

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 20768/09

DATE: 14 DECEMBER 2009

5 In the matter between:

NITRO SECURITISATION 1 (PTY) LIMITED Plaintiff

and

BRIAN KEVIN CHRISTIANS Defendant

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JUDGMENT

DAVIS, J

15 This matter came before me in the form of an application for
summary judgment for the return of a motor vehicle that was
sold to the first defendant in terms of an instalment sale
agreement. The plaintiff avers that the defendant was in
default in terms of the agreement and that it elected to cancel
20 the agreement. Accordingly, it was entitled to the return of the
vehicle.

Defendant filed an affidavit in which he opposed summary
judgment, further admitting that he was in arrears in terms of
25 the contract, also admitting that for the past year he had been

making payments to plaintiff in an amount far less to that which had been agreed as the monthly amount and admitting that the debt review that he applied for on 9 September 2008 had been properly terminated on 19 December 2008, pursuant to section 86(10) of the National Credit Act 34 of 2005 ('the Act'). Furthermore defendant admitted that he received a notice informing him that plaintiff would proceed to trial.

The defences that were then raised concerned the fact that the debt review had not been properly terminated, and furthermore that the approach which commended itself to this Court should be based on a judgment of Binns-Ward, AJ in Changing Tide 17 (Pty) Ltd N.O. v Erasmus and Others, unreported decision of the CPD, case number 18153/09.

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Pursuant to these arguments, I reserved judgment and asked counsel to consider these particular issues and provide me with written argument. Both Mr Wessels, on behalf of the plaintiff, and Mr Jacobs, on behalf of the defendant, not only obliged, but provided very learned and thoughtful heads of argument for which they deserve commendation and the thanks of this Court.

It is to those two defences that I must turn in the sense that they are the only bases by which the defendant has argued

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that summary judgment should be refused.

Debt Review unlawfully terminated

It appears that the argument that the debt review has not been properly terminated is predicated on the wording of section 86(10). On the papers, there is an admission that defendant received the notice and there is no denial that the notices were sent as alleged in the particulars of claim, nor that it was not generated in terms of section 86(10). In my view, there is no justification for this defence, which, on the facts of this case, stands to be rejected.

I turn to the second defence.

15 First Debt Councillor did not comply with his duties and defendant acted in good faith

In order to understand this particular defence it is important to traverse section 86(10) of the Act. If a consumer is in default under a credit agreement, that is being reviewed in terms of the section, the credit provider, in respect of that credit agreement, may give notice to terminate the review in the prescribed manner to (a) the consumer, (b) the debt councillor, and (c) the National Credit Regulator, at any time at least 60 days after the date on which the consumer applied for the debt review.

Mr Jacobs submitted that notwithstanding section 86(10), Section 86 (11) provides that, when a creditor enforces the agreement after having terminated the debt review, the Court,
5 hearing the matter, may nevertheless order that the debt review resume on any conditions that the Court considers just in the circumstances.

In this connection Mr Jacobs referred to the Changing Tides
10 decision, *supra*, in which it was held that the evident purpose of a notice by a credit provider in terms of section 86(10) of the Act is to enable the consumer and/or the debt councillor to urgently bring an application to a magistrate in terms of section 86(7)(c) or 86(8)(b), if that has not already been done.
15 Section 131(a) of the Act provides that at least ten business days must have elapsed after notice to the consumer as contemplated in Section 86(10) of the Act before a credit provider may institute proceedings with enforcement of the credit agreement. If a defendant wishes to avoid summary
20 judgment, on the basis that the claim is subject to uncompleted debt review proceedings, Mr Jacobs submitted that the defendant is required to describe precisely as to what stage the respective debt review had progressed and furnish an explanation as to why the credit provider had not obtained a
25 debt rearrangement order in terms of section 86(7)(c)(ii) or

section 87(7)(b)(2) of the Act.

In Mr Jacobs' view, consideration of these particular sections, and therefore the architecture of the Act, now needs to be
5 analysed through the prism of a dictum of Binns-Ward, J at para 36 of the Changing Tides judgment:

10 "In the event that it is determined on enquiry that the debt councillor fails for no good reason in material respects to properly process the debt reviews to the stage of obtaining debt rearrangement orders from the magistrate's court, the proper order in each of these matters must be refused summary
15 judgment because of the reasonable possibility that a Court would at trial stage in such circumstances make an order referring the defendant's situation to a debt councillor for a debt review afresh, this time in proper
20 compliance with the provisions of the NCA."

Before this approach is applied to the facts, it is important to interrogate whether the architecture of the Act sustains the conclusion reached by Binns-Ward, J.

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Mr Wessels submitted that an examination of section 86(10) of the Act reveals, that if the debt review processes for any reason have not been completed within 60 business days, after an application for debt review has been made, the credit
5 provider may terminate the debt review procedure and enforce the agreement in court. This conclusion flows from the express wording of section 86(10).

