Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number 6687/2009

In the matter between:

S A TAXI SECURITISATION (PTY) LTD Plaintiff

versus

MBOVANE, PHAKAMISA LUCAS Defendants

AND TWELVE SIMILAR CASES

JUDGMENT DELIVERED: 17 MAY 2011

ZONDI, J:

Introduction:

[1] These matters were combined for the purposes of arguing various exceptions taken by each defendant to the plaintiff's particulars of claim in each matter. The separate exceptions were argued simultaneously as the ruling on one exception would be determinative of the remaining exceptions as the basis of

each exception is identical. In each instance the plaintiff was represented by the same counsel and each defendant by the same counsel.

[2] The matters of B Nuse case number 14285/09 and S Mfanta case number 13313/09 were removed from the roll as these matters had been settled. The matter of B. M. Matrose case number 9353/2009 was also removed from the roll as the defendant is since deceased.

The pleadings:

[3] An examination of the pleadings is necessary to determine issues raised in these matters.

[4] In each case the plaintiff alleges that it concluded a written lease agreement with the defendant in terms of which it leased a motor vehicle. Each agreement made provision for the payment by the defendant of an initial deposit, a first rental and thereafter certain monthly rentals.

[5] In each matter the plaintiff alleges in paragraph 9 of its particulars of claim the following:

> "9. The agreement furthermore provides that should the Defendant fail to pay the rental on due date or fail to satisfy any of his other obligations in terms of the agreement the Plaintiff shall, without

prejudicing any of his other rights in law, be entitled to:-

9.1 cancel the agreement and in the instance of such cancellation:-

9.1.1 claim return and possession of the vehicle;

9.1.2 retain all payments already made by the Defendant;

9.1.3 claim payment of the difference between:-

9.1.3.1 the amount outstanding at date of cancellation of the agreement less a rebate on finance charges calculated from date of termination of the agreement and;

9.1.3.2 the amount at which the vehicle is valued in terms of the agreement or the re-sale value thereof, whichever is the greater;

9.2 claim interest on any outstanding amounts calculated at 23% per year, alternatively at the current interest rate linked to the fluctuation of the interest rate calculated from date of termination of the agreement to the date of payment;

9.3 costs on the Attorney and Client scale;

9.4 claim all expenses incurred in tracing the defendant before or after the institution of action, attaching the vehicle, removing it, valuing it, storing it and the sale of the vehicle."

[6] The plaintiff alleges further that the defendants breached the agreements by failing to pay the rentals due in terms of the agreements and that they were arrears with the payments.

[7] In each matter the plaintiff alleges in paragraph 11 of its particulars of claim that:-

7.1 The defendant applied to have himself declared over-indebted as contemplated in section 86 (1) of the National Credit Act, No. 34 of 2005 (the NCA);

7.2 The debt counsellor delivered to the plaintiff the notice in terms of section 86 (4)(b)(i) of the NCA (form 17.1);

7.3 The debt counsellor sent a notice to the plaintiff proposing an arrangement of the defendant's obligations (form 17.2).

[8] It is further alleged by the plaintiff that it subsequently gave a notice in

terms of section 86 (10) of the NCA to the defendant, the debt counsellor and the National Credit Regulator informing them of its election to terminate the debt review process. The plaintiff alleges that the defendant is currently in default in terms of the agreement, has been in default for at least 20 (twenty) business days, at least 60 (sixty) business days have passed since the date on which the defendant applied for the debt review and at least 10 (ten) business days have elapsed since the plaintiff delivered the notice in terms of section 86(10).

[9] The plaintiff further alleges that it terminated the agreement due to the defendant's breach.

[10] In each case the defendants took exception to the plaintiff's particulars of claim on the basis they do not disclose a cause of action. In amplification of their respective exceptions the defendants allege the following:

"1. At paragraphs 10 and 13 its Particulars of Claim the Plaintiff pleads that the Defendant is in breach of Agreement (being Annexure "A") to the Particulars of Claim) in that it failed to pay rentals due and that it is presently in default.

2. At paragraph 14 of its Particulars of Claim the Plaintiff

pleads that it has consequently cancelled the Agreement, alternatively that it 'hereby' cancels the Agreement.

