Republic of South Africa

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

Case No: 16098/2011

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

THE MOTOR FINANCE CORPORATION Plaintiff

and

JO-LEEN HERBERT Defendant

JUDGMENT DELIVERED: 24 APRIL 2012

BINNS-WARD J:

[1] In this matter the plaintiff has applied for summary judgment for the delivery up of a motor vehicle that had been sold by it to the defendant in terms of an instalment sale agreement. The instalment agreement was a credit agreement to which the provisions of

National Credit Act 34 of 2005 ('the NCA') applied.The defendant has opposed the application. Her defences may be summarised as follows:

1. That the action was instituted in breach of the requirements of s 130(1) of the NCA.[1]

2. That the plaintiff had not sufficiently alleged compliance with s 86(10)[2] of the NCA, in respect of its purported termination of the debt review process.

3. That an order in terms of s 86(11)[3] of the NCA should be granted, or that the debt should be dealt with in terms of s 85 of the NCA,[4] in other words that the debt review process should be resumed.

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[1]Section 130(1) of the NCA provides:
Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (9), or section 129 (1), as the case may be;

(b) in the case of a notice contemplated in section 129 (1), the consumer has-

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

[2]Section 86(10) of the NCA provides:
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.

[3]Section 86(11) of the NCA provides:
If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.
By means of an interpretative reading in the SCA has determined that the reference to 'the Magistrate's Court' includes the High Court. See *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA).

[4]Section 85 of the NCA provides:
Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may-

(a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86 (7); or

(b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

(The defendant also alleged that the plaintiff had failed to apply with an agreed industry code of conduct and had, in that regard, acted in contravention of the good faith requirements of the statute. However, quite correctly, that defence was not persisted in at the hearing.)

[2] In order to properly assess the validity of these defences it is necessary to set out the history. This is most conveniently done in point form, consistently with the plaintiff's counsel's heads of argument:

1. The instalment sale agreement was concluded in March 2008.

2. The defendant, and her husband, to whom she is married in community of property, applied for debt review in terms of s 86(1) of the NCA on 30 July 2009. The instalment sale debt was included in this review.

3. The defendant fell into arrears in respect of the payment of the instalments due in terms of the credit agreement.

4. On 5 October 2010 the defendant applied to the magistrate's court for a debt restructuring order in terms of s 86(7) of the NCA.

5. The debt restructuring application, which was opposed by the plaintiff, was set down for hearingon 20 October 2010, but was dismissed on that date for want of prosecution - the defendant's then legal representative having failed to appear in court to move for relief in terms of the application.

6. On 1 July 2011, the plaintiff, being unaware of the determination of the debt restructuring application, purported to give notice of the termination of the debt review in terms of s 86(10) of the NCA.

7. On 4 August 2011 summons in the action was issued. The summons was served on the defendant on 11 August 2011. The summons incorporated notice of cancellation of the credit agreement.

8. The application for summary judgment was served on the defendant on 25 August 2011.

9. The summary judgment application was called before Baartman J in the Third Division on 21 September 2011. The learned judge appears to have considered that the plaintiff was required by the NCA to have given notice to the defendant in terms of s 129(1)(a) of the Act before commencing the action. Apparently acting in terms of s 130(3)(a)[5] read with s 130(4)(b) of the NCA[6], Baartman J made an order postponing the application for summary judgment *sine die* and directing the plaintiff to send a notice to the defendant in terms of s 129(1)(a), giving it leave to re-enrol the application for summary judgment after it had done so and had filed a further affidavit to show that it had complied with the order.

10. On 7 November 2011, the magistrate's court made an order rescinding the order which had been made on 20 October 2010.

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[5]Section 130(3)(a) of the NCA provides:
Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with

[6]Section 130(4)(b) of the NCA provides:
In any proceedings contemplated in this section, if the court determines that-
(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (a), or has approached the court in circumstances contemplated in subsection (3) (c) the court must-

(i) adjourn the matter before it; and
(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed

11. After the requirements of the order made by Baartman J had been satisfied, the summary judgment application was re-enrolled and came before Weinkove AJ in the Third Division on 6 February 2012. For reasons which are not apparent, the learned acting judge did not dispose of the application, but postponed it for hearing on the semi-urgent roll in the Fourth Division. The matter thus came before me today.

[3] In my judgment,the debt review came to an end when the debt restructuring application was dismissed in the magistrate's court on 20 October 2010. By reason of the provisions of s 88(3)(b)(i)[7] read with s 88(1)(b)[8] of the NCA, the plaintiff was thereupon entitled to institute enforcement proceedings against the defendant without further compliance with statutory formality. The defendant's attorney argued, however, that because the debt restructuring application had been dismissed for want of prosecution because of the non-appearance of the defendant's legal representative, and not after a consideration by the magistrate of the merits of the application, s 88(1)(b) did not apply. He submitted that in the circumstances it could not properly be said that the magistrate's court had '*rejected the consumer's application*' within the meaning of the provision. I do not find any merit in that argument.

