IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 9182/11

In the matter between:

NEDBANK LIMITED Applicant

and

STOFFEL JAARS Respondent

JUDGMENT DELIVERED 4 JUNE 2012

GANGEN, A.J.:

Introduction

[1] This is an application for summary judgment in terms whereof Applicant seeks delivery of a vehicle sold to Respondent in terms of an instalment sale agreement. Applicant seeks an order-

(a) Confirming the termination of the agreement;

(b) For return of the vehicle

(c) Costs on an attorney and client scale.

The Facts

[2] On or about 13 December 2007 the Respondent entered into an instalment agreement with the Applicant whereby Respondent purchased a motor vehicle. In terms of the agreement, the Applicant would remain the owner of the vehicle until Respondent fulfilled his obligations in terms of the agreement. Respondent was to pay a deposit of R10 000,00 and thereafter instalments of R2316.04 commencing from 1 February 2008.

[3] In the event that the Respondent defaulted in his payment, the full balance would become due and payable. Further, if the Respondent breached the agreement, Applicant would be entitled to cancel the agreement, repossess the vehicle and retain all payments already made by the Respondent to the Applicant.

[4] The Applicant's claim is based on Respondent's breach of the agreement, the amount in arrears as at 9 February 2011 being R32 658.75 and the full outstanding balance at that date being R83 727.12.

[5] On or about 20 May 2009 Respondent applied to be placed under debt review when he realised his financial situation was deteriorating. On 7 October 2009 the debt counsellor sent an instalment offer to Applicant reducing the monthly instalments from R2183.78 to R1135.29. On 30 March 2010 an application in terms of Section 86(11) was made to the Magistrate's Court, Vredenburg

containing the payment proposal submitted by the debt counsellor to Applicant in October 2009.

[6] On 29 March 2011 Applicant sent a notice in terms of Section 86(10) of the Act by registered post to Respondent whereby Respondent was advised that he was in default of the credit agreement for more than 60 days from date of application for debt review and giving him notice of the termination of the debt review process with immediate effect and affording him 10 days to raise a dispute or to make arrangements.

[7] On 5 May 2011 Applicant instituted action against Respondent wherein it cancelled the agreement and claimed return of the vehicle. Respondent filed a notice of intention to defend the action and Applicant duly applied for summary judgment.

The law and the issues

[8] Respondent's opposition to the application is premised solely on the provisions of the National Credit Act("the NCA"). Respondent argues that at the stage that he applied for debt review, he was up to date with his payments in respect of the instalment sale agreement. He submits that no response was received from the Applicant and that subsequent to the offer he made payments to the debt counsellor as per the proposal.

[9] Respondent's defence is that he paid Applicant in terms of the debt counsellor's proposal as the Applicant had not responded to the proposal, that

Applicant did not act in good faith as it made no counter proposal and Applicant only terminated the debt review proceedings some 22 months after the application for debt review. It was argued that the Applicant's right to terminate the debt review proceedings only arose where Applicant acted in good faith and participated in the debt review process.

[10] Applicant submits that it duly terminated the debt review in respect of the credit agreement by complying with the requirements of Section 86(10) and that Respondent failed to bring an application for reinstatement of the debt review in this Court terms of Section 86(11).

[11] Applicant further submits that there is no application made before this Court for an order reinstating the debt review in terms of Section 86(11) and accordingly the debt review in respect of the credit agreement remains properly terminated. Applicant submits that it is only in the Section 86(11) proceedings that the participation of the credit provider 'in good faith' in the debt review becomes relevant.

[12] Applicant further submits that as early as October 2009 Respondent failed to pay the full monthly instalment of R2316.04 and only paid R1103.10 and therefore was in arrears from that stage.

[13] Section 86(10) of the Act states as follows-

> 'If a consumer is in default under a credit agreement that is being reviewed in terms of this 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 counsellor; and

(c) the National Credit Regulator,

at any time at least 60 business days after the date on which the consumer applied for the debt review.'

[14] It us clear from the wording of Section 86(10) that *'If a consumer is in default under a credit agreement that is being reviewed,'* that the credit provider may give notice to terminate the review "*at any time at least 60 business days after the date on which the consumer applied for the debt review.*'

[15] In *Collett v Firstrand Bank* (766/2010) [2011] ZASCA 78, the SCA held that a credit provider is entitled to terminate the debt review process at any time after the prescribed 60 day period has expired, even after a referral of the debt review to the Magistrates' Court.

