

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Pretorius (38002/07) [2007] ZAGPHC 299 (9 November 2007)

[2007] ZAGPHC 299**COURT**

High Courts - Gauteng

BEFORE

E Bertelsmann

CASE / FILE NUMBER

38002/07

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(TRANSVAAL****PROVINCIAL DIVISION)****DATE:**

09/11/2007

CASE

NUMBER: 38002/07

UNREPORTABLE

In

the matter between:

ABSA

BANK LIMITED

.....
Plaintiff

And

WILLEM

ROBERT NICOLAAS

PRETORIUS.....Defendant

JUDGMENT

The plaintiff is ABSA BANK LIMITED, a bank registered according to the company laws of the Republic of South Africa with principal place of business in Pretoria at ABSA BANK BUILDING, Van der Wait Street, Pretoria.

The defendant is Willem Robert Nicolaas Pretorius, an adult male who resides at 119 Hendrik Potgieter Street, Klerksdorp, North West Province, which address is the defendant's chosen domicilium citandi et executandi.

The plaintiff and the defendant entered into an instalment sale agreement on the 15th February 2006 at plaintiff's business address. The agreement was entered into in writing and a copy thereof is annexed to the

summons. In terms of the said agreement, the defendant bought from the plaintiff a 2006 COMEC on car disc lathe.

The purchase price was R 28 000,00, to which VAT of R 3 920,00 was added. A cash deposit of R 6 384,00 was paid, the balance of the purchase price was to be paid in 48 instalments, including R 7479,91 as finance charges calculated at 15,160% (4,660% above the prime lending rate), together with R 999,99 charged as a documentation fee, making a total R 34 015,90 to be paid off as aforesaid. The agreement is covered by the National Credit Act 34 of 2005 ("the Act").

The lathe was delivered to the defendant.

The instalment agreement contained terms that were standard for agreements concluded under the Credit Agreements Act 75 of 1980,

reserving ownership of the goods to the seller until all instalments had been paid.

The defendant fell into arrears and the plaintiff gave notice on the 21st June 2007 in terms of section 129(1)(a) and (b) (i) of the Act, but the defendant failed to react thereto.

Plaintiff claims confirmation of the cancellation of the agreement, repossession of the goods, damages, if any, to be established and interest on all outstanding amounts.

When the agreement was cancelled, the outstanding amount due to the plaintiff was R 25 140,70.

It is therefore clear that the claim could and should have been instituted in the Klerksdorp Magistrate's Court.

There is no allegation in the papers that would justify the institution of the action in the High Court.

The defendant is in default and the plaintiff applied to the Registrar of this Court for default judgment.

The Registrar refused to grant judgment and indicated that he regarded the pursuit of this claim in the high Court as unlawful in terms of section 90(2)(k)(vi)(aa) and (bb) of the Act. He referred the matter for argument to this Court, together with the case of ABSA BANK Ltd v Jean Pierre Myburgh, Case No 31827/07. In the latter instance, I gave a comprehensive judgment of which a copy is annexed to this

judgment.

For the reasons set out in the Myburgh judgment, this matter is transferred to the Magistrate's Court having jurisdiction in terms

of the following order:

The matter is transferred to the Magistrate's Court of Klerksdorp;

Notice of the transfer is to be given by registered post to the defendant at his chosen domicile through plaintiff's attorney; The plaintiff may not recover any costs that have been incurred to date until such time as the matter is properly enrolled in the Magistrate's Court, subject to the proviso that the plaintiff may claim costs of the legal notice and the issuing of summons on the appropriate Magistrate's Court scale if the plaintiff succeeds in that court; The order typed by the court typist on the 17th October 2007 is withdrawn; A copy of this judgment and the Myburgh judgment are to be placed upon the court file in the Klerksdorp's Magistrate Court.

Signed on this 8th day of November 2007.

E BERTELSMANN Judge of the High Court

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NUMBER: 31827/2007

In the matter between:

ABSA BANK LIMITED Plaintiff

And

JEAN PIERRE MYBURGHDefendant

JUDGMENT

BERTELSMANN, J: The plaintiff is describes itself in its particulars of claim as ABSA BANK LIMITED, a bank duly registered according to the company laws of the Republic of South Africa, having its principal place of business in Pretoria at ABSA BANK Building, Van der Walt Sreet, Pretoria. The defendant is Jean Perre Myburgh, an adult male whose full and further

particulars are to the plaintiff unknown, residing at 4 Normenader Flats, Barberton, Mpumalanga. This address is the defendant's chosen domicilium citandi and executandi.

