IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MIDDELBURG]

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

27/IV/2017
DATE

SIGNATURE

CASE NUMBER 975/2017

CASE NUMBER 1621/2017

STANDARD BANK OF SA LIMITED **PLAINTIFF**

And

SIPHO DAVID MAOSHENE **DEFENDANT (Case No: 1621/17)**
RENIER VENTER **DEFENDANT(Case NO: 975/17)**

AND:

CASE NUMBER 1437/2017

In the matter between:

FIRSTRAND BANK LTD **PLAINTIFF**

And

NICOLAAS JOHANNES DAVEL **DEFENDANT**

JUDGMENT

LEGODI J,

[1] The national Credit Act 34 of 2005 permits consumers who have fallen into arrears and face impeding debt enforcement procedures to remedy their default or, as the Act terms it "reinstates" their credit agreement by paying the full arrear amounts, along with the credit provider's permitted default charges and reasonable costs of enforcing the agreement[1].

[2] The Act seeks to infuse values of fairness, good faith, reasonableness and equality in the manner actors in the credit market relate. Unlike in the past, the sheer raw financial power difference between the credit giver and its much needed but weaker counterpart, the credit consumer, will not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibility. Yes, debtors must diligently and honestly meet their undertakings towards their creditors. If they do not, the credit market will not be sustainable. But the human condition suggests that it is not always possible – particularly in credit arrangements that run over many years or decades, as mortgage bonds over homes loans do. Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only have rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit giver ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our constitution[2] .

[1] Nkata v Firstrand bank Limited [2016] ZACC 12 at para 13
[2] See Nkata at para 94

[3] At the core of the Act is the objective to protect consumers. This protection, however must be balanced against the interests of credit providers and should not stifle a "competitive, sustainable, responsible, efficient and effective ... credit market and industry." The Act - replaces the apartheid era legislation that regulated the credit market and infuses the constitutional considerations into the culture of borrowing and lending between consumers and credit providers[3].

[4] The three cases cited above all concern a relationship between credit providers and consumers which relationship had gone wrong because of the credit consumers' failure to pay the instalments in terms of their respective credit agreements concerning motor vehicles. At the heart of the court's concern is what must happen to the vehicles once the agreements are cancelled and motor vehicles in question returned to the respective credit providers.

[5] In respect of all the three cars the credit providers want to sell them and thereafter return to the court to claim the balance outstanding after the vehicles would have been sold. In other words, the credit providers will sell the vehicles, deduct the proceeds thereof from the balance outstanding and thereafter claim the balances if any still outstanding which often is the case. At play, the question is how and for how much should the vehicles be sold. The further question is whether the court needs to be proactive and ensure that the vehicles are not sold at a ridiculous price to the prejudice of already distressed credit consumers.

[6] In the **Standard Bank case** where two credit consumers are involved, of relevance, in paragraph 3 of the prayers, relief is sought as follows:
"Damages being the difference between the value of the vehicle at the time of repossession and the total balance outstanding in respect of the total payments still owing in terms of the Agreement alternatively payment of the sum of---,to be postponed sine die.

In the **Firstrand Bank Limited case** where one credit consumer is involved a relief in paragraph 3 of the prayers is couched as follows:

[3] See further Nkata at para 95

"That the entire Damages component of the plaintiff's claim, arising out of the Defendant's breach of the Agreement entered into between the parties, to be postponed sine die."

Then in paragraph 4 of the relief sought, is stated:
"Forfeiture of all monies paid to the plaintiff by the defendant."

[7] Bearing in mind that *'unlike in the past, the sheer raw financial power difference between the credit giver and its much needed but weaker counterpart, the consumer, will not always rule the roost'* and therefore courts are urged to strike a balance between their respective rights and responsibilities.

[8] The object of the Act as alluded to earlier in this judgment is to protect credit consumers and to ensure values of fairness, good faith, reasonableness and equality in the manner actors in credit market relate to each other. That being the case, courts cannot play a passive role and thus let go the situation of an already financially distressed consumer to precipitate. It is for this reason that I urged to be fully addressed on the reliefs quoted in paragraph 6 of this judgment.

[9] There is a tendency to recover these vehicles and then sell them at a ridiculous price. Some measure of control is needed in order not to allow the system to be abused to the prejudice of credit consumers. I am greatly indebted to Advocate H.F Brauckmann who represented the three applicants, the credit providers. His oral submissions and written heads of argument filed at the request of the court have been valuable.

[10] The issue as I see it, is not much about whether or not the credit providers are owners of the vehicles in question and whether or not cancellation of the agreement and return of the vehicles make it less important insofar as it relates to the interest of the credit consumers to an extent that this court has no role to play post cancellation and return of the vehicles and before the court is approached on what is referred to as "damages claim".

[11] I was made to understand that upon return of the motor vehicles to the respective credit providers, they will be valued and thereafter sold. It is the price at which these vehicles will be sold that concerns me. Mr Brauckmann on behalf of the applicants indicated that the values of the vehicles will be determined by an independent valuator who will then provide a valuation certificate. He however could not give an assurance that the vehicles would not be sold at an amount less than as per the evaluation certificate without the sanctioning of the court.

[12] Section 127 of the Act deals with surrender by credit consumer of goods forming the subject of credit agreements. This is preceded by section 123 which deals with termination of the agreement by the credit provider and subsection (1) thereof provides that a credit provider may terminate a credit agreement before the time provided in that agreement only in accordance with this section. Subsection (6) provides that the unilateral termination of a credit agreement by a credit provider as contemplated in this section does not suspend or terminate any residual obligations of credit provider to the consumer under the agreement or this Act.

