement in terms of the common law and in terms of the agreement itself.

16. I mentioned earlier in this judgment that, bar the question of the lack of the cancellation clause, the defences raised by the defendant hold no water. My reasons therefore are briefly set out hereunder.

17. The defendant has maintained that the plaintiff is unaware of the exact amount due by the defendant. As verification of this the defendant pointed to the letter of demand which referred to an "*overdue amount as at 13 January 2015: R18,285.45*". Defendant further referred to the affidavit in support of summary judgment (attested to by one Mr. Meade) averring that it was inaccurate as it referred to the full outstanding balance as being R547,983, and submitted that this contradicted the

⁶ No. 34 of 2005

earlier amount referred to in the letter of demand. It is abundantly clear that Meade was referring to the full accelerated and outstanding balance as opposed to the "overdue amount" or outstanding monthly instalments in terms of the agreement. There is thus no inaccuracy in Meade's affidavit.

18. In the defendant's heads of argument it is stated that the issue to be determined by this court is whether or not the defendant is "in arrears with monthly instalments". This is not quite accurate. It appears to me that the issue in this regard, if there is one, would be whether or not the defendant fell into arrears and thereby breached the contract, and if so, what the consequences thereof would be as I have dealt with earlier in this judgment. Nowhere in the defendant's opposing affidavit has the defendant specifically stated that she was not in arrears with her instalments. On the contrary, she has said that she made certain payments to the plaintiff on this contract sometime after the summons was served on her. This would seem to be a clear acknowledgment that she was indeed in arrears with her instalments.

19. Of further significance is the fact that the defendant has not, in the opposing affidavit, alleged payment of any of the instalments on due date which were said by the plaintiff to have not been paid. Generally speaking, one would have expected such a statement to have been made in order to establish a *bona fide* defence for the purposes of avoiding summary judgment.

20. The defendant also referred to the fact that she, on 9 March 2015, deposited the sum of R22,000 into the plaintiff's account. Reference was made in this regard to a deposit slip which was annexed to that affidavit.

In response to a letter indicating that this amount had been paid, plaintiff's attorney stated that this notwithstanding, there was still an outstanding amount due to the fact that this payment was made by cheque which would only be cleared within 10 – 14 days. Therefore, effectively, as at that time no payment had been made.

21. Reference was also made by the defendant to a further payment made thereafter but the amount was not specified and the annexure "NPM 6" referred to in the affidavit was not annexed thereto. The summons was served on the defendant long before these alleged dates of payment and it is clear from the summons that the plaintiff cancelled the agreement as a consequence of the defendant's default before issue of summons, and, if not, at least as at the time of service of the summons on the defendant, at a time when she was admittedly in arrears.

22. The third, and somewhat technical, defence raised by the defendant appears to be the fact that the person signing the particulars of claim and summary judgment application is not a duly admitted or qualified attorney. *Prima facie* all the documents, such person, a Mr. Kholisile Benson Mabanga, is indeed a qualified attorney and one who is certified in terms of section 4 (2) of Act 62 of 1995 to appear in the High Court.

23. Subsequent to the hearing of the matter, and in supplementary heads of argument, I was referred by Mr. Qina to a judgment of Laing AJ in the matter of **Community Property Company (PTY) LTD v Eastern Cape Burial Scheme CC and Another**⁷. Having read this judgment, it is clear that it provides no support for the defendant. In that case, Laing AJ dismissed the application for summary judgment because he found that

⁷ ECLD, Mthatha, Case No. 1643/2014 delivered on 18 September 2014.

the claim for summary judgment in that matter was not founded on a liquidated amount in money. That is not the situation in this matter.

24.In all these circumstances, I am satisfied that the defendant has not established a bona fide defence and **I accordingly grant summary judgment as follows:**

- 1. An order confirming the termination of the Agreement between the parties;**
- 2. An order directing the defendant to return the 2012 Mercedes Benz ML 250 Bluetek with the engine number 65196031003923 and vehicle identification number WDC 1660042A 059691 to the plaintiff;**
- 3. The defendant is ordered to pay the costs of suit.**

JUDGE OF THE HIGH COURT

HEARD ON : 30 APRIL 2015

DELIVERED ON : 14 MAY 2015

COUNSEL FOR APPLICANT : Mr Mtshabe
INSTRUCTED BY : K. B. Mabanga Inc.

COUNSEL FOR RESPONDENT : Mr Qina
INSTRUCTED BY : T. Qina & Sons

