Republic of South Africa

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

Case No: 2656/14

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

SA TAXI SECURITISATION (PTY) LTD Plaintiff

and

JOHN PHUMELELE MELAPHI Defendant

JUDGMENT: DELIVERED: 2 APRIL 2014

BINNS-WARD J:

[1] The plaintiff sold a 15-seater Toyota Quantum Sesfikile motor vehicle to the defendant in terms of an instalment sale agreement. The contract provided that ownership of the vehicle remained vested in the plaintiff until such time as the defendant had discharged all his obligations under the agreement. It also provided that if the defendant defaulted on his contractual obligations the plaintiff would be entitled to terminate the agreement and take possession of the vehicle. The instalment agreement was a 'credit agreement' that was subject to the National Credit Act 34 of 2005 ('the NCA'). It is common ground that the defendant fell into arrears with the periodic payments that he was required to make under the agreement. The summons alleges that the defendant was R44 254,72 in arrears as at 13 February 2014. The plaintiff has given notice of cancellation of the contract and has instituted proceedings by action for the return to it of the vehicle and certain other consequential relief.

[2] Prior to the institution of the action, the defendant had applied for debt relief in terms of part D of chap. 4 of the NCA. In that connection, an application, which, according to the tenor of the notice of application, was made in terms of '*section 86(7) read with sections 83(3)(b), 86(8)(b), 86(11), 87(1), 85 & 79*' of the NCA, is currently pending at the Khayelitsha Magistrates' Court. The plaintiff alleged that it had given the defendant notice of termination of the debt review in terms of s 86(10) of the NCA, and thereby complied with the requirement of s 129(1)(b)(i) of the Act.[1] The defendant was alleged to still be in default when the action was instituted, the period referred to in s 130(1)(a) of the Act[2] having by then elapsed.

[3] The defendant entered appearance to defend the action and has opposed the subsequently instituted application by the plaintiff for summary judgment in respect of its prayer for delivery up of the vehicle.

[4] The defendant's opposing affidavit set forth a number of defences that the defendant says that he intends to plead in the action. Firstly, he contended that the stipulated interest charged under the agreement (24% per annum) exceeds the maximum rate permitted in terms of regulation 42 of the National Credit Regulations, 2006[3] (which the defendant averred to be 21% per annum[4]). He averred that in the result he was overcharged for interest in the sum of R21 216,03 as at 13 February 2014. Secondly, the defendant averred that in the context of his application for declarations of reckless credit, the provisions of s 86(10) of the NCA[5] do not avail the

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[1] Section 129 (1)(b) of the NCA provides:

> *If the consumer is in default under a credit agreement, the credit provider-*
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> *(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before-*
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> *(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and*
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> *(ii) meeting any further requirements set out in section 130.*

[2] Section 130(1) (a) 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-*
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> *(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.*

(The reference to s 86(9) is plainly intended to mean s 86(10).)

[3] Published under GN R489 in *GG* 28864 of 31 May 2006 as amended by GN R1209 in *GG* 29442 of 30 November 2006 and GN R604 in *GG* 30713 of 29 May 2008.

[4] It is in fact currently 22,1% per annum.

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

plaintiff. He alleged that in any event he had not received the s 86(10) notice. Thirdly, he averred that the contract was concluded in the context of reckless lending within the meaning of that concept in part D of chap 4 of the NCA and that he would be entitled to ask the trial court to partially set aside and reorder his obligations under the contract.

[5] The plaintiff's counsel pointed out in respect of the first of the aforementioned defences that even were the defendant to be correct in his reliance on regulation 42 (which counsel did not concede), crediting him with the amount that he contended had been overcharged to interest would still leave him in the red in respect of payments due and thus would not detract from the validity or effectiveness of the plaintiff's cancellation and consequent entitlement to return of the vehicle. In my judgment the soundness of that argument is irrefutable. (It is unnecessary to make any finding in that regard, but it is in any event clear that the defendant's calculations are incorrect. The contract provides for a variable interest rate 'linked to prime'. I think the court is entitled to take judicial notice of the fact that the prime rates charged by lending institutions are in practice directly related to the ruling SA Reserve Bank repurchase rate. In other words, the prime rate rises and falls in line with rises and falls in the 'repo' rate. The maximum permitted rates of interest provided for in terms of regulation 42 also fall to be calculated with regard to the ruling SA Reserve Bank Repurchase Rate. Regulation 42 accordingly falls to be construed with reference to extraneous fact. It is a matter of public record that there have been two changes in the SA Reserve Bank repo rate during the period from inception of the contract and 13 February 2014,[6] whereas the defendant's calculation assumes a constant rate of 5%. The rate has in fact been fixed at 5.5% for two periods during the currency of the contract. During those periods the maximum permitted rate of interest on credit agreements which qualify as credit facilities would have been 22,1% per annum.) The correct interest calculation is an issue that may bear relevance on the

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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.

