IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.

ELECTRONICALLY SIGNED

SIGNATURE DATE: 18 November 2020

Case No: 29899/2018

In the matter between:

SONTO ELIZABETH MASHELE Applicant

and

BMW FINANCIAL SERVICES (PTY) LTD First Respondent

THE SHERIFF OF THE HIGH COURT, JOHANNESBURG EAST Second Respondent

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JUDGMENT

WILSON AJ:

1 This application raises a question about the interpretation of sections 129 and 130 of the National Credit Act 34 of 2005 ("the NCA").

2 Straightly put, that question is whether the payment of an arrear amount specified in a notice issued under section 129 of the NCA prevents the

enforcement of a credit agreement even if, at the time the payment is made, the consumer has fallen into further arrears which are not part of the sum specified in the section 129 notice.

3 The applicant ("Ms. Mashele") seeks the rescission of an order granted by Maumela J on 14 August 2018. That order confirmed the cancelation of an instalment sale agreement ("the agreement") governing Ms. Mashele's purchase of a BMW Z4 motor vehicle ("the vehicle"). The agreement is a "credit agreement" within the meaning of section 1, read with section 8 (4) (c), of the NCA. Maumela J's order also authorised the repossession of the vehicle. It postponed the determination of any amounts Ms. Mashele still owed under the agreement *sine die*, to allow the proceeds of the sale of the vehicle to be deducted from Ms. Mashele's indebtedness.

4 Ms. Mashele now claims that Maumela J's order was erroneously sought and granted within the meaning of Rule 42 (1) (a). The bases on which Ms. Mashele advanced her case shifted somewhat between her founding and replying affidavits. In her founding affidavit, Ms. Mashele stated that the order of Maumela J was erroneously sought and granted on what she described as a "stale" section 129 notice issued by the first respondent ("BMW"). The founding affidavit did not identify the source of this "staleness". It was also contended that the section 129 notice should have been personally served, and that Ms. Mashele was unaware, when she signed the agreement, that she was liable, at the end of the term of the agreement, to pay a large "residual" or "balloon" amount in addition to her ordinary instalments.

5 Ms. Howard, who appeared for Ms. Mashele, wisely abandoned reliance on the personal service point, and accepted that, whatever Ms. Mashele thought the terms of the agreement were, the agreement she signed provided for payment of the residual amount. Ms. Howard accepted that Ms. Mashele cannot escape liability for the residual payment merely on the basis that she signed the agreement without properly familiarising herself with its terms.

6 Relying on a replying affidavit deposed to by Ms. Mashele's daughter, Ms. Howard instead argued that BMW was never entitled to the order of Maumela J because the amount BMW demanded in its section 129 notice had been paid before it instituted proceedings for the recovery of the vehicle. This point, set out for the first time in reply, was said to be no more than a development of the "staleness" argument which featured in the founding affidavit. In truth, as Mr. Bowles, who appeared for BMW, argued, this was a new point. Mr. Bowles nonetheless accepted that it was one I could and should consider, and in relation to which no new evidence was required.

7 Ms. Howard also raised a second point. That point related to an apparent discrepancy between the amount alleged to be in arrears in BMW's particulars of claim, dated 2 May 2018, (R197 139.49) and the amount by which BMW's own payment history stated Ms. Mashele was in arrears as at 3 May 2018 (R174082.67). The payment history was not before Maumela J when he granted the default judgment on 14 August 2018, by which time the arrears appear to have escalated to R188882.67. Ms. Howard argued that, had Maumela J been aware of the difference between the arrear amount alleged

in the particulars of claim, and the amount as it then fluctuated between May and August 2018, he might have been disinclined to grant judgment by default.

8 Whatever the merits of that claim, the fluctuations in the arrears make no difference to BMW's right to enforce the agreement. The fact remains that Ms. Mashele was very substantially in arrears at every point in the process. A minor fluctuation in indebtedness between the institution of a claim and the granting of default judgment (which is to be expected in matters of this nature) does not render a judgment to which BMW was otherwise entitled erroneous within the meaning of Rule 42 (1) (a). The question is whether BMW was "procedurally entitled" to that judgment (*Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA)). The fluctuations to which Ms. Howard drew my attention did not affect BMW's procedural entitlement to the judgment it claimed.

9 The question remains whether sections 129 and 130 of the NCA had been complied with. If they had not been complied with, then, as Mr. Bowles accepted, BMW was not entitled to judgment, and rescission must follow.

10 The answer to this question requires the interpretation of sections 129 and 130 of the NCA, and their application to the peculiar – but I would imagine not particularly unusual – facts of this case.

The notice and the payment in terms of it

11 Between April 2013 and October 2015, Ms. Mashele more or less honoured her payment obligations under the agreement. There were small amounts in arrears throughout this time, generally ranging from under R100 to just over

R7500. BMW tolerated these defaults, but from November 2015 Ms. Mashele's performance under the agreement worsened significantly. Debit orders for November 2015, December 2015 and January 2016 were returned dishonoured.

