IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, DURBAN

Case No: 6565/2014

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED — Plaintiff

And

MARLENE HARILALL — Defendant

JUDGMENT

THATCHER AJ:

[1] On 6 February 2008, the plaintiff, the Standard Bank of South Africa Limited, a registered credit provider, concluded an instalment sale agreement with the defendant, Marlene Harilall, in terms of which the former sold to the latter a 2008 Dodge Caliber [2…..] In terms of the contract, the defendant was to repay the principal debt and interest in 60 monthly instalments commencing on 31 March 2008 with the final instalment to be paid on 5 February 2013.

[2] On 22 February 2011, the magistrates' court at Verulam granted a debt restructuring order in favour of the defendant and her husband, to whom she is married in community of property, in terms of which she and her husband were to pay the plaintiff a restructured amount of R3 258,14 per month. That debt restructuring order was granted after opposition from the plaintiff.

[3] On 28 November 2011, and despite the existence of the debt restructuring order, the plaintiff brought an action in this court under case number 13296/2011. In that action, the plaintiff alleged that it had, in accordance with section 86(10) of the National Credit Act, terminated the debt review process. On 26 January 2012, a plea was delivered on behalf of the defendant by her attorneys, Booysen & Co. Inc. In that plea it was denied that the plaintiff was not aware of the debt review application and order. On the same day, Booysen & Co. Inc addressed a letter to the plaintiff's attorneys in that action (who, I must mention, are not the attorneys in this action.) That letter stated as follows:-

> "We fail to understand why you are proceeding on this matter. This is a debt review order and your client is receiving payments in terms thereof. Kindly note that our legal fees are being debited against the payments made to your client."

[4] It is common cause that from January 2012 to May 2012, the defendant, as she and her attorneys had indicated to the plaintiff, did not pay the instalments due to the plaintiff under the debt restructuring order. The plaintiff applied for an expedited trial date and the trial was set down for hearing on 11 June 2012. On 29 May 2012, shortly before the trial, the plaintiff withdrew the action and tendered to pay the defendant's costs incurred by her in opposing it

[5] On 13 August 2012, the plaintiff launched a second action in this court under case number 8272/2012 against the defendant alleging that the defendant had breached the debt restructuring order of 22 February 2011.

[6] On 24 August 2012, Booysen & Co. Inc. on behalf of the defendant, addressed a letter to the plaintiff's attorneys in the action under case number 13296/2011 in which they confirmed that the defendant's bill of costs had been taxed in the amount of R7 358,80. The defendant's attorneys confirmed that an amount of R14 627,44 had been withheld from the plaintiff in order for her to pay her legal fees in the action which the plaintiff had withdrawn shortly before the trial date. The letter advised of R7 241,64 being paid into the plaintiff's account, being the difference between the amount of R14 627,44 which had been withheld and the taxed legal costs of R7 385.80. The letter also noted that the plaintiff had brought a new action under case number 8272/2012 and called upon the plaintiff to withdraw that action before further costs were incurred.

[7] On 23 April 2014, the plaintiff gave notice of the termination of the debt restructuring order, and on 5 June 2014 brought this action, the third, against the defendant, based upon her alleged breach of the debt restructuring order. Attached to the particulars of claim was an annexure "D", alleged to be evidence of her breach. On the face of it, annexure "D" shows the transactions from 1 January 2014 to 15 May 2014 among which are four instalments of R3 258,14 apparently paid on the 28th of each of the months of January to April 2014 inclusive.

[8] Unsurprisingly, in her plea in this action the defendant raised a special plea of *lis alibi pendens*, contending that there was pending before the court the plaintiff's action under case number 8272/2012. On 15 October 2014, the plaintiff delivered a notice of withdrawal of the action under 8272/2012 and accordingly the defendant, understandably, did not persist with the special plea at the trial.

[9] On 12 January 2015, and in the absence of a tender by the plaintiff to pay the defendant's costs incurred in opposing the action under case number 8271/12, the defendant launched an application for an order that the plaintiff pay her costs in that action. One month later, the plaintiff tendered to pay those costs and that application did not proceed.

[10] In this action before me, the defendant raised a number of defences, namely:-

(a) as at the date of institution of the present action, the defendant was not in default of the debt rearrangement order and neither had she been in arrears in March 2014;

(b) it was impossible for the defendant to pay the monthly instalments from January 2012 in terms of the debt restructuring order because:-

(i) the plaintiff launched an unmeritorious action against the defendant which the defendant, with the help of attorneys, was obliged to defend;

(ii) she was obliged to pay legal fees to those attorneys to defend that litigation;

(iii) she was required to divert money payable to the plaintiff under the debt restructuring order in order to pay those legal expenses;

(iv) the plaintiff's conduct in launching that unmeritorious litigation rendered the plaintiff liable for its consequences;

(c) it is not open to the plaintiff, two years after the non-payment of four instalments in 2012, to base an action upon that non-payment, more especially when the defendant was not in arrears at the time of the institution of the action;

(d) if the plaintiff was not prepared to accept that the defendant could hold back the payment of the instalments for the purpose of paying legal fees, there was a duty on the plaintiff to speak out, and from its silence it must be inferred that the plaintiff accepted that arrangement and the plaintiff cannot now mount a claim against the defendant based upon the non-payment of those instalments.

