

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Van der Westhuizen (30650/2013) [2014]

ZAGPJHC 255 (5 June 2014)

[2014] ZAGPJHC 255

COURT

South Gauteng High Court, Johannesburg

BEFORE

Weiner

CASE / FILE NUMBER

30650/2013

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REPUBLIC
OF SOUTH AFRICA
SOUTH
GAUTENG HIGH COURT JOHANNESBURG
CASE
NO: 30650/2013

DATE: 05 JUNE 2014
In

the matter between: NEDBANK
LIMITED.....Plaintiff
And
VAN
DER WESTHUIZEN: PIETER JOHANNES.....Defendant

JUDGMENT

WEINER J:

Facts

1 The plaintiff and the defendant are the seller and purchaser respectively in terms of an instalment sale agreement in respect of a Ford Ranger motor vehicle with engine number WEAT174628 and chassis number AFATXXMJ2T8Y03468 (“the vehicle”).

2. The defendant defaulted and the plaintiff issued summons. The plaintiff thereafter applied for summary judgment. The basis of the

defendant's defence is that the plaintiff is precluded from proceeding with its action, because the defendant applied for debt review.

3. The defendant applied for debt review in terms of the National Credit Act 34 of 2005 ("the NCA") on 11 March 2013. Thereafter the plaintiff sent a notice to the defendant in terms of Section 86(10) of the NCA dated 23 July 2013. This notice was sent after the requisite period of 60 days (as provided for in the NCA), to the defendant's chosen domicilium address, the debt counsellor (both by way of registered mail) and the National Credit Regulator (by way of e-mail).
4. When the defendant failed to respond to the Section 86(10) notice, the plaintiff terminated the debt review process and subsequently cancelled the installment sale agreement in writing. The plaintiff then issued summons for the return of the motor vehicle.

First point in limine

5. The defendant denies that the deponent to the affidavit in support of the application has the requisite personal knowledge of the matter to depose to the affidavit.
6. The deponent states that she is a legal manager, that she has been personally involved with the plaintiff's claim and that

she obtained knowledge from the plaintiff's files and documents under her control. Unless the defendant can point to specific

circumstances of which this deponent would not have knowledge, these allegations are sufficient.

7. This issue has been dealt with definitively in the judgment of Dean Gillian Rees v Investec Bank Limited [2014] ZASCA 38 at [15].

No authority

8. The defendant also denies that the deponent has the requisite authority to depose to the affidavit.
9. The correct procedure to challenge authority to institute proceedings is that set out in Rule 7(1) of the Uniform Rules of Court.
10. In Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) the SCA found at 624F - 625A that it was irrelevant whether the deponent to the founding affidavit had been authorised to depose to the affidavit. It is the institution of the

proceedings and the prosecution thereof which must be authorised.

Defective summons and agreement

11. The defendant alleges that not all annexures have been annexed to the summons and that therefore the plaintiff has failed to comply

with Rule 18(6) of the Uniform Rules of Court. The defendant does not set out which annexures were not annexed.

12. The plaintiff submits that the failure to strictly comply with the provisions of Rule 18(6) is a purely technical issue as the agreement and its terms are not disputed. No defence has been raised which relates to the terms of the agreement. There is therefore no prejudice to the defendant. There has been substantial compliance with the provisions of Rule 18(6). This non-compliance can therefore be condoned as was held in *Dass and Others NNO v Lowewest Trading (PTY) LTD* 2011 (1) SA 48 (KZD) at [15] - [16]:-

It is trite law that, where it is possible, the rules of court must be complied with. It is important to take heed of what was stated by Addleson J in *Charsley v Avbob (Begrafnisdiens) Bpk* 1975

(1) SA 891 (E) at 893C - D:

'(l)f there is a material defect in any of the formalities required by the Rules of Court, the court should not readily grant summary

judgment.

On the other hand, where it is clear that the Rules have substantially been complied with and there is no prejudice to the defendant, I think that the court should condone a failure to comply with a technical requirement of the Rules.'

Defence on the merits

13. The Respondent contends that it made an application for debt review in terms of Section 86(7)(c) of the NCA on 8 March 2013. The

debt counsellor subsequently issued a notice in terms of form 17.1 informing the Applicant of the Respondents application for debt

review on or about 11 March 2013. On or about 26 March 2013, the debt counsellor sent the Applicant a proposal of the monthly instalments

which the Applicant was to be paid. The first payment in terms of the proposal was paid in favour of the Debt Counsellor as negotiation

fees as permitted by the NCA, on or about the 28 March 2013. On or about 29 April 2013, a payment was distributed to the attorney

appointed to prepare the application in terms of section 86 of the NCA. A small portion was also paid to the creditors. The Applicant

was paid an amount of R 43.69 within the 60 day period. In the third month, the creditors were paid as per the proposal made. The

Applicant was paid an amount of R1, 076.60 on the 3 June 2013. The Defendant's debt counsellor subsequently proceeded with an application in terms of section 86(7)(c), which application is currently pending before the Vereeniging Magistrates Court.

