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

CASE NUMBER: 2019/4132

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

Judge Dippenaar

In the matter between:

NEDBANK LIMITED

PLAINTIFF

and

SALOMON CORNELIUS NIEMANN

DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 17th of MARCH 2025.

DIPPENAAR J:

[1] This is a trial action in which the plaintiff seeks the confirmation of the cancellation of an instalment sale agreement concluded between the parties on 2 November 2017 in terms of which the plaintiff financed the purchase of a caravan for and on behalf of the defendant.

[2] The background facts are by and large common cause. The conclusion of the agreement in its terms was not disputed. The agreement is subject to the National Credit Act ('the Act').¹ The principal debt in terms of the agreement was R 334 107.24 and its total cost R456 993. The defendant was obliged to pay one instalment of R7683.85 and 59 monthly instalments of R7 615.41 commencing on 31 January 2018 up to 30 November 2022.

[3] In terms of clause 25 of the agreement, the plaintiff retained ownership of the goods until all amounts due by the defendant in terms of the agreement had been paid in full. Clause 17 regulated the procedure to be taken before debt enforcement. In terms of clause 17.1, in the event of a default, the plaintiff would give the defendant notice of default and propose that the defendant refer the agreement to a debt counsellor, alternative dispute resolution agent, the consumer court or Ombud with jurisdiction with the intention of resolving any disputes or developing and agreeing on a plan to bring payments up to date. In the event of a breach, clause 18.1.4 of the agreement entitled the plaintiff to elect to cancel the agreement, take possession of the goods and to claim an amount equivalent to the outstanding balance less the market value of the goods at the date of cancellation of the agreement.

[4] It was also common cause that the defendant breached the agreement by failing to make payment of the instalments due to the plaintiff and by 29 November 2018 was at the time in arrears in the amount of R31 898.09. The last payment made by the defendant was an amount of R3 500 paid on 12 September 2018.

¹ 34 of 2005.

[5] It was common cause that a notice letter in terms of s 129(1) of the Act was sent to the defendant. The plaintiff delivered the notification letter by registered post. The track and trace report produced by the plaintiff reflected that the defendant was sent a first notification on 5 December 2018. The letter notified the defendant that unless payment of the arrear amount was made within 10 business days, the agreement could be cancelled and the full amount would become immediately due and payable. It further notified the defendant: *'If you disagree, you may contact a debt counsellor (unless you are a juristic person), an alternative dispute resolution agent, the consumer court or the bank ombudsman to help resolve the matter or to develop a plan to bring your payments up to date'*.

[6] The plaintiff cancelled the agreement by way of letter sent to the defendant by registered post on 11 January 2019 and instituted legal proceedings. The summons was served on the defendant on 14 February 2019.

[7] The plaintiff sought summary judgment, which was opposed. Wilson AJ dismissed the application and granted the defendant leave to defend the action. In granting leave to defend, the court construed the defendant's affidavits generously as he is a lay pleader, in the light most favourable to him. It found genuine prospects that the defendant would be able to demonstrate at trial that sections 129 and 130 of the Act had not been complied with.

[8] In his plea, the defendant contended that the plaintiff's particulars of claim were excipiable as no judgment amount was claimed and that leave was rather sought to apply for damages. The defendant further contended that it was unconstitutional that no reserve price was set for the sale of the caravan. He further pleaded that a settlement amount of R324 443.29 presented to the defendant during November 2018, plus interest to 'the current date' was the maximum the plaintiff was entitled to. It was

pleaded that there thus as a dispute on quantum. The defendant did not persist with those defences at trial.

[9] Given that the present proceedings pertain only to the cancellation and repossession relief sought by the plaintiff, those issues do not presently require determination and it is open to the defendant to raise any quantification issues in due course.

[10] In his affidavits resisting summary judgment, the defendant further contended that: (a) the action was launched prematurely given his dispute with the plaintiff regarding interest on the settlement amount provided by the plaintiff ('the dispute issue'), (b) the action had been instituted in the wrong forum and should have been instituted in the magistrates court ('the forum issue'); and (c) the plaintiff had not yet responded to his PAIA application concerning whether the agreement was securitised ('the securitisation issue'). Those defences were again raised in his plea and at the trial and constitute the disputes between the parties which must be determined.