Whether the Defendant was not in default of the Debt Restructuring Order when this action was instituted

[11] Ms *Olsen*, who appeared for the defendant, argued that the plaintiff's payment history as reflected on page 40 of exhibit A read with the defendant's payment ledger, exhibit B at page 187, evidenced that at the date of the institution of this, the third action, the defendant was not in breach of the debt restructuring order. It was the plaintiff's case that between 22 February 2013 and 14 November 2014, the instalment due under the debt restructuring order was R3 258.14. Between those dates the defendant made ten payments of between R3 841.48 and R3 841.56 so the difference between the instalments due and the payments made each month was approximately R583.34 so that as at 14 November 2013, the defendant's total overpayments amounted to R5 833.40. Between 28 November 2013 and 13 February 2014, the defendant made three payments of R4 258.08. The difference between the instalment due and the payment made each month was R999.94 so that there was a total overpayment during this period of R2 999.82. The two overpayments added together totalled R8 833.22 so that as at 13 February 2014, the defendant had overpaid in that amount. The two instalments reflected on A40 on 28 February 2014 and the 28 March 2014 total R6 516.28 which amount is less than the amount by which the defendant had already overpaid so that the overpayment covered that amount. Moreover the defendant's records reflected a payment on 14 March 2014 of R4 258.08. However that amount was only credited by the plaintiff on 28 August 2014. On the face of it therefore the defendant was not in arrears in terms of the debt restructuring order when this action was instituted.

[12] On the face of it, the defendant was not in breach of the debt restructuring order when this action was instituted. However I do not have to make a finding in this regard because of the decision by the Constitutional Court in the case of *Ferris v FirstRand Bank Ltd* 2014(3) SA 39 (CC). At page 44G, the following is stated:

> "Mr and Mrs Ferris breached the debt-restructuring order. Once the restructuring order had been breached, FirstRand was entitled to enforce the loan without further notice. This is clear from the wording of the relevant sections of the Act. Section 88(3)(b)(ii) does not require further notice – it merely proves a credit provider from enforcing a debt under debt review unless, among other things, the debtor defaults on a debt restructuring order."

The court concluded that an original credit agreement is enforceable without further notice if the debt restructuring order is breached.

[13] It is common cause that the debt restructuring agreement was breached by the defendant's failure to pay the instalments due for the months January to May 2012 inclusive. I am bound by the decision of the Constitutional Court in *Ferris v FirstRand Bank Ltd* (*supra*). The plaintiff was accordingly entitled to enforce the debt under review unless any of the other defences raised on behalf of the defendant succeeds. it is those to which I now turn.

<u>Impossibility of performance</u>

[14] The defendant in her plea pleaded impossibility in the following terms:-

> "9.2
>
> The defendant was entitled to withhold payments to the plaintiff for the period January to May 2012 on the grounds that the plaintiff had made it impossible for the defendant to perform under the agreement as amended by the debt restructuring order by wrongfully instituting action against her, and impossibility of performance created by one party releases the other from the reciprocal obligation."

[15] Where a defendant seeks to rely on impossibility of performance, he or she bears the onus of establishing the impossibility.

> *Emadyl Industries CC v Formex Engineering* 2012 (4) SA 29 (E) at 34B-C

[16] As I understand it, for the defence of impossibility to succeed, it must be objective impossibility, not subjective impossibility. *World Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W) at 534H. It is not open to a party to plead impossibility of performance because in a commercial situation, through changed financial circumstances the payment has become difficult, expensive or unaffordable. *Unibank Savings and Loans (formerly Community Bank) v ABSA Bank* 2000 (4) SA 191 (W) at 198D-E.

[17] In any event, if the impossibility is subjective impossibility, the defendant has not discharged the burden which rests upon her to establish that impossibility. She failed to place any evidence before the court that the institution of the action under case number 13296/11 rendered it impossible for her to maintain the payments in terms of the debt restructuring order. The defendant had succeeded in persuading a magistrate's court that she was over indebted. It is probable therefore that the financial circumstances of the defendant were constrained and that any unforeseen, additional, expenses with which she was subsequently saddled would place her under further financial strain. However she placed no evidence before the court of her finances in January 2012. The court order declaring her to be over indebted was made on 22 February 2011, nearly one year earlier. It may well be that the defendant’s financial circumstances had either not changed since the order was made on 22 February 2011 or that her financial circumstances had deteriorated further. Whatever the position, it was incumbent upon her to place evidence before the court as to what her personal financial circumstances were in January 2012 that rendered it impossible for her to comply with the debt restructuring order. She did not place any evidence before the court on this aspect. She has therefore not discharged the burden which rests upon her to establish impossibility.

