IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG: PRETORIA

(1) REPORTABLE ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES YES / NO
(3) REVISED. OK.

23/5/14
DATE

SIGNATURE

CASE NO.: A458/12

23/5/2014

In the matter between:

N.S. RAMAANO **APPELLANT**

and

FIRSTRAND BANK LIMITED t/a WESBANK **RESPONDENT**

JUDGMENT

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1. This is an appeal against the order for summary judgement granted by this court on 27 January 2012. The order related to the return of a Toyota Corolla motor vehicle, the postponement of the claim for damages and the issue of costs.

2. The background of the matter is briefly the following: The respondent, as plaintiff, issued summons against the appellant during November 2011 for the return of the said Toyota motor vehicle which the appellant purchased from the plaintiff in terms of a written instalment sale agreement. The respondent also claimed damages arising from the breach of the agreement which claim was to be postponed pending the return of the vehicle. The appellant failed to pay the monthly instalments due in

terms of the agreement. The appellant applied for debt review in terms of section 86 of the National Credit Act, Act 34 of 2005 ("the Act"). On 10 May 2010 the Magistrates' Court made an order pursuant to that application rearranging the appellant's contractual obligations towards the respondent in respect of the aforesaid instalment sale agreement.

3. The appellant failed to comply with his obligations in terms of the re-arrangement and, at the time of the issuing of summons, he was in arrears in the amount of R4 501,96. The appellant was obviously also in arrears as far as the credit agreement was concerned. This resulted in the respondent issuing summons wherein he cancelled the credit agreement and claimed possession of the vehicle as well as damages he may have suffered as a result of the breach and costs.

4. The appellant opposed the action whereupon the respondent applied for summary judgement. The application for summary judgement was opposed on three grounds. Firstly, it was submitted that the respondent should have given notice to the appellant as well as the relevant debt counsellor as well as the National Credit Regulator in terms of section 86 (10) of the Act. It was submitted that since this had not happened, the summons was premature. Secondly, it was submitted that the deponent of the affidavit filed in support of the application for summary judgement had failed to state the grounds for her alleged personal knowledge of the matter. Thirdly, it was submitted that the appellant was not in arrears.

5. In respect of the second ground, the court a quo found that the deponent's affidavit contained sufficient allegations to prove her personal knowledge of the facts she deposed to. In respect of the third round, the court a quo found that the allegations

of the appellant did not rebutt to the allegations of the respondent and that the appellant was in fact in arrears.

6. In respect of the first ground, the court a quo found that, given the facts which were common cause, it was not necessary for the respondent to have acted in terms of section 86 (10) of the Act and furthermore that a notice in terms of section 129 had not be necessary. Summary judgement was accordingly granted as prayed for by the court a quo.

7. In the present appeal two grounds were relied upon. The first ground relied upon was that the respondent had failed to comply with the provisions of section 86 (10) of the Act prior to instituting the claim against the appellant for the debt which had been subjected to the debt review re-arrangement. It was submitted that as a result of this failure, the respondent's action was premature.

8. There is no merit in this argument. In **Firstrand Bank Ltd v Fillis And Another** 2010 (6) SA 565 (ECP) the following was found in paragraph [14] and [15] of the judgement:

"[14] ... The Act provides very extensive protection to a consumer who has become overindebted, whether it be of his or her own making or through circumstances beyond his or her control. Not only does a rearrangement afford him or her alleviation from the onerous monthly obligations that he or she has in all seriousness undertaken to his or her credit providers, but he or she also enjoys the protection of s 103(5) against the ravaging effect of escalating interest whilst he or she remains in default under the credit arrangement. If, however, he or she fails to embrace this opportunity, or he or she is, notwithstanding this very considerable assistance, unable to comply with his or her restructured debt commitment, the Act permits the common law to run its course.

[15] Thus, once the credit review process has commenced, s 88(3) of the Act prevents a credit provider from exercising or enforcing, by litigation or other judicial process, any right or security under any credit agreement until -

'(a) the consumer is in default under the credit agreement; and

(b) one of the following has occurred:

(i) An event contemplated in subsection (1)(a) through (c); or

(ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.'

[16] It follows, in my view, as a matter of interpretation, that once the jurisdictional requirement set out in s 88(3)(a) co-exists with any one of the jurisdictional requirements set out in s 88(3)(b), the credit provider is at liberty to proceed and to exercise and enforce, by litigation or other judicial process, any right or security under his credit agreement, without further notice." (My underlining)

9. I respectfully agree with the aforesaid interpretation of the provisions of the Act. Apart from the pertinent provisions of the Act, it may be added that the purpose of the provisions relating to notice to the debtor is, *inter alia*, to provide the debtor with the opportunity to make use of the protection afforded by the provisions of the Act. In a case like the present, where the debtor has already followed such procedure to its conclusion, there is obviously no need to notify him again.

10. The second ground relied upon by the appellant was that at the time of instituting its action the respondent could not rely on the order of the Magistrate, namely, that the rights and obligations as amended by the re-arrangement will be revived and be fully enforceable should the appellant default in terms of the said order. It was further submitted that the Magistrates' Court, as a creature of statute, cannot change the law (it being the provisions of the Act) but must merely interpret and apply it.

11. In my view there is no merit in this second ground relied upon by the appellant. The court a quo did not rely on any part of the Magistrate's order but applied the law according to the provisions of the Act. Once the credit review process has

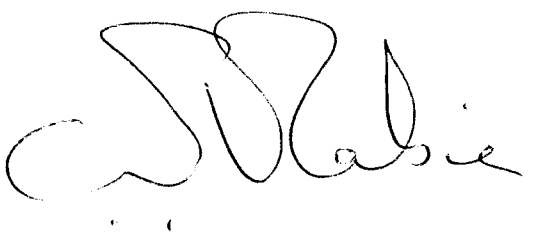
commenced in terms of the Act, section 88(3) thereof prevents a credit provider from exercising or enforcing, by litigation or other judicial process, any right or security under any credit agreement until, as stated in the passage quoted above, the consumer is in default under the credit agreement, and, *inter alia*, the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court.

12. *In casu* the appellant was in default in respect of his obligations in terms of the re-arrangement and was also in default in respect of the credit agreement. The respondent was consequently at liberty to proceed and to enforce its rights under the credit agreement. See **Firstrand Bank Ltd v Fillis And Another** (supra).

13. As far as costs are concerned, there is no reason why the costs of appeal should not follow the event.

14. In the result the following order is made:

    1. The appeal is dismissed with costs.



C.P. RABIE

JUDGE OF THE HIGH COURT

I concur

S.P. MOTHLE

JUDGE OF THE HIGH COURT

I concur

~~T.B. VILIKAZI~~ T. D. VILAKAZI

ACTING JUDGE OF THE HIGH COURT