[11] The forum issue can be disposed of succinctly. The Supreme Court of Appeal resolved the controversy in *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of South Africa v Gqirana NO and Another*² in holding *inter alia* that a high court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a magistrates court as it has concurrent jurisdiction. That puts paid to the defendant's contention.

[12] The issues which remain are (a) whether the action was instituted prematurely and (b) whether the agreement was securitised, being the nub of the information sought by the defendant in his PAIA application. Ultimately, this boils down to the question whether the plaintiff has *locus standi* to seek the relief claimed.

² *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of South Africa v Gqirana NO and Another* 2021 (6) SA 403 (SCA) para 88.

[13] Two witnesses testified at the trial. Ms Christel Toweel, a team leader in MFC's litigation and defended, secured and relationship recoveries department testified on behalf of the plaintiff. The defendant, who was self-represented, also testified.

[14] The evidence of the plaintiff established the common cause facts already referred to. In sum, Ms Toweel's evidence was that no formal dispute was referred to the banking Ombudsman and that she had made enquiries in that regard from the relevant department. She established that no such dispute had been referred to the Banking Ombud. She further testified that the defendant did not respond to the s 129 notice. After the defendant queried the interest calculation in the settlement figures provided to him in November 2018, the calculations were confirmed and the plaintiff responded to the query. The plaintiff further provided a breakdown of the settlement figure. There was no dispute raised regarding the defendant's arrears. The normal procedure is that the plaintiff does not refer disputes to the Ombud, the obligation is on a client such as the defendant to do so at his election. The defendant had all the relevant information to refer the dispute to the Ombud. If there was a formal dispute raised with the Ombud, the plaintiff would respond thereto. The defendant did not need the plaintiff's consent to refer a dispute.

[15] Ms Toweel further testified that there was a response to the defendant's PAIA application wherein he was notified that the agreement was not ceded or securitised. Despite being extensively cross examined on the issue Ms Toweel remained firm that the agreement was not ceded to any third party. She testified that if there had been a cession, she would have been notified and she received no such notification. Although the defendant was unwilling to accept that version and cross examined Ms Toweel on the issue, no controverting evidence was presented and Ms Toweel did not deviate from her evidence. The registration documentation of the caravan reflects the plaintiff as the title holder. The defendant did not dispute this.

[16] The plaintiff agreed that the defendant could rely on the email exchanges between the parties during the period November 2018 to January 2019 attached to his summary judgment affidavits and that the documents would form part of the record. The defendant relied on those documents, both in cross examination and in his own evidence. The defendant relied on the correspondence in evidence. It is necessary to set out the exchanges between the parties in some detail.

[17] The correspondence commences with a settlement quotation provided by the plaintiff dated 13 November 2018, in term of which the defendant was notified that the settlement amount would be R324 443,29, valid up to 20 November 2018. On 14 November 2018, the defendant addressed an email to the plaintiff advising that he did not agree with the calculation and requesting a breakdown of the interest charges.

[18] The plaintiff responded on 15 November 2018, providing a calculation and advising the settlement is calculated on the Capital debt as at 13 November 2018 + interest on the Capital Debt = Appears Outstanding + Arrear interest on the arrears. It also referred to certain additional charges. The letter proceeded: *“Should you wish to enter into a payment arrangement, kindly note that 70% of the arrears are due and payable immediately with a payment arrangement of three months of the balance of the arrears”*. On 18 November the defendant responded and disagreed with the calculation of interest which in his view was only R40 092.87.

[19] The following day, the plaintiff responded with confirmation that the calculation was correct and no adjustments would be made. The defendant was requested to state his intentions on the payment or settlement of the account. On 20 November 2018, the defendant responded: *“I disagree, so we have a dispute. Please send me the contact details and procedures of the Bank Ombudsman”*. On the same date, Ms Rosenbrock of the plaintiff responded and provided an email address [i\[...\]](#) referring the defendant to the Web for all the details. Ms Rosenbrock further stated: *‘The contents of your mail is*

noted. Please take note that your account will be transferred today to your (sic) legal department to proceed with the cancellation of the contract for the return of the goods.'

