

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 2274/10
Date Heard: 1 February 2011
Date Delivered: 15 February 2011

In the matter between:

NITRO SECURITISATION 3 (PTY) LIMITED

Plaintiff

and

MELANIE DESMOND

Defendant

JUDGMENT

EKSTEEN J:

[1] This is an application for summary judgment in which the plaintiff seeks the immediate delivery to it of a specified Mitsubishi Colt 2400I 4x4 Trailbuste motor vehicle ("the motor vehicle").

[2] The plaintiff has alleged in its summons that on 10 January 2007 Firstrand Bank Limited trading as Wesbank ("Wesbank"), entered into a written instalment sale agreement ("the Agreement") with the defendant. In terms of the Agreement Wesbank sold and delivered the motor vehicle to the plaintiff.

[3] The Agreement provided for a purchase price of R119 131,02 which was payable by way of an initial payment of R27 000 and 54 monthly instalments thereafter. The Agreement further provided for ownership of the

motor vehicle to remain vested in Wesbank until the defendant has paid all amounts under the Agreement. In the event that the defendant fails to pay any amount which becomes due to Wesbank, Wesbank would be entitled to cancel the Agreement, to take possession of the motor vehicle, to sell the motor vehicle and to retain all payments already made to Wesbank. In addition Wesbank would be entitled to claim the balance payable from the defendant as damages.

[4] The express terms of the Agreement stipulate that the amount due at any given time would be proved by the issue of a certificate by one of its managers. In the event that the plaintiff has to incur costs as a result of the defendant's failure to comply with her obligations then, in terms of the Agreement, the defendant would pay such costs on a scale as between attorney and own client.

[5] On 14 May 2007 Wesbank ceded all its rights under the Agreement, including the right of ownership of the motor vehicle, to the plaintiff.

[6] The defendant in due course fell considerably into arrears with her payments in terms of the Agreement and in December 2009, realising her predicament, she applied for debt review in terms of section 86 of the National Credit Act, 34 of 2005 ("the NCA"). The Agreement was included in the debt review. The debt review was however not pursued with any sense of urgency and accordingly, when no progress had been paid the plaintiff ultimately, as it was entitled to do, gave notice to the defendant that it was terminating the

debt review process in terms of section 86(10) of the NCA. This notice the defendant states was delivered to her on 12th March 2010, after the lapse of 60 days from date of her application for debt review.

[7] Following upon these events and in consequence of the dilatoriness of the defendant's debt counsellors the defendant attended upon new debt counsellors on 21 April 2010. She was advised by her new debt counsellors that due to the payments made by her not having been properly receipted her application for debt review had not been timeously processed.

[8] On 22 April 2010 an application was launched in the Magistrate's Court for an order that the debt review process should resume as is envisaged in section 86(11) of the NCA. On the same day, notwithstanding that the debt review process had been terminated as set out above, the defendant avers that an application was "launched" in terms of section 86(7)(c) of the NCA for an order restructuring her debt. It appears therefore that the defendant, through her new debt counsellors recognised on the one hand, the valid termination of the debt review, hence the section 86(11) application, and, on the other hand, continued with the debt review process as if the process had never been terminated. Hence the section 86(7)(c) application.

[9] It appears that the plaintiff did not immediately object to this process. On 13 July 2010, however, after the lapse of more than a further 60 days the plaintiff again gave notice in terms of section 86(10) purporting again to terminate the process. This was followed by the issue of summons on

5 August 2010. In the summons the plaintiff gave notice that it had cancelled the contract and sought the return of the motor vehicle and certain additional relief. The defendant entered an appearance to defend, hence the application for summary judgment. In the application for summary judgment counsel for the plaintiff seeks only the return of the motor vehicle and costs at this stage together with an order that the remainder of the action be postponed *sine die*.

[10] Summary judgment proceedings are governed by the provisions of rule 32 of the Uniform Rules of Court. The procedure of summary judgment has been the subject of much discussion in many decision over a lengthy period of time. It has frequently been described as “extraordinary” or “drastic”. The entire procedure again came under consideration in the Supreme Court of Appeal in ***Joob Joob Investments (Pty) Limited v Stocks Mavundla Zek Joint Venture*** 2009 (5) SA 1 (SCA) at 11G-12D where the following is stated:

“The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G-426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G- 426E. “

[11] What the rule requires of a defendant seeking to resist summary judgment is to set out the nature and the grounds of his/her defence and facts upon which it is founded with sufficient clarity to satisfy the court of its *bona fides*. The facts so set out, if proved at the trial, must make out a defence which is good in law. If these requirements are satisfied summary judgment will be refused.