3. The relief sought by the Plaintiff in its prayers flows from the alleged cancellation by it of the Agreement.

4. Clause 9.2.2 of the Agreement entitles the Plaintiff to cancel the Agreement *'after due demand'*

5. Clause 9.2.2 of the Agreement provides further that *'due demand' means 'immediately on demand unless the Lessee is entitled to notice, in which case "due demand" shall mean the giving of such notice to which the Lessee is entitled'.*

6. Demand is accordingly a prerequisite for the right to cancel the Agreement in terms of Clause 9.2.2.

7. The Plaintiff has not pleaded having made any demand of the Defendant and its Summons contains no such demand.

8. The Plaintiff's Particulars of Claim accordingly lack sufficient averments to make out a cause of action for the

relief sought."

[11] The essence of the defendants' exception is that the plaintiff's particulars of claim do not disclose a cause of action in that they lack sufficient averments. There are two bases upon which the defendants contend that the plaintiff has not made out a case for the relief it seeks.

[12] First, it is alleged by the defendants that clause 9.2.2 of the agreement requires the giving of notification or demand by the plaintiff before the issue of summons or the notification of cancellation and that to the extent that the plaintiff has not pleaded that it made demand of the defendants or that such demand was dispensed with, the plaintiff's particulars of claim fail to disclose a cause of action.

[13] Secondly, the defendants contend that the purported termination of the lease agreements by the plaintiff was ineffectual to the extent that it was done at a time when the defendants enjoyed protection against the credit agreements enforcement proceedings in terms of NCA.

[14] Before I proceed to deal with the defendants' contention I consider it necessary to restate some of the legal principles governing exceptions of the nature raised by the defendants. It is important to emphasize that every pleading

must set out the complete chain of relevant facts on which the cause of action or defence is based, and the omission of any linking fact will break the sequence and render false the conclusion which is sought to be drawn from the relevant facts and therefore in such a case the opposite party will be entitled to take exception.

[15] In **Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd** 1999(1) SA 624 (W) the court pointed out at 632 C – E:

> "When an exception is taken to a pleading, the excipient proceeds on the assumption that each and every averment in the pleading to which exception is taken is true, but nevertheless contends that, as a matter of law, the pleadings do not disclose a cause of action or defense, as the case may be (see, for example, *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244B – 245E and *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C).) An exception will not succeed unless no cause of action or defence is disclosed on all reasonable constructions of the pleading in question (*Callender-Easby and Another v Grahamstown Municipality and Others* 1981 (2) SA 810 (E) at 812H – 813A). When, as in the present case, the exception is based upon an interpretation of a contract, it is necessary for the excipient to demonstrate that the contract is unambiguous."

[16] Clause 9 of the agreement deals with breach and sets out various circumstances in which default could occur. For instance it provides that

default occurs if the lessee fails to make punctual payment of any of the instalments.

[17] Clause 9.2 provides as follows:

"9.2 Upon an event of default or the loss, damage or destruction of the vehicle as determined in 6.1 the Lessor may, subject to the provisions of the Act and any other applicable legislation, at its election and without prejudice to any remedy which it may have in terms of the agreement or otherwise –

9.2.1 without notice, claim immediate payment of all instalments, whether then due for payment or not, provided that if the Lessee does not make immediate payment, the Lessor may, notwithstanding the election to claim immediate payment [in] terms of this sub-clause, claim the relief set out in clause 9.2.2 below: or

9.2.2 after due demand, cancel this agreement, obtain possession of the vehicle and recover from the Lessee, as pre-estimated liquidated damages, the total amount of payments not yet

paid by the Lessee, whether same are due for payment or not or the proceeds of any insurance policy paid by the Lessor in respect of the vehicle, In addition, the Lessor shall be entitled to claim from the Lessee any amount of any value added tax payable in respect of such damages. For the purpose of this sub-clause, "due demand" shall mean immediately on demand unless the Lessee is entitled to notice, in which case "due demand" shall mean the giving of such notice to which the Lessee is entitled."

