REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.8821/11

In the matter between

SA TAXI SECURITISATION (PTY) LIMITED Plaintiff

and

L.B. PHAMBUKA
(ID NO.) Defendant

JUDGMENT

Delivered: 30 March 2012

WANLESS, AJ.

Introduction

[1] This is an application for summary judgment by the Plaintiff against the Defendant. The Plaintiff is a registered credit provider and duly registered as such as defined in section 40 of the National Credit Act 34 of 2005 (hereafter referred to as "the Act"), The Plaintiff and one Lindelani Blessing Phambuka (hereafter referred lo as "the Defendant") entered into a written agreement which, it is common cause, is a credit agreement in terms of section 8 of the Act.

[2] The Plaintiff has instituted an action against the Defendant wherein the Plaintiff relies on a breach by the Defendant of the aforesaid agreement and claims the following relief, namely: "

1. Confirmation of termination of the agreement:
2. Return of the 2010 CMC AMANDLA with engine number E3447G and chassis number LA61BAS31AB5G6153 to the Plaintiff forthwith;
4. Expenses incurred for removal, valuation storage and sale of the vehicle;

5. Attorney and client costs to be taxed;
6. Further and'or alternative relief."

[3] The action has been defended by the Defendant and the Plaintiff has instituted this application for summary judgment wherein the Plaintiff claimed the same relief as sought by it in the action. However, at the hearing of this application I was advised by Mr Moodley, who appears for the Plaintiff, that the Plaintiff would only be seeking the relief for confirmation of the termination of the agreement; the return of the motor vehicle which is the subject matter of the agreement entered into between the parties, together with attorney and client costs to be taxed$_H$ Arising therefrom the Plaintiff essentially seeks summary judgment in terms of Rule 32 (l)(c) for the return of the motor vehicle to the Plaintiff and that in terms of Rule 32(6)(b) the Defendant be given leave to defend the claim for damages which is the remainder of the relief sought by the Plaintiff in the action.

The Salient Facts

[4] Arising from the Plaintiffs Particulars of Claim in the action together with the Defendant's affidavit in terms of rule 32(3J(b) the following facts are either common cause or cannot be disputed, namely:

(a) On the 12$^{r]l}$ of October 2010 the Plaintiff and the Defendant entered into the agreement;

(b) The Defendant has breached the agreement in that the Defendant has fallen into arrears in respect of his payments in terms of the agreement;

(c) On the 5th of March 2011 the Plaintiff sent by registered post a letter to the Defendant which complied with the provisions of section 129(l)(a) of the Act and which advised the Defendant that he could refer the matter to a debt counsellor to resolve any dispute or to develop a plan that would be acceptable to both the Plaintiff and the Defendant in order to bring the Defendant's payments up to date;

(d) The Defendant referred the matter to a debt counsellor;

(e) In terms of section S6(4) of the Act the debt counsellor notified all the credit providers to whom the Defendant was indebted that the Defendant had applied for a debt review. This was done by the debt counsellor on the 28^{,h} of July 2011;

(f) On the 11th of August 2011 the debt counsellor, having found the Defendant to

be over-indebted, launched an application on behalf of the Defendant in the Magistrates* Court (Pinetown) for an order declaring the Defendant to be over-indebted and re-arranging the credit agreement obligations of the Defendant (including the Defendant's obligations to the Plaintiff);

(g) By way of a letter dated 12 August 2011 which was sent by registered post on the 15lh of August 2011 the Plaintiff advised the debt counsellor, inter alia, that "the Consumer's application for debt review is declined";

(h) No notice as prescribed in terms of section 86(l0)(a); (b) or (c) of the Act was given by the Plaintiff to terminate the Defendant's application for debt review;

(i) On the 31st of August 2011 notice of the Defendant's application to the Magistrates' Court, Pinetown, was served on the Plaintiff;

(j) The Plaintiff did not serve or file any notice of opposition in respect of the aforesaid application and did not file any affidavits in opposition thereto;

(k) On the 28111 of September 2011 the Magistrates' Court (Pinetown) granted an order in terms of which the Defendant was declared to be over-indebted and in terms of the provisions of section 86(7)(c) of the Act the Defendant's credit agreement obligations (including the Defendant's obligations to the Plaintiff) were re-arranged by extending the period of each agreement and reducing the amount of the monthly payments required. Apart from the Defendant's obligations to the Plaintiff as aforesaid the Defendant's obligations to "Standard Bank" were also subject to the provisions of the said order; (1) On the ll"1 of October 2011 the Plaintiff served the Plaintiffs Combined Summons upon the Defendant, The Plaintiff purported to cancel the agreement by, inter alia, service of its Combined Summons.

