

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 2145/2015

In the matter between:

TOYOTA FINANCIAL SERVICES SOUTH AFRICA
(PTY) LTD

Applicant

and

MOSIUOA GEORGE MOHLABI

Respondent

HEARD: 23 JULY 2015

DELIVERED: 10 SEPTEMBER 2015

MOKOENA, AJ

[1] This is an application for summary judgment. The plaintiff seeks the return of a 2009 Toyota Quantam 2.7 motor vehicle. Although the plaintiff has claimed cancellation of the instalment sale agreement and other relief in the notice of application for summary judgment, counsel for plaintiff indicated during the hearing of this matter that the plaintiff has abandoned other relief sought and would only persist on summary judgment in respect of the return of the motor vehicle.

[2] The vehicle in question had initially been the subject matter of an instalment sale agreement concluded between the parties in January 2009. The defendant failed to comply with his payment obligations and during 2014 the plaintiff issued summons to

cancel the credit agreement. In May 2014 the plaintiff obtained default judgment against the defendant. After default judgment was granted and the instalment sale agreement cancelled, the defendant approached the plaintiff, to settle the outstanding arrears. As a result the instalment sale agreement was reinstated at the defendant's instance and request. Subsequent to the reinstatement of the credit agreement, the defendant has breached the agreement by failing to make payment of the monthly instalments due to the plaintiff.

[3] The following is common cause:

- (a) the instalment sale agreement in question is a credit agreement as defined in section 8 of the National Credit Act 34 of 2005 ('the NCA').
- (b) in terms of the instalment sale agreement, should the defendant commit any breach of the agreement, the plaintiff will be entitled to proceed with the enforcement or termination of the agreement as set out in Chapter 6 Para C of the NCA.
- (c) the defendant is in breach of the instalment sale agreement by not complying with his payment obligations.
- (d) the plaintiff has elected not to enforce or terminate the instalment sale agreement.

[4] The issues to be determined by this court are:

- (a) whether summary judgment proceedings entitle the plaintiff to a final relief order of restitution of the motor vehicle absent cancellation of the instalment sale agreement and

(b) whether the defendant's plea of "reckless credit" and "over-indebtedness" renders the instalment sale agreement *null and void* thereby entitling the plaintiff to the return of the motor vehicle without having to first cancel the instalment sale agreement.

[5] Counsel for the defendant raised these *point's in limine*: (a) the plaintiff's abandonment of its prayer of cancellation of the instalment sale agreement has rendered the summary judgment application fatally flawed and accordingly, the plaintiff is not entitled to an order attaching the motor vehicle prior to the cancellation of the instalment sale agreement, (b) the plaintiff's failure to first cancel the instalment sale agreement does not give it any basis in law both under the common law, the instalment sale agreement and the National Credit Act to claim restitution of the motor vehicle. The submissions made on behalf of defendant on points *in limine* are dealt with below.

[6]

(i) *Do summary judgment proceedings entitle the plaintiff to a final order of restitution absent cancellation of the credit agreement?*

The short answer to this question can be found, in **Absa Bank v De Villiers and Another** 2009 (5) SA 40 (C) page 11 where Fourie J said the following:

"[18] According to our law of contract, restitution is the normal result following from the cancellation of a contract. By cancelling the instalment sale agreement, applicant, as the

innocent party, would seek to set aside the agreement and return to the status *quo ante*, by claiming repossession of the vehicle, and to claim damages for breach of contract.

[19] It follows from the aforesaid that, in terms of the general principles of our law of contract, an order authorising the attachment of a vehicle which is the subject of an instalment agreement, would be granted by the court as a claim ancillary to the cancellation of the instalment agreement.”

[7] Counsel for the plaintiff argued that (a) the plaintiff is entitled to seek a final order for the restitution of the motor vehicle on summary judgment proceedings absent cancellation of the instalment sale agreement, (b) the defendant cannot on the one hand allege that the credit afforded to him by the plaintiff is reckless, yet on the other hand refuse to deliver the motor vehicle to the plaintiff, (c) the defendant’s plea of reckless credit renders the instalment sale agreement *null and void* and therefore the plaintiff is entitled to the return of the motor vehicle without having to first cancel the instalment sale agreement.

