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IN THE NATIONAL CONSUMER TRIBUNAL

HELD AT CENTURION AND HARRISMITH

Case No: NCT/29/2009/128(1) (P)

In the matter between:

SS MAPEKA

APPLICANT

and

WESBANK

RESPONDENT

JUDGMENT AND REASONS

INTRODUCTION

[1] The Applicant in this matter is Mr Sello Stephen Mapeka. The Respondent is Wesbank, a division of First Rand Limited.

[2] On 8 December 2008 the Applicant commenced proceedings against the Respondent before the National Consumer Tribunal with an application in terms of section 128(1) of the **National Credit Act, 34 of 2005** (hereafter the NCA or Act).

[3] The application is for a review of the sale of goods by the Respondent on the grounds that the Respondent did not sell the goods as soon as reasonably possible alternatively did not sell the goods at the best price reasonably obtainable.

[4] The application was set down and the hearing commenced on 2nd April 2009. At the close of the Applicant's case the Respondent moved for an order of absolution from the instance, which was subsequently denied. The matter was re-enrolled for hearing on 2 and 3 September 2009 and finalized on the last date with judgment and reasons reserved without a date.

THE RELEVANT SECTIONS OF THE NCA

[5] Section 128(1) of the NCA provides that a consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of section 127 directly with the credit provider, or through alternative dispute resolution under Part A of Chapter 7, may apply to the Tribunal to review the sale.

[6] Section 128(2) of the NCA provides that "If the Tribunal considering an application in terms of this section is not satisfied that the credit provider sold the goods as soon as reasonably practicable, or for the best price reasonably obtainable, the Tribunal may order the credit provider to credit and pay the consumer an additional amount exceeding the nett proceeds of the sale".

[7] Section 127(1) of the NCA provides that "A consumer under an instalment agreement, secured loan or lease may (a) give written notice to the credit provider to terminate the agreement and; (b)(ii) otherwise return the goods...to the credit provider within five business days after the date of the notice... "

[8] Section 127(4) (b) of the NCA provides that " ...the credit provider must sell the goods as soon as reasonable practicable and for the best price reasonably obtainable."

AGREED FACTS

[9] It is common cause between the parties that the-

[9.1] Applicant entered into an instalment agreement with the Respondent for the purchase of a motor vehicle, Hyundai Elantra 1.6 GLS 2007 model, on 13 July 2007.

[9.2] Applicant returned the motor vehicle to the Respondent's premises at Bethlehem on 1 July 2008.

[9.3] That the odometer reading on 1 July 2008 was approximately 23 000 kilometres.

[9.4] Applicant was in arrears with the instalments under the credit agreement at the time.

[9.5] Vehicle was sold on auction on 25 September 2008 for R 87 780 inclusive of VAT.

MATTERS IN DISPUTE

[10] The parties disagree –

[10.1] About the condition the vehicle was in upon its return and consequently on the valuation of the vehicle.

[10.2] The extent of the outstanding balance on the account claimed by the Respondent, with the Applicant alleging that this outstanding amount should be lower and alleging that the Respondent have not sold the vehicle as soon as reasonably practicable or at the best price reasonable obtainable.

[11] Evidence was led by the Applicant in respect of the the events leading up to his return of the vehicle and the consequent interactions between himself and the Respondent. Respondent led evidence on the process they followed upon the return of the vehicle to them and the valuation of the vehicle before its sale on auction. The Respondent presented evidence before the Tribunal on the condition of the vehicle upon its return and presented oral evidence of Mr.Grobler an expert valuer on the valuation of the motor vehicle prior to the date of the sale.

PRE-REQUISITES FOR APPLICATION IN TERMS OF SECTION 128

[12] In order for the Applicant to succeed with his application and claim before the Tribunal he must satisfy the requirements of section 128(1) and section 127(1).

[13] **Firstly**, the applicant has to establish that he has "...unsuccessfully attempted to resolve a disputed sale of goods in terms of section 127 directly with the credit provider or through alternative dispute resolution under Part A of Chapter 7." (section 128(1))

[14] **Secondly, on the plain reading of section 128(1)** section 128(2) relief is only available to a consumer (applicant) for a disputed sale of goods in terms of section 127.

[15] Section 127(1)(a) provides that "a consumer under an instalment agreement.. ...may give written notice to the credit provider (respondent) to terminate the agreement and ...if the goods are in the credit provider's possession require the credit provider to sell the goods or otherwise return the goods that are the subject of that agreement to the credit provider's place of business ...within five days of the date of the notice." (our emphasis).

"UNSUCCESSFULLY ATTEMPTED TO RESOLVE DISPUTED SALE OF GOODS"

[16] While the NCA states what is required of the alternative dispute resolution process, it gives no guidance as to what might constitute an attempt to resolve a dispute directly

with the credit provider. Nor does it specify any formal criteria, for example that the communication with the credit provider must be in writing.

[17] It is thus for the Tribunal to decide what would satisfy this pre-requisite for an application under section 128.