[18] I now proceed to deal with submissions made on behalf of the defendants by *Mr Tredoux*. *Mr Tredoux* submitted , firstly that on the facts alleged by the plaintiff in its particulars of claim it is not entitled to the relief it seeks. In developing his argument he pointed out that clause 9.2.2 of the agreement, on which the plaintiff sues, requires the plaintiff to give notice to or demand of the defendants before the issue of the summons and the giving of notification of cancellation in the summons. He argued that in terms of clause 9.2.2 of the agreement the defendants are entitled to be sent a notice or demand prior to the issue of the summons and the notice of cancellation in the summons. He pointed out that to the extent that the plaintiff has not pleaded that it made a demand of the defendants or that such demand was dispensed with (which are facts which are material to be proved to entitle it to succeed in this claim), the

plaintiff's particulars of claim do not disclose a cause of action.

[19] In reply to this argument *Mr Mundell* submitted on behalf of the plaintiff that clause 9.2 of the agreement does not establish the requirement contended for by the defendants.

[20] In advancing his argument he argued that clause 9.2 of the agreement contemplates two disparate sets of scenarios. The first scenario contemplated by clause 9.2 is one where the defendant is entitled to notice and in which event the plaintiff is compelled to furnish such notice prior to cancellation. He, however, pointed out that the agreement does not define the notice referred to in clause 9.2 or describe the circumstances in which the defendant becomes entitled to such notice. He submitted with reference to the provisions of the NCA that any notice that the defendants were entitled to receive in terms of the NCA was furnished to them prior to the institution of the action. In this regard he referred to a notice in terms of section 86(10) which the plaintiff addressed to the defendants and which he submitted was the notice which the defendants were entitled to receive in terms of NCA.

[21] The second scenario, which *Mr Mundell* submitted is contemplated in 9.2.2, is one in which the defendant is not entitled to notice in any form either under section 129(1)(a) or section 86(10) of the NCA. He argued that in that

event since the concept of "due demand" referred to in clause 9.2.2 is defined to mean immediately on demand there was no need for the plaintiff to have furnished a preceding extra-judicial demand calling on the defendants to rectify their breach of the lease prior to the plaintiff acquiring the right to cancel that agreement. He submitted that communication of cancellation in the summons satisfied that requirement and in support of his submission he referred to the case of **SA Taxi Securitisation (Pty) Ltd v Mbatha** and two similar cases 2011 (1) SA (GSJ) 310 paragraph 20.

[22] In my view on a proper construction clause 9.2 gives a lessor two options in the event of default by the lessee. The lessor may without notice claim immediate payment of all instalments without cancelling the agreement. Alternatively if the lessor elects to cancel the agreement he may do so by giving a notice in terms of either section 129(1) or section 86(10) of the NCA if debt review process has started. This is so because section 129(1)(b) of the NCA precludes the initiation of the legal proceedings to enforce the credit agreement by the credit provider before first providing notice to the consumer in terms of section 129(1)(a) or section 86(10) and has met any further requirements set out in section 130.

[23] It therefore follows that as the plaintiff in the present cases elected to cancel the agreements pursuant to clause 9.2.2 it could only do so by first giving

notice in terms of section 129(1) or section 86(10) depending on whether debt review process has been initiated. In other words, for it to establish a cause of action it had to aver in its particulars of claim that it has given the requisite notice before suing for cancellation.

[24] In my view the plaintiff's particulars of claim do make this necessary averment. The plaintiff alleges in paragraph 12 of its particulars of claim that it furnished the defendants with a notice terminating the debt review in terms of section 86(10) of the NCA. It goes on to allege in paragraph 13 of the particulars of claim that the defendants are currently in default in terms of the agreement, had been in default for at least 20 (twenty) business days, at least 60 (sixty) business days have passed since the date on which the defendants applied for a debt review and at least 10 (ten) business days have elapsed since it delivered the notice in terms of section 86 (10). Section 123 of the NCA permits the cancellation of a credit agreement after the furnishing of a notice in terms of section 86(10).

[25] In paragraph 14 of its particulars of claim the plaintiff alleges that it has terminated the agreement, alternatively the agreement is terminated herewith. This, in my view, is a clear indication that the plaintiff intended to treat the agreement as cancelled. (**Thelma Court Flats (Pty) Ltd v McSwigin** 1954(3) 457 (C) at 462 C-D).

[26] In the result I find that any notice that the defendants were entitled to receive from the plaintiff in terms of the NCA was indeed furnished prior to the institution of the action and the plaintiff does allege in its particulars of claim that it forwarded to the defendants a notice in terms of section 86 (10) and that it has terminated the agreements. *Mr Tredoux's* submission that the plaintiff's particulars of claim do not disclose the cause of action must therefore fail.