Debt review

14. The main thrust of the defendant's defence is that:
 - a. He applied for debt review;
 - b. He is not in arrears with his monthly payments as the debt has been restructured in terms of a proposal;
 - c. He made the required payments in terms of the proposal;
 - d. The proposal was to be dealt with in the Magistrates Court on 28 November 2014 and the plaintiff cannot proceed with legal action

whilst this is pending.

15. The plaintiff argues that a court should not exercise its discretion against the plaintiff in summary judgment proceedings where the matter had already been referred to a debt counsellor and the debt review had been justifiably terminated, especially where no material change in the defendant's position has been demonstrated. See *Seyffert and Another v Firststrand Bank Ltd t/a First*

National Bank 2012 (6) SA 581 (SCA). See also *Collett v Firststrand Bank Ltd* 2011 (4) SA 508 (A) at [18] (518G), where it was held that the credit provider has the right to terminate the credit transaction where the consumer is in default of the particular credit agreement.

16. The defendant is furthermore not entitled to retain possession of the motor vehicle where the agreement has been lawfully cancelled,

as is the case here. See *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD).

The NCA

17. Section 86 of the NCA provides:-
 - (1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.
 - (2) ...
 - (3) A debt counsellor-
 - (a) may require the consumer to pay an application fee, not exceeding the prescribed amount, before accepting an application in terms of subsection (1);
 - (4) ..,

- (5) A consumer who applies to a debt counsellor, and each credit provider must:
- (a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement; and
 - (b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.
- (6) -(9)...
- (10) 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 business days after the date on which the consumer applied for the debt review.

- (11) 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.
18. Section 86(10) and (11) of the Act thus provides for a credit provider to terminate the debt review process and enforce the agreement (subsection 10). The Magistrate may then, at the hearing, order that the debt review process resume vis-a-vis the credit provider (subsection 11).
19. The dicta in Collett (supra) deal succinctly with the defendant's defence:-

"[6] The question to be decided is therefore whether a credit provider is entitled to terminate a debt review in terms of s 86(10) after the debt counsellor has referred the matter to the Magistrate's Court for an order envisaged by s 86(7)(c) (and s 87(1)(b)) and while the hearing in terms of s 87 is still pending...However, as has become typical of the jurisprudence developing around the NCA, there is a host of decisions that have taken a different view."

And iater at

[14] and [15]:-

“ The conclusion that the right of the 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... 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.

However, the right of the credit provider to terminate the review is balanced by s 86(11) which provides that if the credit provider has given notice to terminate and proceeds to enforce the agreement 'the Magistrate’s Court may order that the debt review resume on any conditions that the court considers to be just in the circumstances'. It is at this moment that the participation of the credit provider in the debt review becomes relevant. He is obliged to comply with the reasonable requests of the debt counsellor (s 86(5)(a)) and to

participate in good faith in the review and any negotiations designed to result in responsible debt re-arrangement (s 86(5)(b)). Should the credit provider fail or refuse to participate in the review, a resumption of the process may well be ordered. But where the credit provider on good grounds concludes that the proposed restructuring will not lead to the 'satisfaction by the consumer of all responsible financial obligations'(s 3(g) and (i)) or a re-arrangement as contemplated by s 86(7)(c) the court considering the resumption of the debt review may well refuse to sanction its resumption. As was stated by D Pillay J in *FirstRand Bank Ltd v Mvelase* 2011 (1) SA 470 (KZP), the NCA strikes a balance between the interests of consumers and those of credit providers -

‘through a push-pull tension which ensures that whenever sections of the NCA tip the scales in favour of the consumer, countervailing rights of the credit provider in other sections sway the balance in favour of the latter, and vice versa. ’

20. The defendant states that the plaintiff failed to participate in the negotiations in good faith and thus was not entitled to terminate the debt review. In *Seyffert* (supra), the Court, in dealing with Section 86, stated as follows:-