[18] Accordingly the defence of impossibility must fail.

Whether the Plaintiff can rely in this action on the non-payment of four instalments in 2012

[19] Ms *Olsen* submitted that the plaintiff had continued, since May 2012, to accept regular payments from the defendant after she had breached the debt restructuring order. By so doing, she contended, the plaintiff had elected to continue to treat the debt restructuring order as binding. So, the argument continued, the plaintiff could not rely upon the non-payment of these four instalments two years earlier, particularly when the defendant was not in arrears at the time of the institution of the action.

[20] The plaintiff, did not, by electing to accept the instalments after the non-payment of the four instalments in 2012, elect to keep the debt restructuring order in place. In August 2012, a short period after the defendant had defaulted on the debt restructuring order, the plaintiff instituted an action in which it sought cancellation of the instalment sale agreement. This conduct of the plaintiff, far from constituting an election to treat the debt restructuring order as binding, is precisely the opposite. Thus the acceptance by the plaintiff of instalments in terms of the debt restructuring order after they resumed in June 2012 cannot in my view be regarded as the plaintiff electing to abide by the debt restructuring order.

Whether the plaintiff consented to the defendant withholding payments

[21] Ms *Olsen* argued that the failure by the attorneys then acting for the plaintiff to respond to the defendant's attorneys letter of 26 January 2012 advising them of the defendant's intention not to pay the instalments for January 2012 to May 2012 must give rise to the inference that the plaintiff accepted that arrangement. I do not think that this is the case. The plaintiff's institution of the action in August 2012 under

case number 8272/2012 gives the lie to this. In that action the plaintiff specifically relies upon the defendant's default in paying the instalments for January to May 2012 inclusive.

[22] I accordingly find that the plaintiff is entitled to an order cancelling the contract and an order that the defendant restore possession of the vehicle to the defendant.

[23] With regard to paragraph 3(b) of the prayer to the particulars of claim, the rate of interest payable on the debt is variable. It is thus appropriate that in the application envisaged in paragraph 3, evidence be set out of the rate of interest which may be claimed by the plaintiff. In those circumstances I propose to amend the relief set out in paragraph 3(b) to provide for this.

Costs

[24] There remains the question of costs.

[25] The purposes of the National Credit Act are set out in paragraph 3 of that Act. The relevant part of that Act is the following:-

> "**3. 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) to (f) ...;
>
> (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms 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;

(i) providing for a consistent and harmonized system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

[26] The defendant cannot be described as a recalcitrant debtor intent upon avoiding her financial obligations. When she found herself in financial difficulty in 2011, she sought the assistance of the Act and the Magistrate's Court in order to restructure her debts. That application was opposed by the plaintiff and notwithstanding its opposition, on 11 February 2011, such an order was made on 22 February 2011. There is no evidence to indicate that the defendant did not thereafter adhere to that debt rearrangement order. Some ten months later, on 28 November 2011, the plaintiff brought an action against the defendant for the cancellation of the instalment sale contract and the return of the vehicle. The defendant, understandably, was compelled to retain the services of an attorney to defend this action. Her attorney addressed a letter to the plaintiff's attorneys (who I reiterate are not the plaintiff's attorneys in this action) on approximately 26 January 2012, advising that the plaintiff was receiving payments in terms of the debt restructuring order. It was in that letter that the plaintiff was advised that no further payments would be made because the defendant would be paying her attorney to oppose the plaintiff's action.

[27] It would appear that the defendant did not have the courtesy of a response to that letter from the attorneys then acting for the plaintiff. I would have thought that those attorneys, having received the letter, would investigate the veracity of the allegations made in the letter, and if they were found to be correct, that action would no doubt not have continued and the defendant would not have incurred what for her were significant legal costs. However no such investigation appears to have been done. Instead, on 17 February 2012, an application was made to place the matter on the expedited trial roll and a date, 11 June 2012 was allocated for the trial. After all the trial preparation had been undertaken, the plaintiff withdrew its action against the defendant on 29 May 2012, two weeks before the trial was due to be held. The

plaintiff can only have done so because it at that stage realised that its action was without merit. In the meantime, the plaintiff had put the defendant to the expense of instructing attorneys to oppose its entirely unmeritorious action.

