

SOUTH AFRICA / JUDGMENT

SA Securitisation (Pty) Limited v Matlala (6359/2010) [2010] ZAGPJHC 70 (29 July 2010) [2010] ZAGPJHC 70

COURT

South Gauteng High Court, Johannesburg

BEFORE

Kathree-Setiloane

CASE / FILE NUMBER

6359/2010

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SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 6359/2010

DATE: 29/07/2010

In the matter between:

SA SECURITISATION (PTY) LIMITED Applicant

(Registration Number: 2005/021852/07)

and

MATLALA, GIDEON Defendant

J U D G M E N T

KATHREE-SETILOANE, AJ:

[1] This is an application for summary judgment by the plaintiff, SA Taxi Securitisation (Pty) Limited against the defendant, Mr Gideon Matlala, in which it seeks, inter alia, the return of a 2008 Toyota Quantum Sesfikile with engine number 2TR8137791 and chassis number JTFSX22P806042365 (“the vehicle”), which it leased to the defendant in terms of an agreement of lease which was concluded between the parties on 25 July 2008.

[2] The plaintiff’s cause of action is founded upon the following material facts:

2.1 despite delivery of the vehicle to the defendant, the plaintiff remains the owner;

2.2 the defendant was obliged to pay monthly rental payments in an agreed amount of R7 118,11 payable on the 7th day of each consecutive month but, by 1 February 2010, was in arrears with his payments in the sum of R13 670,79;

2.3 the defendant applied for debt relief in terms of section 86(1) of the National Credit Act, 34 of 2005 (“the Act”) on 16 October 2009, and his debt counsellor delivered to the plaintiff the notice contemplated in section 86(4)(b)(i) of the Act on the same day;

2.4 The debt counsellor, by notice to the Plaintiff on 11 November 2009, proposed a re-arrangement of the defendant’s obligations

in terms of the lease agreement;

2.5 The plaintiff rejected this proposal, and gave notice to the defendant, the debt counsellor and the National Credit Regulator of its election to terminate the debt review in terms of section 86(10) of the Act; and

2.6 As a result of the defendant’s breach, the plaintiff terminated the lease agreement, by service of its summons, on 18

February 2010.

[3] The defendant raises the following principal defences in his affidavit resisting summary judgment:

3.1 At the time of issue of the summons against him, he was “under debt review” in terms of section 86(1) of the Act; and

3.2 the debt review process was irregularly terminated by the plaintiff in terms of section 86(10) of the Act as the plaintiff had knowledge, at the time, of the date for the hearing of the application before the Magistrate’s Court in terms of section

87 of the Act.

[4] The first issue for determination is accordingly whether or not the plaintiff was entitled to give notice to terminate the debt review process in terms of section 86(10) of the Act at the time that it did.

[5] Section 86(10) of the Act makes provision for a credit provider to give notice to terminate a debt review where a consumer is in default under a credit agreement that is being reviewed. It provides:

“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 –

the consumer;

the debt counsellor; and

the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review.”

[6] In *Standard Bank of South Africa Limited v Kruger and Standard Bank of South Africa v Pretorius*, South Gauteng High Court, case numbers 09/45438 and 09/39057, 23 April 2010 (unreported decision), I considered the question of whether section 86(10) of the Act empowers a credit provider, as defined in the Act, to terminate a debt review process once it has been referred, by a debt counsellor with recommendations, to a Magistrate’s Court for consideration. I held as follows:

“ [13] It is clear from a reading of section 86(10) that the termination of a debt review process, referred to in the sub-section, is expressly qualified by the words “that is being reviewed in terms of this section”. A credit provider’s right to terminate in terms of section 86(10) of the Act would, consequently, apply only to a debt review to which section 86 applies. Therefore, once a debt review has been referred to the Magistrate’s Court in terms of section 86(8)(b) of the Act, then section 87 finds application.

...

[14]...Accordingly, any termination of the debt review, in terms of section 86(10), would be unlawful.

