



(1) REPORTABLE: YES/NO.

OF INTEREST TO OTHER JUDGES: YES/NO.

REVISÉ.

26/2/2010  
/DATE

SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)

26/02/2010  
CASE NO: 68430/2009

In the matter between:

FIRST RAND BANK LIMITED,  
T/A HONDA FINANCE

Applicant/Plaintiff

And

NHLUPHEKO LAZARUS LUTHULI

Respondent/ Defendant

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JUDGMENT

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LEDWABA, J

[1] This is an application for summary judgment in terms whereof the applicant, plaintiff, prays for judgment against the defendant for:

"A. Confirmation of Cancellation of the Agreement;

B. Repossession of the GOODS;

2004 TOYOTA COROLLA GLS A/T

ENGINE NUMBER: AH53ZEC206504754

REGISTRATION NUMBER: PXF 048 GP

- C. *Damages postponed sine die;*
- D. *Costs in the APPLICATION;*
- E. *Interest on prayer C at the rate of 15.948% per annum as from date of Summons to date of payment; calculated on the outstanding balance from time to time, postponed sine die;*
- F. *Further and/or alternative relief.”*

[2] The defendant is opposing the application. The defence(s) raised by the defendant to the plaintiff's application is set out in paragraph 8, pages 30-31 of the opposing affidavit as follows:

*“Furthermore that applicant is precluded by the provisions of Section 88(3) which clearly states that: Subject to Section 86(9) and Section 86(10) the credit provider who receives court proceedings contemplated in Section 83, 85 or 86(4) (b)(i) may not exercise or enforce litigation or other judicial process, any right or security under the credit agreement until-*

*(a) the consumer is in default under the credit agreement; and*

*(b) One of the event contemplated in Section 88 subsection (1) (a) through (c) has occurred: which are*

*(i) the debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired without the consumer having so applied.*

*(ii) the court has determined that the consumer is not over indebted, or has rejected a debt counselor's proposal or the consumer's application; or*

*(iii) a court having made an order or the consumer and the credit providers having made an agreement re-arranging the consumer's obligation under the credit agreement as re-arranged are fulfilled, unless the consumer fulfilled the obligation by way of consolidation agreement.*

*(c) or the consumer defaults on any obligation in terms of the re-arrangement agreed between the consumer and credit providers, or ordered by a court or Tribunal."*

- [3] It is common cause that the agreement between the plaintiff and the defendant is governed by the **National Credit Act 34 of 2005 (the Act)**, goods were delivered to the defendant and ownership thereof would not pass to the defendant.
  
- [4] The defendant does not dispute that he failed to pay regular instalment payments.
  
- [5] The plaintiff, in paragraph 8 of its particulars of claim alleged that on 11<sup>th</sup> May 2009 the defendant applied for debt review in terms of **section 86 (10) of the Act**. However, he remained in default under the Agreement and plaintiff gave notice to terminate the debt review to the defendant, the Debt Counselor and the National Credit Regulator at least

sixty (60) business days after the date on which the defendant applied for the debt review. Plaintiff further alleged that the said notices are dated 27<sup>th</sup> August 2009 and are annexed to the particulars of claim marked 'B', 'C' and 'D' however, the said notices were not annexed to the particulars of claim.

[6] The respondent alleged in the opposing affidavit that he has not received the alleged notice of termination of the debt review.

[7] **Section 86(10) of the Act** reads as follows:

*“(10) 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.”*

[8] The main issue, in my view, is whether the applicant gave the notice of termination in terms of **section 86(10) of the Act** or not. The alleged notices were not attached to the summons and the significantly respondent disputes that he received them.

[9] On the papers before me the manner in which the alleged notices of cancellation were given has not been specified and the address to which the notices were sent is therefore

not known. Since the said notices were not attached, I have a bold allegation by the plaintiff that notices have been sent and a bold allegation by the respondent that the notices were not received.

[10] Having regard to the wording of section 65, I think the onus is on the plaintiff to prove delivery of the notices. In the absence of enough information how notices were given or delivered, I have doubts that notices were given and that **section 86(10)** was complied with.

[11] **I therefore, make the following order:**

**(i) the application for summary judgment is dismissed.**

**(ii) the defendant is granted leave to defend.**

**(iii) costs to be costs in the main application.**

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**A. P. LEDWABA**

**JUDGE OF THE HIGH COURT**

Date of Hearing: 17 February 2010

Counsel for Applicants: Advocate J. du Plessis

Instructed by: Hack, Stupel & Ross

Counsel for Respondent: Advocate L. Leballo

Instructed by: Balyoi Mafuyeka Phalatse Inc.

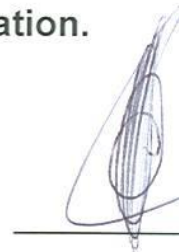
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[11] I therefore, make the following order:

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- (ii) the defendant is granted leave to defend.
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A. P. LEDI

JUDGE OF THE HIGH COURT

Date of Hearing: 17 February 2010

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