[20] On 21 November the defendant addressed an email to [O\[...\]](#) as follows: *'I have a complaint about the calculation of interest on the settlement amount of my account. It seems that MFCs staff and myself come up with vastly different amounts on the calculation. I am in dispute with them over this and it seems that they just want to press on, I would like to take the matter to the Ombudsman but I believe you have to get involved first to try and resolve this issue.* On the same date, the defendant received an automatic reply. The email reads *"thank you for your correspondence. Please note that this mailbox is dedicated to receiving referrals from the offices of the Ombudsman for banking Services only. Should you have an account query that has to date not been escalated to our complaints office please do so via the below contact information.*

[21] It appears that the defendant did so as on 21 November 2018, one Cindy Huyzer of the plaintiff responded: *"Thank you for raising your complaint with us.....Your case has been escalated to relevant division for investigation. I will revert back to you as soon as feedback has been provided on the matter.* On the same date written confirmation of receipt of the complaint was sent to the defendant, together with the Ombuds contact details.

[22] On 30 November 2018, the plaintiff responded after review of the defendant's complaint, confirming the figures provided earlier by the plaintiff to the defendant. The letter concludes: *'Should you not be in agreement with our findings and decision, you are welcome to seek dispute resolution at your own discretion'.*

[23] On 12 December the defendant responded *"I do not agree with your letter below. It was not a concern that was raised but a formal complaint. I still do not agree with your calculation and will take the matter up to try and get a resolution'.*

[24] The defendant did not in evidence state that he took any steps thereafter to actually refer the matter to the Ombud. There was also no documentary evidence that he had done so. In fact, in his email of 16 January 2019 to Ms Rosenbrock of the plaintiff the defendant requested 'please refer this matter to the Bank Ombudsman'. A similar request was sent on 30 January 2019. The irresistible inference, as confirmed by the evidence of the defendant, is that the dispute was never referred to the Ombud, although the defendant expressed his intention to do so.

[25] After receipt of the s 129 letter, the defendant on 16 January 2019 informed the plaintiff's attorneys that there was a dispute regarding the settlement and that the notice was premature. He responded to the attorneys: *"I consider this a matter between myself and MFC and I am still waiting for the bank ombudsman, until the matter is settled between us I do not consider you a party to this dispute."* The defendant thus did not expressly accept any offer made in terms of the said s 129 letter.

[26] In response to the defendant asking the plaintiff to refer the matter to the Ombud on 30 January 2019, a further settlement letter and an email explaining the breakdown of the figures was provided by the plaintiff on 30 and 31 January 2019 reflecting the settlement amount as R331 364.31. The breakdown letter reflected the defendant's arrears as being R46 861.03 at the time.

[27] In his plea, the defendant disputed certain terms of the agreement. Those terms were however contained in the agreement, the terms of which were common cause. He further contended that the particulars of claim were excipiable as no judgment amount was applied for and leave was sought to apply for damages. It was pleaded that a reserve price for the caravan must be set. Those grounds were not persisted with at the hearing. In any event, they lack merit.

[28] In his evidence and argument at trial the defendant focused on the PAIA request and the attempted referral of the dispute regarding the settlement figures to the banking

Ombud. The defendant did not in evidence give meaningful content to that dispute. The high watermark of his case was that he disputed the interest component presented by the plaintiff in its calculations. He relied heavily on the correspondence between the parties.

[29] The defendant further contended that the loan was securitised and that the plaintiff had made a request for information under the Promotion of Access to Information Act³ to which he had not received a response, thus hampering his constitutional rights.

[30] That contention lacks merit for various reasons. The application was lodged on 8 March 2019, after legal proceedings had already commenced. In terms of s 7(1) of PAIA, the Act does not apply to a record of a public or private body if (a) such record is requested for the purposes of civil proceedings (b) it is requested after the commencement of civil proceedings and (c) the production or access to that record for the purposes in (a) is provided for in any other law. The defendant did not avail himself of the provisions of r 35(3) to seek access to the documents. In any event, the plaintiff did respond to the application via its attorneys on 22 July 2019. In relevant part, it expressly stated that the plaintiff had not ceded its rights under the agreement to any third party and the agreement was not securitised. The defendant's complaints regarding securitisation are speculative and unsubstantiated and his arguments pertaining to the PAIA application lack merit. On the probabilities, and the evidence presented, the loan was not securitised.

[31] I turn to the defendant's central defence in the matter pertaining to the 'dispute' relating to the interest payable on the settlement figures and whether this court is precluded from determining the matter because of that dispute.

