

SOUTH AFRICA / JUDGMENT

Firststrand Bank Ltd t/a Wesbank v Nel (7170/10) [2011] ZAGPPHC 191 (14 September 2011)

[2011] ZAGPPHC 191

COURT

North Gauteng High Court, Pretoria

BEFORE

MNGQIBISA-THUSI

CASE / FILE NUMBER

7170/10

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

CASE

NO: 7170/10

DATE:14/09/2011

In

the matter between:

FIRSTRAND

BANK LTD t/a

WESBANK.....Applicant

and

NEL

ANNELIZE

MARIEN.....

Respondent

JUDGMENT

MNGQIBISA-THUSI J

[1] In its notice of motion the applicant is seeking an order on the following terms:

1.1 confirmation of the cancellation of the agreements;

1.2 that the sheriff be authorised and directed to forthwith attach and take into his possession a 2006 Volkswagen Polo classic 1.6 Trendline with chassis number AAVZZZ9NZ6U054376 wherever it may be found and to hand same over to the applicant;

1.3 leave be granted to approach the court on the same papers duly supplemented for the payment of the difference between the balance

outstanding and the market value of the goods in the event of there being a balance outstanding by the respondent to the applicant;

1.4 directing the respondent to pay the costs of this application on the scale as between attorney and client;

1.5 postponing this application sine die in respect of the relief sought in prayers 1.3 and 1.4 above;

1.6 further and alternative relief.

[2] The respondent is opposing the application on the following grounds:

2.1 that the respondent was not in default of her payments; and

2.2 that at the time the applicant issued the section 86(10) notice, it was not entitled to terminate the debt review since her debt counsellor had already concluded that the respondent was over-indebted and had referred the matter to a magistrate's court,

together with a debt restructuring proposal, recommending that the respondent be declared over-indebted.

[3] The respondent also raised the fact that the applicant had not issued her with a section 129(1) (a) notice.

[4] Furthermore, the respondent prays that should I find that the applicant was entitled to terminate the debt review, I should make an order renewing the debt review in terms of section 86(11) and set the conditions under which the magistrate's court should deal with the matter, in view of her over-indebtedness.

[5] On 22 November 2007 the applicant and the respondent concluded an instalment sale agreement ("the agreement") in terms of which the applicant sold to the respondent a second hand 2006 Volkswagen Polo classic 1.6 Trendline motor vehicle ("the motor vehicle"). The agreed purchase price was the amount of R119 995.00.

[6] The agreement provided, inter alia, that:

6.1 the respondent would pay an initial deposit of R 30 000.00;

6.2 the balance to be payable in 58 monthly instalments of R 2 453.19 each, with the first instalment due on 22 November 2007;

6.3 ownership of the vehicle to remain with the applicant until payment of the last instalment;

6.4 in the event of the respondent defaulting in her payments or be in breach of the agreement, the applicant would be entitled to cancel the agreement, obtain return of the vehicle, retain payments already made and/or recover damages.

6.5 the respondent's chosen domicilium address was 208 Vias Street, Doornpark, Pretoria.

[7] It is not in dispute that:

7.1 the agreement between the parties is a credit agreement in terms of section 1 of the National Credit Act 34 of 2005 ("the Act");

7.2 the respondent is in default of her payments in terms of the agreement;

7.3 the applicant is entitled to cancel the agreement in the event of the respondent being in material breach of the agreement.

7.4 on 1 July 2010 the applicant applied to a debt counsellor for debt review in terms of section 86(1) of the Act.

7.5 on 5 October 2009, 60 days after the applicant's application for debt review, the respondent issued a notice in terms of section 86(10) terminating the debt review;

7.6 the respondent has received the section 86(10) notice from the applicant.

[8] On or about 9 February 2010 the applicant launched these proceedings on the basis that the respondent has repudiated the agreement in that she is in default of her repayment of the loan, alternatively, that she has materially breached the agreement by failing to make payments when due. It was further submitted on behalf of the applicant that as of 4 January 2010, the respondent was in default of payments in the amount of R9 841.76.

[9] The respondent denies that she is in default of her payments. It was submitted on her behalf that the respondent has been making payments in terms of a debt restructuring plan devised by the debt counsellor and was, therefore, not in default. As proof thereof, a schedule of a proposed plan for repayments was handed up in Court. What this schedule indicates is a list of payments to be made. However, there is no evidence as to whether any payments were made and if they have, how much had already been repaid.

[10] The respondent, besides handing over a page titled "Proposal for rearrangement", has not provided information, besides

allegations made from the bar that she has been paying in terms of the said proposal. No information was provided as to how much has been paid and whether, whatever might have been paid removes the default of the respondent. The respondent has not disputed the allegation made by the applicant that by 4 January 2010, the respondent was in arrears to the amount of R9 841.76. All I have

before me is the uncontroverted evidence of the applicant that the respondent is in default. For these reasons this ground raised by the respondent is dismissed.

[11] The second submission "made on behalf of the respondent is that since the respondent's debt review was already referred to the magistrate's court for a section 86(7) (c) order, the applicant was not entitled to terminate the debt review.

[12] The issue to be determined is whether the applicant was entitled to terminate the debt review in terms of section 86(10) of the Act whilst the respondent's matter in terms of section 87 of the Act is still pending before another Court.