[16] The question is whether the Respondent was in default under the credit agreement. The monthly instalment due by the Respondent was R2183.78. The proposal made in terms of the debt review was R1135.29 per month. No order was made in that regard. Respondent states that he was not in arrears at the time of applying for debt review. From the information provided by the Respondent, it appears that from October 2009 Respondent paid amounts of approximately R1103.10 and in some months amounts less than R600. This is not in accordance with Respondent's contention that *"From these statements the Court will note that I have been making regular payments since I have* applied for debt review and have never skipped a single payment". It is clear that the Respondent was not only in arrears with his payments in terms of the credit agreement at the time that Applicant gave

notice to terminate the debt review but also in default of the payments per the debt review proposal .

[17] The question is then raised as to the consideration of the bona fides of the credit provider and delay in terminating the review proceedings. The delay in terminating the review proceedings is not on its own an indication of mala fides. In fact, it may be argued that the delay in the termination of the review proceedings was to the advantage of the Respondent.

[18] The Applicant's case that the question of good faith and the credit provider's participation in the debt review proceedings is only relevant in the Section 86(11) proceedings is supported by the dictum in the *Collett* case(supra) where it was stated –

> "However, the right of the credit provider to terminate the review is balanced by Section 86(11) which provides that is the credit provider has given notice to terminate and proceeds to enforce the agreement 'the Magistrate's Court may order that the debt review resume on any conditions that the Court considers to be just in the circumstances. It is at this moment that the participation of the credit provider in the debt review becomes relevant"

[19] The Respondent confirms that he applied to be placed under debt review in May 2009. He further states that the application for restructuring was placed on the roll for the first time in June 2010 and that at the time of making the affidavit, the matter was still pending and would be heard again in July 2011. The Respondent has however not placed information before this Court as to

why an order was not made in June 2010, the reason for the postponement or what had transpired in the intervening period.

[20] The Respondent in this matter does not indicate that he or the debt counsellor made any attempt to communicate with the Applicant and in the absence of such information, it cannot be said that the Applicant did not act in good faith.

[21] In the unreported case of S A Taxi Securitisation (Pty) Ltd v Ndobela Joseph case no 9162/2010 (March 2011) in the South Gauteng High Court, Mokhari A J considered the duty of the parties to act in good faith in participating in the debt review process and at p12 held as follows-

> "The duty to act in good faith is not only confined to credit providers, it extends to consumers as well. It is a reciprocal duty on both parties to engage meaningfully in debt review negotiations. What I imply is that a consumer is not permitted to sit back when he or she does not receive any counter proposal or response from the credit provider and allow the 60 business days to pass before raising an argument that the credit provider acted in bad faith. The consumer has a reciprocal duty to act diligently and proactively the moment it becomes clear that the credit provider is not engaging in good faith or does not respond to his or her proposals for debt review. In this regard, debt counsellors have a meaningful role to play."

And further at p14 the Court held -

> "In my view a consumer who can demonstrate that he or through his or her debt counsellor acted proactively the moment it became clear to him/her that the credit provider does not act in good faith, and refer the matter to the Magistrate within 60 business days, is entitled to raise a point that the credit provider failed to act in good faith."

[22] The further issue in this matter is that the Applicant is claiming return of the vehicle. The position where a credit provider was proceeding to recover his security was set out in detail in *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 (1) SA 310 (GSJ) at p317, where the Court held as follows:

> " I stress that all of these objectives are directed at the consumer's indebtedness - ie the claim for the outstanding deficiency after realisation of the lender's securities (the deficiency claim). The intention is not to unfairly deprive lenders of their security.
>
> Where a consumer is over-indebted, the credit provider's prospects of recovering from the consumer are often effectively limited to the recovery of the creditor's security. If lenders are unable to recover deteriorating security, such as motor cars, promptly, the consequences would be economically disastrous for asset-based lenders, especially those lending to the less affluent. It would have the effect of reducing available credit and pushing up the cost of credit for those consumers who are performing their obligations. Taking these practical factors into account is part of balancing the interests of credit providers and consumers.

And further at p319

> "It seems unlikely that the legislature ever intended that the consumer could keep the 'money and the box'. If the consumer obtained possession and use of a motor vehicle in circumstances in which no credit should have been extended to the consumer, it would be fundamentally unfair and counterproductive for the consumer to continue to use the vehicle, while at the same time not making any payments under the agreement."

And at p319 -320

"On the other hand, if the effect of the agreement is merely suspended, all elements of the agreement would have to be suspended. This would mean that the consumer would not be entitled to continue to retain possession of the vehicle during the period of suspension. At the same time, the consumer would not have to make any payments under the agreement during the suspension period.