[28] It must be borne in mind that the plaintiff is one of the four largest banks in South Africa. The defendant, on the other hand, is an individual who does not have at her disposal the financial resources that the plaintiff can call upon. Indeed, having opposed the application for debt review, the plaintiff and its then attorneys must have been acutely aware of the defendant's parlous financial situation. Notwithstanding this, no endeavour was made by or on behalf of the plaintiff to investigate the matter and it was only after the defendant had incurred the expense of preparation for trial that the plaintiff withdrew the unmeritorious litigation.

[29] If that was not enough, in August 2012 the plaintiff launched a second action, this time based upon the defendant’s default of the debt restructuring order occasioned by the first, unmeritorious action. To compound this, on 5 June 2014, and while the second action was still pending, the plaintiff launched the third action which is now before the court. That second action was then withdrawn in October 2014 with no tender to pay the defendant's costs. The defendant was compelled to incur the further expense of launching an application in this court for an order that the plaintiff pay her costs in the second withdrawn action. It was only a month later that the plaintiff deigned to tender those costs.

[30] Ordinarily, the unsuccessful party is ordered to pay the successful party’s costs. A successful party however may under certain circumstances be ordered to pay the costs of the proceedings, but this is a very unusual order, seldom given. In *Michael v Linksfield Park Clinic (Pty) Ltd* 2001(3) SA 1188 (SCA) the Supreme Court of Appeal stated as follows at page 1203J to 1204A, paragraph [5]:-

> “It is beyond question that the circumstances of a case may warrant an order, in the exercise of the Court’s discretion, depriving a successful party of costs, partially or

> entirely, and even warrant an order requiring the successful party to pay the unsuccessful party's costs – again, partially or entirely."

[31] There are two general principles with regard to questions of costs namely, that the court has a judicial discretion as to costs, and that the successful party should, as a general rule, have his costs. *Fripp v Gibbon & Co* 1913 AD 354 at 357.

[32] This judicial discretion is to be exercised in accordance with the principles laid down by Atkin, LJ in the case of *Ritter v Godfrey* [1920] 2 KB 47 (CA) at page 60, quoted with approval in *Merber v Merber* 1948 (1) SA 446 (AD) at 453. Atkin, LJ stated as follows:

> "In the case of a wholly successful defendant, in my opinion, the Judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."

[33] Where the plaintiff has been wholly successful, the same principles must apply in considering the appropriate costs order.

[34] The National Credit Act was passed in order to assist over-indebted people by providing them with temporary relief. A court granted the defendant the temporary relief the Act permitted, and she appears to have grasped the opportunity afforded her. When her attorneys advised the plaintiff's then attorneys on 26 January 2012 that there was a debt restructuring order that was being complied with by the defendant, the plaintiff did not dispute this. The plaintiff then instituted two actions which it subsequently withdrew. By withdrawing those actions, the plaintiff must have regarded them as being without merit. In the first case, the plaintiff tendered to pay the defendant's costs although, as is clear from the evidence, the defendant was still out of pocket after having her costs taxed. In the second case the plaintiff made no such tender and the defendant was compelled to incur more legal costs to bring a

High Court application before such a tender was forthcoming. All of this conduct of the plaintiff arises from a single transaction, the instalment sale agreement it concluded with the defendant, the transaction over which the parties have been litigating since 28 November 2011 when the plaintiff launched the first of two baseless actions against the defendant arising from the instalment sale agreement. This conduct of the plaintiff arising from the instalment sale agreement constitutes serious oppression of the defendant. In the circumstances, and in the exercise of my discretion, I am of the view that it is appropriate that the plaintiff pay the defendant's costs of this action. I accordingly make an order in the following terms:

1. The cancellation of the instalment sale agreement No. 600454770001 concluded between the plaintiff and the defendant on 6 February 2008 is confirmed.

2. The defendant is directed to restore to the plaintiff possession of a motor vehicle being a 2008 Dodge Caliber 2.0 CVT SX with the engine number 8D563540 and the chassis number IB3H348BX8D563540 to the plaintiff within five (5) days of the service of this order upon the defendant.

3. In the event of the defendant failing to deliver the vehicle to the plaintiff within the aforementioned period of five days, the sheriff of the High Court is authorised to attach the vehicle and to deliver it to the plaintiff.

4. The plaintiff is granted leave to apply to this court on the same papers, supplemented insofar as may be necessary, for an order that the defendant pay to the plaintiff such damages that the plaintiff may have suffered in an amount to be calculated by subtracting the current market value of the vehicle from the balance outstanding in terms of the instalment sale contract and taking into account the rebate on unearned finance charges as well as any interest which may be payable by the defendant to the plaintiff in terms of the instalment sale agreement referred to in paragraph 1.

5. The plaintiff shall bear its and the defendant's costs of this action.

Date of Hearing	:	2 March 2015
Date of judgment	:	9 April 2015
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