[8] Counsel for the plaintiff based his submissions on *inter alia*, the case of **SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar cases** 2011 (1) SA 310 (GSJ) and referred this court to paragraphs 45-50 wherein Levenberg AJ said:

“[45] It is significant that, in relation to the suspension of a credit agreement, s84 focuses on whether the consumer is required to make payments or is obliged to pay any interest, fee or other charge during the period of suspension. Although s 84(1)(c) contemplates that the credit provider will not be

entitled to enforce its rights during the period of suspension, that subsection must be read with ss 84 (1)(a) and (b). There is no basis for reading into the language of the NCA a provision that, when suspension is appropriate, the court also has the power to permit the consumer to utilise the security in a manner which will permit it to deteriorate during the period of suspension.

[46] It seems unlikely that the legislature ever intended that the consumer could keep the “money and the box”. If the consumer obtained possession and use of a motor vehicle in circumstances in which no credit should have been extended to the consumer, it would be fundamentally unfair and counterproductive for the consumer to continue to use the vehicle whilst at the same time not making any payments under the agreement.

[47] If the consumer has a valid complaint that, but for the recklessness of the credit provider, the consumer would never have become involved in the credit transaction, it might be “just and reasonable” to “set aside” the agreement. In that event the agreement would be null and void, and as if it had never been. As a consequence, the credit provider, who remains the owner of the vehicle, would be entitled to restoration of the vehicle. On the other hand, the consumer, who no longer has any obligation under the agreement that has been set aside, would be relieved of any indebtedness or deficiency claim under the agreement. In certain circumstances, this would be a fair and symmetrical solution.

[48] On the other hand, if the effect of the agreement is merely suspended, all elements of the agreement would have to be suspended. This would mean that the consumer would not be

entitled to continue to retain possession of the vehicle during the period of suspension. At the same time, the consumer would not have to make any payment under the agreement during the suspension period.

[49] I agree with the following statements by my sister Masipa J in **Standard Bank of South Africa Ltd v Panayiotts** 2009 (3) SA 363 (W) at 370:

“[77] In any event, my view is that the NCA does not envisage that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods which form the subject-matter of the agreement. Such goods should be sold to reduce the defendants’ indebtedness.

[81] The purpose of the NCA is, *inter alia*, to provide for the debt re-organisation of a consumer who is over-indebted, thereby affording such consumer the opportunity to survive the immediate consequences of his financial distress and to, achieve a manageable position ... 6”

[50] That the NCA does not contemplate retaining “the money and the box” is also borne out by the provisions of s 130 (1) of the NCA. That section provides that the failure of a consumer to surrender its security is a factor that militates in favour of immediate enforcement of the credit agreement by the credit provider.”

[9] Counsel for the plaintiff then concluded his argument by submitting that in the light of the aforementioned authority, it is clear that the defendant cannot on the one hand allege that the

credit afforded to him by the plaintiff is reckless, yet on the other hand, refuse to deliver the motor vehicle to the plaintiff.

- [10] It is important to note that counsel for the plaintiff placed reliance on the case of **SA Taxi Securitisation** *supra*. In my view, the principles espoused in the case referred to cannot and do not apply in the present matter. The present case is fundamentally distinguishable from **SA Taxi Securitisation** for the following reason(s). Unlike in this case, in that case the credit agreement had been cancelled. There is nothing in that case that supports the view that summary judgment can be granted for the restitution of the motor vehicle absent cancellation of a credit agreement. This case requires an examination of the issues which were never dealt with in that case being (a) whether a final relief order of restitution can be granted on summary judgment application absent cancellation of the credit agreement, and (b) whether the defendant's plea of reckless credit and over indebtedness renders the instalment sale agreement *null and void* thereby exempting the plaintiff from first cancelling the credit agreement prior to claiming a final relief of restitution of the motor vehicle.

[11]

- (ii) *Does the defendant's plea of 'reckless-credit' and over-indebtedness render the instalment sale agreement null and void thereby entitling the plaintiff to the return of the motor vehicle?*

This question can be answered with reference to what was said in paragraphs (f-g) on page 315 and paragraph 47 of **SA Taxi Securitisation Case** *supra*:

“[f-g] Since the enactment of the NCA, there seems to be a tendency in these courts for defendants to make bland allegations that they are ‘over-indebted’ or that there had been ‘reckless credit’. These allegations, like any other allegations made in a defendants’ affidavit opposing summary judgment, should not be inherently and seriously unconvincing, should contain a reasonable amount of verificatory detail, and should not be ‘needlessly bald, vague or sketchy’. A bald allegation that there is ‘over-indebtedness’ will not suffice.”

