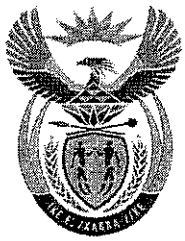


IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: **13392/12**

In the matter between:

MERCEDES-BENZ FINANCIAL SERVICES

SOUTH AFRICA (PTY) LTD Applicant/Plaintiff

and

HEINRICK DANIEL HOLTZHAUZEN Respondent/Respondent

JUDGMENT DELIVERED THIS 7TH DAY OF DECEMBER 2012

DOLAMO, AJ

[1] During the period 23 January 2007 to 9 April 2009 the Defendant purchased from the Plaintiff 13 motor vehicles in terms of instalment sale agreements (the "agreements"). In terms of these agreements the Plaintiff would remain the owner of

the vehicles until all instalments have been fully paid by the Defendant. In the event of the Defendant breaching the agreements the Plaintiff would be entitled to cancel the agreements and claim back the vehicles. The combined purchase price of these vehicles was the sum of R4 298 578.37. These vehicles included *bakkies* and luxury sedans. The total monthly instalments amounted to R97 189.66. The Defendant took delivery of all these vehicles, is still in possession thereof and presumably uses all of them.

[2] The Defendant breached material terms of these agreements by failing to make regular payments as provided for in the terms and conditions of each and every one of those agreements with the result that as on 5 June 2012, was in arrears in the sum of R4 298 579.37. The total balance outstanding being the sum of R6 115 621.35. The last payment made was on 23 July 2009. Since then he had been engaged in litigation with the Plaintiff which, for various reasons, instituted and withdrew actions against him. The current actions wherein it sought to cancel the agreements, claim return of the vehicles and costs on the scale as between attorney and own client is but one of such actions. As with the previous actions defendant entered appearance to defend this matter. And as with the previous matters, the Plaintiff applied for summary judgment in this matter which the Defendant also opposed raising a plethora of defences.

[3] These defences can conveniently be summarised as follows: at all material times hereto the Defendant was married in community of property and his wife, as such, has a direct and substantial interest in the relief being sought against him. Her

omission from the proceedings amounted to a misjoinder; that the Plaintiff had previously instituted fourteen separate actions against him under different case numbers and proceeded with summary judgments against him in thirteen of the matters, all of which the Defendant opposed and filed opposing affidavits. Once there was opposition to these matters the parties agreed that all the summary judgment applications would be heard simultaneously under case no: 25620/2009 being one of these fourteen cases. But on the date of hearing all thirteen applications, as well as the claims on which they were based, were withdrawn. The Plaintiff however omitted to withdraw the fourteenth case which was under case no: 26482/2009 prior to instituting the current proceedings under case no: 13392/2012. As a result the Defendant raised the defence of *lis pendens;* and that the Plaintiff failed to serve on the Defendant the affidavits which it filed in court.

[4] The Defendant further raised the defences that the Plaintiff had failed to annex the original agreements to the summons and that the attempts to explain the missing documents with an affidavit deposed to by its employee, one Kavitna Kaylaser, was *mala fide*. The Defendant also alleged that there was currently a debt review application pending in the George Magistrate Court of which the Plaintiff was aware and that this would most certainly be affected by any order made by this court should the court make such an order. I need to point out however that while the debt review proceedings were still pending in the Magistrate's Court the debt counsellor advised the Plaintiff in writing that he had cancelled the debt review process due to Defendant's failure to pay the debt counsellor's fees. The Defendant further averred that he was over-indebted alternatively that Plaintiff extended reckless credit.

[5] At the hearing of this application, Mr Van Dugteren, who appeared for the Defendant pressed ahead with only two of these defences, namely, the non-attachment of original agreements to the particulars of claim and the pending debt review proceedings. As regards the debt review process, the Defendant's submissions were that the debt counsellor's termination of the process was invalid and that therefore the process was still underway which constitute a bar to the present proceedings.