The Issues

[5] In his opposing affidavit to summary judgment the Defendant set out two grounds upon which the Defendant averred 1 should refuse summary judgment.

[6] In the first instance the Defendant relies upon the fact that there is a valid and binding court order being the order being the order of the Magistrates' Court (Pinetown) granted on the 28,h of September 2011 which remains in existence and

is binding upon both the Plaintiff and the Defendant. It is the Defendant's contention that until the Plaintiff takes the necessary steps to set this order aside the order restructuring the Defendant's indebtedness to the Plaintiff remains in force and the Plaintiff is precluded from proceeding with the present action instituted against the Defendant.

[7] The second ground relied upon by the Defendant in his opposition to summary judgment is that he did not receive the Plaintiffs notice in terms of section 129(I)(a) of the Act.

[8] When this matter was argued before me Mr Blomkamp, who appeared on behalf of the Defendant, indicated that the Defendant was not persisting with this latter gi-ound in light of the fact that it has become settled law that once the said notice has been sent by the credit provider in compliance with the Act it does not necessarily have to come to the attention of the credit receiver,

[9] In light of the aforegoing, it was only necessary for me to consider the first ground raised by the Defendant in opposition to the Plaintiffs application for summary judgment.

The Arguments

[10] Mr Moodley, on behalf of the Plaintiff, submitted that section 86(2) of the Act provides that an application in terms of section S6 of the Act (debt review) may not be made in respect of and does not apply to that particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 of the Act to enforce that agreement.

[11] In support of this contention he relied upon the decision *ofNedbankLtd and Others* v *National Credit Regulator and Another* 2011 (3) SA 581 (SCA), In this matter it was held, inter alia, that by giving the notice envisaged by s 129(l)(a) the

credit provider "has proceeded to take the steps contemplated in s 129 to enforce the agreement; a debt review relating to that specific agreement U thereafter excluded (at 590 F)'\

[12] I am, of course, insofar as this principle is ultimately applicable to the facts of the present matter, bound thereby.

[13] In amplification of the above argument, Mr Moodley also relied upon the fact that the provisions of s 86(7)(c)(ii) do not authorise a Magistrates[1] Court seized with a debt review application to ᵘre-instate" a credit agreement that has been properly cancelled-

[14] Also, it was argued on behalf of the Plaintiff that following the cancellation of an agreement the only "amount" that the magistrate may reduce and the only dates for payment that may be postponed as contemplated in terms of s 86(7) of the Act arc those pertaining to the obligations that remain in place once the subject matter of that credit agreement has been surrendered in terms ofs 127 of the Act, Accordingly, it was contended that once an agreement was cancelled and even where a debt review was held with an older made by a magistrate as set out above the credit receiver was not entitled to retain the subject matter or "merx" of the agreement and the credit provider was entitled to the return thereof

[15] In support of the aforesaid principles Mr Moodley sought to rely primarily upon the decisions of *Motimba Management and Labour Services cc and Others v SA Taxi Securitization (Pty) Ltd and Another* (a decision of the South Gauteng High Court delivered on 24 March 2010 under Case NoJ6490/2009, at this time unreported, at pages 11 and 12) and the decision of *BMW Financial Services (SA) (Pty) Ltd* v *Donkin* 2009 (6) SA 63 (KZD). Reliance was also placed upon the decisions of *Standard Bank of SA* v *Newman,* an unreported decision of the Western Cape under Case No.2777l/20\0 delivered on 15 April 2011 at paragraph 11; *Wesbank* v *Mohideen* (Western Cape) an unreported decision under Case No,10870/2010 (at paragraph 11); *SA Taxi Securitization (Pty) Ltd* v *Chesane* 2010 (6) SA 557 (GSJ) at paragraph 27.