[18] The word 'dispute' implies that an aspect of the sale is being contested, and 'attempt' in its ordinary sense means that the consumer must have tried or made an effort to resolve the dispute. It seems that, to satisfy this requirement, the consumer must at least make the credit provider aware that he / she is dissatisfied with an aspect of the sale, with a request that the outcome of the sale be re-assessed on those grounds.

[19] The facts presented by the consumer should be such that, considered objectively, a reasonable inference can be drawn that a consumer has, whether by oral or written communication, given the credit provider notice of his / her grievance and given the credit provider the opportunity to remedy the grievance prior to an application to the Tribunal.

[20] The further requirement that the attempt be unsuccessful is clearly subjective, and simply means that the consumer is not satisfied with the credit provider's response, if any, or the outcome of the matter subsequent to his or her efforts.

[21] The Applicant, at the hearing, handed up documentary evidence and gave oral evidence to the effect that he attempted to resolve the disputed sale of the goods directly with the credit provider (respondent) on various occasions, but without a satisfactory resolution¹.

[22] Respondent did not place applicant's evidence regarding his attempts to resolve the dispute in contention.

¹ Hand written letter directed to Wesbank dated 1 July 2008.

[23] From correspondence addressed to the Applicant, it appears that the Respondent never addressed the dispute the Applicant raised relating to the sale of goods, save to state that the vehicle was cleared for sale on 26 August 2008, sold on auction on 23 September 2008 for an amount of R87 780 inclusive of VAT against a valuation of R60 500. This appears from correspondence from the Respondent to the Applicant, dated 8 December 2009, by a certain S Ramsurup, described in the letter as Supervisor Specialised Collections – Retail KZN.

[24] The Applicant consequently filed this application in terms of section 128(1), that is the subject of this judgment, with the Tribunal on 8 December 2008.

[25] We accordingly find that the Applicant met the requirements of Section 128(1) in that he unsuccessfully attempted to resolve the disputed sale of goods with the Respondent as required in the section.

WHAT CONSTITUTES A SALE IN TERMS OF SECTION 127

[26] We now turn to what constitutes a sale in terms of section 127, as the application in terms of section 128 is only available in respect of a disputed ***sale of goods in terms of section 127*** (our emphasis).

[27] Section 127(1) provides that “a consumer under an instalment sale agreement, secured loan or lease ***may give written notice to the credit provider to terminate the agreement; and***, if – the goods are in the credit provider’s possession, require the credit provider to sell the goods; or otherwise, ***return the goods that are the subject of the agreement to the credit provider’s place of business during ordinary business hours within five days after the date of the notice...***”.

[28] It is clear from the reading of the section that it contemplates both written notice of termination of the agreement ***and*** return of the goods that are the subject of the agreement. The latter, the so-called ‘voluntary surrender’ of the goods.

[29] This requirement is mirrored in the credit agreement entered into between the parties on 13 July 2007 in Clause 10.1 thereof, as follows – “10. Early termination of this agreement by voluntary surrender of goods - 10.1 You may terminate this Agreement at any time by giving us written notice that you wish to terminate this Agreement and by surrendering the Goods to us”. The parties agree that the goods were indeed returned by the Applicant to the Respondent’s premises in Bethlehem on 1 July 2007.

[30] What we are required to determine is whether there was a written notice of termination by the Applicant to bring this section 127 into play for the section 128(1) application to succeed.

[31] This is mainly a factual enquiry into the written communications exchanged between the parties, as the section requires ‘written notice of termination’ by the consumer.

[32] Before we get into the factual question, it might be useful to consider how termination of a credit agreement before the time allowed for in the credit agreement, as in the instant case, can come about.

[33] Other means of termination of a credit agreement before the time are provided for in sections 122 and 123(2) of the NCA.

[34] Section 122(2) provides for the credit receiver to terminate the agreement in two ways namely either by paying the settlement amount or surrendering the goods subject to the credit agreement in accordance with section 127(1) and in the latter event paying to the credit giver any remaining amount demanded in terms of section 127(7).

[35] Section 127 clearly provides for a means for the consumer to terminate an agreement before the time allowed for in the credit agreement. In the words of the learned Fourie, J in ABSA vs. De Villiers and Others (citation) page—“Section 127 confers an extraordinary right on the consumer, whereby he or she can rid himself of an instalment agreement.”

[36] It could be interpreted that a mere surrender of the goods under a credit constitutes termination of the credit agreement but for the concluding words in section 122(2)(b) namely "... in accordance with section 127(1), which not only requires written notice of termination but also return of the goods to the credit provider.

[37] The relevant evidence put before the Tribunal in this regard is a handwritten letter by the Applicant addressed to the Respondent "TO WHOM IT MAY CONCERN) (Wesbank, Bethlehem)" dated 1 July 2008.

[38] In relevant parts the letter states that "..."

"...I would like to plead with Wesbank to take the car to their storage until such time my employer has decided about my fate..."

"... I am prepared to continue with the instalment as soon as the matter has been resolved..."

[39] Rather than reflecting an intention to terminate, the letter standing uncontroverted, is directly contradictory to an intention to give notice of termination but rather reflects desire for the contract to be kept alive.