I agree with the following statements of my sister Masipa J in Standard Bank of South Africa Ltd v Panayiotts 2009 (3) SA 363 (W) at 370:

'[77] In any event, my view is that the NCA does not envisage that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods which form the subject-matter of the agreement. Such goods should be sold to reduce the defendant's indebtedness.

. . .

[81] The purpose of the NCA is, inter alia, to provide for the debt re-organisation of a consumer who is over-indebted, thereby affording such consumer the opportunity to survive the immediate consequences of his financial distress and to achieve a manageable financial position. . . .'

That the NCA does not contemplate the consumer retaining 'the money and the box' is also borne out by the provisions of s 130(1) of the NCA. That section provides that the failure of a consumer to surrender its security is a factor that militates in favour of immediate enforcement of the credit agreement by the credit provider. "

And at 323-324

"Although the line of defence is convoluted, it seems to be that the plaintiff is barred from availing itself of the provisions of s 86(10) of the NCA because the plaintiff allegedly did not participate in good faith in the debt review procedure. I

express no opinion on whether a credit provider's failure to participate in good faith in the debt review procedure may constitute a defence to a monetary claim under the NCA. However, I cannot see how a lender's failure to participate in good faith would entitle the borrower to retain the security while at the same time suspending all payments under the credit agreement."

[23] The position was also dealt with in the unreported judgment of *Standard Bank of South Africa Ltd v Christopher Newman* Case number 27771/2010 delivered 15 April 2011 where Binns-Ward J held as follows on page 6:

"The plaintiff has cancelled the instalment sale in question and, in the language of the Act, seeks at this stage only to 'enforce its security' by obtaining repossession of the motor vehicle. I do not consider that the object of debt review and restructuring is to enable a consumer in terms of an instalment sale agreement to continue in possession and use of the credit provider's property after the relevant contract has been cancelled. The object of debt review is directed as a restructuring of monetary debt with the object of the ultimate settlement of such debt".

[24] In *Notri Securitisation 3 (Pty) Ltd v Desmond* (2274/10) [2011] ZAECPEHC 3 (15 February 2011, Unreported), Eksteen J held as follows at par 17 – 18:

"The effect of a notice in terms of section 86(10) is that the entire debt review process in respect of the credit agreement in issue is terminated. If the process is validly terminated, as it was in this case, then the matter is no longer before a debt counsellor. The credit provider may then, subject to the provisions of section 130(1) and of section 86(11), proceed to enforce the obligations of the credit consumer under the credit agreement.

In terms of section 86(11) a Magistrate's Court may order that the process resumes. Until such order is made the process is suspended and the matter is not before a debt counsellor. A debt counsellor can accordingly take no further effective steps in

terms of section 86 unless and until an order is first obtained in terms of section 86(11) that the process resume".

[25] In the unreported judgment of *Wesbank v Standaar* Case No 22722/2010 handed down on 1 March 2011, Fourie J held as follows:

"[6] It is trite that a defendant in a summary judgment application has to fully set out the nature of his defence in order to avoid summary judgment. To this end he/she should set out facts in a manner that is not needlessly bald, vague or sketchy. See Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA (T) at 228. What is required is that the defendant should set out facts in a manner which, if proven at trial, would entitle him to an order in terms of section 86(11).

[8] In my view [the allegations made by the defendant] fall woefully short of what is required by a defendant in summary judgment proceedings to constitute a bona fide defence.

[9] I agree with the submission made on behalf of the plaintiff that, at least, facts ought to have been provided regarding:

(a) Details of defendant's income, expenditure and financial prospects to show that he is over-indebted; and

(b) the proposals that he makes to his creditors and why he asserts the proposals are reasonable in the circumstances".

[25] I agree with the learned judge. As set out earlier, the Respondent has only placed very limited information before this Court. He attached the initial application made to the Vredenburg Magistrate's Court and his statements. Those statements, in any event contradicted his version that he made regular payments.

[26] For the reasons set out above, the application for summary judgment must succeed.

[27] With regard to the question of costs, the Applicant as the successful litigant is entitled to its costs. However, having regard to the quantum of the amount due, I am of the view that the Applicant is only entitled to costs on the Magistrate's court tariff.

ORDER

[28] It is accordingly ordered that-

(a) the termination of the instalment sale agreement in respect of the vehicle OPEL CORSA UTILITY 1.7 Dti Sport with engine number Y17DT01113894 and chassis number ADMRF80AP4A225476 is confirmed;

(b) Respondent is directed to forthwith deliver the vehicle to the Applicant;

(c) The Respondent is to pay Applicant's costs of suit on an attorney and client scale on the Magistrate's Court tariff.

GANGEN AJ.