12 Accordingly, on 28 January 2016, BMW issued a notice in terms of section 129 (1) of the NCA. The notice drew Ms. Mashele's attention to the fact that she was, at that time, R14925.27 in arrears, and invited her "to remedy the default within 10 business days" or to take any of the further remedial steps contemplated in section 129 (1) (a) of the NCA.

13 The notice was despatched by registered mail on 3 February 2016. It was collected from the "Pretoria GPO" by a Mr. Tladi on 18 March 2016. Mr. Tladi is alleged in BMW's section 129 compliance affidavit to be a relative of Ms. Mashele.

14 In the meantime, on 6 February 2016, Ms. Mashele paid BMW an amount of R15000. Although that was more than BMW demanded in its section 129 notice, the payment did not have the effect of clearing Ms. Mashele's arrears under the agreement. This was because, on 1 February 2016, another debit order was returned unpaid, leaving Ms. Mashele's arrears somewhere in the region of R7442.38 as at 7 February 2016. (BMW's payment history suggests that the arrears were in fact R22442.38, but that appears to be an error).

15 Nonetheless, the situation on 7 February 2016 was that Ms. Mashele had paid more than the amount demanded in the section 129 notice dated 28 January 2016, but had not brought her payments under the agreement completely up

to date. BMW's payment history shows that Ms. Mashele did not at any point thereafter bring her payments up to date.

16 Ms. Mashele was not to receive the section 129 notice until 18 March 2016, but Ms. Howard argued that, on receipt of a notice, any reasonable consumer would have seen the date of the demand – 28 January 2016 – and assumed that the payment of 6 February 2016 had cured the default. Ms. Mashele would then reasonably have believed that she would be entitled to – and would be sent – a further section 129 notice before BMW took any further enforcement action. Ms. Howard submitted that it was BMW's failure to send a further notice before instituting enforcement proceedings that rendered Maumela J's judgment erroneously sought and granted. Maumela J thought that section 129 of the NCA had been complied with, when in fact it had not.

17 So it is to the requirements of section 129, read, as they must be, with section 130 of the NCA, that I now turn.

Sections 129 and 130 of the National Credit Act

18 Section 129 of the NCA controls the first step in the process of enforcing a credit agreement. Where a consumer falls into default, section 129 provides that a credit provider "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".

19 Although the credit provider may choose to tolerate the default, and is not required to issue a section 129 notice immediately upon a consumer falling into arrears, section 129 (1) (b) prevents the credit provider from taking any action to enforce a credit agreement in court without first providing the section 129 notice to the consumer, and complying with the further requirements of section 130.

20 Section 130 (1) of the NCA prevents the credit provider from approaching a court to enforce a credit agreement unless the consumer (1) “has been in default under that credit agreement for at least 20 business days”; (2) “at least 10 business days have elapsed since the credit provider delivered” a section 129 notice to the consumer; and (3) the consumer has either not responded to the section 129 notice or has responded to the notice by rejecting the proposals contained in it.

21 Section 130 (3) of the NCA forbids a court from so much as entertaining an application to enforce a credit agreement if the procedures set out in section 129 have not been complied with, or if a consumer has “brought the payments under the credit agreement up to date, as contemplated in section 129 (1) (a)”.

22 The broad purpose of these provisions is “consumer friendly and court-avoidant”. They offer consumers the opportunity to “restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls” (*Sebola v Standard Bank of South Africa* 2012 (5) SA 142 (CC), para 50).

23 In other words, sections 129 and 130 of the NCA are designed to allow distressed consumers to cure a default under the credit agreement and avoid

the enforcement of that agreement in court. There would be little point in them if a credit provider were not required to issue a fresh section 129 notice every time a consumer falls into arrears on a credit agreement.

24 It is accordingly clear that where a consumer responds to a section 129 notice by simply paying the arrears outstanding under the credit agreement at any time before enforcement proceedings are actually instituted (which cannot be less than ten business days after the delivery of the notice), then the default is cured, and any further act of default triggers a credit provider's obligation to issue a fresh section 129 notice.

How sections 129 and 130 apply to this case

25 This case is not quite so simple. Ms. Mashele paid the amount demanded in the section 129 notice, but by the time she did so her arrears had increased. She accordingly did not "bring the payments under the credit agreement up to date, as contemplated in section 129 (1) (a)".

26 Nor had Ms. Mashele actually seen the section 129 notice at the time she made the payment that satisfied the demand contained in it. Ms. Howard invited me to infer that, when the notice reached Ms. Mashele, five weeks after she made the payment, she must have assumed that her payment met the demand contained in the notice, and that any further enforcement action would be preceded by a further section 129 notice.

27 It is a matter of regret that Ms. Mashele elected not to depose to an affidavit setting out whether she ever actually had sight of the section 129 notice and what she made of it if she did. The highwater mark of Ms. Howard's

submissions is not that Ms. Mashele thought that her default had been cured, but that any reasonable consumer in Ms. Mashele's position would have thought that payment of the amount demanded in the notice was sufficient to cure the default; that they would have disregarded the section 129 notice when it reached them; and that they would have expected another section 129 notice to be issued before the credit provider took any further enforcement action.