[27] I now proceed to deal with *Mr Tredoux's* second point in which he submitted that the plaintiff's purported termination of the agreement was ineffectual to the extent that it was made at a time when the defendants enjoyed protection in terms of the NCA. *Mr Tredoux* went on to develop this point by contending that in respect of all the defendants the debt review process had started until it was purportedly terminated by the plaintiff by means of a notice in terms of section 86(10).

[28] In support of his contention *Mr Tredoux* cited two decisions of this division in the **Wesbank v Deon Papier and Another**, Case number 14256/10 delivered on 31 January 2011 and **Nicholas Roziers v First Rand Bank Ltd**, Case number 3050/11 delivered on 17 February 2011 which he submitted are authority for the proposition that the consumer is protected against the enforcement proceedings by the credit provider, not only once a re-arrangement

order has been made by a magistrate in terms of section 87, but also while proceedings for such order are pending.

[29] On the other hand *Mr Mundell* submitted that the defendants in the present matters are not protected against the credit agreement enforcement proceedings because when the plaintiff sent a notice in terms of section 86(10) the debt councellor had not sent a notice in terms of section 87(7)(c). He pointed out that in the absence of a section 87(7)(c) notice the plaintiff is not precluded from cancelling the agreement by giving a notice in terms of section 86(10). In support of his contention he relied on the decision of the South Gauteng High Court in the matter of **SA Taxi Securitisation** (supra) at paragraph 63 – 64. He argued that the cases of **Deon Papier** and **Nicholas Roziers,** upon which the defendants seek to rely, are distinguishable from the facts of the present case in that in those cases a notice in terms of section 87(7)(c) had been given when the credit receiver gave notice terminating debt review which therefore protected the respective defendants against enforcement proceedings. He further argued that the defendants are not without remedy. They can invoke the provision of section 86(11).

[30] In reply *Mr Tredoux* submitted that a notice in terms of section 86(10) may not be given by the credit provider unless the consumer is in default under a credit agreement that is being reviewed. He accordingly argued that in the

present case it was not competent for the plaintiff to give a notice in terms of section 86(10) in the absence of an allegation that the defendants were in breach of the agreements that were being reviewed.

[31] In order to examine whether the giving of a section 86(10) notice was precluded in these matters it is necessary to refer to section 86 in which provisions for debt review are made.

[32] Section 86 establishes a process whereby a consumer may be declared over-indebted. It states that a consumer may apply to a debt counsellor in the prescribed manner and form to be so declared. On receipt of an application , the debt counsellor is required to notify all the consumer's credit providers and every registered credit bureau.

[33] Section 86(5) requires a consumer who applies to a debt counsellor and each credit provider who receives an application of a consumer from the debt counsellor to comply with any reasonable request by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and prospects for reasonable debt rearrangement and participate in good faith in the review and any negotiations designed to result in responsible debt rearrangement.

[34] Section 86(7) sets out the possible action that the debt counsellor may

take after concluding his assessment. It provides as follows:

"(7) If, as result of an assessment conducted in terms of subsection (6), a debt counsellor reasonable concludes that –

(a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into;

(b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders –

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

(ii) that one or more of the consumer's obligations be re-arranged by –

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6."

[35] In my view the giving of a section 86(10) notice was not precluded in these matters as it is not suggested by the defendants that when the plaintiff terminated debt review process the debt counsellor had, as a result of an assessment he conducted, concluded that the defendants were over-indebted. In my view a finding by the counsellor that a consumer is over-indebted is a jurisdictional fact which must first be established where it is sought to prevent

the credit receiver from giving a notice in terms of section 86(10). In order to invoke protection afforded by a debt review process it is not sufficient for a consumer to merely state that he was protected against enforcement proceedings at the time of the cancellation of a debt review process by the credit receiver. The consumer must allege and prove firstly, that a debt counsellor concluded that he was over-indebted and secondly, that following that conclusion the debt counsellor approached the court for relief in terms of section 86(7)(c).

[36] The decision of this court in **Wesbank v Deon Winston Papier** supra, upon which *Mr Tredoux* relies for the contention that the consumer who has applied for debt review under section 86 is protected against enforcement proceedings, is distinguishable from the facts of the present case. The question in that case was whether it is competent for a credit provider to terminate a debt review process in terms of section 86(10) after an application has been lodged with the magistrate's court for an order restructuring a consumer's debts as envisaged in section 86(7)(c) of the NCA but before an order has been made in terms of section 87(1).