[6] The rate was fixed at 5.5% on 19 November 2010, 5% on 20 July 2012 and 5.5% on 30 January 2014. The contract was entered into during March 2011.

consequential monetary relief to be claimed by the plaintiff when it is has determined the value of the vehicle after taking repossession, but it has no relevance in the peculiar circumstances to the claim for delivery up of the vehicle.

[6] There is also no merit in the defendant's second defence in my view. The provisions of s 86(10) of the NCA plainly bear on any credit agreement debt being reviewed in terms of s 86 of the Act. It is common ground that the plaintiff's contractual claim against the defendant constituted such a debt and that the defendant had submitted it for review in terms of the section. One of the matters that a debt counsellor who has accepted an application in terms of s 86 must determine, in the prescribed manner and within the prescribed time, is '*whether any of the consumer's credit agreements appear to be reckless*'. The obligation to make this determination arises '*if the consumer seeks a declaration of reckless credit*'; see s 86(6).[7] The tenor of the application made by the debt counsellor to the magistrates' court in terms of s 86(7) of the NCA,[8] annexure QZ2 to the opposing affidavit, confirms that declarations of reckless credit must have been sought by the defendant because relief

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[7] Section 86(6) of the NCA provides:

> *A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time-*
> *(a) whether the consumer appears to be over-indebted; and*
> *(b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.*

[8] Section 86(7) of the NCA provides:

> *If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably 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.*

is asked for in terms of s 83(3)(b) of the Act.[9] It is thus apparent that the fact that the defendant's application for debt review included an application for a declaration of reckless credit did not put the plaintiff's claim outside the debt review in terms of s 86 of the NCA and thus also did not immunise the review in any relevant respect from the effect of s 86(10).

[7] The defendant's attorney's reliance in argument on the following dicta of Malan JA in *Collett v Firstrand Bank Ltd and Another* 2011 (4) SA 508 (SCA), at para 11, was misplaced:

> The words in s 86(10), 'that is being reviewed in terms of this section', rather emphasise that it is not a debt review pursuant to s 83(3)(b) or 85(a) and (b). Entirely different considerations apply to the review under these sections: they are not necessarily initiated by the consumer and the court has a discretion whether to proceed under those provisions. The credit provider is not entitled to terminate either of them.

In context it is clear that all that the learned judge of appeal intended to state was that a termination by a credit provider in terms of s 86(10) does not in and by itself displace a court's powers to undertake a review in terms of ss 83 or 85 of the NCA, a matter to which I shall return in the context of the defendant's third defence. The issue of relevance in regard to the defendant's second defence, however, is whether his allegations of reckless credit rendered the plaintiff's notice in terms of s 86(10) ineffectual for the purposes of s 129(1)(b) of the NCA.[10] The short answer is that they did not. Accordingly, in the context of the defendant's continued default in payment under the agreement after the plaintiff had given notice in terms of s 86(10), the latter was entitled to cancel the agreement. The effect of the cancellation on the ambit of the defendant's remedies under s 83 of the Act will be considered presently, in relation to his reckless lending defence.

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[9] Section 83(3) of the NCA provides:

> *If a court declares that a credit agreement is reckless in terms of section 80 (1) (b) (ii), the court-*
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> *(a) must further consider whether the consumer is over-indebted at the time of those court proceedings; and*
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> *(b) if the court concludes that the consumer is over-indebted, the court may make an order-*
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> *(i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension; and*
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> *(ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.*

[10] See note 1, above.

