

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

CASE NO.: 2906/2010

In the matter between:

FIRSTRAND BANK LTD trading as WESBANK Applicant

(Registration Number: 1929/001225/06)

And

DAVID RONALD REES Respondent

(Identity Number:)

JUDGMENT

BESHE J:

[1] This is an application for summary judgment. Plaintiff's claim is based on an instalment sale agreement (the agreement) entered into between the parties in this matter on or about the 28th of November 2006. in terms of this agreement the plaintiff sold to the defendant a motor vehicle described as a 2006 Ford Territory 4.01 TX A/T with engine number JGAT5E 48449, chassis number 6FPAAAJGA5E48449 and vehicle registration number DRS 746 EC on credit for the total purchase price of R449,683,40.

[2] Plaintiff claims that the defendant has breached the terms of the agreement by failing to maintain regular payments and as at 07 June 2010 the

defendant had fallen into arrears with payments to the sum of R125, 941, 82.

[3] This resulted in plaintiff issuing summons against the defendant during September 2010 seeking judgment for:

The confirmation of the cancellation of the agreement;

A warrant of delivery authorising the sheriff of this court to attach, seize and hand over the vehicle in question to the plaintiff. Damages being the difference between the full balance owing in terms of the Agreement and the value of the goods as at date of possession;

Interest;

Collection commission;

Cost;

Alternatively in the event of the goods not being found payment of the sum of R347, 455, 25.

[4] The defendant admits his indebtedness to the plaintiff as alleged in the summons and confirmed by Yolande Theresa Schoeman in her affidavit verifying the cause of action.

[5] In paragraph 2 of the affidavit resisting summary judgment defendant states:

“I admit the facts contained in Yolande Theresa Schoeman, but request the Honourable Court to declare me over-indebted and refer the matter to my debt counsellor to evaluate my circumstances and to make a recommendation in terms of Section 86 (7) (C) of the National Credit Act 34 of 2005 (“the Act”). “

[6] Over-indebtedness of a consumer is defined in section 79 of the National Credit Act:

“79 Over-indebtedness

1) A consumer is over-indebted if the preponderance of available information at a time a determination is made indicated that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to the consumer’s-

(a) financial means, prospects and obligations; and

(b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer’s history of debt repayment.

2) When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the time the determination is being made.

3) When making a determination in terms of this section, the value of-

(a) any credit facility is the settlement value at that time under that credit facility; and

(b) any credit guarantee is-

i) the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or

(ii) the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor.”

[7] The National Credit Regulations of 2006 (the regulations), promulgated under the National Credit Act, provide that a debt counsellor, when assessing the consumer’s application for a debt review, must refer to section 79 and further consider the following:

(a) A consumer is over-indebted if his/her total monthly debt payments exceed the balance derived by deducting his/her minimum living expenses from his/her net income.

(b) Net income is calculated by deducting from the gross income, statutory deductions and other deductions that are made as a condition of employment.

(c) Minimum living expenses are based upon a budget provided in the consumer. Adjusted by the debt counsellor with reference to guidelines issued by the National Credit Regulator.

[8] Section 85 of the National Credit Act provides for declaration and relief of over-indebtedness and provides as follows:

“Court may declare and relieve over-indebtedness

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.”

[9] In order for the defendant to successfully resist an application for summary judgment he must satisfy the court that he has a *bona fide* defence to the claim. In so doing the defendant must fully disclose the nature and grounds of his defence and the material facts upon which it is founded. It is indeed so that the defendant has not put up a defence to the merits of the application, but claims that he is over-indebted and requests that he be declared as such and for the matter to be referred to his debt counsellor to evaluate his circumstances and to make a recommendation in terms of section 86 (7) (C) of the National Credit Act. This will no doubt have the effect of delaying the payment of the debt by the defendant.

[10] It is trite law that Rule 32 of the Uniform Rules of this court is designed to prevent the plaintiff's claim from being delayed by what amounts to an abuse of the process of the court. This is a point that was made by *Navsa J* in ***Joob Joob Investments v Stocks Mavundla Zek 2009 (5) SA 1 at page 11 - G*** when he said: "So too in South Africa, the summary judgment procedure was not intended to "shut (defendant) from defending", unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights."

[11] I am however also mindful of the purpose of the National Credit Act as set out in section 3 as follows:

"Purpose of Act

The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-

- a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
- b) ensuring consistent treatment of different credit products and different credit providers;

- c) promoting responsibility in the credit market by-
 - (i) encouraging responsibly borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
 - (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
- d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
- e) addressing and correcting imbalances in negotiating power between consumers and credit providers by-
 - (i) providing consumers with education about credit and consumer rights;
 - (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
- f) improving consumer credit information and reporting and regulation of credit bureaux;
- g) addressing and preventing over-indebtedness of consumers, and providing mechanism for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

- h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
- i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.”

[12] The word “may” in section 85 of the Act suggests that the court has a discretion to as to whether it should refer the matter to a debt counsellor or declare the consumer over-indebted. It is trite that such discretion should be exercised on the material facts before court. In ***Firststrand Bank v Olivier 2009 (3) SA 353 at 359 SECLD A – B AR Erasmus J*** said that “A court is not obliged to act simply on the defendant’s allegation of over-indebtedness, but “may” make an appropriate order in terms of paragraph (a) or (b). The court will exercise this discretion judicially with due regard to the objective of the National Credit Act which, in the present regard, is to assist the over-burdened consumer to rehabilitate his affair. In doing so the act makes serious inroads into the credit provider’s common law rights of access to the courts (s 34 of the Constitution of the Republic of South Africa Act 108 of 1996). The court will restrict the statutory limitation of the credit provider’s rights to the extent that it is reasonable and justifiable to do so in our democratic order while promoting the objects of the National Credit Act.”

