

SOUTH AFRICA / JUDGMENT

Wesbank v Safter (15177/2011) [2011] ZAWCHC 459 (14 October 2011)

[2011] ZAWCHC 459

COURT

Western Cape High Court, Cape Town

BEFORE

Eloff

CASE / FILE NUMBER

15177/2011

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IN THE HIGH COURT OF

SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 15177/2011

DATE: 14 OCTOBER 2011

In the matter between:

WESBANK

.....Plaintiff

and

E

SAFTER

.....Defendant

JUDGMENT

ELOFF, AJ:

This is an application for summary judgment in an action launched by the plaintiff, a division of Wesbank, against the defendant, arising from the plaintiff's cancellation of an agreement in terms whereof the plaintiff sold to the defendant a motor vehicle. The defendant fell into default in respect of payments under the agreement, as a result whereof the plaintiff elected to cancel the agreement. Such cancellation was conveyed to the defendant, if not prior to the institution of action, then certainly in terms of the summons.

The defendant was represented by attorneys who went on record on 12 September 2011, however, soon thereafter, such attorneys withdrew from the record.

The plaintiff's application for summary judgment came before this court on 16 September 2011, and it was postponed until today so as to enable the defendant to obtain legal representation and to deal with the matter. An affidavit resisting summary judgment had been delivered on behalf of the defendant by his previous attorneys, dated 15 September 2011.

At the commencement of the hearing, counsel for the defendant asked for a further postponement in order to enable him to prepare for the matter. Since the matter had already been postponed a month earlier in order to enable the defendant to secure legal representation, I was not prepared to yield to such request, other than to allow it to stand down for a while so as to enable counsel to prepare for the hearing.

I have studied the affidavit resisting summary judgment and, other than alluding to the fact that the defendant had initiated a debt review process, it does not disclose any defence.

When the matter was called again, counsel for the defendant raised the point that the agreement had not been properly cancelled and that Annexure D1, which is the notice under Section 129 of the National Credit Act, did not constitute a cancellation of the agreement. That document, however, did not purport to constitute a communication of cancellation of the agreement, it was merely a notice under that section of the Act. The cancellation of the agreement was pleaded in paragraph 9 of the particulars of claim, and confirmation thereof is sought by the plaintiff in its particulars of claim.

The defendant submits that there is a further fact that ought to be taken into account in opposition to the application for summary judgment. It is this - a few days ago and, seemingly, on 4 October 2011, well after the date of service of the summons in the action upon the defendant, the defendant, represented by a debt counsellor, distributed a proposal plan to various of his creditors, including the plaintiff, proposing payment of the outstanding balance to all of these creditors. He suggested that payment of an amount of approximately R5 700,00 would be made to the plaintiff in instalments in satisfaction of the outstanding amount. However, by 4 October 2011, the plaintiff had already cancelled the agreement between itself and the defendant, and all that remained to be done was to obtain return of the motor vehicle, to quantify any damages that the plaintiff may have suffered and to proceed with the action for the recovery of such damages. It was, subject to a change in attitude on the plaintiff's part, too late to restructure the debt.

It was also pointed out to me that, within the last few days, the defendant in fact paid an amount of approximately R7 000,00 into the plaintiff's account. Counsel for the defendant suggested that by accepting that payment, the plaintiff, so I understood his contention, had agreed to reinstate the agreement. I do not believe that there is substance in this argument. The mere fact that the plaintiff may have received payment of a further amount did not, in my view, without more, constitute an unequivocal agreement to reinstate the initial agreement. The mere fact that the plaintiff proceeds with this application today indicates that it has not agreed to reinstate the agreement.

I was prepared, for the benefit of the defendant, to receive a copy of the proposal plan, and his proof of the payment to which I have referred, in order to decide whether there was a sufficient justification to postpone the matter once again, so as to enable the defendant to put these matters before the court by way of an affidavit.

However, having considered carefully the argument made to me by the defendant and the further documents submitted by him, I do not believe that the submission of those documents under cover of an affidavit would advance the defendant's case any further. I am therefore not prepared to allow a further postponement of the matter, and I grant summary judgment in terms of the draft order, which I shall mark "X".

ELOFF, AJ

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