“[47] If the consumer had a valid complaint that, but for the recklessness of the credit provider, the consumer would never have become involved in the credit transaction, it might be ‘just and reasonable’ to ‘set aside’ the agreement. In that event the agreement would be *null and void*, and as if it had never been. As a consequence, the credit provider, who remains the owner of the vehicle, would be entitled to restoration of the vehicle. On the other hand, the consumer, who no longer has any obligations under the agreement that has been set aside, would be relieved of any further indebtedness, or deficiency claim under the agreement.”

[12] Counsel’s submission that defendant’s plea of ‘reckless-credit’ and ‘over-indebtedness’ has rendered the instalment sale agreement null and void thereby entitling plaintiff to the restoration of the vehicle is therefore not sustainable.

- [13] As appears from what is stated above, it follows that a mere plea of 'reckless credit' does not automatically vitiate the credit agreement.
- [14] I now turn to the arguments of counsel for the defendant on the merits. Counsel for defendant submitted that the agreement and the granting of the credit were reckless in terms of section 80 of the NCA in that: (a) although the plaintiff conducted the assessment as required by section 82 (1) of the NCA, the plaintiff entered into the credit agreement with the defendant despite the fact that the preponderance of information available to the plaintiff indicated that the defendant did not understand and/or appreciate the risks, costs or obligations under the proposed credit agreement, (b) alternatively, the plaintiff entered into the credit agreement with defendant notwithstanding the fact that preponderance of information available to the plaintiff indicated that entering into the credit agreement with the defendant would make him over-indebted.
- [15] It was also submitted on behalf of the defendant that: (a) the defendant intends to hold the contract intact and fulfil his financial obligations having managed to raise an amount of R70 000.00 and that (b) defendant tenders a monthly payment of R5000.00 in order to settle the outstanding balance owing to plaintiff.
- [16] Counsel for defendant submitted further that (a) during June 2010, defendant applied to court to be placed under debt review and a proposal was sent to the plaintiff which proposal was accepted by plaintiff, (b) defendant has made payment to the

debt counsellor in terms of the debt rearrangement but the debt counsellor failed to make the agreed payments to the creditors, (c) defendant is over-indebted as a consequence of the reckless credit and, (d) the debt counsellor's failure to discharge his obligations has compounded the dire financial situation of defendant and has contributed to his over-indebtedness.

- [17] Having found fortification from the **Absa Bank** case *supra*, which case is on all fours with this one, I am of the view that in summary judgment proceedings, the plaintiff cannot be entitled to a final order authorising restitution (in this case the attachment of the motor vehicle) absent the cancellation of the instalment sale agreement as doing so would amount to the infringement of the consumer's rights to protection against arbitrary repossessions of property by credit providers.
- [18] The plaintiff also has an insurmountable difficulty in that clause 11.1 of the instalment sale agreement in question provides that:

"If you do not comply with any of the terms and conditions of this Agreement (all of which you agree are material), or if you fail to pay any amounts due under this Agreement, or you have made misleading statements to us before signing this Agreement, or you allow any judgment that has been taken against you to remain unpaid for more than seven days, or are sequestered or liquidated, or perform an act of insolvency in terms of the Insolvency Act No. 24 of 1936 or enter into a compromise with any of your creditors, or being a natural person, die, or being a juristic person undergo a material restructure, then we may (without affecting any of our other rights), proceed with the enforcement or termination of the

Agreement, as set out in chapter 6 Part C of the Act.” (My own emphasis).

- [19] I see nothing in the language of the instalment sale agreement that entitles the plaintiff to restitution prior to termination of the credit agreement.
- [20] The defendant did not substantiate his plea of ‘reckless credit’ and ‘over-indebtedness’ with any verificatory evidence and accordingly, his pleas are sketchy and do not suffice.
- [21] Section 86 of the National Credit Act permits a consumer to apply to a debt counsellor for a declaration that he is over indebted. The defendant has alleged that he appointed a debt counsellor and the latter has failed to pay his creditors. These allegations were not challenged by the Plaintiff and it is necessary that they be ventilated. I fail to understand how the defendant’s plea of ‘over-indebtedness’ should render the credit agreement null and void. There is no evidence before this court that a debt-counsellor was indeed appointed and I am constrained to make a finding in this regard.
- [22] As appears from what I have set out above, the plaintiff has failed to make a case for summary judgment. Defendant has tendered payment of R70 000.00 towards the arrears and this demonstrates his good intentions to settle the amounts in arrears. However, I will not make a finding in this regard.

[23] Accordingly, I make the following orders:

1. The plaintiff's application for summary judgment is dismissed with costs.

R. MOKOENA, AJ

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Instructed by:
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BLOEMFONTEIN

On behalf of respondent: Adv. P.C. Ploos van Amstel
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