

REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
DATE: 05 July 2024
SIGNATURE: [REDACTED]

CASE NUMBER:19839/22

In the matter between:

BMW FINANCIAL SERVICES SA (PTY) LTD

PLAINTIFF

And

SV105 TRADING CC

FIRST DEFENDANT

DANIEL RETIEF GEYER

SECOND DEFENDANT

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 05 July 2024.*

Summary: *Application - summary judgment. Credit sale agreement. Incorporation- National Credit Act 34 of 2005. Application of the NCA-through 'incorporation'-agreement where NCA could not have been applicable (Juristic persons – section 4(1)(b) alongside Regulation 7). Section 129-compliance-NCA. Application granted with costs-party and party (Scale B).*

JUDGMENT

NTLAMA-MAKHANYA AJ

[1] This is an opposed application for a summary judgment for the return of a motor-vehicle which is in possession of the Defendants. The parties entered into a credit sale agreement wherein the Defendants defaulted on its payment, breaching the terms of the agreement. The quantum portion for damages was postponed *sine die* pending the return and selling of the motor-vehicle. The application is opposed by the Defendants with the reasons to be articulated below.

[2] The relief sought was for the:

[2.1] confirmation of the termination of the agreement.

[2.2] return of the motor-vehicle (Jaguar ...).

[2.3] an order postponing the quantum *sine die* and authorizing the Plaintiff to apply to the Court on the same papers, supplemented in so far as they may be reasonably necessary, in respect of any damages and further expenses incurred by the plaintiff in the repossession of the said vehicle, which amount can only be determined once the vehicle has been repossessed and has been sold.

[2.3] Costs to be taxed.

[2.4] Further and or alternative relief.

[3] Let me situate the subject of the dispute in this matter.

Background

[4] The parties entered into a written instalment sale agreement of a motor-vehicle on 24 June 2020, both represented by their representatives. On the said date (24 June 2020) the second Defendant also signed a deed of suretyship and bound himself as a co-principal debtor for all present and future obligations of the first Defendant in favour of the Plaintiff. The Defendants breached the terms of the agreement and a letter of demand dated 11 February 2022 was delivered to them and failed to respond to it for the payment of arrears which were at the amount of R46 652. 59. Secondly, the Defendants failed to respond to the notice within ten (10) business days from the date the letter was sent to them. Thirdly, they did not surrender the motor-vehicle. Therefore, the agreement was terminated due to the breach of the agreement by the Defendants. As submitted by the Plaintiff, the Defendants do not have a legal basis upon which to keep the possession of the motor-vehicle.

[5] The Defendants opposed the application and alleged that the Plaintiff brought it *mala fide* with no justifiable grounds to institute it except to intimidate and force them to incur further legal costs whilst being aware of their defences. The Defendants contextualized their objection to the application in that:

[5.1] the Plaintiff did not comply with the requirements of section 129 of the NCA regarding the termination of the agreement.

[5.2] they agreed to have the provisions of the NCA to regulate their agreement despite the NCA not have been applicable in their agreement.

[5.3] in essence, being a juristic person, the first Defendant, with an annual turnover that exceeded R1 000 000 at the time of the conclusion of the agreement, the latter being a large agreement as defined in the Regulation 7(1) of the NCA, the NCA would not be applicable to the agreement.

[5.4] in a similar vein, the deed of suretyship, would also not be subject to the NCA.

[6] Broadly, the Defendants submitted and acknowledged that although the parties may agree to the provisions of the NCA applicable to their agreement, it is not possible to agree to make the whole NCA including the whole section 129 to be made applicable except for the portions thereof. The Defendants are also adamant that they intended the provisions of the NCA should apply to the agreement. Further, they challenged the eligibility of the Plaintiff's deponent that she could

not have attested to the substance of the agreement as she was not involved in its conclusion as she is a mere collections manager that becomes involved on allegations of a breach of the agreement. Overall, the Defendants also submitted that the alleged letter of demand was not brought to their attention or became aware of it and the agreement was not validly terminated due to the failure of the Plaintiff to comply with the NCA provisions.

[7] The material issue to this matter relates to the determination of whether the NCA would find application in circumstances where it could not have been applicable. Simply put, does the scope and purpose of the NCA finds application in a credit agreement where its provisions are not affirmatively included in the agreement through the principles of 'incorporation'?

Analysis

[9] This Court moves from a premise for a common cause between the parties that the NCA could not have been applicable in the agreement by virtue of the First Defendant being a juristic person and excluded as envisaged from section 4(1)(i) of the NCA and alternatively section 4(1)(b) in that the agreement is a large agreement as envisaged in Regulation 7(1) of the said Act. The consequent result would then influence the deed of suretyship. It also moves from a balanced view regarding the general overview and purpose of the NCA regarding the promotion of socio-economic interests of the consumer against the promotion of a fair and transparent credit market regulation which is to be upheld by the creditors, (Mhlantla J in *Amarion v Registrar of Deeds* (2019 (2) BCLR 193 (CC), para 42).

