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**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Case No: 17616/2022**

|                  |                                 |
|------------------|---------------------------------|
| (1)              | REPORTABLE: NO                  |
| (2)              | OF INTEREST TO OTHER JUDGES: NO |
| (3)              | REVISED YES                     |
| .....            | .....                           |
| <b>SIGNATURE</b> | <b>DATE</b>                     |

In the matter between

**NEDBANK LIMITED**

(Registration Number: 1951/000009/06) Applicant

And

**GADIFELE SOPHIE MOELETSI N.O.**

(Identity number: 720125 0401 087) First Respondent

**THE MASTER OF THE HIGH COURT,  
JOHANNESBURG**

Second Respondent

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**JUDGMENT**

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**WANLESS J**

**Introduction**

[1] In this application NEDBANK LIMITED (*"the Applicant"*) seeks the return of a motor vehicle from one GADIFELE SOPHIE MOELETSI N.O. (*"the First Respondent"*). The First Respondent is the duly appointed *executrix* of the deceased estate of DANIEL RAUTSHIO MOELETSI (*"the deceased"*). Arising therefrom, THE MASTER OF THE HIGH COURT (JOHANNESBURG) is cited as the Second Respondent. No relief is sought by the Applicant against the Second Respondent.

[2] It was always the intention of this Court to deliver a written judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be *"converted"*, or more correctly *"transformed"*, into a written judgment and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an *ex tempore* basis.

**Facts which are common cause**

[3] The facts which are either common cause in this

matter or cannot be seriously disputed by either party, are the following:

3.1 on the 24<sup>th</sup> of October 2017 the Applicant and the deceased entered into a written Instalment Sale Agreement ("*the agreement*");

3.2 the Applicant could cancel the agreement and claim liquidated damages from the deceased if he committed a material breach of the agreement, including if the deceased died (*which he did*);

3.3 on default and without prejudicing the Applicant's other rights the Applicant may, *inter alia*, cancel the agreement, take possession of the asset and claim from the deceased an amount equivalent to the outstanding balance less the market value of the asset at the date of cancellation of the agreement;

3.4 the Applicant may provide a certificate from any one of its managers, whose position the Applicant need not prove, showing the amount that is due and how it is calculated. Unless the deceased was able to satisfy the court that the amount in the certificate was incorrect, it was agreed that the Applicant may take any judgment or order that it is entitled to in law, based on the facts contained in the certificate;

3.5 the deceased acknowledged that the Applicant was the owner of the goods and would remain so until all obligations and repayments to the Applicant had been fulfilled by the deceased after which he would become the owner;

3.6 the Applicant has complied with all its obligations in terms of the agreement; and

3.7 the Deceased died on 10 June 2021.

**The issues**

[4] Arising from the application papers in this matter the following issues fall to be adjudicated by this Court, namely:

4.1 whether the Applicant has complied with section 129 of the *National Credit Act 34 of 2000* ("*the NCA*");

4.2 whether the application is premature, incompetent and/or unlawful and in conflict with the *Administration of Estates Act 66 of 1965* ("*the Act*");

4.3 whether the amount claimed by the Applicant was correct and/or competent to be claimed;

4.4 non-receipt on behalf of the First Respondent of the Applicant's demand;

4.5 that the deponent to the Applicant's Founding Affidavit does not explain where he derives his authority to do so and to represent the Applicant.

**Whether the Applicant has complied with section 129 of the NCA**

[5] This defence by the First Respondent illustrates how the First Respondent has misconstrued the Applicant's cause of action. The Applicant seeks only the return of the motor vehicle following upon the death of the Deceased. In terms of the agreement the Applicant is entitled to the foregoing relief. It is clear that the Applicant's cause of action is based upon the *rei vindicatio*. Ownership of the motor vehicle still vests with the Applicant.

[6] The Applicant does *not* seek, in the present application, payment from the First Respondent. In the premises, the so-called "*issue*" as to whether section 129 of the act has been complied with by the Applicant, is in fact a "*non-issue*".

[7] The foregoing and the misunderstanding by the First Respondent as to the Applicant's cause of action, as will become apparent hereunder, is a fundamental flaw in respect of this defence as raised by the First Respondent to the relief sought by the Applicant in this application.

**Whether the application is premature, incompetent and/or unlawful and in conflict with the Act**

[8] The First Respondent alleges, *inter alia*, that:

8.1 as the *executrix* of the estate of the deceased she is entrusted with custody and control of the property in the estate in terms of section 26 of the Act;

8.2 the Applicant had to lodge its claim with the Second Respondent before approaching court;

8.3 at death the estate of the deceased person is frozen and no-one may withdraw funds from the deceased's bank account or deal with any of the estate assets without the necessary permission from the Master of the High Court;

8.4 this application is therefore premature as the Applicant has not submitted its claim and the liquidation and distribution accounts of the estate of the deceased have not yet been finalised and/or approved by the Master.