[16] Mr Blomkamp (on behalf of the Defendant) has submitted that whilst I am bound to accept the judgment of the Supreme Court of Appeal in the matter of *Nedbank Ltd and Others* v *National Credit Regulator and Another (supra)* in mat where a notice has been provided by a credit provider in terms of section

129(l)(a) of the Act a debt review relating to that specific agreement is thereafter excluded, this is distinguishable from a case where, despite the provision of such a notice, an order has been made by a Magistrates' Court in terms of s 87 of the Act,

[17] Put simply, Mr Blomkamp's argument is that where a credit provider has given notice in terms of section 129(l)(a) of the Act and the credit receiver then gives notice that he wishes to apply for a debt review that credit receiver is not excluded horn doing so. In other words, it is open for the credit provider to either give the requisite notice in terms of s 86(10) of the Act terminating the debt review process or oppose the application for debt review in the Magistrates' Court, If neither of these steps are taken it must follow (on the argument as put forward by Mr Blomkamp) that the order of the Magistrates' Court is a valid one until it has been set aside.

[18] in support of the aforegoing Mr Blomkamp relied on the yet unreported judgment in the matter of *Reid and Another* v *Standard Bank of SA Ltd* Case No,AR.6/l 1, a decision of the Full Bench of the ICwaZulu-Natal High Court, Pietermaritzburg. In this matter Lopes J (Jappie J and Ndlovu J concurring) held, inter alia, that the provisions of ss 86(2) do not necessarily render a decision by a magisu"ate pursuant to a debt review application void. It may well be that a debt counsellor is precluded from bringing such an application after the credit provider bns taken steps in terms of s 129 but there is nothing in the Act to indicate that once having done so, it is visited with a nullity (at subparagraph 9(c)) of the judgment). Further, also at sub-paragraph 9(c) of the judgment the learned Judge held the following:

"In ***my*** view il was incumbent on ihe respondent to have applied to set aside the Magistrates* Ccurt orders rather than seeking simply to ignore ihem. Once a court

order is granted, it is valid and enforceable until and unless set aside. As pointed out by counsel for the appellants, any assumption of invalidity would possibly affect other patties to the order"

[19] Whilst T am bound by the decision of *Nedbank and Others v National Credit Regulator and Another (supra)* J am likewise bound by the decision of *Reid and Another v The Standard Bank of SA Ltd (supra).* See also; *Jacobs v Baumann NO* 2009 (5) SA <132 (SCA) at paragraph 20; *Twit v Ipser* 1993 (3) SA 577 (A) at 589 C; *Clipsal Australia (Pty) Ltd and Others* v *Gap Distributors (Pty) Ltd and Others* 2010 (2) SA 2S9 (SCA) at paragi-aph 2 1.

[20] With regard to the Plaintiffs reliance on the decisions of *Matimba Management and Labour Services cc and Others v SA Taxi Securitization (Pty) Ltd and Another (supra); BMW Financial Services SA (Pty) Ltd v Donkin (supra)* and *Standard Bank of SA v Newman (supra)* Mr Blomkamp submitted that all of these decisions were distinguishable from the present matter on the basis that in *Matimba* the credit provider had given notice in terms of s 86(10) of the Act; in *Donkin* the credit provider had cancelled the agreement before issuing summons and in *Newman* the credit receiver had failed to refer the matter to a debt counsellor.

[21] Relying on the aforegoing Mr Blomkamp submitted that the Plaintiffs application for summary judgment should be dismissed with costs.

Conclusion

[22] It is common cause in this matter that the Defendant was in arrears in respect of the instalments payable by him to the Plaintiff in terms of the agreement. Relying on the Defendant's breach of the agreement (which Is also common cause) the Plaintiff seeks to have the motor vehicle returned to it through the remedy of summary judgment and that the remainder of the Plaintiffs claim against the Defendant be adjudicated upon at-trial.

[23] To my mind the answer as to whether or not the Plaintiff is entitled to the mum of the motor vehicle largely (if not solely) depends, within the framework of

the Act and the remedy of summary judgment, when cancellation of the agreement takes place. In this regard Mr Moodley also submitted that *I* should construe the Plaintiffs notice in terms of s 129(l)(a) of the Act to be the Plaintiffs lawful cancellation of the agreement. Whilst I understand Mr Moodley's desire to have me construe this notice to be the Plaintiffs cancellation of the agreement in that it obviously preceded the Defendant's referral to the debt counsellor, I cannot do so. In the first instance the said notice, apart from the fad that it describes itself as a notice in terms of s 129 read with s 130 of the Act also bears the heading "Letter of Demand". Moreover, it contains no reference whatsoever to any purported cancellation of the agreement. Finally, clause 8 of the agreement (clause 8.2,2 thereof) specifically provides for cancellation of the agreement after due demand,