[16] It is clear from a proper reading of section 86 of the Act, that the only review process that maybe terminated, in terms of section 86(10) of the Act, is the one which is undertaken by a debt counsellor. In other words, any of the review steps taken by a debt counsellor, in terms of section 86(6) to 86(8)(a) of the Act, prior to a referral to the Magistrate’s Court. I am of the view that any contrary interpretation in terms of which a credit provider would be entitled to terminate the debt review process after a period of 60 days, despite it having been referred to a Magistrate’s Court, would lead to an absurdity in

that any delay by any party to such application, any delay occasioned at the instance of the court or even any delay due to unforeseen

circumstances would deprive the consumer of the opportunity to have the matter properly determined by that court.

[17] Furthermore, section 86(10) clearly contemplates that the debt review process before a debt counsellor will be completed at least 60 business days after the date on which the consumer applied for the debt review, failing which the credit provider may terminate the review in the prescribed manner. Therefore, having regard to lengthy delays when attempting to obtain a date for a hearing in the Magistrate’s Court, the likelihood of multiple postponements in a review, which has a multitude of credit providers and other similar factors, I am of the view that an unqualified entitlement to terminate proceedings, where a court has been seized with the review therein, without reference to that court is clearly not consistent with a core objective of the

Act, which is the promotion and protection of consumers.”

[7] However, Mr Mundell appearing on behalf of the plaintiff referred me to the recent judgment of SA Taxi Securitisation (Pty) Ltd v Nako and six others, case numbers 19,21,22,77,89,104 and 842/2010, 11 May 2010, High Court Eastern Cape, Bisho (unreported decision) where Kemp AJ disagreed with this conclusion on the basis that section 86(11) of the Act makes provision for a Magistrate's Court to order a debt review to resume, where a credit provider, who has given notice to terminate a review contemplated in section 86(10) of the Act, proceeds to enforce that agreement in terms of Part C of Chapter 6 of the Act. Although it is not necessary to resolve this disagreement I will, nevertheless, attempt to do so.

[8] Kemp AJ's disagreement with my conclusion in Kruger and Pretorius is founded upon his interpretation of section 86(11) of the Act which provides:

“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.”

[9] According to Kemp AJ in SA Taxi Securitisation v Nako, the Magistrate's Court referred to in section 86(11) is the Magistrates Court to whom the debt review has been referred in terms of section 86(7) or (8) of the Act, and the phrase “hearing the matter” refers to the review before it in terms of section 87 of the Act. With all due respect to Kemp AJ, I am of the view that his interpretation of section 86(11) is misconceived for the following reasons. It is clear from a proper reading of section 86(11) of the Act that the Magistrate's Court referred to in that section is not the Magistrate's Court to which the review has been referred in terms of section 86(7) or (8) of the Act, but rather the Magistrate's Court before which the credit provider seeks to enforce the agreement in terms of Part C of Chapter 6. Hence, the phrase the ‘Magistrate's Court hearing the matter’ refers to the Magistrate's Court hearing the matter which concerns the enforcement of the agreement in terms of Part C, Chapter 6 of the Act, and not the debt review itself. Hence, and in spite of the enforcement proceedings before it, if the Magistrate's Court was to find, for whatever reason, that the review before the debt counsellor, in terms of section 86 of the Act, should resume, he or she may order that that debt review resume on any conditions the court considers to be just in the circumstances.

[10] I am of the view that the words “debt review” in section 86(11) refer to a debt review before a debt counsellor in terms of section 86 of the Act, and not the review before a

Magistrate's Court, in terms of section 87 of the Act. This is borne out by the use of the phrase “a debt review as contemplated in subsection 10”. In Kruger and Pretorius I held that the debt review contemplated in section 86(10) of the Act, is only a debt review to which section 86 applies, as it is

clear from a reading of section 86(10) that the termination of a debt review process, referred to in the sub-section, is expressly

qualified by the words “that is being reviewed in terms of this section.” (Kruger and Pretorius, *supra* at para.13) These words have been intentionally used by the Legislature. Its intention must, therefore, be ascertained by giving to the words their ordinary, literal and grammatical meaning. To the extent that the meaning of the words are clear and unambiguous, and do not lead to an absurdity or to a result contrary to the intention of the Legislature when viewed in the context of the Act as a whole, effect must be given to them (*S v Tom and S v Bruce* [1990] ZASCA 38; 1990 (2) SA 802 (A) at 807 -809). They, therefore, cannot simply be ignored, as appears to be contended for by Kemp AJ in *SA Taxi Securitisation v Nako* (at para.43).