[9] As correctly submitted on behalf of the Applicant the claims procedure against a deceased estate is governed by, *inter alia*, section 35 read with sections 29, 32, 33 and 34 of the Act. In the matter of *Nedbank Limited v Steyn and Others* 2016 (2) SA 416 (SCA) which dealt with the issue as to whether the procedure provided in the Act precluded a creditor from its common law right to institute action against the deceased estate for payment in terms of a loan agreement, the SCA held that there is no express provision in the Act which can be construed as depriving an Applicant of its common law right against a deceased estate. Accordingly the common law right in effect remains extant (over and above the creditor's right to lodge a claim against the deceased estate in terms of the Act).

[10] The Applicant is accordingly entitled to have brought this application and the application is not premature, incompetent and/or unlawful as alleged by the First Respondent.

**Whether the amount claimed by the Applicant was correct and/or competent to be claimed**

[11] In respect of this defence raised by the First Respondent it is correct that, as submitted on behalf of the Applicant, the Applicant is not claiming or seeking any amounts or monetary relief at this stage. For this reason this defence must fail in the present application (*Paragraphs [5] to [7] ibid*).

**Alleged non-receipt on behalf of the First Respondent of the Applicant's demand**

[12] The First Respondent alleges that despite the Applicant's proof of service through registered post, she did not receive any demand from the Applicant and that she only set eyes on the demand annexed to the application when the application was delivered at her residence.

[13] On 16 March 2022 the Applicant, through its attorneys of record, delivered the letter of demand via registered mail to, *inter alia*, the First Respondent's residential address. A copy of the said letter and proof of dispatch is attached to the Applicant's Founding Affidavit.

[14] Notwithstanding the above the First Respondent admits having received the letter with the application and has taken no steps to act in accordance therewith or to attempt to make any arrangement with the Applicant or to engage with the Applicant in respect of a reasonable repayment structure. This while retaining possession of the asset.

[15] In the premises, the First Respondent cannot rely on this defence to support her opposition to the relief sought by the Applicant.

**Deponent to the Applicant's Founding Affidavit does not explain where he derives his authority to do so and to represent the Applicant.**

[16] The First Respondent alleges that the Applicant is a juristic *persona* and the deponent does not explain where he derives his authority to represent the Applicant. It was submitted, on behalf of the Applicant, that the deponent to the Founding Affidavit states, under oath, that she is duly authorised to depose to the Founding Affidavit and to make this application on behalf of the Applicant.

[17] The First Respondent, or her attorneys of record, never challenged or disputed the authority of the Applicant's attorneys of record, in terms of subrule 7(1) of the Uniform Rules of Court, or at all (*Eskom v Soweto City Council* 1992 (2) SA 703 (W)); *Unlawful Occupiers School Site v City of Johannesburg* 2005 (4) SA 199 (SCA)).

[18] In the premises, this defence, as raised by the First Respondent, has no merit.

### **Conclusion**

[19] It must follow from the foregoing that the Applicant is entitled to the relief sought. Put simply, that relief is supported by the material terms of the agreement entered into between the Applicant and the Deceased, together with the Applicant's reliance upon the *rei vindicatio*.

### **Costs**

[20] Apart from the fact that the agreement itself provides for costs on an attorney and client scale, it is trite that, unless unusual circumstances exist, costs should normally follow the result. It is also trite that a court has a general discretion in respect of costs.

[21] No unusual circumstances have been brought to the attention of this Court. Moreover, no facts have been placed before this Court as to why there should be a deviation from the scale of costs agreed to by the parties. In the premises, it would be just and equitable if the First Respondent was ordered to pay the costs of this application on the scale of attorney and client.

### **Order**

[22] This Court makes the following order:

1 the Applicant is entitled to take possession of the undermentioned asset and to sell the asset in order to mitigate the Applicant's damages;

2017 Maza CX-5 2.0 Active;

Chassis number; J[...]

Engine number; P[...]

*("the asset")*

2 Should the First Respondent fail and/or refuse to deliver the asset to the Applicant, or its authorised representatives, the Sheriff with jurisdiction is authorised and directed to remove and/or repossess the asset from the

First Respondent, or any third party who may be in possession thereof and to return and/or deliver the asset the Applicant.

3 The cancellation of the Instalment Sale Agreement is confirmed.

4 The First Respondent is to pay the costs of this application on the attorney and client scale.

**B. C WANLESS**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION**  
**JOHANNESBURG**

Date of hearing: 19 February 2024

Date of *ex tempore*: 14 August 2024

Date of written Judgment: 16 August 2024

**Appearances**

On behalf of the Applicant: Adv. A. J. Reyneke  
Instructed by: Uys Matyeka Sxhwartz Attorneys

On behalf of the First Respondent: Unknown  
Instructed by: TJP Attorneys