[40] The fact that Applicant's letter dated 1 July 2008 nowhere gives notice to terminate the agreement, but in fact indicates a contrary intention indicate that there was not termination of the agreement.

[41] The applicant remained adamant during the hearing and his evidence stands uncontroverted that he never intended to terminate the agreement.

[42] We accordingly find that no written notice to terminate had been given by the Applicant to the Respondent.

[43] Consequently a sale in accordance with section 127 did not eventuate and as a result the sale that took place was not a sale as defined in section 128(1) of the NCA.

[44] Section 123(2) provides that "If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C Chapter 6 to enforce and terminate the agreement."

[45] Clause 11 of the Instalment agreement entered into between the Applicant and the Respondent mirrors the above provision of section 123(2). Clause 11.1. provides that "If you do not comply with any of the terms of the Agreement (all of which you agree are material), or if you fail to pay any amounts due under this agreement ... then we may (without affecting any of our rights) proceed with the enforcement or termination of the agreement as set out in Chapter 6 Part C of the Act".

[46] With regard to the use of the words "enforce" and "terminate" in section 123(2) the Fourie, J found in ABSA that "It appears that the Legislature has used the word "enforce" in a wide sense, namely the exercising of any remedies by the credit provider. Further down the learned Judge states that "it follows, in my view, that in the event of the consumer defaulting under a credit agreement, the credit provider who wishes to invoke any remedy at his / her disposal in terms of the relevant credit agreement, will have to comply with the requirements laid down in a sections 129 and 130.

[47] The Respondent did not at any point during the pleadings or the hearing aver that it terminated the agreement between the Applicant and itself. The correspondence handed up at the hearing and during the period leading up to the hearing amounts to various letters respectively dated 8 July 2008, 30 September 2009 - so-called shortfall letter; 22 October 2009 – 20 days notice letter before reporting to Credit Bureau; 29 September 2009 – VAT 264/TAX INVOICE; and 8 December 2008 – setting out Respondents comments to Applicant's query of 5 December 2008 further stating that the vehicle was re-possessed.

[48] Respondent's letter dated 8 July 2008 reads as follows: "We have valued the goods at R60 500 excluding VAT. If you want to re-instate the agreement and retake possession of the Goods, we will agree to this if you pay all the arrears plus any further costs you may be liable for. If you do not respond to this letter within 10 (ten) business

days of receipt of this letter, we will have no option but to sell the Goods as soon as reasonably practicable, for the best price reasonable obtainable, and contact you with a view to make arrangements to pay any amounts (including any additional costs) that may still be outstanding on your account."

[49] A credit provider, who wishes to invoke any remedy at his / her disposal in terms of the relevant credit agreement, will have to comply with the requirements in sections 129 and 130" Fourie, J at page 4/12 Para 14.

[50] Further, in dealing with the contention by the applicant relying on section 129(4) (a) (i) that the NCA has introduced a procedure at variance with the common law concept of the cancellation of an instalment agreement upon breach thereof, in the matter of Absa and De Villiers and others, the learned Fourie J, found that the relevant instances, referred to in section 129(4) amongst others, as follows"... (a) The sale of any property pursuant to – (ii) the surrender of property in terms of section 127...", implies that the credit agreement had been cancelled.

[51] According to our law of contract restitution (repossession of the vehicle) is the normal result following from the cancellation of a contract. Fourie, J page 4/12 Para 18.

[52] None of the correspondence nor any evidence led by the Respondent indicate that the Respondent ever notified the applicant of its intention to cancel the agreement.

[53] From the evidence led and documents handed up by the Respondent it appears that the Respondent did not take the steps set out in section 129 under Part C of Chapter 6 of the NCA.

[54] There is therefore no need to consider whether the car was sold as soon as reasonably possible or for the best price reasonably obtainable since there was no termination of the contract and compliance with section 129 and 130 of the Act.

[55] We accordingly find that -

[56.1] Applicant only partly met the requirements of section 128(1) entitling him to approach the Tribunal for relief in terms of section 128(2) in that -

[56.2] He showed that he attempted to but was unsuccessful in resolving the disputed sale of goods with the Respondent;

[56.3] Applicant did not prove that he gave written notice of termination of the agreement in terms of section 127(1) and as result no sale in terms of section 127 eventuated.

[56.4] Respondent never averred nor showed that it cancelled the credit agreement or followed the termination processes set out in section 129 and 130 of the NCA.

[56.5] Respondent proceeded with the sale of goods as if it was a section 127 voluntary surrender.

[56.6] It appears on the facts and evidence before the Tribunal that the Respondent sold the car without following the termination and enforcement procedures set out in Part C, chapter 6 of the Act.

[56] The Tribunal accordingly refers the matter on the sale of the car to the National Credit Regulator -

[56.1] To investigate whether there was compliance with section 129 and 130 of the Act.

[56.2] To investigate whether there was a prohibited conduct on the part of the Respondent.

[56.3] To revert back to the Tribunal within 3 months with a report on its findings for the Tribunal to make a ruling.

[57] Each party to pay their own costs.



D Terblanche

Concurring



P Beck



Advocate F Manamela

Handed down on this 5th day of November 2009