**IN THE HIGH COURT OF SOUTH AFRICA**

**FREE STATE DIVISION, BLOEMFONTEIN**

Case No: 3189/2014

In the matter between:-

**FFS FINANCE SOUTH AFRICA (PTY) LTD t/a FORD CREDIT** Applicant

And

**WYNAND ALBERT VAN DER WESTHUIZEN** Respondent

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**JUDGMENT BY:** TSATSI, AJ

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**HEARD ON:** 23 OCTOBER 2014

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**DELIVERED ON:** 8 JANUARY 2014

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## INTRODUCTION

[1] This is an opposed summary judgment against the respondent for:

(a) The return of and delivery to the plaintiff without delay, the 2008 Ford Ranger 3.0 T…. Hi-Trail ……. motor vehicle with engine number: W…………, chassis number: A…………. T………..

(b) That the sheriff of the court be authorised and ordered to attach the said motor vehicle notwithstanding where he may find it, notwithstanding in whose possession he may find it and to forthwith deliver it to the plaintiff.

(c) Payment in the amount of R117 368.13.

(d) *Mora* interest on the amount R117 368.13 from date of summery until date of payment.

(e) That the plaintiff be directed and authorised, in so far as sections 131 read with 127 and 128 of the National Credit Act 34 of 2005, is applicable to the Credit Agreement, to act with the vehicle in accordance with the aforementioned provisions;

(f) That leave be granted to the Plaintiff to approach this Court, on these papers duly amplified for damages if any,

(g) Costs of this suit

(h) Further and/or alternative relief.

[2] The respondent opposed the application on the following grounds:

2.1 The reasons for the amendment were that the debt counsellor who tended to the affairs of the respondent during the period when the debt restructuring order of February 2010 was granted was Ms Cornelia Susanna Schoeman. Ms Belinda Louiza Driskel took over from Ms Schoeman on 1 March 2012. According to the respondent's opposing affidavit there was a magistrate order which ordered that the respondent pay an amount of R7900.00 monthly to Payment Distribution Agency (PDA), and that the PDA will cause an amount of R4730.37 to be paid to the applicant monthly. On 30 May 2013 the afore mentioned court order was amended. There was an increase in the PDA's fees. The respondent complied in full with the court order during this period. It was not due to the default of the respondent that payments were not allocated to the applicant. An amount of R14349.89 was paid to the applicant during April 2014 to rectify non-payment to the applicant.

2.2 The applicant did not terminate the debt review during this period and payments resumed from August 2011. The respondent was informed that payments during this period were not made due to the applicant, because of an administration error. This error cannot be attributed to the respondent.

**FACTS**

[3] During or about 21 October 2008 at Johannesburg alternatively Bloemfontein, the applicant and respondent entered into and concluded an instalment sale agreement. In the said agreement the applicant is the plaintiff and the defendant is the respondent. The relevant and express, alternatively and or implied terms and of the credit agreement were as follows:

> "4.1 The Plaintiff sells to the Defendant who purchases from the Plaintiff a 2008 Ford Ranger 3.0T…….. Hi-Trail X……… motor vehicle with engine number W………., chassis number: A………… (hereinafter, referred to as either "the vehicle or the goods")

4.2 The principal debt amounts to R297459.50.

4.3 The amount is repayable by the Defendant in 72 monthly payments in the amount of R5455.45 per month, the first payment that is due on the 1st November 2008 and all subsequent payments will be due and payable on the same day of each successive month thereafter:

4.4 Defendant will make monthly repayments to Plaintiff by way of electronic debit order against its bank account held with Nedbank under account number 1……………..

4.5 The Defendant must make all payments due under the agreement without deductions of any amount.

4.6 The Plaintiff is and will remain the owner of the goods (vehicle) and ownership of the goods shall pass to the Defendant only upon the Defendant paying all amounts which it owe to the bank in terms of the agreement.

4.7 should the Defendant fail to pay any amount(s) due by him to the Plaintiff on due date thereof or breach any terms of the agreement the Defendant will be in default of the terms of the agreement and thus in *mora*. In such event the Plaintiff will be entitled to give the Defendant written notice of such default.

4.8 In the event of the Plaintiff giving the Defendant notice as afore mentioned the Plaintiff will be entitled to commence legal proceedings to enforce the agreement including retaking possession of the goods and recovering collection costs and administration charges from the Defendant."

The defendant does not dispute the breach of terms of the instalment sale agreement by failure to pay certain instalments.

[4] On 11 February 2010 the magistrate court Bloemfontein made an order in terms of which the defendant's obligation in terms of the agreement was restructured. The restructuring order was amended on 30 May 2013 and 17 July 2014. In terms of the restructuring order, and amount of R4730.37 was to be paid on a monthly basis by the respondent to the applicant. The respondent failed to make payments between 3 June 2010 to 1 August 2011. This included 3 January 2013 to 17 April 2013. An amount of R3442.60 was paid on 3 December 2013 to 11 March 2014. After the restructuring order was amended for the second time an amount of R1298.29 had to be paid to the plaintiff on a monthly basis. The respondent failed to comply with the amended restructuring order due to the fact that his employment was terminated between June and July 2014. The applicant was opposed to the fact that the respondent paid in excess of the normal instalment.