The defendant as purchaser and a business known as Fred Whelpton Beleggings (Pty) Ltd as seller entered into an instalment sale

agreement on the 23rd January 2007.

The defendant fell into arrears and, according to the particulars of claim owed the sum of R 5 277, 87 in respect of unpaid instalments

when summons was issued.

This agreement was entered into in writing and a copy thereof is annexed to the particulars of claim. In terms thereof the defendant

purchased a Honda CRF 450 moto cross motorcycle from the seller. The purchase price was R 39 473,68, some extras were added for the sum of R 500,00 and VAT amounted to R 5528,32, giving a total purchase price of R 45500,00.

The defendant paid a deposit of R 10 000, 00 and the balance of the purchase price was to be paid in 42 instalments of R 1133,59 each. Finance charges were declared to amount to R 12 110, 64, calculated at 17%, being 4.5% over the prime lending rate.

The first instalment was payable on the 5th March 2007. Ownership of the motorcycle was reserved until the full purchase price had been paid.

The seller's right, title and interest was ceded to the plaintiff bank on

The seller's right, title and interest was ceded to the plaintiff bank on the 23rd January 2007.

The motorcycle was delivered to the defendant. The agreement contains standard provisions that were usual terms in instalments agreements concluded under the Credit Agreements Act 75 of 1980, the predecessor of the present National Credit Act 34 of 2005 ("the Act"). The pre-printed agreement annexed to the particulars of claim entitles the seller - and therefore the plaintiff -, should the defendant be in breach of any of the terms of the agreement relating to the payment of the purchase price, to cancel the agreement without further notice and to retain all payments made to date of cancellation, to return of the goods, to payment of damages, of arrear instalments and of collection and other legal costs.

The agreement concerned and its execution is now subject to the Act.

The agreement entered into between the defendant and the seller was concluded prior to the promulgation of the Act, when the Credit

Agreements Act had not yet been repealed. 16. In terms of the transitional provisions of the Act, a registered notice dispatched to the defendant by pre-paid registered mail sent in terms of the Credit Agreements Act, calling upon the defendant to make payment of the arrears that allegedly amounted to R 5 277, 87 within 14 days from date of dispatch, is deemed to constitute compliance with section 129(1)(a) and (b)(i) of the Act.

The notice was sent, according to the particulars of claim, on the 4th April 2007, but defendant failed to react thereto. I note in passing that it is unclear how a sum of R 5 277,87 could have accumulated in terms of arrear instalments in only one month after the first instalment was due, but this need not be investigated at this stage and by this Court.

The agreement the plaintiff relies upon contains a specific provision that the parties consent to the jurisdiction of the Magistrate's

Court in respect of all causes of action that arise from the said agreement.

Proper service of the summons and the particulars of claim was effected upon the defendant's chosen domicile on the 4th August 2007.

The defendant is in default of appearance.

When the plaintiff approached the Registrar of this Court for default judgment, the Registrar refused to grant such an order, but referred the matter for argument to the Court. The Registrar indicated that he could not deal with the matter as it fell within the jurisdiction of the Magistrate's Court. He referred to sections 90(2)(k)(vi)(aa) and 127(8) of the Act, read with section 90(2)(k)(vi)(bb) thereof.

Section 90 of the Act deals with provisions in credit agreements that are outlawed by the Act. The relevant subsection reads as follows:

"90. UNLAWFUL PROVISIONS OF CREDIT AGREEMENTS 1. A credit agreement must not contain an unlawful provision. 2. A provision of a credit agreement is unlawful if (k) It expresses, on behalf of the consumer (vi) a consent to the jurisdiction of (aa) The High Court, if the Magistrate's Court has concurrent jurisdiction; or (bb) Any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept."

In order to properly assess the question whether the plaintiff is entitled to approach the High Court to enforce a claim falling both under the Act and within the jurisdiction of the Magistrate's Court's jurisdiction, the purpose, aim and general scheme of the Act must be analyzed.

The Act is the latest in the various attempts by the Legislature to put enactments in place that regulate the granting of credit to the consumer and to restrict the financial gains that credit providers may garner from this enterprise that has often been more than a little controversial. It replaces and repeals the Usury Act and the Credit Agreements Act and creates a new dispensation that is intended to ensure that the consumer is effectively protected without restricting access to affordable credit provided and obtained in a responsible fashion.

The Act's purpose is set out in the preamble in the following fashion: "To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt-reorganisation in cases of over. indebtedness;.. ..to establish national norms and standards and relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit..."

Section 2 of the Act contains the following in subsection (1): "This Act must be interpreted in a manner that gives effect to the purposes set out in section 3."

