IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

2015/02/06

DATE SIGNATURE

06/02/2015

CASE NO: 57075/14

IN THE MATTER BETWEEN

NEDBANK LTD Plaintiff

and

KBT McGOVERN, KIM BERNADIE THORA Defendant

JUDGMENT

LEGODI, J

[1] This is an application for summary judgment. The application is opposed. The parties will be referred to as in the main action. The plaintiff, NEDBANK Ltd seeks the

return to it, of a motor vehicle HYUNDAI ACCENT 1.6 GLS 2008 model, engine number G4EDD8010567.

[2] The vehicle is the subject of installment sale agreement entered into on 3 June 2008 between the defendant, Kim Bernadine Thora McGovern and Motor Finance Corporation (Pty) Ltd t/a MFC whose all its right, title and interest in the agreement were ceded to NEDBANK. The agreement is subject to the provisions of the National Credit Act No 34 of 2005 (hereinafter referred to as the ("Act").

[3] The issue at hand is whether the plaintiff is entitled to enforce the agreement after having given notice of termination of the debt review on the 16 April 2013 in terms of section 86(10). A brief background to the dispute is necessary.

[4] On the 2 January 2031 Debtsafe Debt Counselors gave notice in terms of section 86(4)(b)(i)(ii) of the Act. The section provides as follows:

> "*(4) On receipt of an application in terms of subsection (1), a debt counsellor must-*
>
> *(a) ...*
>
> *(b) notify, in the prescribed manner and form-*
>
> *(i) all credit providers that are listed in the application; and*
>
> *(ii) every registered credit bureau".*

[5] On the 16 April 2013 Debtsafe Debt Counsellors gave notice terminating debt review application because of the defendant's 'non-payment'.

[6] Subsequent thereto, the plaintiff gave notice of termination of debt review proceedings in terms of section 86(10). Section 86(10) provides as follows:

> *"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 date on which the consumer applied for the debt review".

[7] In the notice, under section 86(10) referred to above, the plaintiff stated as follows:

"*2.4 On* ***25 April 2013*** *plaintiff duly served section 86(10) notices upon the defendant, the National Credit Regular and the debt counsellor Debtsafe, the relevant part of which statutory notice reads as follows:*

On behalf of Nedbank we hereby give notice in terms of section 86(10) of the National Credit Act of Nedbank's withdrawal from your application for debt review, as a period of sixty (60) business days have lapsed since receipt of such application without any decision and/or referral to a competent court. Your payments are furthermore not in accordance to industry guidelines and does not make economic sense.

As your account remains in default without just cause, our client hereby give notice of their (sic) intention to immediately enforce their rights in terms of the agreement in accordance with the provisions of the National Credit Act."

[8] On the 15 October 2013 another debt counsellor Sparkman Consulting gave a notice as envisaged in section 86(4)(b)(i)(ii). On the 10 December 2013 the debt counselor aforesaid, found the defendant to be over-indebted and a proposal was made.

[9] On the 22 May 2014 the defendant applied to the Magistrate's Court White River purportedly in terms of section 86(8)(b) subsequent to the notice issued by debt

counsellor Sparkman Consulting on the 15 October 2013. Subsection (8)(b) provides as follows:

"If a debt counselor makes a recommendation in terms of subsection (7) (b) and-

"(b) if paragraph (a) does not apply, the debt counselor must refer the matter to the Magistrate' Court with the recommendations."

Paragraph (a) deals with a situation where a recommendation is made unlike in the present case where the first debt counselor made no recommendations and neither did he refer it to the Magistrate' Court .

[10] Subsection (7)(b) referred to above reads as follows:

" *If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that-*

(a) ...

(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;..."

[11] On the 14 July 2014 the plaintiff through its attorneys gave notice of termination of the agreement due to the defendant's default in his obligations to make monthly payments in terms of the sale installment agreement.

[12] The defendant's counsel, in paragraph 6.2 of his written heads of argument moves from the premise that the defendant's application to be placed under the first debt review was terminated before the defendant was placed under debt review thereof and that 'subsequently the section 86(10) delivered by the plaintiff purports then to withdraw, from a debt review, no longer in existence. Then in paragraph 7.1 of the defendant's written heads of argument, is stated as follows:

> "7.1 *Pursuant to the fact that it can be accepted that the defendant was not under debt review when the notice was sent, nor was there any such application pending, it is submitted that the section 86(10) notice is irregular and void of any effect".*

[13] Subsections (1) and (2) of section 86 provide as follows:

> *"86.* ***Application for debt review*** *– (1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.*
>
> *(2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement".*

[14] It is clear from subsection (2) that a consumer is not entitled to make an application to a debt counsellor to be declared over-indebted if at the time of the application in terms of subsection (1) the credit provider has already taken steps to enforce the agreement.