28 However, the question in this case is not so much what a reasonable consumer would have thought, but what section 129 and 130 of the NCA permit a credit provider to do in these circumstances.

29 The text and purpose of the provisions appear to me to be dispositive of this question. Section 129 of the NCA requires the consumer's notice to be drawn to the default as it stands at the time the notice is issued. But the aim of the section 129 notice is not simply to procure the payment of the amount set out in it. It is to ensure that payments in terms of the agreement are brought up to date, or that any other dispute arising from the agreement is referred to the appropriate forum.

30 A credit provider is not enjoined from approaching a court simply because further payments have been made since it issued the section 129 notice. Section 130 (1) (b) only prevents enforcement where the consumer has brought their payments up to date, or has otherwise responded to the notice without rejecting the proposals contained in it.

31 Likewise, a court is not enjoined from determining proceedings to enforce a credit agreement simply because the amount demanded in the section 129

notice has been paid, unless that payment has the effect of eliminating the arrears due under the agreement.

32 In this case, I can find nothing in section 129 or 130 of the NCA that would have prevented BMW from approaching a court, or would have prevented a court from determining the proceedings brought by BMW. Ms. Mashele did not respond to the section 129 notice. She ignored it. She did not bring her payments up to date. She did not engage with the contents of the notice and seek to develop and agree a plan to restructure or catch up on her payments.

33 In these circumstances, I can find no statutory bar to BMW approaching the Court, and to Maumela J granting the relief it sought.

34 In other words, the NCA required more of Ms. Mashele than she did in this case. Either she would have had to have brought her payments up to date – and not just paid the amount demanded in the 129 notice – or she would have had to have issued some other response to the section 129 notice when she received it. That response may well have been to point out that she had paid the amount demanded in the notice. BMW would then no doubt have stated that she was nonetheless still in arrears and invited her to settle those arrears. There then could have been a process of engagement – all of which would have fended off BMW's enforcement proceedings for the time being.

35 What Ms. Mashele was not entitled to do was ignore the notice on the erroneous assumption that her arrears had already been settled. A section 129 notice is not just another bill. It is an invitation to enter into a process of engagement that is aimed at resolving disputes or bringing payments under the agreement up to date. This is an invitation that Ms. Mashele appears to

have declined. In the absence of actual compliance with her obligations under her agreement with BMW, she cannot now rely on section 129 to rescind the default judgment taken against her.

36 To address Ms. Howard's submission directly: the NCA expects that a reasonable consumer on receipt of the section 129 notice in this case would have contacted BMW and discussed the matter with them. They would not, in my view, have disregarded the notice on the assumption that all it required of them was payment of the amount specified in it. I emphasise: it would have been different if Ms. Mashele's payment had eliminated her arrears under the agreement. Then BMW would have been obliged to issue a further section 129 notice if she later fell into arrears once more. But that is not what happened.

37 It follows that the rescission application must fail, because there was no legal or factual impediment to BMW seeking Maumela J's order, and no legal or factual impediment to Maumela J granting that order.

Costs

38 Relying on clause 14.2 of the agreement, Mr. Bowles asked for costs on the attorney and client scale.

39 It is well established that courts are not bound by extra curial agreements to pay costs on a particular scale, and that costs remain in the discretion of the court hearing the matter. While a court will normally give effect to a contract to pay costs freely entered into, it may, in the exercise of its discretion, and having regard to the nature of the litigation before it, decide to award costs on

a different scale, or no costs at all (*Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA), paras 25 and 26).

40 I have also given some thought to the fact that the interpretation of section 129 of the NCA has been held to raise constitutional issues (*Sebola v Standard Bank of South Africa* 2012 (5) SA 142 (CC), para 36*; Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC), paras 16 and 17). Ordinarily, therefore, an unsuccessful party litigating a point about the meaning of section 129 in good faith ought not to be mulcted in costs at all.

41 In this case Ms. Mashele has raised a point of moderate complexity about the meaning of section 129 of the NCA. It was in the public interest to decide that point, albeit against her. There is accordingly no warrant to mulct Ms. Mashele in costs simply because she raised an argument that turned out to be wrong.

42 It might have been different if there were no controversy about the meaning of section 129, and all that was required was the application of settled law to the facts. But Ms. Mashele raised questions that led to a debate about the meaning of section 129 and 130 of the NCA themselves. In these circumstances, she is entitled to the costs shield that would ordinarily apply in matters of a constitutional nature. That shield should also, in fairness, apply to the postponement application which I refused on 3 November 2020.

43 In the result, the rescission application is dismissed.

S D J WILSON

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 November 2020.

HEARD ON: 6 November 2020

DECIDED ON: 18 November 2020

For the Applicant:	K Howard Instructed by AM Nduna Attorneys
For the First Respondent:	R G Bowles Instructed by MacRobert Incorporated