[10] In concluding that section 86(10) of the Act empowers a debt provider to give notice to terminate a debt review process which has been referred to a Magistrate’s Court in terms of section 87 of the Act, Kemp AJ fails to give proper consideration to section 129(1) and

(2) of the Act, which provide:

“129. Required procedures before debt enforcement. – (1) If the consumer is in default under a credit agreement, the credit provider –

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 agreements up to date; and

subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –

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.

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court

that could result in such order.”

[11] In *Kruger and Pretorius* (at para. 26) I held that:

“It is clear from a reading of section 129(2) of the Act, that neither section 129(1)(a) nor 129(1)(b) of the Act applies to instances where a matter has been referred to a court for determination. The provisions of section 129(1) of the Act are, in this regard, expressly qualified by the provisions of section 129(2); the latter specifically excluding the application of section 129(1) of the Act to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in

such an order. A referral of a debt review by a debt counsellor, in terms of section 86(8) of the Act, to a Magistrate's Court for determination, in terms of section 87 of the Act, may result in a restructuring or re-arranging order in terms of sub-section (b)(i) or (ii) of the Act. It therefore follows that in terms of section 129 of the Act, notice to terminate a review, in terms of section 86(10) of the Act, would be incompetent, once the debt review is referred, by a debt counsellor, to a Magistrate's Court for determination."

- [12] Kemp AJ clearly fails to give proper consideration to section 129 in *SA Securitisation v Naka*. In fact, in response to the submission by the fifth respondent that the application did not have the right to institute legal proceedings against him as the debt owed to the applicant was subject to proceedings in the East London Magistrate's Court that could result in a restructuring order, Kemp AJ stated that he did not agree as:

"All section 129(2) provides is that the credit provider does not have to give notice proposing that the credit receiver refers the credit agreement to a debt counsellor, etc. if the credit receiver has already done so. The contention that section 129(2) prohibits the credit provider from taking action appears to be clearly incorrect" (at para.10)

- [13] Again with all due respect to Kemp J, he appears to have misread section 129(1) of the Act and, in particular has failed to give proper consideration to s129(2) of the Act, which when read together with s29(1)(b)(i) of the Act, expressly provides that legal proceedings to enforce an agreement may not be commenced, by first providing notice to the consumer in terms of section 129(a) or section 86(10) of the Act, where the credit agreement is subject to a debt restructuring order, or proceedings in a court that could result in such order. In the circumstances, I remain of the view that my interpretation of section 86(10) of the Act as set out in *Kruger and Pretorius* is correct, and that:

"[O]nce the debt review process has been initiated, which thereafter results in the referral of the debt review to the Magistrates Court, the credit provider is not entitled to institute court proceedings to enforce its claim, unless the Magistrate's Court has made a determination in terms of section 87 of the Act." (at para. 20)

- [14] This then brings me to the question of what constitutes a referral to the Magistrate's Court. However, in order to answer

to this question, it is necessary to first determine the procedure to be followed when a matter is referred to the Magistrate's Court in terms of section 86 of the Act. In *National Credit Regulator v Nedbank Limited and others* 2009 (6) SA 295 (GNP) at 309F-310D, Du Plessis J considered an argument, advanced on behalf of the National Credit Regulator, that by requiring a debt counsellor to 'refer' a 'recommendation' to the Magistrate's Court, the Act's purpose was to create a sui generis procedure not governed by the Magistrate's Court Act, 32 of 1944 or its Rules. Recognising that the referral of a matter to the Magistrate's Court under section 86(8)(b) of the Act constitutes an extraordinary procedure, Du Plessis J stated as

follows:

“Does it follow from the fact that the procedure is created by the [NationalCredit] Act and is out of the ordinary that the Magistrates’ Courts Act and the Rules do not apply? As a general proposition, court rules are promulgated to regulate the conduct of proceedings of the court in question. Since the enactment of the Rules Board for Courts of Law Act 107 of 1985, rules for Magistrates’ Courts are made, amended and repealed by the Rules Board for Courts of Law that exercises the power, subject to requirements contained in the said Act, ‘with a view to the efficient, expeditious and uniform administration of justice’. Put differently, the rules prescribe the manner in which matters are brought before the Court and the manner in which the Court then deals with them. I shall assume without finding that Parliament may by way of legislation prescribe procedures that differ from the rules.