[8] As to the issue of alleged non-receipt of the notice in terms of s 86(10), the agreement reflected that the address '*Stand No. 36703, 46 Phakama T3V3, Khayelitsha 7750*' had been typed in as the defendant's chosen address for notice purposes. The typescript was crossed through and the handwritten address '*M40 Saxenwold Witsand*' written in its place. The defendant did not deal in his opposing affidavit with how the handwritten amendment came about. The agreement allowed for the service of notices by registered post. The post office 'track and trace reports'[11] annexed to the summons indicated that the s 86(10) notice had been sent by registered post to the defendant at both the aforementioned addresses. The summons also alleged that Heidelberg was the 'appropriate post office' for the nominated address and that Manyanani was the post office serving the Khayelitsha address. The track and trace reports indicate that the registered items reached the respective post offices. The items were not collected and were returned to sender. The item sent to Witsand was held at the Heidelberg post office for only a day before being returned to sender. The one sent to Khayelitsha was held at the Manyanani post office for a month before being returned.

[9] Witsand (Whitesands in English) is well known locally to be a small coastal village in the Western Cape. It lies to the southeast of Cape Town at the mouth of the Breede River. The nearest town to Witsand of any size is Heidelberg, an inland town on the N2 national road. Reference to the South African Post Office website (whence the 'track and trace' reports are obtained) indicates that Heidelberg and 'Whitesands' have the same postal code: 6666.[12] 'Whitesands' is characterised on the website as a 'suburb'. The context indicates that the Post Office treats Witsand as a suburb of Heidelberg. The short period that the item was kept at Heidelberg post office suggests that it may have been returned because the address given was not a valid or recognised one. That would be no cause for surprise because it appears from his opposing affidavit that the nominated address selected by the defendant was not correctly reflected in the agreement. The address that he had meant to select was 'M40 Saxonwold, Witsand, Atlantis, 7349'. Atlantis is a town to the northwest of Cape Town.

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[11] See *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 76-77.

[12] That much was also alleged in the summons.

[10] It appears from the allegations in the summons that, apparently concerned with the effectiveness of giving notice at the address reflected in the agreement, the plaintiff sought other means of effectively giving the defendant the benefit of notice in terms of s 86(10). It appears from the summons that it chose the Khayelitsha address because that was the defendant's last known residential address. Having regard to the objects of the Act, I do not think, in the circumstances of the incompleteness of the postal address given by him in the agreement, that the defendant can be heard to complain about the alternative means of obtaining delivery of the notice chosen by the plaintiff. The return of service in respect of the summons shows that process was served at the Khayelitsha address. The person who accepted service there was described on the sheriff's return as being the defendant's sister. That service at that address was effective is evident from the defendant's subsequent entry of appearance to defend the action. In the circumstances, having regard to the approach stated in *Sebola*[13] and clarified in *Kubyana v Standard Bank of South Africa Ltd*,[14] it would be incumbent on the defendant to explain why the plaintiff had not done everything that could have reasonably achieved effective delivery of the notice.[15] No explanation at all was offered in the opposing affidavit. In the circumstances I do not consider that non-receipt of the s 86(10) notice has been raised *bona fide* as a defence.

[11] Turning then to the third defence. If, as appears to be the case, the defendant is unable to reinstate the credit agreement (see s 129(3) and (4) of the NCA[16]), he has no basis upon which to resist the plaintiff's claim to return of the vehicle; cf. *BMW*

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[13] Note 11, above.
[14] [2014] ZACC 1 (20 February 2014).
[15] *Kubyana*, at para 53.
[16] Subsections 129(3) and (4) of the NCA provide:

> *(3) Subject to subsection (4), a consumer may-*
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> *(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and-*
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> *(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.*
>
> *(4) A consumer may not re-instate a credit agreement after-*
>
> *(a) the sale of any property pursuant to-*
>
> *(i) an attachment order; or*
>
> *(ii) surrender of property in terms of section 127;*
>
> *(b) the execution of any other court order enforcing that agreement; or*
>
> *(c) the termination thereof in accordance with section 123.*

Financial Services (SA) (Pty) Ltd v Donkin.[17] The provisions of s 83 of the NCA, which invest the courts with various powers to deal with the consequences of reckless credit, do not provide for the reinstatement of cancelled contracts. It might be that the defendant could invoke the provisions to ameliorate or avoid his residual liability in terms of the consequential relief claimed by the plaintiff (I make no finding in that regard), but they can be of no assistance to him in his opposition to a claim by the owner to the return of the vehicle; cf. *Donkin* supra, at para 33-35. I am conscious that *Donkin* was decided with reference to the provisions of s 85 of the NCA rather than those of s 83 on which the defendant intends to rely, but the contextual considerations to which Wallis J had regard in construing s 85 apply to the same effect in respect of s 83. In the context of a number of other decisions to the same effect,[18] it would be a supererogation for me to undertake a detailed analysis to support this conclusion.

