FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3865/2012

In the matter between:-

NEDBANK LIMITED t/a MFC, A DIVISION OF NEDBANK Plaintiff

and

MATSEKO LILIAN NTEMA Defendant

HEARD ON: 22 JANUARY 2013

JUDGMENT BY: MHLAMBI, AJ

DELIVERED: 22 MARCH 2013

INTRODUCTION:

[1] This is an application for summary judgment, the Plaintiff seeking an order in terms of prayers 1, 2 and 5 of the Notice of Motion which read as follows:

> "1. Confirmation of the cancellation of the agreement;
>
> 2. An order authorising the Sheriff of the High Court to attach, seize and hand over the **2007 TOYOTA AURIS 140 RT** with **ENGINE NUMBER 422U957945** and **CHASSIS NUMBER SB1KM58E70F008415**, to the plaintiff, attending to confirm such attachment.

5. Costs of suit on the attorney and client scale."

BACKGROUND:

[2] The Plaintiff and the Defendant entered into an instalment sale agreement, in terms of which the plaintiff sold to the Defendant a 2007 Toyota Auris 140 RT, engine number 422U957945 and chassis number SB1KM58E70F00415.

[3] The total amount repayable by the Defendant in terms of the agreement was R249 796.87.

[4] According to the plaintiff the defendant failed to make due and punctual monthly payments to the plaintiff in terms of the agreement and that an amount of R119 356.52 was outstanding on 13 March 2012, together with interest at a rate of 17,76% per annum calculated from 13 March 2012 to date of final payment.

[5] The Plaintiff also attached a certificate of balance to the Particulars of Claim in which the arrear amount was reflected. The agreement is governed by the National Credit Act 34 of 2005 (NCA)

[6] The total amount in terms of the agreement was repayable by the Defendant to the Plaintiff in fifty-nine (59) monthly instalments of **R4 163.28**, commencing on **1 November 2007**, with a final instalment of **R4 163.35** on **1 October 2012.** The

defendant is using and continuing to use the vehicle with the result that it is deteriorating and depreciating in value.

[7] The Defendant alleges that he is not owing an amount of **R119 356.25** to the Plaintiff.

[8] According to the Defendant he has already paid an amount of **R161 507.00** in respect of the selling price of the vehicle.

The debt review order:

[9] It is common cause that a debt review order was granted by the Magistrate's Court, Bloemfontein on **10 December 2009**.

[10] According to the Plaintiff a minimum instalment of **R2 500.00** was payable to the plaintiff in terms of the debt review order.

[11] According to the Defendant the debt review order never specifically pronounced that he should pay R2 500.00.

[12] The Defendant failed to indicate what the correct amount should be.

[13] The defendant however did not dispute that the payments to the Plaintiff had to be made on a monthly basis.

Defendant's default in terms of the debt review order:

[14] The Plaintiff contends that the Defendant defaulted in her obligations in terms of the debt review order.

[15] Consequently, the Plaintiff alleges that in terms of Section 88(3) of the National Credit Act, it is entitled to proceed with legal action against the Defendant.

[16] The Plaintiff alleges that only partial payments were received for the months of **February 2010, April 2010 to June 2010, November 2010, December 2010, March 2011, February 2012 and May 2012.**

[17] According to the Plaintiff no payments were received for the months of **January 2010, March 2010, August 2010 to October 2010, May 2011, July 2011, March 2012, June 2012 and August 2012.**

[18] According to the Defendant the debt counsellor made the following payments to the Plaintiff:

18.1	**February 2010**	**-**	**R2 336.66**
18.2	**April 2010**	**-**	**R2 473.93**
18.3	**May 2010**	**-**	**R2 473.92**

[19] According to the Defendant a double payment for the month of **July** and **August 2010** was made in the amount of **R5 780.00**.

[20] The Defendant also attached a payment history ("**the payment history**") to his opposing affidavit reflecting the following payments:

20.1	**5 November 2010**	**-**	**R2 200.00**
20.2	**10 January 2011**	**-**	**R2 500.00**
20.3	**31 January 2011**	**-**	**R2 500.00**
20.4	**28 February 2011**	**-**	**R2 500.00**
20.5	**30 April 2011**	**-**	**R8 000.00**
20.6	**24 June 2011**	**-**	**R5 000.00**
20.7	**3 August 2011**	**-**	**R1 500.00**
20.8	**1 September 2011**	**-**	**R3 500.00**
20.9	**30 September 2011**	**-**	**R4 000.00**
20.10	**31 January 2012**	**-**	**R4 000.00**
20.11	**29 February 2012**	**-**	**R2 000.00**
20.12	**7 May 2012**	**-**	**R2 200.00**
20.13	**1 September 2012**	**-**	**R2 500.00**

[21] The summons was issued on **4 September 2012** and served on **18 September 2012**, Notice of Intention to Defend filed on **19 October 2012**.

[22] According to the Defendant, it made payment to the Plaintiff on **22 November 2012** to cover such arrears for **June** and **August 2012**.

[23] According to the Defendant he is now in the position to pay the

Plaintiff without the assistance of a debt counsellor.

The issues to be determined

[24] 24.1 Whether the Defendant is in default in terms of the Agreement;

24.2 Whether the Defendant is in default in terms of the re-arrangement order.

Contentions by the parties

Plaintiff

[25] 25.1 The defendant is in default under the credit agreement and the re-arrangement agreement or Court Order.

25.2 The plaintiff is entitled to proceed with legal action against the Defendant in terms of Section 88(3) of the National Credit Act, 34 of 2005 ("NCA").

25.3 The Defendant does not wish to comply with the debt review order by making payments to the debt counsellor.

25.4 On his own version, the defendant is in arrears in terms of the agreement.

25.5 As at the time this action was instituted, the defendant admitted being in default of his obligations in terms of the re-arrangement order.

Defendant

[26] 26.1 Defendant paid an amount of R161 356.00 far in excess of R119 356.25 for the vehicle.

26.2 The interest chargeable at 17.76% is unlawful and unjustly benefits the plaintiff.

26.3 The said interest should have been restructured and reduced in terms of the debt review order.

26.4 Defendant disputes her indebtedness to the Plaintiff as claimed and all arrears alleged in the particulars of claim have been paid.

26.5 Plaintiff is still receiving money from the defendant to date.

26.6 Defendant has a bona fide defence to the plaintiff's action.

Legal Position

[27] Rule 32(3) of the Uniform Rules of court provides as follows: Upon the hearing of an application for summary judgment the defendant may:-

> "(a)……
>
> (b) Satisfy the court by affidavit of himself or any other person who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or evidence shall fully disclose the nature and grounds of the defence and the material facts relied upon therefor."

[28] The summary judgment procedure is not intended to deprive a defendant with a triable issue or sustainable defence of his/her day in court but to ensure that a defendant with a triable issue is not shut out: **Joob Joob Investments (Pty) LTD v Stocks Mavundla Zek Joint Venture** 2009 (5) SA 1 (SCA) at 11G - 12 D.

[29] The defendant must sufficiently disclose the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 at 425 G-426 E.

[30] Section 88(3) of the National Credit Act, 34 of 2005 provides as follows:

> "Subject to Section 86 (9) and (10) a credit provider who receives notice of court proceedings contemplated in Section 83 or 85, or notice in terms of Section 86 (4) (b) (i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until –
> (a) the consumer is in default under the credit agreement, and
> (b) one of the following has occurred
> (i)…
> (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers or ordered by the Court or the Tribunal."

[31] Once the jurisdictional requirement set out in Section 88(3) (a) co- exists with anyone of the jurisdictional requirements set out in Section 88 (3) (b), the credit provider is at liberty to proceed and to exercise and enforce, by litigation or other judicial process, any right or security under his credit agreement without further notice. The restraint placed upon the credit

provider, in consequence of a credit review process and re-arrangement order, falls away on the express authority of Section 88 (3), **Firstrand Bank Ltd v Fillis and Another** 2010 (6) SA 565 (ECP). See also **Collett v Firstrand Bank Ltd** 2011 (4) SA 508 (SCA).

[32] Section 86(7) (c) (ii) (aa) of the NCA provides for debt relief to an over- indebted consumer by extending the period of payment, thereby resulting in a reduction of the payments without reducing the actual amount owing by him/her in terms of the relevant agreement. It does not permit the magistrate's court to reduce the interest rate applicable to an agreement in order to provide debt relief to a consumer. The debt counsellor's scope for making a proposal in terms of Section 86(6) (c) is inextricably linked to the powers of the magistrate's court in section 87 of the Act: he or she cannot recommend what the said court is not empowered to order. **SA Taxi Securitisation (Pty) LTD v Lennard** 2012 (2) SA 456 (ECG)

Evaluation

[33] Paragraphs 19, 20 and 21 set out the Defendant's defence to the summary judgment application, and read as follows:

> "19. I repeat again that I am not owing the Plaintiff the amount of R119 356.25. The Plaintiff has not shown this Honourable Court in terms of the rands and cents as to how this amount has been computed and as such I dispute the amount claimed by the Plaintiff.