[4] The provisions of the Act must be construed contextually with appropriate regard to the apparent objects of the statute. See in this regard ss 2 and 3 of the NCA. It would not

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[7] Section 88(3)(b)(i) of the NCA provides:
Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until-
(b) one of the following has occurred:
(i) An event contemplated in subsection (1) (a) through (c); or…

[8] Section 88(1)(b) of the NCA provides:
A consumer who has filed an application in terms of section 86 (1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, other than a consolidation agreement, with any credit provider until one of the following events has occurred:
(a)…
(b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or
(c)…

serve the purposes of the Act to construe the provision in the manner contended for on behalf of the defendant. It has been recognised that the Act strives to strike a fair balance between the interests of credit providers and those of consumers. If a consumer's application for debt restructuring is dismissed, for whatever reason, the debt review process of which the application isthe culmination - in terms of the statutory scheme - is thereby terminated. The events referred to in s 88(1)(a)-(c) of the NCA are all by their character inherently bound up with the termination of the debt review process. The terminal effect of the order made dismissing the debt re-arrangement application could only be undone by an appropriate application for rescission of the order. Until and unless the order was rescinded the defendant's creditors were entitled to order their affairs consistently with the terminating effect of the dismissal order. There is nothing in the statute which suggests the existence of an obligation on their part to hold back pending possible future developments. In the circumstances I hold that any order dismissing a debt restructuring application, irrespective of the reason therefor, effectively constitutes a 'rejection' of the application within the meaning of s 88(1)(b) of the NCA.

[5] In the circumstances I consider that the interlocutory order made by Baartman was *per incuriam*, and the requirements it gave rise to may be disregarded. There was no obligation on the plaintiff to have preceded its institution of the action with notice to the defendant in terms of s 129(1)(a) of the NCA. The defendant's attorney, quite correctly in my view, did not contend to the contrary in the event of it being held, as it has been, that on the facts the position is governed by s 88(3)(b)(i) of the Act. The order made by Baartman J was in any event, according to its tenor, not intended to prevent a determination of the summary judgment application on its merits.

[6] It is thus not necessary to consider the defence premised on an inadequate allegation of compliance with s 86(10) of the NCA. Suffice it to say, however, that had s 86(10) in fact been applicable, I would not have found any merit in the defence. The summons contained allegations specifying the dates upon which notice in terms of s 86(10) was sent to each of the relevant parties and a copy of the notice and proof of posting was annexed to the summons in support of the allegations. The position differed *toto caelo* from that which was found to be wanting in the summons in *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA).

[7] This application is, as mentioned, for an order for delivery up. The underlying contract has been competently cancelled by the plaintiff and there is no scope in the context of debt review for its re-instatement. See e.g. *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD) and *Standard Bank of South Africa Ltd v Newman*[2011] ZAWCHC 91 (15 April 2011). Section 86(11) does not appear to be relevant because the debt review was not terminated in terms of s 86(10), but relief in terms of s 85 would also not avail the defendant against the remedy sought by the plaintiff consequent upon the cancellation of the instalment sale agreement. When I put this to him, the defendant's attorney realistically conceded as much.

[8] The defences put up by the defendant do not bear scrutiny and the plaintiff is therefore entitled to summary judgment, substantially as prayed. I should perhaps mention, however, that Mr *Wessels*, who appeared for the plaintiff, quite properly drew my attention to an unreported judgment of Lopes J in the Pietermaritzburg High Court (*Subramanian v Standard Bank Ltd* [2012] ZAKZPHC 12 (13 March 2012))in which it was held, consistently with other decisions in KwaZulu-Natal, that notices which fall to be given in terms of the NCA to a person who is married in community of property should be given to both spouses.

In view of the conclusion that I have reached on the issue of notice in terms of s 86(10) in the current matter it was not necessary to reach this point. However, it might limit this point arising in this jurisdiction were I to take the opportunity nevertheless to state, respectfully, that I consider the approach adopted by the KwaZulu-Natal High Court to be without foundation. The relevant provisions of the NCA require notice to be given to the '*consumer*'. The word '*consumer*' is specially defined in s 1 of the NCA.[9] In the current case the defendant, as the sole lessee in terms of the instalment agreement (see the definition of '*lease*' in s 1 of the NCA) falls within paragraph (f) of the definition. Her husband does not. There is in my view no warrant to impose on credit providers notice obligations beyond those expressly required in terms of the Act.

[9] The following order is made:

1. Summary judgment is granted in favour of the plaintiff against the defendant in terms of paragraphs (a), (b) and (c) of the application for summary judgment, dated 24 August 2011.

2. The defendant is directed to pay the plaintiff's costs of suit on the scale as between party and party.

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[9] ***'consumer'***, *in respect of a credit agreement to which this Act applies, means-*
(a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;
(b) the party to whom money is paid, or credit granted, under a pawn transaction;
(c) the party to whom credit is granted under a credit facility;
(d) the mortgagor under a mortgage agreement;
(e) the borrower under a secured loan;
(f) the lessee under a lease;
(g) the guarantor under a credit guarantee; or
(h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement

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