IN THE HIGH COURT OF SOUTH AFRICA,PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 44040/2013
DATE: 27/2/2014

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED: VEHICLE AND ASSET FINANCE DIVISION Applicant

and

LLALA PETER PHOSHOKO Respondent

JUDGMENT

MURPHY J

1. The applicant seeks summary judgment against the respondent in the form of an order confirming the cancellation of the instalment sale agreement entered into between the parties and the return of a 2001 Toyota Hilux Raider motor vehicle, being the subject matter of the sale.

2. It appears from the particulars of claim that the instalment sale agreement was concluded between the parties more than eight years ago on 29 September 2005. The respondent agreed in terms of the agreement to pay 59 monthly instalments of R3202,43 with effect from 1 November 2005 with the final instalment to be paid on 27 September 2010.

3. The respondent avers in the affidavit resisting summary judgment that he applied for debt review on 11 July 2007 with a debt counsellor, Octogen, in Edenvale. Although not stated as such, I assume the application was made in terms of section 86(1) of the National Credit Act 34 of 2005 which provides that a consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted. Although there is no positive averment to that effect in the opposing affidavit, it seems that Octogen determined that the respondent was indeed over-indebted. Section 86(7)(c) of the NCA provides that where a debt counsellor concludes that the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make an order that one or more of the consumer's obligations be re-arranged as contemplated in that subsection. The NCA is silent on the process to be followed in relation to obtaining the order envisaged in section 86(7)(c), but it would seem that both the consumer and the debt counsellor have the necessary *locus standi* to make such an application.

4. According to the respondent, a declaration of his over-indebtedness and proposals for future payments were sent by the debt counsellor to all his creditors during July and August 2007.

5. For reasons which have not been explained, the application as envisaged in section 86(7)(c) of the NCA was only instituted in the Germiston Magistrate's Court during 2009 and the matter was set down for 2 September 2009. The application was not proceeded with. The respondent's explanation for the failure to proceed with the application is vague and incomplete. He places the responsibility for the lapse on two firms of attorneys, without explaining whether such attorneys were mandated by him or the debt counsellor to bring the application. He states that "thereafter a matter was lodged" in the Randburg Magistrate's Court and was set down on 27 May 2011. He then avers that he is "not aware why the Randburg matter did not continue or why an order was never granted in that Court". He offers no explanation, and nor did he file any supporting affidavit, from the debt counsellor, accounting for the matter not being processed to finality.

6. An application was then made to the Polokwane Magistrate's Court and set down for 22 July 2013, that is six years after the debt counsellor sent his recommendations proposing a re-arrangement to the respondent's

creditors. On 22 July 2013 the matter was postponed. It was set down again on 29 October 2013, on which date it was postponed to 3 December 2013, when it was again postponed to an undisclosed date in February 2014. Neither the respondent nor the debt counsellor has furnished the court with any satisfactory explanation for these delays and postponements. The application to the Magistrate's Court in terms of section 86(7)(c) of the NCA remains pending almost 7 years after the recommendation proposing re-arrangement was made by the debt counsellor.

7. Annexure OP1 to the opposing affidavit is a statement issued by the applicant setting out the history of all entries made to the respondent's account from 28 September 2005 until 27 August 2013. The current balance on the account is reflected as R155 930,08. The respondent's payment of the instalments over the period has been erratic. Before the debt counsellor's recommendation he intermittently paid the contractual monthly instalment, but on most occasions paid a lesser amount or nothing. From July 2007 until July 2013 he paid instalments in the amount of between R1100 and R1800. It does not seem that he paid an instalment each and every month. He thus made irregular payments of different amounts. He avers though that he "made payment of the proposed amount to the plaintiff in the amount of R1 292, 22 as regularly as possible and in various instances I paid more than the proposed amount".

8. On 2 July 2013 the applicant's attorneys addressed a letter to the respondent in which they said:

> "2. Our client was notified of your Application to be placed under Debt Review in terms of the provisions of the National Credit Act No 34 of 2005 ("the Act"), by your Debt Counsellor.
>
> 3. You are in default with your obligations in terms of the abovementioned credit agreement and more than 60(sixty) business days have lapsed since you applied for debt review. We hereby give you notice in terms of section 86(10) of the Act, terminating the debt review with immediate effect."

9 Section 86(10) of the NCA provides that if a consumer is in default under a credit agreement that is subject to debt review, the credit provider may give notice to terminate the review *at any time* at least 60 business days after the date on which the consumer applied for the debt review. The NCA does not prohibit the termination of a debt review by a credit provider while an application for a re-arrangement order is pending before the Magistrate's Court. The credit provider has an unequivocal statutory right to terminate a debt review at any time 60 business days after the application for debt review is made to the debt counselor in terms of section 86(1) of the NCA. The remedy against any unjustifiable termination of the debt review by the credit provider lies with the court

called upon to enforce the agreement. Section 86(11) of the NCA provides that if a credit provider who has given notice to terminate a review as contemplated in section 86(10) of the NCA proceeds to enforce the agreement, the Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.