[12] In the present matter it is not in dispute that the defendant is indeed in default of her obligations due under the contract. The plaintiff's contractual rights are set out above. Contractually the plaintiff was, on the admitted facts, entitled to cancel the contract. No contractual defence is raised by the defendant. Rather the defendant places reliance upon the provisions of the NCA.

[13] The defendant states that section 130(3)(c) of the NCA required that a court may only determine a matter dealing with the enforcement of a credit agreement if the court is satisfied that the relevant credit provider did not approach the court during the time the matter is before, *inter alia* a debt counsellor. This, of course, is perfectly correct.

[14] The defendant then proceeds to state that at the time that the plaintiff

proceeded with legal action an application in terms of section 86(11) to reinstate her debt review as well as an application for the restructuring of her credit agreements was already pending before the debt counsellor and the Magistrate's Court and that the plaintiff had full knowledge of such application. The NCA, she records, states further in section 129(2) thereof that the provisions of section 129(1), and specifically section 129(1)(b) do not apply to an agreement which is subject to proceedings in a court and which could result in an order restructuring the obligations under agreement. Such proceedings, she alleges, were pending in court and could have resulted in an order restructuring the agreement. The plaintiff was therefore, so the argument goes, not entitled to terminate her debt review and institute legal action.

[15] The salient facts which the defendant contends underlie these defences are as follows:

- 15.1 Plaintiff sent a notice of termination of the debt review in terms of section 86(10) on 12 March 2010.
- 15.2 An application in terms of section 86(11) of the Act was served on the application on 29 April 2010 in order to reinstate the debt review process.
- 15.3 The plaintiff did not oppose the application in terms of section 86(11) and section 86(7)(c).
- 15.4 A further notice of termination was sent by the plaintiff dated 13 July 2010. It is this notice to which reference is made in the summons.

15.5 By the time that the plaintiff sent the second notice of termination an application in terms of section 86(11) was already pending in the Port Elizabeth Magistrate's Court.

15.6 At the time the plaintiff issued the summons on which this application is based the application in terms of section 86(11) was still pending in the Magistrate's Court, Port Elizabeth.

[16] It is not in dispute that the debt review process commenced during January 2010. At that stage the matter was before a debt counsellor. On 12 March 2010 the defendant gave notice in terms of section 86(10) terminating the process. It is unassailable that this notice validly terminated the debt review process. It is for this reason that a section 86(11) application became necessary.

[17] 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.

[18] 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.

[19] In the current instance the plaintiff did not object to the launching of the application in terms of section 86(7)(c), however, such application must be contingent upon a resumption of the debt review process being authorised by the Magistrate's Court hearing the matter. The application in terms of section 86(7)(c) can accordingly not be said to be "pending" until an order in terms of section 86(11) has been obtained.

[20] In the circumstances I am of the view that the notice of 12 March 2010 terminated the debt review process. No order has been obtained in terms of section 86(11) which would reinstate such proceedings and accordingly there were no proceedings in terms of section 86(7)(c) pending before a debt counsellor after the valid termination of the process. At the time of the delivery of the notice on 12th March 2010 no referral had occurred in terms of section 86(7)(c). In my view such a referral purporting to be in terms of section 86(7)(c) which occurs after the process has been terminated in terms of section 86(10) can have no effect at all. This is so because the entire process has been finally terminated, save for its possible reincarnation if and when an order is obtained in terms of section 86(11).

[21] In these circumstances the notice in terms of section 86(10) delivered during July 2010 was in my view superfluous. To that extent it may be invalid, however, it cannot change the fact that, on the facts alleged by the defendant, the process of debt review had been validly terminated and no order has yet

been obtained that it may resume. It follows that I consider that this defence cannot be sustained.

[22] Section 129(2) of the NCA does not assist either. The application in terms of section 86(11), which was and is pending, is not a proceeding which may result in the restructuring order. The proceedings in terms of section 86(11), if successful, may result in a resumption of the debt review process, a process which has been terminated in the interim. In all the circumstances I consider that the defendant has not set out facts which, if proved at the trial, would constitute a good defence of law.