[13] Section 86(10) of the Act reads as follows:

"If a consumer is in default under a credit agreement that is being reviewed in terms of this section. The credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to-

- (a) the consumer;
- (b) the debt counsellor; and
- (c) the national Credit Regulator;

at any time at least 60 days after the date on which the consumer applied for the debt review."

[14] The Supreme Court of Appeal In *Sally Ann Collett v FirstRand Bank Ltd*, an unreported judgment, case number 766/2010, on 27 May 2011, agreed with the conclusion reached by the Court in *FirstRand Bank v Coilett* 2010(6) SA 351 (ECG) at 357 where the Court stated as follows:

"I am unable to find anything in the structure of s 86, or of the Act in its entirety, which is indicative of an intention on the part of the legislature to limit the right of a credit provider under s 86(10) to the process prior to the reference to the magistrates' court. On the contrary, for the reasons which follow, I consider that the credit provider's rights to give notice in terms of s 86(10) and to legitimately terminate the debt review process continue until the magistrates' court has made an order as envisaged in s 87."

[15] The Supreme Court of Appeal in the Coilett matter (*supra*) further held that:

"[14] The conclusion that the right of a credit provider to terminate the debt review under s 86(10) can be exercised even after a referral to the Magistrate's court, does not lead to the anomalous result contended for on behalf of the amicus curiae. While it is correct to say that s 87(1) requires that the magistrate's Court 'must conduct a hearing', it is not correct to argue that termination of a debt review terminates the hearing. Section 86(10) entitles a credit provider to terminate the debt review relating to a specific credit agreement ('[i]f a consumer is in default under a credit agreement that is being reviewed'), not the 'hearing'. The hearing continues and, if several credit agreements are being reviewed, continues in respect of the others. Although notice of termination of the debt review is not required to be given to the Magistrate's Court but only to the consumer, debt counsellor and the national credit regulator, the proceedings are governed by the Rules of the Magistrates' Courts which makes adequate provision for the service of process and notices."

[16] I am of the view, in the light of the Collett decisions, that the applicant was entitled to terminate the debt review after the lapse of the period stipulated in the section. See further in this regard *FirstRand Bank t/a FNB v Seyffert* 2010(6) SA 429 (GSJ). The fact that the credit provider has terminated the debt review does not deprive the respondent of the remedy in section 86(11) in that the magistrate's court where the respondent's application for debt review is pending can still make an order resuming the debt review if there is cause to do so.

[17] The respondent has also raised as an alternative ground should I find that the applicant was entitled to terminate the debt review in terms of section 86(10) that I should make an order in terms of section 86(11) of the Act for the resumption of the credit review in the magistrate's court on certain terms and conditions.

[18] Section 86(11) of the Act reads as follows:

"If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances."

[19] As indicated in paragraph 16 above and in view of the fact that as at the time of this hearing the debt review was still pending before the magistrate's court, that court on considering the respondent's position might come to the conclusion that the debt review be resumed. The respondent has not provided this court with any information regarding her position in relation to her financial

means, financial prospects and obligations as contemplated in section 79 of the Act. I am therefore not in a position to make a

determination in this regard.

[20] The respondent has also raised the point that the applicant is not entitled to enforce the agreement as it has not served her with a section 129(1) (a) notice. Section 129(l)(a) provides that:

"129 Required procedures before debt enforcement

- (1) If the consumer is in default under a credit agreement, the credit provider-
 - (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
 - (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-

(I) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be;and

(ii) meeting any further requirements set out in section 130."

[21] Further, section 130(l)(a) and 130(l)(b)(i) of the Act reads as follows:

"130 Debt procedures in Court

- (1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, the consumer is in default and has been in default under the credit agreement for at least 20 business days and-
 - (a) At least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (9), or section 129 (1), as the case may be;
 - (b) ...
 - (c) In the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127."

- [22] In terms of section 129(l)(b) read with section 130 of the Act a credit provider is prevented from enforcing a credit agreement until it has satisfied certain requirements, inter alia, giving notice in terms of section 86(10). In this matter the applicant has complied by giving notice in terms of section 86(10) of the Act and nothing prevents the applicant from enforcing its rights in terms of the agreement.
- [23] In terms of the agreement the respondent's default is a material breach of the agreement entitling the applicant to cancel the agreement and getting back the motor vehicle which in any event is still under the ownership of the applicant as the respondent has not paid all the required instalments.
- [24] Accordingly the following order is made:
1. The instalment sale agreement entered into between the applicant and the respondent dated 22 November 2007 is confirmed as cancelled;
 2. the sheriff is authorised and directed to forthwith attach and take into his possession a 2006 Volkswagen Polo classic 1.6 Trendline with chassis number AAVZZZ9NZ6U054376 wherever it may be found and to hand same over to the applicant;
 3. leave is granted to approach the Court on the same papers duly supplemented for the payment of the difference between the balance outstanding and the market value of the goods in the event of there being a balance outstanding by the respondent to the applicant;
 4. the respondent is directed to pay the costs of this application on the scale as between attorney and client;
 5. the relief in 3 and 4 above is postponed sine die.

NP MNGQIBISA-THUSI J

Judge of the North Gauteng High Court

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