The section appears to state that the notice in terms of the
10 provisions of the Act will terminate not the whole of the debt review process, but only the process in respect of the credit agreement between the specific credit provider and a notice may be sent out at any time after the prescribed 60 day period, and up to the granting of the restructuring order. Mr Wessels
15 submitted that this procedure is aimed at ensuring that a credit provider was not unduly prevented from obtaining payment and ultimately judgment by a credit consumer or debt councillor who had not acted with due diligence in order to obtain a debt restructuring order.

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In this regard, he contended that it may be that the debtor or the debt councillor on instruction of the debtor may abuse the fact that the credit provider is unable to obtain judgment as long as a debt review was pending. Alternatively, if the credit
25 provider is of the opinion that the consumer is not really over-

indebted and that he may wish to have the Court decide the matter. Furthermore, the provision ensures that the credit provider's right of access to courts in terms of Section 34 of the Republic of South Africa Constitution Act 108 of 1996 was
5 protected as far as possible.

In short, Mr Wessels submitted that the interpretation that he sought to place on section 86(10) was justified in terms of the doctrine of proportionality; that is proportionate to the
10 interests of a consumer who is over indebted and who is protected by the Act, and to a credit provider who was entitled to enforce the terms of a debt based upon a contract concluded between the parties.

15 Mr Wessels submitted that there was no legal basis for the approach adopted by Binns-Ward, J in paragraph 30 of judgment;

20 "It should only be in an unusual case that a credit provider gives notice in terms of Section 86(10) of the Act. In the ordinary case it would be inappropriate for a credit provider to give notice if the relevant application was really pending before a
25 Magistrate's court and being prosecuted with

reasonable efficiency. The object of section 86(10) cannot be to permit the credit provider carte blanche without good reason to negate the operation and effect of a debt review process instigated in terms of Section 86 of the NCA.”

Mr Wessels submitted that this process was manifestly incorrect because it was contrary to the express wording of section 86(10) which made it clear that such notice may, at any time at least 60 days after the date on which the consumer applied for the debt review, be so generated. There was thus no express wording upon which the dictum of Binns-Ward, J could justifiably be predicated. Further, the finding was based on the incorrect premise that such a notice would negate the operation of an effect of a debt review process. The effect of a section 86(10) notice would not be to deny the credit consumer access to the provisions of the Act pertaining to debt restructuring but provided that a different procedure had to be followed to obtain such order.

There is considerable merit in this approach. It appears to me that part of the difficulty generated by this dictum is that the Act is very poorly drafted and there is some considerable uncertainty as to whether the wording of the Act is congruent

with the purposes of the Act as envisaged therein. However, in my view, there is a great deal of weight in the approach adopted to this matter by Mr Wessels.

- 5 However, I am not required to make a definitive finding in this matter. It is important to traverse what defendant has submitted. Defendant contends that first debt councillor did not comply with his duties and the defendant acted in good faith and accordingly such circumstances must trump the
- 10 wording of section 86(10) and accordingly the same level of discretion should be adopted in this case as applied in the Changing Tides case. There are, however, important distinctions. Firstly, in this case, the Court is not dealing with a domestic residence, as was the case in Changing Tides.
- 15 The debt is based on a Ford Bantam 1.31XL motor vehicle. Section 26 of the Constitution therefore does not apply. The constitutional weight which bore upon the approach in Changing Tides has no application in this case. Secondly, an examination of defendant's argument reveals an absence of
- 20 any specific details concerning the lack of *bona fides* of the credit provider. Accordingly, there is no evidential basis suggested as to what particular basis a Court should exercise its discretion, along the lines suggested by Binns-Ward, J in the Changing Tides judgment.
- 25 In my view, in this particular case, the notice was properly

issued and hence the credit provider was entitled to terminate the proceedings. The Constitution does not enjoin that same kind of benign discretionary act towards the defendant be applied as in the case of Changing Tides.

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The doctrine of proportionality, to the extent that it applies, dictates that the express wording of the Act should be applied in this case.

10 For all of these reasons the defences which had been raised stand to be rejected and summary judgment therefore must be granted.


SUMMARY JUDGMENT IS THEREFORE GRANTED TO THE

15 PLAINTIFF in the following terms;

(a) It is ordered that the defendant forthwith return to the plaintiff a Ford Bantam 1.31 XL motor vehicle with chassis number AFAWAXMJKWA00996, Engine
20 Number 3LO15692 and registration number CA620469, failing which the Sheriff is authorised to attach the goods wherever he may find same, and to hand the goods to the plaintiff.

(b) Defendant is ordered to pay plaintiff's costs.

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DAVIS, J