[23] This, however, is not the end of the enquiry. In terms of the provisions of rule 32(5) the court retains a general discretion to refuse summary judgment even where the affidavit in opposition thereto falls short of the requirements of the rule. Such discretion, it has been held, should be exercised, not capriciously or on the basis of mere conjecture or speculation so as to deprive a plaintiff of the remedy of summary judgment when entitled to it, but upon material before the court from which it appears that a reasonable possibility exists that an injustice may be done if judgment is so granted. (Compare **Breitenbach v Fiat SA (Edms) Beperk** 1976 (2) SA 226 (T) at 229.)

[24] In the present case it is not in dispute that the defendant had indeed launched an application in terms of section 86(11) prior to the issue of summons. Section 86(5) requires of a credit provider to participate in good

faith in a credit review process and in any negotiations designed to result in responsible debt rearrangement. It seems to me therefore that where a credit consumer has set out sufficient facts in his/her opposing affidavit to show that he has, upon receipt of a notice in terms of section 86(10), proceeded with the necessary expedition to obtain an order in terms of section 86(11) and that he has reasonable prospects of success in such application, the court should be slow to grant summary judgment in circumstances where the delay in finalising such application is attributable solely to the congestion of court rolls. A credit provider who proceeds with undue haste to enforce his remedy against a credit consumer who has been prevented access to the courts by virtue of the numerous demands on the court rolls may be considered not to act *bona fide*. In such circumstances I consider that it may well be that a reasonable possibility exists that an injustice would be done if summary judgment were granted. Each case must, however, be judged on its own facts.

[25] In the present matter the application in terms of section 86(11) was launched during April 2010. The affidavit resisting the summary judgment application was attested to on the 10 December 2010, some seven months thereafter. The application for summary judgment was argued before me on 1 February 2011, more than nine months after the section 86(11) application was launched. At this stage the application has still not come to finality. The defendant provides no explanation for the delay other than to state that the plaintiff does have remedies available in the Magistrate's Court in order to oppose any unreasonable postponement of an application. This, it is

contended, the plaintiff did not do.

[26] On a consideration of the explanation it does not appear to me to be in dispute that this application in terms of section 86(11) has not been pursued with any measure of urgency.

[27] The purpose of the NCA as set out in section 3 thereof envisages two major objectives. The first is to promote a credit market and industry which is, *inter alia*, fair, transparent, sustainable and responsible. The second is to protect consumers. In doing so section 3(d) envisages the promotion of equity in the credit market by balancing the respective rights and responsibilities of the credit providers and consumers. It calls for an equitable recognition of both the rights of the credit providers and those of the consumer. In the present instance the motor vehicle in issue serves as security for the debt in respect of which the defendant is in default. It is a depreciating asset which the defendant readily concedes in argument before me is being used by herself on a daily basis. A further delay in the realisation of its security therefore holds the risk for the plaintiff of the diminishing value of its security and the increasing liability of the defendant due to the escalating interest component of the debt.

[28] On a consideration of all these issues I do not consider that this is a proper case for me to exercise a discretion in favour of the defendant.

[29] Finally the defendant seeks, if I should hold against her, that the entire

application for summary judgment should be postponed *sine die* until such time as the application in terms of section 86(11) has been finalised. For the reasons which I have set out above in respect of the exercise of my discretion I do not consider that such an approach would be equitable. In any event, the defendant has made out no case indicative of reasonable prospects of success in such an application. I am not inclined to grant such an application.

[30] In all the circumstances the following order is made:

1. The defendant is ordered forthwith to return to the plaintiff the Mitsubishi Colt 2400l 4x4 Trailbuste motor vehicle with chassis number ABJK75ENR1E060258, engine number 4G64DM0066 and registration number CTM715EC, failing which the sheriff is authorised to attach the vehicle wherever he may find same and to hand the vehicle to the plaintiff.
2. The defendant is ordered to pay the costs occasioned by the hearing of 1 February 2011 on a scale as between attorney and own client.
3. The application in respect of the remainder of the relief sought in the summons is postponed *sine die*.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv C Mey instructed by Rushmere Noach Incorporated,
Port Elizabeth

For Defendant: In Person, Melanie Desmond