[15] Now on the 25 April 2013, the plaintiff took steps to enforce the agreement against the defendant. As quoted earlier in paragraph 7 of this judgment, the defendant was told that his account remained in default and that the plaintiff intended to immediately enforce its rights in terms of the agreement in accordance with the provisions of the National Credit Act.

[16] The defendant relies on an application to be declared indebted, which was filed after the 25 April 2013 by the second debt counselor. In my view, it does not matter whether the steps to enforce the agreement were taken in terms of sections 86(10) or 129. The defendant was in default, at least 60 days after the date on which the defendant applied for debt review, the defendant having applied for debt review in January 2013 and the notice in terms of section 86(10) having been given on 25 April 2013.

[17] Strictly speaking, the plaintiff was within its right to terminate the debt review during April 2013 in terms of section 86 (10). The purported termination of the first debt review on the 16 April 2013 by the first debt counselor, was, in my view, not a bar to proceeding with termination of the debt review by the plaintiff in terms of section 86(10). That was one step towards enforcement of the plaintiff's rights in terms of the credit agreement.

[18] In terms of section 130(1) a credit provider is entitled to approach the court for an order to enforce a credit agreement, provided at that time, the consumer is in default and has been in default under the credit agreement for at least 20 days and at least 10 business days lapsed since the credit provider delivered a notice to consumer as contemplated in sections 86(10) and 129(1) as the case may be.

[19] In terms of section 129(1) (b), if the consumer is in default under a credit agreement, the credit provider subject to section 130(2) may not commence any legal proceedings to enforce the agreement before firstly providing notice to consumer, of relevance, as contemplated in section 86(1) and in section 86(10) and having met any requirement set out in section 130. The plaintiff met both the requirements of sections 86(10) and 130. The contention by the defendant on this point cannot be sustained.

[20] The plaintiff has been given a notice in terms of section 86(10) during April 2013 and the dies mentioned in in section 130 (1) had lapsed. Clearly, the notice in terms of section 86(10) is a step to enforce the credit agreement. In the circumstances, the defendant was not entitled to proceed with the second debt review on 15 October 2013, the notice to enforce the agreement in terms of section 86(10) having been given on the 25 April 2013.

[21] There is another issue that worries me. That is, whether the credit counsellor was entitled to terminate the debt review proceedings in terms of which he gave a notice of on the 22 January 2013.

[22] The debt counsellor accepted the debt review application dated the 14 January 2013. Subsequent thereto he made a determination to the effect that the defendant was over-indebted. Section 86 (7) (c) of the Act provides as follows:

"If as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that-

(a) ...
(b) ...

(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 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.

[23] Now instead of referring the matter to the Magistrate's court to make either or both of the orders or steps proposed in subsection (7)) of section 86, the first credit provider cancelled the debt review proceedings. I am of the view that the credit

counsellor was not entitled to cancel the debt review. Therefore, termination of the first debt review by the plaintiff was valid. The plaintiff was entitled to cancel the debt review as the defendant was in default at least 60 business days after the date on which the defendant applied for the debt review. Lastly, the plaintiff had given notice of cancellation of the agreement. Such cancellation was due to the fact that the defendant failed to honour its obligations in terms of the installment sale agreement. The plaintiff therefore, should be found to be entitled to the relief sought, that is, the return of the motor vehicle in question.

[24] Consequently an order is hereby made as follows:

24.1 The defendant is ordered to forthwith return to the plaintiff the following asset and to hand it over to a duly authorized representative of the plaintiff and or the sheriff:

ONE USED HYUNDAI ACCENT 1.6 GLS 2008 MODEL, ENGINE NUMBER: G4E D 8010567, CHASSIS NUMBER: KMHCN41 CR 84249204

24.2 That the sheriff is authorized to attach and seize the asset aforesaid wherever it might be found and hand over same to the plaintiff or duly authorized representative of the plaintiff;

24.3 Forfeiture of all monies paid by the defendant to the plaintiff in terms of the agreement annexed to the plaintiff's summons as annexure "A".

24.4 Leave is granted to the plaintiff to apply for judgment on the same papers in respect of;

24.4.1 damages if any, in the amount to be calculated by subtracting the current market value of the aforesaid goods as well as the rebate on unearned financial charges from the balances outstanding, if applicable,

24.4.2 interest on the said damages at the rate of 10.05%

24.5 Costs of the application on the scale as between attorney and client to be taxed.

M F LEGODI
JUDGE OF THE HIGH COURT

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