[6] The defence of failure to annex the original agreements to the particulars of claim was dealt with in a perfunctory manner as to amount to an abandonment. I deem the decision to abandon this defence to have been a wise decision as it had no merits. The affidavits which are filed in compliance with the Consolidated Practice Directive 33 are for the court's purpose to satisfy it that there has been compliance with the provisions of the NCA and their omission does not amount to a *bona fide* defence against summary judgment.

[7] For completeness' sake I deal with the other defences raised by the Defendant though he did not persist with them at the hearing of the application. It is not necessary to join spouses married in community of property. Section 17(5) of the Matrimonial Property Act 88 of 1984 gives a creditor the option, where a debt is recoverable from a joint estate to sue the spouse who incurred the debt or both spouses jointly.

[8] As regards the defence of his *lis pendens* the Plaintiff proved that the matter in case no 26482/2009 was also withdrawn and the notice of withdrawal served on the Defendant's attorneys of record. In any event a plea *lis pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The court has a discretion to stay one or other of the proceedings brought in respect of the same subject matter.

[9] The only defence worth considering is the one involving the alleged invalid termination of the debt review. The essential question for determination therefore is whether the debt review was properly terminated. A corollary question thereto is whether the Plaintiff was entitled to proceed by way of section 129 of the NCA after the "purported" termination or was compelled to proceed by way of section 86(10) of the NCA and properly terminate the debt review.

[10] The Defendant argued that the debt review application had been pending in the George Magistrate Court and the Plaintiff participated therein. Consequently the debt counsellor could not summarily withdrew it. The Defendant argued that the only instance where the debt counsellor could withdraw that application was in terms of section 86(7)(a) and if as a result of an assessment conducted in terms of subsection (6) reasonably concluded that the consumer was not over-indebted. This the Defendant argued, will be the only instance where he can withdraw the application even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into. To substantiate this argument Mr Van Dugteren pointed out that the form 17.4 used by the debt

counsellor to notify the parties about his decision to terminate the debt review was not provided for in the act or regulations promulgated thereunder.

[11] Mr Steyn, on behalf of the Plaintiff argued that the termination of the debt review was valid. He argued that though section 86 does not provide the debt counsellor with the powers to terminate the process it was implicit that he would be able to do so where there was good cause. The failure by the debtor to pay his fees would constitute good cause to terminate the process. He also argued that it was not evident from the defences raised whether the Defendant was alleging over-indebtedness or claiming for declaration of recklessness. He however submitted that on either of these the Defendant had no disclosed a *bona fide* defence to avert summary judgment being granted against him. In *SA Taxi Securitisation (Pty) Ltd v Campher* an unreported judgment in the Eastern Cape High Court case no 5081/2009 it was held at paragraph [14] that a defence based on the over-indebtedness of the debtor does not avail a debtor in circumstances where the creditor seeks the return of goods in which ownership vests in the creditor.

[12] One of the innovations brought about by the NCA is the right of debtor to apply for debt review, to be declared over-indebted and to have his debt arising from credit agreements re-scheduled. The process is not intended to stifle a credit provider in enforcing his rights under the credit agreement or to relieve the consumer of his obligations. By providing for these processes the NCA aims at affording a consumer an opportunity to rehabilitate himself by taking advantage of the debt restructuring process. The co-operation of the debtor with his debt counsellor is

therefore vital for this process to yield the desired benefits: which are to afford the debtor debt relief measures to deal with the problem of over-indebtedness. The debtor is not afforded a sanctuary to avoid his contractual obligation. The debtor must therefore comply with all the requirements to set this process in motion. One of these requirements in terms of section 86(3) of the NCA is to pay the prescribed application fee. The requirement to pay fees is repeated in Regulation 24(1)(d) which states that a consumer who wishes to apply to a debt counsellor to be declared over-indebted must pay the debt counsellor's prescribed fees, if any. Without the payment of these fees the debt counsellor, in my view, would have no mandate to act for the debtor and consequently to bring the debt review application. This in my view constitute good cause for the debt counsellor to cancel the process.