Section 3 reads inter alia as follows: "The purposes of this Act are to promote.....a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers; (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by (f) (ii) providing consumers with protection from deception, and (iii) from unfair or fraudulent conduct by credit providers and credit bureaux.. "

The agreement upon which plaintiff's cause of action is based is a credit agreement as intended in section 8(4)(c) of the Act.

The establishment of the National Credit Regulator in terms of Chapter 2 of the Act creates a statutory body with the function to ensure by various measures that the purposes of the Act are achieved and to monitor compliance with the Act.

The plaintiff is a registered credit provider in terms of section 40 of the Act.

The Act has created important and far-reaching mechanisms to protect the individual consumer against assuming a debt burden that cannot reasonably be repaid from the normal capital or income resources of the consumer concerned. The credit provider is obliged, on pain of having an offending agreement suspended by the court, to obtain sufficient information from the potential credit receiver relating to the latter's financial affairs to ensure that any credit agreement subsequently entered into will not saddle the consumer with instalments or repayment obligations that he is unable to meet. (sections 79

- 84). 32. In addition, the court may declare a consumer to be overindebted and may thereafter put the machinery created in sections 85 to 88 into motion, through which the consumer may have his obligations re-arranged by the extension of payment periods, downward adjustment of instalments or suspension of the contractually agreed instalments for a specified period.

The magistrate's court is given the power to effect such rearrangement schemes.

Section 89 compels a court to declare a credit agreement entered into by a credit provider not properly authorized to do so by the Act; or entered into with an unemancipated minor; or with a person not in possession of his mental faculties at the time of concluding the agreement void from the moment it was signed; and to order restitution of the money paid by the consumer under the agreement with interest. The goods delivered or moneys paid must further be declared forfeit to the consumer or the State.

Section 90 lists a range of terms that are regarded as unlawful in a credit agreement. This list includes terms that are aimed at defeating the Act; terms that unfairly limit the consumer's rights or that create unauthorized procedural advantages for credit providers.

Section 90(2)(k)(vi)(aa) and (bb) has been quoted above. It forbids a consent to the jurisdiction of a court that is not closest in distance to the consumer's residence or the locality where the goods supplied in terms of the credit agreement are kept. In addition, it forbids an expression on behalf of the consumer " ... a consent to the jurisdiction of (aa) the High Court, if the magistrate's court has concurrent jurisdiction."

The Act contains strict provisions relating to the interest rate that may be charged by a credit provider, the circumstances under which the terms of a credit agreement may be changed and which steps must be taken by the credit provider before an instalment agreement may be cancelled.

The Act demands that the credit provider must offer alternative dispute resolution procedures to the consumer prior to taking recourse to the law to terminate the agreement and to impose the consequences flowing from the cancellation thereof.

A consumer is entitled to pay any amount owing under an agreement in advance and may surrender the goods in respect of which the credit agreement was entered into, together with a notice of termination of the agreement.. If the consumer returns the goods, the credit provider must provide the consumer in writing within ten days of an estimated value of the goods.

If the consumer does not decide to collect the goods within ten days of receipt of this notice, and to continue with the agreement, the credit provider must sell the goods. If the full balance outstanding in terms of the credit agreement is not covered by the proceeds of the sale, the credit provider may demand payment thereof and, failing such being made, may institute proceedings in "terms of the Magistrates' Courts Act" for the recovery thereof.

The proceedings to recover any outstanding balance after termination of a credit agreement in this fashion, - at the instance of the consumer - are, significantly, especially decreed to be instituted in the lower court, regardless of any jurisdictional limitation regarding the sum involved.

Even a cursory reading of the Act underlines the objects pursued by the Legislature by its promulgation; namely to protect the credit receiving consumer from being exploited by credit providers, to prevent predatory lending practices; to level the playing field between a relatively indigent and unsophisticated consumer and a moneyed and well-advised credit provider and to limit the financial harm that the consumer may suffer if he is unable to perform in terms of a credit. agreement he entered into.

As part of this protective structure the Act seeks to limit the costs, including the legal costs that a consumer may be held liable for if the credit provider decides to take action once no alternative resolution to rectify a consumer's default has been found.

It is clear that litigation in the High Court is more expensive than in the Magistrate's Court. Should the summons issued out of the High Court come to the defendant's attention - bearing in mind that the summons and any preceding notice of demand need only be delivered to the defendant's chosen domicile: *Marques v Unibank Ltd* 2001

- (1) SA 145 (W) - and should the defendant wish to oppose the action, he will have to instruct attorneys at the seat of the High Court if he does not reside in the district in which the High Court having jurisdiction over him is situated. This is the case in the present

matter. The defendant will have to incur the costs of a correspondent attorney and make provision for fees that are substantially higher than those charged in the Magistrate's Court.

