IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA CASE NO: 1865/11

Heard on: 01/12/11

Delivered on: 02/02/12

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD Applicant

and

NONTSIKELELO PATRICIA MANYIFOLO Respondent

JUDGMENT

NHLANGULELA J:

[1] This is an application for summary judgment in terms of rule 32 of the

rules of this Court.

[2] It appears from the particulars of claim, and annexures thereto, that the plaintiff and the defendant concluded a written instalment sale agreement during or about 06 to 10 September 2007. It is alleged in the particulars of claim that in terms of such sale agreement the plaintiff sold to the defendant a motor vehicle which is described as a 2007 Toyota Yaris T + 3 for the total sum of R230 707,33. The purchase price would be payable by means of 59 monthly instalment of R3 137,37, commencing on 01 October 2007 and a final instalment of R45 604,50 to be made on 03 September 2012. It is a further term of the sale agreement that ownership of the vehicle would not pass to the respondent until the full purchase price is paid in full. Further, in the event that the respondent fails to pay any of the instalments in terms of the agreement, the applicant would be entitled to, *inter alia*, put the respondent in *mora,* cancel the agreement, retake possession of the motor vehicle and recover the balance of the purchase price plus any damages incurred less the value of the motor vehicle as at the date on which the applicant obtains possession of it.

[3] Accordingly, the motor vehicle was delivered to the respondent who

then commenced paying instalments as agreed with the applicant. However, in breach of the sale agreement, the respondent failed to make due and punctual payments to the applicant with the result that, as on 20 June 2011, the total amount owing and payable by the respondent to the applicant was a sum of R98 379,26.

[4] On 03 August 2011 the applicant duly issued summons against the respondent seeking a relief in the following terms:

> "(a) An Order authorizing the Sheriff of this Honourable Court to attach, seize from the Defendant, or wherever it may be found and hand over the vehicle to the Plaintiff;
>
> (b) That the Plaintiff be authorized to sell the motor vehicle in execution;
>
> (c) That the Plaintiff may approach the court for an order enforcing the remaining obligations of the Defendant, if the vehicle has been attached and sold, and the nett proceeds of the sale are insufficient to discharge all of the Defendant's financial obligations under the agreement;
>
> (d) Costs of suit as between attorney and client;
>
> (e) An order declaring the agreement cancelled;

(f) Further and/or alternative relief."

[5] Pursuant to the filing of a notice of intention to defend the action by the respondent, the applicant filed an application for summary judgment seeking only the relief in paragraphs (a), (d) and (e) on the basis that the respondent has no *bona fide* defence to the action and she filed a notice to defend merely for the purposes of delaying the finalization of the action. The respondent opposed the granting of the application for summary judgment.

[6] It is not in dispute that the sale agreement is a credit agreement as defined in s 1 of the National Credit Act 34 of 2005 (the Act). Therefore, the provisions of the Act apply to the agreement. In terms of s 129 (1)(a) of the Act the credit provider seeking to enforce payment of a debt by litigation in terms of s 130 is obliged to deliver written notice to a defaulting consumer encouraging him/her to approach a debt counsellor, or a dispute resolution agent, for the purpose of developing a plan suitable to both the consumer and credit provider to bring the payments under the agreement up to date. Annexure "C" to the particulars of claim is such a notice which the applicant delivered to the respondent before the summons were issued.

Compliance with s 129 (1)(a) notice is conceded by the respondent.

[7] In opposing the summary judgment application the respondent elected to file an affidavit as she was entitled to do so in terms of Rule 32 (3)(b) of the rules of this Court, which provides as follows, *inter alia*:

> "Upon the hearing of an application for summary judgment the defendant may –
>
> **a)** …
>
> b) Satisfy the court by affidavit …that he has a *bona fide* defence to the action; such affidavit … shall disclose fully the nature and grounds of the defence and the material facts that he has therefor."