[24] In addition to the aforegoing paragraph 12 of the Plaintiffs Particulars of Claim simply makes the broad averment that "die Plaintiff terminated the agreement". There is nothing to support this averment. In the alternative thereto, it is averred that "the agreement is terminated herewith[11]. Accordingly, it must be accepted that the agreement was only cancelled on the 11"[1] of October 2011 by way of service of the Plaintiffs Combined Summons upon the Defendant.

See; *Swart v Vosloo* 1965 (1)SA 100 (AD);

Middelburgse Stadsraad v Trans-Natal Steenkoolkorporasie Bpk 1987 (2) SA 244(TPD)at249(A-C);

Phone-a-Copy Worldwide (Pty) Ltd. v Orkin and Another 1986 (1) SA 729 (AD) at 751 A- C

[25] There is no averment in the Plaintiffs Particulars of Claim that the Plaintiff terminated the debt review procedure by the requisite notice in terms of s 86(10) of the Act. Annexure "E'\ which is not referred to in the Plaintiffs Particulars of Claim but appears at pages 18 and 19 of the papers in this application for summary judgment, is a letter from the Plaintiff dated thel2th of August 2011 and which appears to have been sent by registered post on the 15th of August 2011 (at page 19 of the application papers). This letter is addressed solely to the debt counsellor and has not been addressed either to the consumer or the National Credit Regulator in terms of s 86(10)(a) and (c) of the Act. In addition thereto paragraph 3 of the letter

states:
“In the above circumstances, the Consumer's application for debt review is declined".

[26] Not only is there no provision in the Act for a credit provider to "decline" a credit receiver's application for debt review but this letter clearly does not comply with the provisions of s 86(10) of the Act. Further, in light of the fact that no reference is made thereto in the Plaintiffs Particulars of Claim, I should have little or no regard to the contents thereof. In the premises the Plaintiff cannot rely on a termination of the debt review process in terms of s 86(10) of die Act to entitle the Plaintiff to enforce the agreement as contemplated by the provisions of s 129(1)(b)(i) of the ***Act.***

[27] Accordingly, the order granted by the Magistrates' Court on the 28[11,] of September 2011 is a valid and binding order between the Plaintiff and the Defendant (and between the Defendant and Standard Bank). On the facts of this matter it is clear that the Plaintiff seeks summary judgment arising horn an action instituted after the aforesaid order of the Magistrates' Court without seeking to set aside that order. As set out above, the Plaintiff has not complied with the provisions of a 86(10) of the Act and it is further common cause that (despite having been given the opportunity to do so) the Plaintiff did not oppose the Defendant's application for debt review in the Magistrates' Court.

[28] On the basis of the reasoning and judgment in *Reid and Another* v *The Standard Bank of SA Ltd (supra)* the Plaintiffs application for summary judgment against the Defendant must fail.

[29] At this stage 1 feet that it is incumbent upon me to note that the decision of *Reid and Another v The Standard Bank of SA Ltd (supra),* insofar as it has been referred to herein, is not (as it might *prima facie* appear) in conflict with the decision of *Nedbank Ltd and Others* v *National Credit Regulator and Another (supra).* Indeed, when the Full Bench of the KwaZulu-Natal High Court (Pietcrmarilzburg) was seized with the matter *of Reid (supra)* the learned Judges must have been well aware of the decision of die Supreme Court of Appeal in

Nedbank (supra).

[30] I say this because the decision in *Nedbank (supra)* does not exclude the steps that may be taken by a credit receiver after receipt of a notice from the credit provider in terms of s 129(l)(a) of the Act. This would, as highlighted in that judgment and in other judgments which preceded it, be absurd, *(Starita v ABSA Bank Ltd and Another* 2010 (3) SA 443 (GSJ); *BMW Financial Services (SA) (Pty) Ltd* v *Mudafy* 2010 (5) SA 618 (KZD)), Accordingly, a credit receiver is entitled to take die said steps and institute an application for debt review in terms of s 86 of the Act. Likewise the credit provider is entitled to take appropriate steps within the parameters of the Act, This accords with the policy behind the Act as clearly set out in the matter of *SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases* 2011 (1) S A 310 (GSJ) at 316 B-J.