[37] In that case the defendant, who had encountered financial difficulties, applied on 29 September 2009 to a debt counsellor for debt review in terms of section 86(1) of the Act. The debt counsellor, on 2 October 2009, sent notices as contemplated by section 86(4)(b)(i) of the Act to all the defendant's creditors,

informing them of the defendant's application for debt review. This was followed, on 30 October 2009, by a further notice from the debt counsellor, informing all creditors that the defendant's application for debt review was successful; that the defendant was over-indebted as contemplated by section 79(1) of the Act; and that "the debt obligations were in the process of being restructured". This notice was accompanied by an 'instalment offer', proposing a re-arrangement of the debts in question. The proposal entailed that an amount of R5 300 per month would be distributed on a *pro rata* basis amongst the defendant's creditors. This would mean, in the case of the debt owing to the plaintiff, that the latter would receive monthly instalments of R1 762,44, instead of R2 772,90 per month, as originally agreed.

[38] The plaintiff did not make a counter-proposal to the suggestions of the debt counsellor, nor did it respond at all to the debt counsellor's notices The defendant thereupon proceeded to make monthly payments to the debt counsellor, which were distributed among the various creditors – including the plaintiff – in accordance with the earlier proposal.

[39] On 12 March 2010 the debt counsellor launched an application in the magistrate's court citing the defendant and his wife, together with their various creditors (including the plaintiff) as respondents. In the application the respondents were informed that the application would be made to the court on

11 June 2010, *inter alia,* for an order that the defendant and his wife are over-indebted as set out in section 79 of the Act, ordering that the defendant's debt obligations be restructured in accordance with a proposal annexed to the papers; and ordering credit providers who had given notice to terminate the debt review process to resume the debt review in terms of section 86(11) of the Act.

[40] Exactly one week before the scheduled hearing, however, on 4 June 2010, the plaintiff's attorneys notified the defendant by registered post that the plaintiff terminates 'the pending debt review with regard to the above agreement as contemplated in section 86(10) of the Act'. They further pointed out that the defendant was at that stage in arrears in the amount of R40 982,78 in respect of the credit agreement in question and that he had been in arrears for more than 20 business days. They accordingly demanded immediate payment of such arrears. The letter concluded as follows:

> 'Should you fail to (1) pay the arrears mentioned above in full; or alternatively (2) return the vehicle as contemplated in section 127 of the Act; within 10 business days of transmission of this letter, our client intends to cancel the agreement and proceed to take legal action to enforce its rights in terms of the agreement'.

[41] On 29 June 2010 the plaintiff launched the action, seeking to enforce the credit agreement. In its particulars of claim the plaintiff alleged that the debt

review process had been terminated by the delivery of its notice in terms of section 86(10), more than 60 business days after the defendant's application for debt review, and that the defendant had been in default in terms of the agreement on the date when the said notice was delivered.

[42] The court held at paragraph 34 of the judgment that:

> "...on a proper interpretation of subsection 86(10), the consumer is protected against enforcement proceedings by the credit provider, not only once a re-arrangement order has been made by a magistrate in terms of section 87, but also while proceedings for such an order are pending. The corollary is that delivery of a notice of termination by a credit provider in terms of section 86(10) is not competent once any of the steps referred to in ss 86(7)(c), 86(8) or 86(9) have been taken. Obviously this impediment will cease to exist, once a magistrate's court has dismissed the application for re-arrangement or the application has been withdrawn or abandoned."

[43] In the present case it is not suggested by the defendants that when the plaintiff terminated a debt review process in terms of section 86(10) the debt counsellor had in each case made a finding of over-indebtedness and lodged an application with a magistrate's court for an order re-structuring their debts in terms of section 86(7)(c). It is apparent from the facts of the instant case that

when a notice terminating debt review in terms of section 86(10) was given the stage of debt review process contemplated in section 86 (7) (c) had not been reached and in the circumstances the defendants are not protected against the credit agreement enforcement proceedings which the plaintiff has initiated against them.

[44] In the result the exceptions are dismissed with costs.

ZONDI, J