[13] The argument that the Plaintiff was supposed to follow the procedure set out in section 86(1) and not section 129, of the NCA to terminate the review which was pending before the George Magistrate's Court presupposes the existence of a valid debt review. On receipt of the letter from the debt counsellor advising that the application for debt counselling has been cancelled by the debt counsellor, the Plaintiff was entitled to proceed with a section 129 notice. It was not for the Plaintiff to determine whether it was validly terminated nor to proceed with Section 86(10) on concluding that the termination was invalid. Section 86(10) notice is employed by a credit provider who wish to terminate the review where the consumer is in default under a credit agreement which is being reviewed in terms of section 86. *In casu* the credit agreement which was under review was cancelled by the debt counsellor and there was therefore no need to employ section 86(10) of the NCA.

[14] Even if I may be incorrect to hold that the debt review was properly cancelled or terminated by the debt counsellor there is in my view good cause to grant the order in terms prayed for. The Defendant was served with the summons to which was attached a notice of cancellation of the debt review process by his debt counsellor. He claimed not to have received this notice and in paragraph 44 of the affidavit resisting summary judgment undertaking to investigate and take up the matter of the cancellation of the debt review (which in my view is an acknowledgement by the Defendant that the process had been cancelled) with the debt counsellor. He made this undertaking 4 September 2012 when he deposed to the affidavit opposing summary judgment. He does not explain what he did since the service of the summons upon him on 16 July 2012 up until 4 September 2012. Up till the hearing of the matter Defendant has not deemed it necessary to take the court into his confidence and explain the steps he took and what was the outcome of his enquiry with his debt counsellor. There is clearly no display of the intention to pursue the debt review process other than to use the fact that it was pending as a shield against the Plaintiff's legitimate claim.

[15] Defendant further alleged that the Plaintiff was reckless in extending to him the credit in circumstances where he was not in a position to meet his obligations. He concludes that the Plaintiff's failure to conduct a proper assessment in terms of section 81 of the NCA, alternatively extending credit to him despite all indications that he was over-indebted constitutes reckless credit and render the agreements reckless in terms of the NCA. In making this allegation he however does not outline his financial position at the time when this credit was extended to him. This would have enabled this court to determine whether this defence of reckless credit is a

bona fide defence for purposes of opposing summary judgment. Nor does he take advantage of section 127 of the NCA and return the vehicles to the Plaintiff. In *S.A Taxi Securitisation (Pty) Ltd v Chesane* 2010(6) S.A.559 (GSJ) Boruchowitz J held at [27] that:

> *"Even should the respondent be successful at the trial in demonstrating that the credit grant to him was reckless, then and in that event the probabilities are that the court hearing the matter will, in terms of s 83(2)(a) of the NCA, set aside all or part of the respondent's rights and obligations in terms of the credit agreements, in which event the vehicles will be returned to the applicant, and any remaining indebtedness of the respondent to the applicant will be the subject-matter of the court's discretionary re-organisation. It is highly improbable that the trial court will allow the respondent to retain possession of both vehicles, operate them for profit as taxis, and not make any payment therefore to the applicant"*

[16] The balance owed by the Defendant is substantial and all indications are that Defendant is unable to pay. It will defeat the purpose of the NCA in the circumstances to allow him to continue in possession of the vehicles while not paying for them.

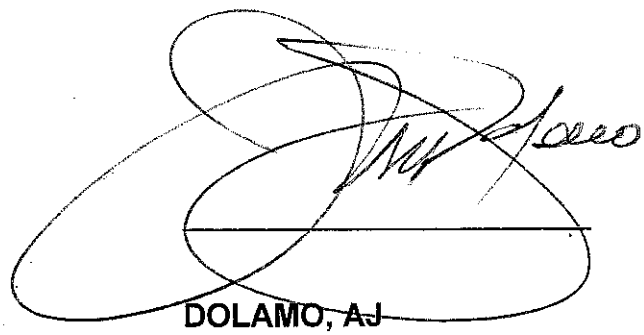
[17] The order I make therefore is the following:

17.1 summary judgment is hereby granted;

17.2 the agreements set out in Annexure B1 to the summons are hereby cancelled;

17.3 the Defendant is ordered to return to the Plaintiff all the vehicles B1'

17.4 the Defendant is ordered to pay costs on the scale as between attorney and client.



DOLAMO, AJ