“[8] Where, as in this case, debtors have applied for debt review, they and the credit provider are obliged not only to comply with any reasonable request by the debt counsellor to facilitate an evaluation of the debtors’ indebtedness and the prospects for responsible debt restructuring, but also to participate in good faith in the review and negotiations. The duty to negotiate in good faith does not terminate on the debt counsellor’s proposal being referred to the magistrate’s court, nor when it is postponed. The right to terminate the debt review in respect of a particular credit agreement is balanced by s 86(11) which gives the ‘enforcing court’ the power to order the resumption of the debt review. It is at this stage that the participation of the credit provider in the debt review process becomes relevant and at which the conduct of both parties will be assessed. As was further stated in Collett’s case:

'Over-indebtedness is not a defence on the merits. However, because of its extraordinary and stringent nature, a court has an overriding

discretion to refuse an application for summary judgment. It would be proper for a defendant to raise termination of the debt review by reason of the credit provider's failure to participate or its bad faith in participating when application for summary judgment is made. These issues may be raised, not as a defence to the claim, but as a request to the court not to grant summary judgment in the exercise of its overriding discretion. Of course, sufficient information on which the request for a resumption of the debt review is based must be placed before the court. ' [emphasis added]

[9] The court considering the enforcement of a credit agreement may decide whether there is any benefit in postponing the application for summary judgment in order to determine

the advantages of a resumption of the debt review... Moreover, the terms of a proposed rearrangement will then also be relevant to assess whether it is likely to lead to the satisfaction of all responsible consumer obligations, if implemented, [emphasis added]

21 In the present matter, the defendant did not apply for a resumption of the debt review in terms of s 86(11). He has also failed to show why the plaintiff was not entitled to terminate the debt review. The proposal is as stated in Seyffert (supra) 'devoid of economic rationality'

22. The proposal will not lead to the discharge of the debt. The defendant provided no facts upon which this court can conclude that

his affairs will improve to the extent that he will be able to discharge his liabilities, within a reasonable time. Having regard to the details of the proposal, it seems the debt review is bound to fail.

23. As was stated in Seyffert (supra) at [16]:-

"Only scant material was presented by the appellants to the court below, and their evidence falls short of inspiring confidence that their affairs will improve so as to enable them to eventually discharge their obligations. Neither of the proposals envisages the discharge of the debt within the agreed period or within any suggested, and feasible, extended time. This is not a case where a debt review can usefully be employed."

24. The proposal in the present case provided for installments of R1 076, 59 over a period of 157 months, as opposed to R6 165, 92 over

73 months in terms of the agreement. In this regard, the plaintiff referred to Standard Bank of South Africa v Wessels, Standard Bank of South Africa v Carl Nenaber tf/a Montana Agencies, Standard Bank of South Africa v Koekemoer [2012] ZAGPPHC 166 at [40]

"I can find no indication of bias or mala fides on the part of the Plaintiff in seeking to enforce its contractual rights and in not accepting the Defendants' proposals. In each instance, the amount and/or time of arrears are substantial. The acceptance of the proposals would also mean that the time for termination of the initial agreements is extended in each instance, allowing the

Defendants to ride around with and/or make use of the Plaintiff's vehicles without making payment in the terms as initially contracted

between the parties and for an even longer period than initially envisaged. One can well understand a plaintiff's frustration and motivation in enforcing its contract which included the finance charges from which the Plaintiff makes its living as it were and/or from which it complies with its obligations, to its shareholders."

25. As set out above, Section 86(11) of the NCA is the balancing section provided for the credit receiver's benefit.
26. The defendant's proposal is one which the plaintiff contends has no prospect of improving the defendant's financial position enabling him to discharge his debt to the plaintiff. It was entitled to terminate the debt review and proceed with an application

for attachment of the vehicle.

Accordingly, the following order is made:

1. Summary judgment is granted against the defendant as follows:

The Sheriff of the High Court is authorised to attach, seize and hand over the following motor vehicle to the applicant:

2009 FORD RANGER 3.0 TDCi HI TRAIL XLE P/U D/C with engine number WEAT174628 and chassis number AFATXXMJ2T8Y03468

2. The plaintiff is granted leave to apply for:

2.1, Damages, if any, in an amount to be calculated in accordance with Section 127(5)-(9) of the National Credit Act 34 of 2005;

2.2. Interest on the said damages at the rate of 12% per annum from the date of judgment to the date of payment;

3. Costs in terms of the Superior Courts Act 10 of 2013.

WEINER J

Counsel for the Applicant: Adv M Reineke Applicant's Attorneys:

DRSM A T TORNEYS Counsel for the Defendant: Adv S Rawat

Defendant's Attorneys: STEENKAMP ATTORNEYS

Date of Hearing: 11 April 2014

Date of Judgment: 05 JUNE 2014

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