³ 2 of 2002.

[32] From the correspondence set out in detail earlier and a conspectus of the evidence, it is clear that the defendant never actually referred any dispute to the Banking Ombud. After the defendant's initial confusion had been clarified and the plaintiff responded to his complaint during November 2018, the plaintiff's stance that it was for the defendant to initiate any alternative dispute resolution was made clear to the defendant. He still took no steps to formally declare any dispute or to refer the matter to the Ombud. The defendant's email of 20 February 2019 shows that by that date no dispute had been referred to the Ombud. By then, the agreement had been cancelled by the plaintiff and the summons and particulars of claim had been served. The defendant admitted in evidence that he has never referred a formal complaint to the Ombud and as such no dispute was before the Ombud.

[33] S 129 of the NCA provides:

'Required procedures before debt enforcement.

129(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 section 86(10), as the case may be; and (ii) meeting any further requirements set out in section 130.*

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.

(3) Subject to subsection (4) a consumer may-(a) at any time before the credit provider has cancelled the agreement re-instate the credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of

enforcing the agreement up to the time of re-instatement and (b) after complying with paragraph (a) may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.'

[34] In turn, s 130 of the Act in relevant part provides:

'(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;

(b) in the case of a notice contemplated in section 129(1), the consumer has-(i) not responded to that notice; or (ii) responded to the notice by rejecting the credit provider's proposals; and

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127;

(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is 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(l)(u) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in section 129; or

(dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).'

[35] In argument, the plaintiff contended for a particular interpretation of the word 'dispute' for purposes of s 129 of the Act. Given the facts, it is not necessary to enter into that debate. The interest dispute and the defendant's expressed intention to refer the dispute to the Ombud occurred in November 2018, well prior to the dispatch of the s 129 letter. On the defendant's version, he collected that letter from the post office on 3 January 2019. The defendant thus did not raise any dispute in response to the s 129 letter, nor did he accept any proposal contained therein.

[36] The defendant further never raised any dispute pertaining to his arrears under the agreement. It was common cause that the defendant was in default and in arrears and that he made no further payments to the plaintiff after September 2018. The defendant's default was raised on multiple occasions in the correspondence between the parties. However, the defendant did not once address his default in that correspondence, but merely disputed the interest component pertaining to the settlement figures provided.

[37] The defendant had already raised his dispute in November 2018. He then persisted with the dispute but nonetheless never actually referred that dispute to the Ombud. Any dispute regarding the settlement figures and interest component thereof provided by the plaintiff pursuant to defendant's request for a settlement figure to settle the agreement immediately was in any event collateral to the issues relating to the defendant's arrears. Fatal to his case is the fact that the defendant did not refer any dispute to the Ombud. In the face of the plaintiff's expressed stance on the issue, it was incumbent on the defendant to do so. His evidence was limited to an expressed intention to do so and excuses as to why he did not, which do not establish his bona fides. That is insufficient and does not avail him.

[38] The plaintiff submitted, based on *Sebola*⁴ that delivery occurred on 5 December 2018 when the first notification was sent to the defendant by the post office. The defendant did not dispute such notification. The plaintiff further submitted that it was entitled to cancel the agreement by way of delivery of the cancellation notice dated 14 December 2019 which was dispatched on 11 January 2019. There was no track and trace report attached to the plaintiff's papers and it remains unclear exactly when the cancellation notice was delivered. The defendant testified that he received the notice in January 2019 but did not provide a date. From the defendant's email correspondence, it appears that by 16 January 2019, he was aware of the cancellation of the agreement. By necessary implication, he must by that date thus have received the cancellation notice.

[39] The requisite time periods of ten and twenty days respectively under s 130 of the Act were thus met and there was compliance with s 130(1). I am further persuaded that none of the barring provisions in s 130(3) were engaged which would preclude the court from determining the matter. There was no evidence that the defendant agreed to a proposal made in terms of s 129(1)(a) as envisaged by s 130(3)(c)(ii)(b). I am

⁴ *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) at paras 75-78.

persuaded that on the common cause facts and the evidence presented at trial, the plaintiff established compliance with s 129 and s 130 of the Act and that there is no impediment to a court determining the matter.

[40] The plaintiff submitted that on the common cause facts it was entitled to the relief presently sought, being confirmation of cancellation and return of the goods. The defendant submitted the opposite.