[8] Certain defences have been disclosed by the respondent in her affidavit. They are the following (I quote them as they stands on the affidavit):

> " 11.
>
> As provided by the National Credit Act, my indebtedness can still be referred to a Debt Counsellor even after the proceedings have started for purposes of determining whether one of the following courses cannot be taken.
>
> (i) That the instalment cannot be lowered to an amount

that I can afford and the period of payment be extended, taking into account my present financial circumstances, which are not the same as at the time I signed the contract.

(ii) That the payment of the debt cannot be suspended for a certain period until I have secured some employment and I am able to resume payments.

12.

I have been paying full instalments with no arrears since October 2007 and I started to have financial problems only in 2011. At the time the summons were issued I had four months arrears. The price of the vehicle was R230 707,33, and at the time the summons were issued the capital balance was R98 37,26, meaning that I have paid more than half of the original R230 379,36.

13.

In such circumstances it is not fair for the plaintiff to call for a fore closure and ask for the orders it is asking to be granted by this Honourable Court.

14.

…

18.

> My legal representative informs me and I believe her, that even after an action has been initiated the Court hearing the matter can still direct that it be transferred back to a Debt Counsellor for such a review. It is therefore not true that I do not have a *bona fide* defence. My defence is that I am entitled to a debt review in terms of the law if I have been paying properly over the two years and I have been temporarily disabled to continue with such payments by circumstances beyond my control and if my history of payment does not reflect me as someone who has no intention of paying the debt.
>
> 19.
>
> It may please this Honourable Court not to grant the Summary Judgment prayed for, instead allow me to file a plea, in which plea I will raise the points I have in this affidavit."

[9] In my reading of the contents of the opposing affidavit of the respondent, and confirmed during argument, a defence is raised that since the balance outstanding is far too less than 50% of the purchase price and the respondent's "financial problems" do not permit payment of the instalments the Court must not grant summary judgment but refer her indebtedness to the debt counsellor for reviewing in terms of the Act.

[10] It was submitted by *Mrs Voyi-Nyobole,* who appeared on behalf of the respondent, that this Court is enjoined in terms of the provisions of s 85 (1) of the Act to refer the matter to the debt counselor. The provisions of s 85 read as follows:

> "Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may -
>
> a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or
>
> b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness."

[11] *Mrs Voyi-Nyobole* contended that the allegations made by the respondent in her affidavit are enough for the Court to exercise its powers as provided in s 85 of the Act.

[12] *Mr De La Harpe*, who appeared on behalf of the applicant, submitted that the allegations which appear in the opposing affidavit are inadequate. He contended that the respondent has failed to establish a defence and the material facts upon which it is founded as required in terms of Rule 32 in that she did not set out in her affidavit any particularity regarding her financial affairs or her estate and has not, therefore, set out a basis upon which this Court, or any other, could exercise its discretion in her favour. Counsel referred to the case of *First Rand Bank Ltd v Olivier* 2009 (3) SA 353 (SECD). In that case AR Erasmus J said the following at 359A-B about the objectives of the Act which the Court should consider when exercising discretion under s 85:

> "[14] A court is obliged to act simply on the defendant's allegation of over-indebtedness, but 'may' make an appropriate order in terms of para (a) or (b) [of s 85 of the Act]. The court will exercise this discretion judicially with due regard to the objectives of the NCA which, in the present regard, is to assist the over-burdened consumer to rehabilitate his affairs. In doing so, the Act makes significant inroads into the credit provider's common-law rights, as well as its constitutional right of access to the courts (s 34 of the

> Constitution of the Republic of South Africa Act 108 of 1996). The court will restrict the statutory limitation of the credit provider's right, to the extent that it is reasonable and justifiable to do so in our democratic order while promoting the objects of the NCA."

[13] Masipa J in *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (WLD) makes an interesting observation, with which I agree, on the interface between Rule 32 and s 85 of the Act. He states as follows at 371, para. [53]:

> "In exercising its discretion the court ought to bear in mind that, although the relief sought in terms of the NCA is *sui* generis, in a summary judgment application one cannot ignore the requirements of rule 32 of the Uniform Rules of Court completely."