20. Furthermore I submit that I had paid for the said Motor vehicle thus far an amount of R161 507.00 which far exceeds the amount of R119 356.25 and almost the actual amount of the selling price Car. The material fact has not been disclosed by the Plaintiff to this Honourable Court and this would be a matter for legal argument.

21. I further submit that the interest charged by the Plaintiff is not on a reducing balance in terms of the Court Order. The interest charged by the Plaintiff has been 17.76% even after the Court so directed that it must be restructured and be reduced. Again this material fact has not been disclosed by the Plaintiff to this Honourable Court. The interest Plaintiff charges me is unjust and unfair as it is based on the amount of the increased instalment to the amount R6 588.42.“

[34] Paragraph 3 of the Defendant’s Heads of Argument reads as follows:

> “It is the Defendant’s submission that she had paid the Plaintiff for the said motor vehicle an amount of R161 356.00 which far exceeds the alleged amount of R119 356.25 and for that matter a 2007 Toyota Auris make.”

[35] The Defendant makes a bare denial, unsupported by material facts as to why she maintains that she does not owe the amount of R119 356, 25 to the Plaintiff in terms of the provisions of the agreement. The interest rate of 17,76% has been fixed in terms of the agreement between the parties and

cannot be reduced by the magistrate, as the latter is not permitted to do so.

[36] Defendant's attorney contended that the Plaintiff, before proceeding with an application for summary judgment, should have first rescinded the magistrate's court order. The above argument lacks merit and can therefore not stand. Besides, it lacks an appreciation of the relationship between the agreement, originally entered into between the parties, the debt review order and the provisions of the NCA.

[37] It is also clear that the Defendant did not maintain constant monthly payments in terms of the debt review order and her own papers attest to this fact. Despite the denial that the Court Order specifically pronounced that the monthly payments were R2500.00 (two thousand five hundred rand) per month, she failed to advance positive facts to indicate what the court order directed. This must be seen in the light that, despite this uncertainty of the monthly payments payable, Defendant continued effecting monthly payments of a stated amount and could determine on 22 November 2012 that she was in arrears for the months of June and August 2012 and duly paid an amount of R5000.00 (five thousand rand) to cover such arrears.

[38] These payment profile and conduct, in my mind, confirm the following two positions:

38.1 The Defendant was at all times aware that the monthly payment payable in terms of the review order was R2500.00 (two thousand five hundred rand).

38.2 She was in default of her payments in terms of the re-arrangement agreement/order as at the time the summons was issued.

[39] The above is fortified furthermore by the fact that on more than five occasions for the period between 5 November 2010 and 1 September 2012, the Defendant effected 5 (five) monthly payments of R2500.00 (two thousand five hundred rand). In paragraph 13 of the opposing affidavit, she confirms that for the months of June and July 2011, she had paid an amount of R5000.00 (five thousand rand only). The whole payment pattern contained in paragraphs 8 to 13 of her opposing affidavit attest to this fact.

[40] Due to the erratic payments by the Defendant to either the debt counsellor and/or the Plaintiff, I am convinced that the Defendant, as at 13 March 2012, was in arrears with her payments to the Plaintiff.

[41] I find, therefore, that the Defendant has failed to disclose the nature and grounds of her defence and the facts upon which it is founded. Her defence is neither bona fide nor good in law.

I find furthermore that the Defendant is in default in terms of both the rearrangement order and the agreement.

Costs

[42] Counsel for Plaintiff relinquished his prayer for costs on an attorney and client scale and asked for costs on a party and party scale.

Order

[43] In the result, the application for summary judgment succeeds and the following order is made:

43.1 Prayer 1 and 2 are granted.

43.2 Costs of suit on a party and party scale

J.J. MHLAMBI, AJ

On behalf of plaintiff:	Adv W J Groenewald Instructed by: Matsepes Inc BLOEMFONTEIN
On behalf of defendant:	Mr M J Ponoane Instructed by: Ponoane Attorneys BLOEMFONTEIN

JJM/spieterse