[41] In argument, the defendant strongly relied on the judgment of Wilson AJ in the summary judgment application. That reliance does not avail the defendant. The principles applicable to summary judgment proceedings are entirely different from those applicable to trials. The fact that leave to defend was granted in the summary judgment proceedings, does not mean that the defendant must succeed at trial.

[42] Considering all the evidence, the defendant has not established that the provisions of s 129 and 130 have not been complied with. The plaintiff has established the contrary. From his own concessions, it is clear that he has no actual defence to the plaintiff's claim. In the normal course, and had the defendant not been in breach, resulting in the cancellation of the agreement, the agreement would have expired through effluxion of time at the end of November 2022, more than three years ago.

[43] In his heads of argument, the defendant sought an order that the legal action was instituted prematurely and a referral to dispute resolution, to be resolved within 60 days. He further sought an order that the plaintiff make available all the information in terms of his PAIA application and an order directing each party to pay own costs. There was no counterclaim for such relief. The defendant is a lay litigant and he should not be held to the same standard of accuracy, skill and precision in the presentation of his case as required of lawyers. In consideration of his case, substance must take precedence

above form.⁵ However, that does not mean that the defendant is absolved from the responsibility of establishing his defence.

[44] Leaving aside the technical difficulties with the defendant's approach and adopting a benevolent approach to him, it would serve no purpose to refer, as the defendant seeks me to do, his dispute for alternative dispute resolution. The applicability of the settlement figures provided by the plaintiff in November 2018, has long since passed and such exercise would be of academic interest only. The defendant did not in evidence even articulate the dispute properly so that it could be considered whether such dispute was *bona fide*. In his supplementary heads of argument, the defendant broadly submitted that the settlement figure was given as R324 443.29 which was unacceptable as the purchase price of the caravan was R334 107.24 and he had calculated the interest at some R40 000. Such argument entirely disregards the finance costs involved and at first blush appears contrived. It may well not be *bona fide*. The defendant has in any event failed to establish such a case and there is no counterclaim in respect of this issue.

[45] As the plaintiff established its entitlement to the relief sought, it was incumbent on the defendant to illustrate that he does not have to make payment to the plaintiff for the caravan which he admittedly has in his possession and for which he does not pay and has not paid since September 2018 or that the action was instituted prematurely. He did not do so.

[46] As held by the Constitutional Court in *Kubyana v Standard Bank of South Africa Ltd*⁶:

'The Act does not imply, and cannot be interpreted to mean, that a consumer may unreasonably ignore the consequences of her election to receive notices by registered mail, when the notifications in question have been sent to the address

⁵ *Xinwa v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC) para 13.

⁶ *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) para 46.

which she duly nominated. While it is so that consumers should enjoy the full benefit of the protections afforded by the Act, the noble pursuits of a statute should not be open to abuse by individuals who seek to exercise those protections unreasonably or in bad faith’.

[47] This is apposite to the present case. Upholding the defendant’s complaint would only allow him to abuse the protection the Act afforded to consumers and to escape his contractual obligations. It would truly be an abject case of placing form over substance. The courts cannot countenance such conduct.⁷ Whilst flagrantly discounting his breach of the agreement, the defendant raised a dispute, not pertaining to his arrears, but to the interest component of a settlement figure provided by the plaintiff. That does not satisfy the requirements.

[48] In my view, the plaintiff has established its entitlement to the relief sought, based on the common cause facts. Costs follow the result. The plaintiff sought costs on scale B. Considering the issues, such scale is justified.

[49] In the result, the following order is granted:

[1] The cancellation of the agreement is confirmed;

[2] The defendant is directed to return the goods described as a 2017 AFRISPOOR CHEETAH; ENGINE NUMBER NONE AND CHASSIS NUMBER A[...] to the plaintiff;

[3] The defendant is directed to pay the costs on scale B.

EF DIPPENAAR
JUDGE OF THE HIGH COURT JOHANNESBURG

HEARING

⁷ Ibid para 56.

DATE OF HEARING: 3 MARCH 2025

DATE OF JUDGMENT: 17 MARCH 2025

APPEARANCES

PLAINTIFF'S COUNSEL: Adv S. McTurk

PLAINTIFF'S ATTORNEYS: DRSM Attorneys

DEFENDAN: In person