10. In *Changing Tides 17 (Pty) Ltd v Grobler and another* [2012] 3 All SA 518 (GNP) at para 19, commenting on the judgments in *Collett v Firstrand Bank* 2011 (4) SA 508 (SCA) and *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 (1) SA 374 (WC), I observed:

> "It is thus clear that the SCA considered that the enforcement of a credit agreement should not be postponed indefinitely simply once steps have been taken to seek a re-arrangement order. The purpose and objects of the Act will best be served by allowing the consumer a 60 day period of grace during which alternative means of resolving the dispute may be attempted and thereafter for the enforcing court (being either the Magistrate's Court or the High Court) to exercise the discretion to resume the debt review on the basis of more complete evidence regarding the earlier debt review process. The enforcing court is required to decide whether there would be any benefit or meaningful prospect of a better outcome in the event of the debt review resuming. In this regard the court will take into consideration the history of the dispute, the good faith participation of both parties in any prior negotiations designed to result in responsible debt re-arrangement, and the prospect of any satisfactory re-arrangement and compliance with it. An approach along these lines, the SCA held, would strike a fairer balance between the interests of consumers and those of credit

providers and would give effect to the intention of the legislature as expressed in the language of sections 86(10) and 86(11) of the Act."

11. The respondent contends that the termination of the debt review is unreasonable. He submitted that the proposed repayment plan is reasonable and will lead to the satisfaction of all his financial obligations in terms of the credit agreement within a reasonable period. He stated further that should summary judgment be granted, and he be ordered to return the vehicle, he would be prejudiced in that he required transport for the purpose of his employment. He explained that his over-indebtedness arose from his requiring brain surgery in 2007 and the costs associated with that. He also indicated that he had laid a complaint with the National Credit Regulator regarding the conduct of the debt counsellor. And finally he tendered henceforth to pay an amount of R3500 per month to the applicant to extinguish his debt. He accordingly requested the court to order that the terminated debt review resume on the condition that he pay the applicant R3500 per month.

12. The applicant opposes the grant of an order resuming the debt review. It points out that if the respondent is now able to pay R3500 he is able to acquire another vehicle and thus his employment is not in jeopardy.

13. I am satisfied that the applicant lawfully terminated the debt review in terms of section 86(10) of the NCA. I am also not persuaded that it will be

just to order the debt review to resume. The principal debt in this instance should have been fully repaid by 27 September 2010, more than 3 years ago. The arrears now outstanding, R155 930,08, are more than the original principal debt of R121 929,82. This is a clear indication that in a debt period of almost 9 years the respondent has been unable to service his debt and fulfill his obligations to the applicant. Moreover, the respondent has failed to disclose his present financial situation and has furnished no supporting evidence that he is in a position to pay R3500 per month. On the evidence before me there is no meaningful prospect of a better outcome in the event of the debt review resuming, especially when such prospects are assessed in the light of what has gone before. While it may be that the debt counsellor should have been more proactive, there was equally a duty on the respondent to drive the process to obtain a re-arrangement order. His supine attitude in this regard does not inspire confidence that he will take steps to extinguish his debt. I am accordingly not prepared to make an order in terms of section 86(11) of the NCA that the terminated debt review be resumed.

14. I am left then with the application for summary judgment. The only defence raised by the respondent, beyond his plea for the terminated debt review to be resumed, is a point *in limine* that the deponent to the affidavit in support of summary judgment is not a person who can swear positively

to the facts verifying the cause of action or able to state that there is no *bona fide* defence to the action, as required in terms of rule 32(2).

15. The deponent, Ms Zenobia Harmen, is the Manager, Legal of the Standard Bank of South Africa Limited, Vehicle and Asset Finance Division, Johannesburg (the applicant). She states in the affidavit that through her position she has access to all records and information in the possession of the applicant pertaining to this matter. She avers further that she has perused the records in her possession and acquainted herself with the contents thereof and is able to state that the respondent is indebted to the applicant on the grounds stated in the summons and particulars of claim and that the respondent has no *bona fide* defence and has delivered the notice of intention to defend solely for the purpose of delay.

16. The respondent contends that the deponent's averments are insufficient basis for her conclusion that he is indebted and lacks a *bona fide* defence. However, her averments are in fact corroborated by Annexure OP1 to the respondent's affidavit and the fact that he raises no defence. The content of the opposing affidavit make the *in limine* attack pointless. A challenge to the deponent's personal knowledge of the facts is irrelevant if no *bona fide* defence is discernible or where there is no averment that the amount claimed is wrong or that the claim is false - Herbstein and van Winsen:

The Civil Practice of the High Courts of South Africa (5th Ed) 525; and *Cape Town Transitional Metropolitan Substructure v Ilco Homes* 1996 (3) SA 492 (C). Moreover, as a legal advisor with access to the respondent's statement of account within the undisputed records of the applicant, the deponent is probably in as good a position as anyone else to swear to the facts - *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C) at 311C-D. I do not share the opinion sometimes put forward in these kind of cases that a deponent's personal knowledge must extend to an involvement in negotiations and discussions with the consumer. The fact deposed to is that the records of the applicant, in other words the relevant bank account, reflecting all debits and credits, reveals a particular indebtedness giving rise to a right of action. Where that indebtedness is common cause it would be pedantry to insist on further evidence from persons who had direct dealings with the respondent. It appears from the nature of the evidence that the facts are within the knowledge of the deponent and that she was able to positively swear to them. The point *in limine* must accordingly be dismissed.

17. The respondent raises no other *bona fide* defence to the application and accordingly the applicant is entitled to summary judgment.

18. In the premises an order is granted in terms of prayers 1-4 of the application for summary judgment dated 9 September 2013.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard:	24 January 2014
For the Applicant:	Adv E Botha
Instructed By:	Newtons Attorneys
For the Respondent:	Adv GVR Fouché
Instructed By:	JF van Zyl & Associates