[5] The respondent denied that he was deliberately in default. According to the respondent all payments were made to the PDA in terms of the debt restructuring order. There had been more payments advanced to the PDA than ordered. An additional payment was made to the plaintiff in the amount of R10 740.00 in January 2010, as well as the payment of February 2010 in the excess of R1420.00. The applicant did not terminate the debt review during the relevant period and accepted all payments from the PDA. Even though the respondent may have failed to pay certain instalments, he had also paid in excess. The excess payment around July 2014 amounted to R5740.00.

**ISSUES**

[6] The main issue in this matter is whether the respondent on the facts, disclosed either in whole or in part of the claim, has a defence that is bona fide and good in law.

[7] The other issue is whether the respondent is entitled to keep possession of the vehicle even though a debt restructuring order is granted.

**SUBMISSIONS**

[8] It was submitted on behalf of the applicant that the respondent should return the vehicle. Once the vehicle is received by the applicant the latter will sell the vehicle at an auction. If there is an amount owing, the respondent must pay the difference. It was submitted that the debt review was not valid. From the outset, there was no defence that the court can accept that Section 86(10) was defective. Once a debtor is in default of an agreement and is also in default of the relevant debt restraining order, the credit provider is at liberty to proceed and to exercise and enforce, by litigation, any right or security **(First Rand Bank v Fillis** 2010 (6) SA 565 (ECP) P 570 Para 16).

[9] It was submitted on behalf of the respondent that the respondent was not in wilful default, It would not be fair to the respondent to be expected to hand over the vehicle. Three days after the order was issued, the respondent complied with the order. Failure by PDA to pay the applicant the agreed amount could not be attributed to the respondent. Counsel for the respondent made a submission with regards to **Section 88(3)** of the Act which provides that, credit provider who receives notice of court proceedings contemplated in terms of **Section 83 or 85** may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement, until the consumer is in default under the credit agreement.

**THE LAW**

[10] "……..summary judgement procedure was not intended to shut (a defendant) out 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 plaintiff who were endeavouring to enforce their rights…..Summary judgment proceedings only hold terrors and are 'drastic', for a defendant who has no defence." (**Joob Joob Investments Pty Ltd** (161/08) (2009) ZA SCA 23 para 31 - 33.

[11] Summary judgment is an extraordinary and stringent remedy. The court should always keep this in mind when exercising its discretion – **Arend and Another v Astra furnishers (Pty) Ltd** 1974 (1) SA 298 (C).

[12] Section 86(10) of the National Credit Act 34 of 2008 provides that:

> "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 consumer, and
> (c) The National Credit Regulator, at any time ….. 60 business days after the date on which the consumer applied for the debt review."

[13] Section 86(11) of the Act provides that:

> "If a credit provider who has given notice to terminate a review as contemplated in Subsection (10) proceeds to enforce that agreement in terms of Chapter 6, the Magistrate's court hearing the matter may order the debt review resume in ant conditions the court considers to be just in the circumstances."

**APPLICATION OF THE LAW**

[14] The respondent elected to oppose summary judgment by filling an opposing affidavit as envisaged in Rule 32(3) (b). The respondent alleged that he complied with the order by making payments to PDA. Unfortunately PDA failed to make payments to the applicant. I am of the view that the respondent was not deliberately in default of the rearrangement order. I am not inclined to shout out the respondent from defending this matter. The respondent may have a case to defend and ventilate issues at the trial.

[15] This matter is the subject of debt review, in terms of Section 86 of the Act. The Section 86(10) notice was not valid. I am therefore persuaded to give the respondent the benefit of the doubt by affording him the opportunity to defend the matter. The applicant was aware that the respondent paid PDA for the latter to pay the applicant. However the applicant was also aware that PDA failed to effect payments to the applicant and that it was not the respondent's fault. The applicant did not seriously challenge the respondent's allegation that it was PDA's fault not to pay the applicant.

[16] It follows in my view, and as a matter of interpretation, in terms of Section 88(3) regarding the jurisdictional requirement of 88(3)(b)(ii) the applicant should not have exercised and enforced, by litigation or other judicial process, any right or security under the credit agreement.

[17] In all the circumstances, the respondent has made out a case and set out facts upon which I can exercise discretion in his favour.

[18] I accordingly make the following order:

18.1 The application for summary judgment is refused;

18.2 The respondent is granted leave to defend the main action and is ordered to file a plea, if any, within ten (10) days from the date of this order;

18.3 Costs shall be in the main action.

**E. K. TSATSI, AJ**

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| On behalf of the applicant: | Adv. W.J. Groennewald<br>Instructed by:<br>Phatsoane Attorneys<br>BLOEMFONTEIN |
| On behalf of the respondents: | Adv. L. Le Roux<br>Instructed by:<br>Jordaans Rij Kheer Attorneys<br>BLOEMFONTEIN |