[13] *Mr Gajjar* who appeared for the plaintiff submitted that the defendant did

not go far enough in his affidavit to place enough material to enable the court to come to his aid.

[14] Summons were issued against the defendant during September 2010. In his affidavit in support of the opposition to summary judgment, defendant alleges that:

“4. My wife and I applied for a debt review in 2009 with *Kobus Kruger*, a debt counsellor who was then involved with Debt Sense Group. Application for debt review was duly made as alleged in the applicant’s particulars of claim; but the matter was postponed from time to time due to a multitude of oppositions. My wife and I were involved in a business with my father-in-law, Smith Trailers. That business was run as a sole proprietorship by my father-in-law and we were all dependant on the income of that business. At the time the business environment had worsened to such a state that Smith Trailers became financially unviable and the debt review process of my father-in-law, his business and ours was unfortunately dealt with as one by the said Kobus Kruger. Kobus Kruger abandoned us as debt counsellor and apparently handed the file back to the Debt Sense Group. I am not sure when this was and I was not informed thereof.

I was under the impression, at all times, that the matter was still dealt with as a debt review matter until the summons was served on me. My wife attended upon our attorneys of record who dealt with previous matters of ours during the course of the debt review and was then informed that I should ascertain whether I am still under debt review and to obtain the required proof.

Upon enquiring with the Debt Sense Group about the status of our debt

review, I was informed that to their knowledge the matter was no longer under debt review. The aforesaid facts came to my knowledge during the course of the last week of October 2010.

5. I was then again registered under debt review on 1 November 2010 and Tommy Swart of the Debt Sense Group, my debt counsellor, is in the process of putting together a proposal for the credit providers.

6. I attach hereto, marked “DRR1”, a copy of the Form 17.1 advising my creditors of the debt review application and a copy, (marked “DRR2”) of the Form 17.1 informing the creditors that I was found to be over-indebted. My debt counsellor is currently in the process of formulating a proposal to present to the credit providers. I attach hereto a copy of the Form 16 from which appears my income and expenditure as well as my total liabilities. My debt counsellor has verified these figures with documents which I do not wish to burden the court record with. I submit that it is very clear that I am hopelessly over-indebted and I attach hereto marked “DRR3” a copy of the form 16 containing my personal circumstances.”

[15] As would appear from paragraph four of defendant’s affidavit, a debt review process of his father-in-law, the business and that of his and his wife were dealt with as one by the debt counsellor. It is not clear why the said *Kobus Kruger* abandoned the process and why it was not taken over by another debt counsellor at Debt Sense Group. It would seem that the defendant himself abandoned the process in that he appears to have had very little interest in what was happening regarding the process until such time that he was jolted into action by the service of summons on him.

[16] In his quest to show that he is over-indebted, defendant annexes DRR3, which is a copy of form 16 which is an application by consumer for credit review in terms of section 86 of the National Credit Act 34 of 2005.

[17] According to the particulars appearing in this form the defendant is employed by G H Airconditioning, his occupation is given as “maintenance” and has been employed for six months with a gross income of R15 000.00 per month. He owns the house in which they stay with his family and has been staying in that house for one month. He does not have any insurance policies listed and therefore no insurance policies that he is prepared to surrender or cancel. There are no assets that are identified as potentially and reasonably capable of being sold, the proceeds of which the consumer can use to reduce his indebtedness to his credit providers.

[18] The outstanding balance to credit providers stands at over R3 million, with aggregate monthly instalments of some R40 000.00. He only has available for payment to credit providers a sum of ± R8 000.00 per month.

[19] There is no indication how the defendant intends or proposes to rehabilitate his affairs. No indication as to why he needs to retain the motor vehicle in question, whether doing so will improve his financial situation in any

way, or how he will be prejudiced if the motor vehicle were to be repossessed. Whether or not if it were to be attached and resold, it will reduce his indebtedness to the plaintiff.

[20] I am not persuaded that the application by the defendant is *bona fide*, it appears to be a ploy to buy more time on the defendant's part, a mere tactic to delay plaintiff's claim. In the circumstances I do not think that it will be justifiable to limit the plaintiff's rights to payment of the debt owed to it by the defendant. In the circumstances I am of the view that the plaintiff is entitled to the relief which it seeks.

[21] In the result the following order is made:

Summary judgment is granted in favour of the plaintiff against the defendant for an order for:

- a) Confirmation of cancellation of the agreement;**
- (b) A warrant of delivery authorising the sheriff of this court to attach, seize and hand over the 2006 Ford Territory 4.01 TX A/T with engine number JGAT5E48449, chassis number 6FPAAAJGAT5 48449, and vehicle registration number DRS 746 EC to the plaintiff;**
- (c) Damages being the difference between the full balance owing in terms of the agreement and the value of the goods**

as at date of repossession;

(d) In the event of the goods not being found, payment of the sum of R347, 455, 25;

(e) Interest calculated on the aforesaid sums at the fixed rate of prime (currently 10%) less 0.758% per annum from 8 June 2010 to date of payment;

(f) Collection commission on all payments made calculated at the rate of 10% plus VAT on each payment, subject to the maximum of R1 000, 00 plus VAT payment;

(g) Costs of suit on a scale as between attorney and client.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For Applicant

ADV: G J Gajjar

Instructed by

JOUBERT GALPIN SEARLE INC.

For Respondent

Mr A Curtain

Instructed by

J R BESTER & ASSOCIATES

Date Heard	30 November 2010
Date Reserved	30 November 2010
Date Delivered	23 June 2011