[12] In the result I have been impelled to conclude that none of the grounds of opposition advanced in the defendant's opposing affidavit makes out a sustainable defence to the plaintiff's claim for delivery up. At the hearing, however, the defendant's attorney sought to argue an additional point arising out of the defendant's averment in his opposing affidavit that he had only grade 5 education with a limited command of English and no ability to read or write the language. I did not understand the opposing affidavit to attach any significance to this other than to rely upon it in the context of the abovementioned reckless lending defence, in respect of which he averred (at para 29 of his opposing affidavit) that '*Nobody properly explained the terms and conditions of the credit agreement and I generally did not understand and appreciate the risks and costs of the proposed credit and my rights and obligations under the credit agreement*'. Outside the context of reckless credit, the only possible relevance of the defendant's alleged lack of understanding of the agreement would be to the validity of the agreement, for if he was not able to understand the agreement there could not have been actual *consensus ad idem* between the contracting parties. The result might then be that the purported agreement would not be binding on him;

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[17] 2009 (6) SA 63 (KZD).

[18] See e.g. *SA Taxi Securitisation (Pty) Ltd v Mbatha; SA Taxi Securitisation (Pty) Ltd v Molete; SA Taxi Securitisation (Pty) Ltd v Makhoba* 2011 (1) SA 310 (GSJ); *SA Taxi Securitisation (Pty) Ltd v T Booi and Three other similar matters* (ECG High Court case no.s 4077, 5065, 4021 and 5069/2009 (20 March 2010) (per Plasket J) and *SA Taxi Securitisation (Pty) Ltd v Nako and Others* [2010] ZAECBHC 4 (8 June 2010).

cf. *Standard Bank of South Africa Ltd v Dlamini*.[19] Such a result would not, however, give the defendant any cause to avoid returning the vehicle.

[13] The defendant's attorney also sought to rely on the averment made by the defendant in the section of his opposing affidavit which dealt with the s 86(10) related defence to the effect that all his credit providers responded to his debt counsellor's debt restructuring proposal by '*engag*[ing] *in bona fide negotiations, except for* [the plaintiff], *which did not respond in any meaningful manner to the Debt Counsellor*'. He submitted that this amounted to an allegation of non-compliance by the plaintiff with its obligations in terms of s 86(5)(b) of the NCA. There are a number of difficulties with this argument, which seemed to me to hang in the air. Firstly, non-compliance with s 86(5)(b) was not advanced as a defence in the opposing affidavit. Secondly, the issue was not treated of in meaningful detail in the opposing affidavit. I accept that it is not necessary for the deponent to an opposing affidavit in summary judgment proceedings to set out a defence with the precision that might be expected in pleadings, but he must set out the relevant facts out in sufficient detail to enable the court to establish his *bona fides*; cf. e.g. *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228. There is nothing in the affidavit to allow the court to assess what proposals were made to the plaintiff, or how it could be regarded as having been unreasonable in failing to react positively to them. It is contextually evident that this was probably so because the defendant does not appear to have intended to raise the point as a substantive issue in his opposing affidavit. Thirdly, it is not evident from the Act that non-compliance with s 86(5)(b) would render notice subsequently given by the credit provider in terms of s 86(10) of the NCA ineffectual.

[14] The following order is therefore made:

(a) Summary judgment is granted in favour of the plaintiff for the delivery up to it by the defendant forthwith of the 2011 Toyota Quantum Sesfikile 2,5D-4D 15-seater motor vehicle with engine number 2KD5245810 and chassis number JTFSS22P800083967.

(b) The defendant shall be liable to pay the plaintiff's costs of suit in the summary judgment application on the scale as between attorney and client (as provided in terms of the instalment agreement).

[19] 2013 (1) SA 219 (KZD) at para 64-67.

(c) The further conduct of the action for the determination of the remaining relief sought in terms of the plaintiff's particulars of claim is postponed until such time as the relevant issues are ripe for hearing after the return of the vehicle in compliance with paragraph (a), above.

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