[10] Let me now turn to the contentious issue in this matter regarding the justification of the cancellation of the agreement by the Plaintiff. The Plaintiff argued that the NCA is not applicable in the agreement in that it falls under the exclusions as prescribed by the NCA. Particularly, the status of the First Defendant as a juristic person that has an annual turnover of R1 000 000 as envisaged in section 4(1)(b) of the said Act. As contended, the argument raised a question herein whether the glaring exclusions can be indirectly incorporated into an agreement without an express undertaking from both parties to do likewise? However, the Defendants maintained that the NCA is applicable to the agreement by virtue of the 'principle of incorporation' where certain provisions of the said Act were made applicable to the agreement. Their reliance was based on sections 92 and 121 of the NCA which are referred to in the agreement regarding the pre-agreement disclosures and rescission of agreements.

[11] The Plaintiff dismissed the application of the NCA by 'incorporation' into the agreement and argued against the application of section 129 in ensuring compliance with the termination of agreements in the NCA. In essence, the Plaintiff argued that the reliance in section 129 was misplaced in that the agreement does not make any reference to the said provision except for the sections 92 and 121 of the NCA which are commonly acknowledged by the Defendants. This meant that the agreement cannot by virtue of reference to the said provisions be grounded and be a point of departure for the incorporation of section 129 of the NCA which was not otherwise included to determine compliance on default by the Defendants.

[12] I must revert and state that section 129 of the NCA being a subject of contention in this matter reads as follows:

- (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.

[13] The crux of section 129(1) application, I repeat, constituted the subject of the dispute and raised a question whether it could find the '*back-door*' application through the principle of 'incorporation' into the agreement? I must also state the substance of section 129(1) which was contextualised by Malan JA in *Nedbank Ltd v The National Credit Regulator* [2011] 4 All SA 131 (SCA) *para 8*, who held:

despite the use of the word 'may' in s 129(1)(a) the notice referred to therein is *indeed a mandatory requirement prior to litigation to enforce a credit agreement.*

This is apparent when the subsection is read with ss 129(1)(b) and 130(1). Section 129(1) has been described as a '*gateway*' or '*new pre-litigation layer to the enforcement process*'. Delivery of the s129(1)(a) notice was said to be a compulsory step 'devised by the legislature in an attempt to encourage parties to iron out their differences before seeking court intervention.' As such it was said to give effect to the object of the NCA set out in s3(h), by encouraging 'a consistent and accessible system of consensual resolution of disputes arising from credit agreements', and as such it is also consistent with s3(i). This construction is the subject matter of the appeal by the Credit Regulator. It is not only the subject of the academic debate referred to but also of conflicting decisions. An analysis of the relevant provisions is thus required, (*author's emphasis, all footnotes omitted*).

Malan JA (*para 9*) went on to state that:

the notice required by s 129(1)(a) refers to a specific credit agreement in respect of which the consumer is in default. It must '*propose*' that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud '*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*'. The s 129(1)(a) notice deals with one credit agreement only and seeks to bring about a consensual resolution relating to that agreement. It does not contemplate a general debt restructuring as envisaged by ss 86 and 87. ... '[t]he proposal is directed at achieving a situation where the consumer and the credit provider, through the agency of the debt counsellor, negotiate a resolution to the consumer's particular difficulties under a particular credit agreement. It is a consensual process, the success or failure of which will depend upon whether the parties can arrive at a workable basis upon which to resolve the issues caused by the consumer's default'. (*author's emphasis and all footnotes omitted*).

[14] Drawing from Malan J, the foundation of section 129(1) entails the consideration of other options in settling the debt such as debt counselling or determination of the matter before another forum. In this case, there is no evidence to suggest that the parties did attempt to reconcile their differences regarding the settling of the default and instead the matter was presented before this Court.

[15] However, let me reiterate the question raised by this matter whether it is permissible for the NCA provision (129) that is not explicitly stated and referred to in the credit agreement to find an *indirect application* in regulating the said agreement? Further, to what extent does the principle of 'incorporation' influence the rationality of such agreements?