He goes further to say the following at 372, para.[55]:

> "The application in terms of s 85 must still be *bona fide* and not raised solely as a delaying tactic. The debtor must provide sufficient information to support his allegation of over-indebtedness. This means a consumer who raises a defence of over-indebtedness must plead and prove, on a balance of probabilities, that he is over-indebted as envisaged

in s 79 of the NCA."

[14] In this matter, I am of the view that the allegation that it would be unfair to grant summary judgment against the respondent on the basis that she has paid instalments which exceed 50% of the purchase price, without more , is inadequate and, consequently, not within the contemplation of s 85 of the Act. The Court would have been placed in a better position to exercise discretion where the full circumstances (the financial problems) under which the debt was incurred was disclosed. Further, the respondent would be better served if she had told the Court on affidavit if she is employed or has a source of income to pay off the debt; why she did not avail herself of the opportunity to approach a debt counselor prior to debt enforcement; how it came about for her to be over-indebted as alleged, and whether it is possible for her debt to be re-scheduled under the agreement. The respondent has not even bothered to apply for condonation and explain these matters in a supplementary affidavit. See: *The Guide to the National Credit Act by Lexis Nexis* at 11 – 21 para. [11:3.3.3]. It is plain from the nature of the facts alleged in the opposing affidavit that acceding to the respondent's mere say so that she is over indebted would be prejudicial to the applicant.

[15] However, the s 85 argument alone is not dispositive of the application. There is a further submission, based on law, raised in the heads of argument for the respondent that the relief sought in para. [a] cannot be granted because the instalment sale agreement has not been cancelled, and that cancellation is impossible to the extent that the agreement does not authorize cancellation. For this submission *Mrs Voyi-Nyobole* relies on the judgments in *Absa Bank v Havenga And Similar Cases* 2010 (5) SA 533 (GNP); and *Absa Bank Ltd v De Villiers & Another* 2009 (5) SA 40 (C). These cases are the authority for a proposition that a relief for the attachment of a vehicle under a written instalment sale agreement can only be granted where the terms of the written agreement as pleaded in the particulars of claim gives the credit provider a right to cancel. A third case which was referred to the Court on the same point, the case of *Absa Bank Ltd v De Villiers* 2010 (2) All SA 99 (SCA), is irrelevant to this case because it deals with judicial review of the decision of a magistrate. Therefore, I will not have regard to it.

[16] In this case, the instalment sale agreement has a Default clause (at page 15 of the papers) which does not provide a cancellation clause. There is no clause which provides for it. The situation prevailing is, therefore, that

we have here the particulars of claim in which it is pleaded that the agreement gives a right to the applicant to cancel the agreement whereas, in truth, it does not. For that reason the cause of action is defective. Without an appropriate amendment, no relief based on the particulars of claim as they stand can be granted despite the finding I have made with regard to the respondent's defence based on the provisions of s 85 of the Act.

[17] In the circumstances, the application for summary judgment ought to be refused. Inevitably, the applicant should pay the costs of the application because it ought not to have brought the application for summary judgment based on a non-existent right to cancel the instalment sale agreement.

[18] In the result the following order shall issue:

"The application for summary judgment be and is hereby refused with costs."

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv. D.H. DE LA HARPE
Instructed by	:	Drake Flemmer & Orsmond Inc c/o J H Heunis & Associates MTHATHA
Attorney for the respondent	:	Ms N. E. Nyobole c/o Voyi-Nyobole Attorneys MTHATHA

31/01/12 CASE NO: 340/12

In the matter between:

THANDISWA J. HEADBUSH	Applicant
and	
KUTLOANA HEADBUSH	First Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Second Respondent

FOR THE APPLICANT :

FOR THE RESPONDENTS: