FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2985/2012

In the matter between:-

STANDARD BANK OF SOUTH AFRICA BEPERK Plaintiff

and

HELENA DU RANDT Defendant

JUDGMENT BY: MATLAPENG, AJ

HEARD ON: 15 OCTOBER 2012

DELIVERED ON: 22 NOVEMBER 2012

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[1] This is an application for summary judgment wherein the following is claimed against the defendant:

(a) confirmation of cancellation of the agreement as cited in the plaintiff's particulars of claim;

(b) return of the following goods namely Audi TT motor vehicle with engine number TRUZZZ8J471011625, chassis no BWA090454;

(c) costs on attorney and client scale;

(d) remainder of the prayers as contained in the particulars of claim to be postponed sine die.

The application is opposed.

[2] The factual matrix is briefly: In 2007 the plaintiff and the defendant entered into a written instalment sale agreement for the sale of the Audi motor vehicle at the agreed price of R525 705,60. In terms of the agreement, the defendant bound herself to pay monthly instalments of R8 761,68. The defendant failed to comply with her monthly obligations and is in arrears. In terms of the written agreement the defendant will be in breach of the agreement, amongst others, if she fails to make stipulated payments at regular intervals or if judgment is entered against her name and remains unsatisfied for a period of seven days. This will entitle the plaintiff to terminate the agreement.

[3] The defendant entered appearance to defend the action which resulted in the current application for summary judgment by the plaintiff.

[4] It is trite that for a defendant to successfully resist an application for summary judgment, he has by an affidavit to satisfy the court that he has a *bona fide* defence to the claim.

Such a defence has to be a defence in law and the facts set out in the affidavit must fully disclose the nature and grounds of such defence and the material facts relied upon. See **MAHARAJ v BARCLAYS NATIONAL BANK LTD** 1976 (1) SA 418 (A).

[5] An application for condonation for the late filing of the defendant's affidavit in opposition was made and not opposed. I granted the said condonation. In her opposition to the application, the defendant raises a technical objection namely that her financial affairs are currently under debt review in terms of the National Credit Act, 35 of 2005 ("the NCA") and the plaintiff is debarred from enforcing the current claim unless the jurisdictional requisites envisaged in s 88(3) of the NCA have been met.

[6] Defendant submits that in order for s 88(3) of the NCA to find application the jurisdictional requirements mentioned in s 88(3)(a) should co-exist with any of the requirements mentioned in s 88(3)(b). In support of her contention that s 88(3) is not applicable, the defendant mentions the following:

(i) that she was not in arrear with the monthly instalments in terms of the agreement when the application for debt review was made;

(ii) that she is not in arrears with the rearranged payment and if any non-payment has occurred, it was not due to any fault of hers;

(iii) she was not aware of the judgments that were obtained against her.

[7] On behalf of the plaintiff it was submitted that in order for s 88(3) to apply, any one of the jurisdictional requisites mentioned in that section has to be present. As the defendant has defaulted on the agreed re-arranged payment plan, one of the requisites has been established and the plaintiff was thus entitled to institute the action against the defendant. In support of this contention, the plaintiff referred to a passage in the matter of **FIRSTRAND BANK v FILLIS** 2010 (6) SA 565 (ECP) (the **FILLIS** case) where it was stated at paragraph [14]:

> "[14] The second argument raised is, in my view, equally lacking in merit. The Act provides very extensive protection to a

> consumer who has become overindebted, whether it be of his or her own making or through circumstances beyond his or her control. Not only does a rearrangement afford him or her alleviation from the onerous monthly obligations that he or she has in all seriousness undertaken to his or her credit providers, but he or she also enjoys the protection of s 103(5) against the ravaging effect of escalating interest whilst he or she remains in default under the credit arrangement. If, however, he or she fails to embrace this opportunity, or he or she is, notwithstanding this very considerable assistance, unable to comply with his or her restructured debt commitment, the Act permits the common law to run its course."

I am of the view that the paragraph referred to does not support the plaintiff's cause.

[8] Section 88(3) of the NCA provides as follows:

> "(3) 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) An event contemplated in subsection (1)(a) through (c); or

(ii) The consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal."

[9] It seems clear to me that the whole question depends on the interpretation of s 88(3) and such an answer will be resolutive to the issue at hand. In order to give proper meaning to the section, it has to be read as a whole, especially paragraphs (a) and (b) which have to be read together. In my judgment the word "**and**" at the end of s 88(3)(a) is used in a conjunctive sense. Had it been the intention of the legislature that any one of the jurisdictional requisite should suffice it would have achieved that purpose by the use of the word "**or**". It follows therefore that the jurisdictional requirements in s 88(3)(a) and s 88(3)(b) are not stand alone and have to be present at the same time to enable plaintiff to proceed with an action against the

defendant. This is also the conclusion reached in the **FILLIS** case (*supra*) where the following is stated in paragraph [16]:

> "[16] It follows, in my view, as a matter of interpretation, that once the jurisdictional requirement set out in s 88(3)*(a)* co-exists with any one of the jurisdictional requirements set out in s 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."

[10] The assertions of the defendant that none of the jurisdictional requirements were met are belied by the annexures to the plaintiff's summons. When the debt restructuring order was granted by the magistrate's court on 19 August 2010 firstly there were already two judgments obtained against the defendant. That these judgments were granted on 6 January 2010 and were more than seven days old is beyond dispute. This went against the provisions of the instalment sale agreement. In answer to this, the defendant states that she has instructed her attorneys to attend to the rescission of the judgments. In my opinion giving instructions to an attorney to apply for rescission of judgment, will not cure the breach

of agreement as the conduct complained of has already occurred. Secondly, when the application for debt review served before the magistrate's court, the defendant according to her own record of payments was making irregular payment.

[11] Her travails do not end there. After the debt review order was granted, the defendant did not comply with the order in that she continued making irregular payments that were less than the agreed amount as per restructured payment plan. When faced with difficulty she explains that she had paid in full and the fault lies with the debt counsellor. She makes this bald statement unsupported by any proof in the form of bank statements showing that indeed she made payments to the debt counsellor.

[12] The NCA was enacted to be a cushion to consumers who are in financial trouble either as a result of their own folly or through the vicissitude of economic climate, not to fall with a big bang but to have a soft landing. It was never meant to be used as shield and a refuge for people who though unable to comply with agreed financial commitments would cling to the

life style they became accustomed to even though it is evident that they cannot afford such life style.

[13] In view of the above, the conclusion is inescapable that the defendant does not have a *bona fide* defence. The nature and grounds of the defence and the material facts relied upon are not borne by the facts. Her reliance on s 88(3) of the NCA is unfortunately misplaced and has no merit. The facts clearly show that the plaintiff has established that the jurisdictional requirements as provided in s 88(3)(a) and (b) are present in this matter and is entitled to succeed.

ORDER

[14] As a result I make the following order:

1. Cancellation of the agreement between the parties as cited in the particulars of claim is hereby confirmed;
2. The defendant is ordered to return the following goods to the plaintiff:

   Audi TT 2.0T FSI Tronic

   Registration Number: Unknown

   Engine number: TRUZZZ8J4711625

   Chassis number: BWA090454

3. Costs on attorney and client scale;

4. Remainder of the prayers contained in the plaintiff's particulars of claim are postponed *sine die*.

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D.I. MATLAPENG, AJ

On behalf of plaintiff:	Adv. L.W. de Beer Instructed by: Symington & De Kok BLOEMFONTEIN
On behalf of defendant:	Adv. J.J. Buys Instructed by: Botha Hefer Inc BLOEMFONTEIN

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