[16] The question raised by this matter was answered in the affirmative in case law provided by the Plaintiff in *RMB Private Bank (GSJ) v Kaydeez Therapies CC* 2013 6 SA 308 and *First National Bank v Clear Greek Trading* 2014 (1) SA 23 (GNP). This includes a scholarly article by *Reneke and Coetzee entitled: Can the National Credit Act be made applicable to (excluded) juristic persons or not? (2014) THRHR 567-585*. I am indebted to the assistance by the Plaintiff in that as the scholars argued and having analysed the above cases, it is evident from the reading and analysis of the article including the case law therein, that 'incorporation' must be explicitly included into the agreement to ensure certainty in the application and regulation of the said agreement (*page 585*). Let me acknowledge that scholarly articles are of a persuasive value in judicial reasoning and not of a binding nature, thus, having read the cases as well, I am also of the considered view that the parties are at liberty to 'incorporate' the NCA provisions which would not have been applicable, to ensure certainty on the legitimacy of the agreement. However, the Defendants dismiss the influence of above cases in this matter as they are of the view that the agreement is regulated through the 'incorporation' of sections 92 and 121 which indirectly infused the section 129(1) provision. I am not persuaded that an excluded provision would have to find application because of the reference to other articles in the agreement and I find the Defendants argument without substance. It is my view that the application of the principles of incorporation was misdirected in this case and carries no substance to justify the Defendants' defence of the matter.

[17] I must also state that even if section 129 had to be applicable by 'incorporation', the Defendants could not have had a legal basis to deny the application based on '*pure unawareness*' or not receiving the notice or letter dated 11 February 2022. This letter is the foundation for the determination of the compliance with the NCA provisions in that the creditor advises the defaulting party of the breach of the agreement and requiring the said party to act on such notice. At the end of this letter, the Plaintiff advised the Defendants of the need to respond within 10 business days, failing which, he will approach the court to enforce the agreement. This letter captures the content of a balance I mentioned above for defaulting parties to be provided with an opportunity to weigh

options that are available to them whilst on the other hand the creditor advances the principles of transparency in credit agreements regulations. I do not intend to exhaust the purpose of this letter, thus, herein, the Defendants dispute the receipt of the 11 February 2022 letter. In the context of the dispute regarding the receipt of the letter, it is imperative to note the guidance provided by Cameron J in *Sebola v Standard Bank of South Africa* 2012 (8) BCLR 785 (CC) on an appeal from the South Gauteng High Court, *para 74* in settling the question of the receipt or not who held:

[delivery] must be found in a broader approach – by determining what a credit provider should be required to establish, on seeking enforcement of a credit agreement, by way of proof that the section 129 notice in fact reached the consumer. As pointed out earlier, *the statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address.* But given the high significance of the section 129 notice, *it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer,* (author's emphasis).

[18] I am influenced by Cameron J by settling the contention in this matter in that the Plaintiff has proved by the D2 annexure that the letter was registered for dispatching to the Defendant's address. Although Cameron J acknowledged the risks that are associated with a mere postage of the letter '*as not enough*' with his affirmation that '*even registered letters may go astray, he gave reliability that at least if registered, there is a high probability that most of them will be delivered*', (*para 75*). However, in this instance, it is evident that the Defendants were disingenuous in that the letter (*item number: rc328354015za*) was recorded as having been delivered at the Menlyn branch on 2022/04/07 at 9:16 am to ML Mahlangu. It therefore leaves no doubt in the minds of this Court if it had to evaluate compliance with section 129, the Plaintiff did adhere to the basic principles regarding fulfilment of the NCA requirements. The bare denial of receipt of the letter is an abuse of this court process and a frivolous exercise of defending this matter. I need not comment on this letter and the effect it has regarding the settling of the dispute as section 129 is not of 'incorporation' into the credit agreement through the legal lens of other provisions of the NCA. In essence, the application of section 129 cannot be implied to be incorporated into the agreement and such reference must be explicitly stated to ensure the legitimacy and legal certainty of the regulation of the credit agreement. I repeat, the Defendants would still not have the legal ground to enforce the section 129 compliance by dismissing the

receipt of the letter with evidence provided herein that it reached his postage destination and finally signed off to him.

[19] I am not to reproduce the substance of the credit agreement as I am of the view that Defendants reliance on section 129 compliance was misplaced and of non-application to the agreement as envisaged in the Act. The blanket denial of the claim based on technical approaches to the 'incorporation' of the NCA did not serve the purpose to be achieved by the statute. In addition, it is not the view of this Court that the Plaintiff was at liberty not to follow the letter of the law in enforcing a default, the Defendants could not and are not justified in enjoying the benefit of being in possession of the motor-vehicle whilst not upholding the obligations due.