Should judgment eventually be granted against him, executing is more expensive in the High Court and the costs are further increased if the process is directed by the credit provider's attorney at the seat of the High Court.

Legal costs also increased for the same reasons if the consumer is sued in the Magistrate's Court in a district in which he does not reside or in which his goods are not kept.

Issuing summons in the High Court for a debt that could be recovered in the Magistrate's Court therefore runs counter to the express purposes of the Act. The practice is expressly declared unlawful in section 90 as quoted above, at least in respect of actions instituted in a Magistrate's Court in whose jurisdiction the consumer neither resides nor keeps his goods.

As far as the institution of the action in the High Court having concurrent jurisdiction is concerned, the wording of section

90(2)(k)(vi) is a little confusing at first glance.. No consent to jurisdiction is required if the plaintiff prefers to institute

action in the High Court for a claim enforceable in the lower court; albeit at the risk of being awarded costs only Magistrate's Court scale: *Graham v Odendaal* 1972 (2) SA 611 (AD).

The section is applicable to the entire Act and is not restricted to the debt re-arrangement that the Magistrate's Court may decree in terms of sections 86(7)(b) and 86.

If the section is read in the context of the Act as a whole, however, and in particular with reference to sections 2 and 3 thereof, it is clear that the Legislature intended to prevent the institution of an action in the High Court in circumstances such as the present. Nugent JA quoted the remark by Lord Steyn in *R v Secretary for the Home Department, ex parte Daly* [2001] UKHL 26; [2001] 3 All ER 433 (HL) at 477a with approval in his judgment in *Aktiebolaget Haessle and Another v Triomed (Pty) (Ltd)* 2003

- (1) SA 155 (SCA) at par [1], p 157G: "'In law, "" context is everything' and so it is when it comes to construing the language used in documents, whether the document be a statute, or a contract, or, as in this case, a patent specification."

In the same judgment, he quotes from the judgment of Hefer, JA (as he then was) in *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997

- (1) SA 710 (A) at 726H-727B: "The task of the interpreter is, after all, to ascertain the meaning of a word or expression in the particular context of the statute in which it appears (*Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 846G ad fin). As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensable.

Occasionally, however, it is not. "

52. In instances of this nature, purposive interpretation is therefore called for. The Act is indubitably aimed at protecting the consumer's fundamental rights to dignity, equality, non-discrimination and fair administrative and trial procedures and must be purposively interpreted for that reason alone: *Daniels v Campbell NO and Others* [2004] ZACC 14; 2004
- (5) SA 331 (CC); *Investigating Directorate: Serious Economic Offences and Other v Hyundai Motor Distributors and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001
- (1) SA 545 (CC). The Constitution requires legislation to be interpreted, where possible, in ways which give effect to its founding values.

The Act itself commands in section 2 an interpretation that gives effect to the purposes set out in section 3.

It is therefore clear that the phrase quoted above must be read as declaring unlawful "the practice of instituting action in the High Court to enforce the credit provider's rights in terms of a credit agreement while a Magistrate's Court has concurrent jurisdiction."

As the Registrar has correctly pointed out, this interpretation is supported by the express wording of section 127 above.

Even if this interpretation of section 90(1)(k)(vi) is wrong, the practice of launching an action to enforce the credit provider's

rights in the High Court while a Magistrate's Court has concurrent jurisdiction is clearly in conflict with the avowed aims of the Act to lighten the financial burden that the conclusion of a credit agreement may impose on the consumer, as much as possible. It cannot be countenanced for these reasons.

One might perhaps imagine the existence of highly unusual or extraordinary circumstances that could force the provider to approach the High Court, but this argument would be speculative in the context of this case. No such circumstances have been alleged in

any event.

The Registrar consequently correctly refused to grant default judgment. The question now arises what order the court should make. As there is no precedent to rely on, I believe that the fairest order is the following:

The matter is transferred to the Magistrate's Court in Barberton; Notice of such transfer is to be given to the defendant by plaintiff's attorney at the chosen domicile by registered post; The plaintiff /applicant may not recover any costs incurred until the date the 'matter is enrolled in the Magistrate's Court apart from such costs that were incurred in connection with the notice to remedy the failure to comply with the terms of the credit agreement and the issuing and service of summons. Such costs, if eventually awarded to the plaintiff by the Magistrate's Court, must be calculated on the appropriate Magistrate's Court scale; a. A copy of this judgment is to be placed on the court file in the Magistrate's Court.

Signed on this 7th day of November 2007.

E BERTELSMANN Judge of the High Court

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