Republic of South Africa

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

385/2012

Case No: ~~355/2012~~

Before: The Hon Mr Justice Binns-Ward

In the matter between:

ABSA BANK LTD Plaintiff

and

MICHAEL JOHN O'CONNOR Defendant

JUDGMENT DELIVERED ON 13 MARCH 2012

BINNS-WARD J:

[1] In terms of an instalment agreement, the plaintiff, which is a registered credit provider under the National Credit Act 34 of 2005, sold a motor vehicle to the defendant. The agreement provided that the plaintiff would retain ownership of the vehicle until the defendant had discharged all of his obligations under the contract. The defendant has fallen into default in respect of his periodic payment obligations under the agreement and the plaintiff has cancelled the agreement. The plaintiff instituted action against the defendant for the delivery up of the vehicle and certain

related relief. The defendant entered an intention to defend the action. This has prompted an application by the plaintiff for summary judgment against the defendant.

[2] The defendant has delivered an affidavit opposing the summary judgment application. In the affidavit he advances the following grounds of opposition to the application:

1. That the plaintiff acted in bad faith in terminating the debt review
2. That the notice terminating the debt review was improperly served on the defendant's debt counsellor.
3. That the remedy sought by the plaintiff is excluded by the provisions of s 88(3) of the NCA.
4. That the pending debt review be resumed in terms of s 86(11) of the NCA.
5. That the court is precluded from giving judgment in the plaintiff's favour by the provisions of s 130(3)(c)(i) of the NCA.
6. That the matter should be adjourned as provided in s 130(4)(c) of the NCA.

[3] The purpose of debt review is a restructuring of monetary debt with the object of assisting the consumer in the ultimate redemption of the indebtedness. There have been a number of judgments given in recent years in which it has been observed that it is not the object of debt review to enable consumers to retain the credit provider's property in possession after the cancellation of instalment agreements due to the consumer's default. See in this regard, for example, *SA Taxi Securitisation (Pty) Ltd v Mbatha & Two Similar Cases* 2011 (1) SA 310 (GSJ); *Standard Bank of SA Ltd v Newman* (WCHC case no. 27771/2010) (judgment delivered on 15 April 2011) and *Standard Bank of SA Ltd v Jikeka* (WCHC case no. 3430/2010) (judgment delivered on 9 June 2011).

[4] In the current matter the plaintiff cancelled the agreement after giving notice in terms of s 86(10) of the termination of the debt review. The plaintiff was entitled in terms of the NCA to effect such termination if the review was not completed within 60 business days. The Supreme Court of Appeal has confirmed the competence of such termination even if at the time of termination an application on behalf of the debtor for a rearrangement order is pending before the magistrate's court. See *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA). The plaintiff's failure to respond to a debt restructuring proposal did not serve as a reason for the failure of the defendant to obtain a re-arrangement order within 60 business days of the commencement of the review. In the circumstances there is nothing in the failure to respond that derogates from the effectiveness of the plaintiff's termination of the review.

[5] I do not consider that there is any bar in s 86(10) to the giving of the required notice to the debt counsellor by telefax. As far as I have been able to ascertain, and I was not informed to the contrary during the hearing, no means of giving notice has been prescribed by regulation. Section 168 of the NCA provides 'Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either- (a) delivered to that person; or (b) sent by registered mail to that person's last known address'. The word 'delivered' is not defined in the Act. Should s 168 be of application, the word 'delivered' denotes in my view a wide enough concept to include delivery by telefax. There is nothing in the evidence to suggest that the debt counsellor was not in receipt of the notice in terms of s 86(10).

[6] Section 88(3) of the NCA finds no ground for application by reason of the plaintiff's termination of the debt review.

[7] I am not persuaded that any application for the resumption of the debt review in respect enjoys any prospect of success in the context of the cancellation of the instalment agreement. In any event, as pointed out by Fourie J in *Wesbank v Standaar* (case no. 22722/2010) (judgment dated 1 March 2011) at para 9, any such basis for resisting summary judgment requires to be supported by cogent details of the defendant's financial situation to show that good purpose within the objects of the Act would be served by the grant of a resumption order. No such detail is provided in the opposing affidavit. Moreover, having regard to the object of debt review, more particularly that it is not directed at enabling a defaulting purchaser under an instalment agreement to continue using the *res vendita*, thereby diminishing its value as security, while not complying with the provisions of the agreement, and considering the nature of the relief sought by the plaintiff, which is the delivery up of the *res vendita*, it seems to me that the resumption of the debt review could serve no practical purpose in the context of the plaintiff having competently cancelled the agreement.

[8] In view of the effective termination of the debt review, the defendant's reliance on s 130(3)(c)(i) of the NCA is misdirected.

[9] An adjournment in terms of 130(4)(c) of the NCA is an order that is provided for in the event that a court is precluded by the provisions of s 130(3) from giving judgment in favour of the credit provider. That situation does not obtain in the current case.

[10] In the result the following orders are made:

1. The cancellation of the credit agreement is confirmed.
2. The defendant is ordered to forthwith return 2009 Chevrolet Aveo 1.6 LS with engine number F16D34476851 and chassis number KL1TJ5C63AB012907 to the plaintiff.
3. The amounts paid by the defendant to the plaintiff in terms of the agreement are declared forfeit.
4. The defendant is ordered to pay the plaintiff's costs of suit on the scale as between party and party, as taxed or agreed.

A.G. BINNS-WARD
Judge of the High Court