Where, however, there is no such prescription, the relevant rules of the Magistrate’s Court must be followed.

The consumer’s initial application must be in the form prescribed by regulation. A consumer who applies directly to the magistrates’ court under 86(9) must also do so ‘in the prescribed manner and form’. Section 86(8) (b) obliges a debt counsellor to refer certain matters to the magistrates’ court, but does not prescribe any procedure. It follows that in such cases the Magistrate’s Court Act and the rules apply. Counsel for the applicant submitted, and I agree, that the debt counsellors referral

constitutes an application to the court. The appropriate rule to follow therefore is rule 55 of the rules that deal with applications

to the magistrates’ courts. The appropriate form to follow is Form ‘No 1 (Notice of Application (General Form)’ that appears in Annexure 1 to the rules.”

[15] I accordingly agree with the conclusion of Du Plessis J in *National Credit Regulator v Nedbank* (at 310H-311A) that:

“ ‘ A referral by a debt counsellor to a magistrate’s court under 86(8)(b) (and section 86(7)(c)) of the National Credit Act, 2005, is an application within the meaning of the Magistrates’ Courts Act, 1944, and the rules of the magistrates’ courts and falls to be treated as such in terms of rule 55 of the Rules.

I likewise also agree with Du Plessis J (at 312F-G) that:

“Rule 9 of the magistrates’ courts’ rules pertaining to service is applicable to the service of process, any recommendation and other documents for the purpose of the referral and hearing contemplated in sections 86(7)(c), 86(8)(b) and 87 of the National Credit Act, 2005, but service of any such documents may, with agreement of the affected parties, be by way of fax or email.”

[16] I accordingly agree with Mr Mundell that, in terms of Rule 9 of the Rules of the Magistrates’ Court, service of the referral on the credit provider would constitute a referral to the Magistrate’s Court in terms of section 86(8)(b) or section 86(7)(c) of the Act. In this regard, Mr Mundell pointed out that the referral to the Magistrate’ Court, in terms of 86(7)

- (c) of the Act, although issued on 28 January 2010, was only served on the applicant on 15 February 2010. Hence, by the time the referral was served on the plaintiff it had already given notice, in terms of section 86(10) of the Act, to terminate the debt review process before the debt counsellor. Accordingly, in view of the absence of service of the referral on the plaintiff, the debt review was not yet before the Magistrates Court for a hearing in terms of section 87 of the Act, and the plaintiff was thus entitled to give notice to terminate the review on 3 February 2010.

[17] In the circumstances, I am of the view that:

17.1 the defendant is in default under the agreement, having failed to challenged this allegation in the particulars of claim;

17.2 the plaintiff's notice to terminate the debt review process before the debt counsellor was validly sent by registered

mail to the defendant's home address on 3 February 2010, more than sixty days after the date on which the defendant applied for the debt review;

17.3 the plaintiff's summons was validly issued on 18 February 2010, after at least ten days had elapsed from the date on which the plaintiff delivered the notice contemplated in section 86(10) of the Act;

17.4 the plaintiff's summons was validly served on the respondent on 9 March 2010; and

17.5 the plaintiff validly terminated the lease agreement in its summons.

[18] In the result, I find that the defendant has not disclosed a bona fide defence to the plaintiff's claim for return of the motor vehicle. I accordingly grant summary judgement in favour of the plaintiff against the defendant, with costs as between attorney and client, for return of the motor vehicle to the plaintiff forthwith.

KATHREE-SETILOANE

ACTING JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

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