[31] Whilst the decision m *Nedbank and Others v National Credit Regulator and Another (supra)* excludes (based on s 86(2) of the Act) a debt review where a credit provider has given notice to a credit receiver in terms of s 129(l)(a) of the Act the Court did not deal with the situation where an order is made in respect of debt review after that notice and the effect thereof.

[32] In the premises I am bound to follow the decision of *Reid and Another v The Standard Bank o/SA Ltd (supra)* unless that case is clearly distinguishable from the facts of the present matter. In this regard it is not and it was never argued before me that such a distinction could be drawn.

[33] I also wish to add at this stage that in light of, inter alia, the decision of *Reid and Another v The Standard o/SA Ltd (supra)* the contention by Mr Moodley that any order by the Magistrates^ Court could not "re-instate" an agreement which had been lawfully cancelled cannot be sustained. Apart from the fact that (as dealt with above) the Plaintiff only sought to cancel the agreement after the order was made by the Magistrates' Court, *Reid (supra)* is clear that the said order must stand.

[34] The only remaining issue to be decided is the argument as put forward on

behalf of the Plaintiff that the magistrate could only make an order in terms of s 86(7) of the Act and more particularly in respect of a debt review, in relation to the monetary obligations as between the Plaintiff and the Defendant and not in respect of the subject matter of the agreement (the motor vehicle). Firstly, I am satisfied that in terms of the agreement the return of the motor vehicle by the Defendant to the Plaintiff can only follow upon the lawful cancellation of the agreement by the Plaintiff. As dealt with above this cancellation only took place after the order granted by the Magistrates' Court- In tight thereof this argument cannot carry any weight.

[35] Even if this were not the case I am satisfied that the decisions relied upon by the Plaintiff (dealt with above) are indeed distinguishable on the facts as submitted by Mr Blomkamp in his argument and also dealt with herein. This is also true in respect of the other cases cited by Mr Moodley in his Heads of Argument.

[36] Further, I am satisfied that in light of the agreement itself the monetary obligations of the Defendant to the Plaintiff cannot be separated from the subject matter or merx of the agreement. Put simply, in order to enforce the agreement, including the return of the motor vehicle the Plaintiff must cancel the entire agreement. The agreement ha?, not been cancelled but is subject to the Magistrates' Court order. This includes the possession of die motor vehicle.

[37] Lastly, it was also argued on behalf of the Defendant that summary judgment could not be granted as prayed since should it be ordered that the Defendant return the motor vehicle to the Plaintiff and same be sold in reduction of the Defendant's indebtedness to the Plaintiff this could well affect the restructuring of the Defendant's indebtedness to Standard Bank as dealt with in the order of the Magistrates[1] Court, Support for this argument is to be found in the matter of *Reid and Another* v *Standard Bank of SA Ltd (supra),* at subparagraph *9(c)* where it was held that any assumption of invalidity in respect of such an order would possibly affect other parties to the order. This is a valid argument and is further support for not only the validity of the Magistrates' Court order but also why summary

judgment should not be granted in this matter.

[38] in the past the remedy of summary judgment was often described as [1] 'extraordinary[1]'. Today it is merely "ordinary" in that the principles applicable thereto are fairly trite. For that reason I do not intend to burden this judgment by setting out same.

[39] Having regarding to the aforegoing. *I* am satisfied that the Defendant has placed before this Court material facts from which 1 can conclude that the Defendant has a *bona fide* defence to the Plaintiffs action within the meaning o f Ru 1 e 3 2 (su mmary j u dgment),

Order

[40] In the premises T make the following order namely:

(a) The Plaintiffs application for summary judgment is dismissed with costs.

(b) The Defendant is given leave to defend the action.

B C WANLESS AJ

DATE OF HEARING : 15 MARCH 2012

DATE OF JUDGMENT: 30 MARCH 2012

PLAINTIFFS COUNSEL: MR V MOODLEY

PLAINTIFFS ATTORNEYS: NICHOLSON & COMPANY

DEFENDANT'S COUNSEL: MR P.J. BLOMKAMP

DEFENDANTS ATTORNEYS: WHA COMPTON ATTORNEYS