[20] The Defendants further challenged the rationality of the deed of suretyship which I find discomforting without any reasonable grounds such as being misled into the agreement. The second Defendant voluntarily entered into the agreement and there is no evidence that he did not understand the terms of the agreement. It is evident from paragraph 3 of the Deed of Suretyship (Annexure C) that the Second Defendant entered the terms of the surety binding himself to the terms of the agreement as surety and co-principal debtor of the first Defendant. It was also his own submission that he facilitated the conclusion of agreement, and it is disconcerting that he would not have satisfied himself of the implications of the NCA into the agreement. Voluminous jurisprudence has been produced by the courts on the binding nature of a deed of suretyship unless there are justifiable reasons which I found not to exist in the Defendant's defence. I am influenced by Koen J in *Astill v Lot 54 Falcon Park CC KZN* Case No AR 447/2011 *paras 8;18-19* that '*a deed of suretyship must be construed strictly ... [and] court to ascertain the intention of the parties ... [and] not to sought it in isolation ... [wherein] it must be interpreted against the background of all [its] provisions*'. Linked to this was the Defendants dismissal of the Plaintiff's deponent as a legitimate person in submitting the affidavit as she was not involved in the conclusion of the agreement. I found this contention a distraction and designed to put the '*cloud*' on the '*legal lens*' of this Court. The deponent is not a mere collections manager, and it is also her own affirmation that she did not submit the affidavit blindly but '*perused and examined the documents relating to this matter which was also grounded on his knowledge of the applicant's business*'. In this instance, I am content to affirm that the Plaintiff was justified in cancelling the agreement. The Defendants were not genuine and with *no bona fide* defence in defending the application.

[21] I am also conscious of the implications of the summary judgment as it '*shuts door*' in the face of the Defendants. In this regard, section 130(3) allays the fears of this Court and requires that it must be 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
 - (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)(u) 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).

[22] The substance of section 130(3) gives content to the observations made herein that there was no other forum that determined this matter. As noted above, with this matter not having served or before another tribunal, I am of the view that the Plaintiff has satisfied the requirements of a summary judgment and has a *bona fide* claim against the Defendants. The termination was on good cause wherein the Plaintiff was deprived of its lawful and legitimate rights to enjoy the benefits of the agreement within the broader context of the law of contract in credit agreements. The Defendants were obliged in terms of the agreement to pay the instalment due to avoid any loss that the credit provider (Plaintiff) may suffer because of the default. The non-payment has negative consequences for the Plaintiff as well and without assuming how the Plaintiff is funding his business, it is possible that, as Wallis J exemplified in *JMV Textiles (Pty Ltd v De Chalin Spareinvest* 14 CC [2011] 1 All SA 318 (KZD) *para 17* that '*the operations may be conducted on*

credit such as such as an overdraft, and is compelled to pay more interest than it would have done had the payment been made timeously'. Determining this matter on the technicality of the application of the NCA does not seem to fulfil the purpose of the statute in ensuring a balanced fair of contractual relations in bridging the gap between those that are economically empowered and those impoverished. This Court learnt a lesson that granting a judgment whether in favour or against a litigant should not be motivated by advantages or disadvantages that either party has regarding the matter. Of importance, which must be judicially exercised, is a balanced determination on what would constitute fairness in the adjudication of the matter. It is the assertion of this Court that the defences raised by the Defendants are not merited and bad in law.

[22] With regard to the costs order, the courts serve as the pinnacle in the exercise of their discretion to ensure balanced and merited circumstances for an order that is fair and just between the parties. I must express that with lessons learnt on the exercise of a judicial discretion on costs orders, this Court is not a '*slaughterhouse*' that will plant fear on prospective litigants to refrain from bringing their matters before the courts in promoting the principles of the new constitutional dispensation, particularly the development of the substance of the principles of section 34 of the Constitution, 1996. The said section is tied with the provision of remedial measures that are just and equitable in ensuring South Africa's flourishing and transformative jurisprudence of the 30 years of the new dawn of democracy. The costs, as indicated below, are reflective of a balanced view regarding the interpretation of the substance of the dispute and not who is '*better legally muscled*' than the other in this matter.

[23] Accordingly, the following order is made:

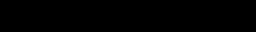
[23.1] confirmation of the termination of the agreement.

[23.2] return of the motor-vehicle (Jaguar ...).

[23.3] an order postponing the quantum *sine die* and authorizing the Plaintiff to apply to the Court on the same papers, supplemented in so far as they may be reasonably necessary, in respect of any damages and further expenses incurred by the plaintiff in the repossession of the said vehicle, which amount can only be determined once the vehicle has been repossessed and has been sold.

[23.4] Costs to be taxed.

[23.5] the costs of this application are granted in favour of the Plaintiff on a party and party scale – SCALE B.


N NTLAMA-MAKHANYA
ACTING JUDGE, HIGH COURT
GAUTENG, PRETORIA

Date Heard: 28 November 2023

Date Delivered: 05 July 2024

Appearances:

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