[13] In section 131 of the Act reference is made to the provisions of section 127 and it provides that if a court makes an order with respect to property that is the subject of a credit agreement, section 127 (2) to (9) and section 28 read with the changes required by the context, apply with respect to any goods attached in terms of that order. Subsection (2) (b) of section 127 provides that within 10 business days after receiving goods tendered, credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information.

[14] The main object of subsection 127 (2) (b) is obvious. That is, to ensure that the values of the vehicles do not deteriorate in the hands of credit providers, and thus the 10 business day period within which to provide estimated value of the vehicle. But even more importantly, in my view, the provisions of subsection (2) (b) are meant to protect the consumers by ensuring that the vehicles returned to the credit providers are not sold at a ridiculous amount. If this was not the intention of the legislature why should it become necessary to provide the consumer with estimated value of the vehicle within ten days from date of surrender thereof or upon return as per the court order contemplated under section 131?

[15] Any sign of possible abuse ought to be cautioned and rooted out at the same time, not to unfairly prejudice the credit providers. If the court is entitled to make an order returning the vehicle to the credit provider upon cancellation of the credit agreement as per the relief sought on these three vehicles, it should also be entitled to take proactive steps in protecting the consumer by ensuring that the vehicles are not sold at a far less price than the vehicles' values unless good cause is shown to the court why a less price should be sanctioned. It cannot be right to allow the horse to bolt, that is, to sell the vehicles under credit agreements at a less price than the value and thereafter approach the court in the form of damages claim.

[16] In the course of oral submission, it was contended that the proposed order by the court can be problematic. That is, the order directing the applicants in the present proceedings not to sell the vehicles at a less price than the value thereof. I understood the contention to have been that the credit providers would be forced to approach courts at a huge costs time and again. I do not share the view as the concern will just surely perpetuate the sales of returned vehicles at less price than the value thereof to the great prejudice of credit consumer who will find themselves being burdened with a huge debt occasioned by money not for value for the vehicles so returned. Any credit provider who seeks to sell the returned vehicle at a lesser price, must in my view, get the sanctioning of the court.

[18] Concern about a credit providers being forced to approach the court in an open court instead of asking the Registrar in applications of this nature to grant judgment can be resolved by ensuring that averment is made in the application that the returned vehicle will not be sold at a price less than its value unless sanctioned by the court. In any event in all the present three applications the credit providers are obliged to return to court at some stage or the other for damages claim. The point I am making is that the credit provider does not have to be approaching the court several times provided there is caveat to the price at which the returned vehicle as indicated in the preceding paragraphs.

[19] Look at it this way: A credit consumer who is provided with a valuation certificate in which the estimated value is set out as so contemplated in section 127 (2) (b) of the

Act, may decide not to pursue the matter because he or she is satisfied with the value thereof and would be looking forward for a significant reduction of his or her indebtedness to the credit provider. Therefore to sell the goods at a less price without reverting to the consumer and without the sanctioning of the court makes the provisions of subsection (2) (b) moot or academic.

[19] Just before I conclude, I want to revert to another relief sought by FirstRand Bank as quoted in paragraph [6] of this judgment. "Forfeiture of all monies paid to the plaintiff by the defendant", is a bit confusing and I think is unnecessary. Does it mean that if the vehicle is sold and out of the proceeds thereof there is credit balance, the credit consumer will be regarded to have forfeited such a credit? If this is not what is meant by the relief sought, then it is not a necessary relief. In any event should the credit provider not recover all the amount of money due to it upon sale of the motor vehicle, it will be forced to revert to the court and ask for damages. Its quantification of the amount due to it, will then be dealt with at that stage. I therefore find no need to deal with paragraph 4 of the relief sought by FirstRand Bank against the credit consumer, Mr Nicolas Johannes Davel.

[20] Consequently default judgment is granted as follows regarding all the three matters:

20.1 Cancellation of the agreement in each case is hereby confirmed.

20.2 The return of the following vehicles to the credit provider, **Standard Bank**, is ordered:

20.2.1 Ford Kuga 1.6 Ecoboost Trend bearing engine number DU86764 and chassis number WF0AXXWPMADU86764;

20.2.2 2010 Audi A4 1.8T AMBITION (B8) bearing engine number CDH086852 and chassis number WAUZZZ8K2AA141331.

20.3 The return of the following vehicle to the credit provider, **FirstRand Bank**:

20.3.1 2010 Volkswagen Polo 1.6 Comfortline SE, Engine number CLS056389, Chassis number WVWZZZ60ZBT044929

20.4 That upon return of the vehicles described in paragraphs 20.1.1, 20.1.2 and 20.3.1, the applicants (credit providers) shall, within 10 business days from date of receiving the vehicles respectively, give the consumer written notice setting out the estimated value of the vehicles aforesaid and informing the consumers respectively that the vehicles in relation to each one of them will not be sold at a price less than such an estimated value unless so sanctioned by the court to sell the vehicles at a lesser price after a notice shall have been given to the consumer concerned.

20.5 Costs of R200.00 and sheriff's fees in the amount of R444.04 as prayed for by Standard Bank against Mr Denie Venter in paragraph 5 of the relief sought.

20.6 Costs of R200.00 and sheriff's fees in the amount of R426.27 as prayed for in paragraph 5 of the relief sought against Mr Sipho David Maoshene (the credit consumer) to Standard Bank.

20.7 The defendant / respondent, Nicolaas Johannes Davel to pay the costs of the application to First Rand Bank Ltd.

M F LEGODI
JUDGE OF THE HIGH COURT

DATE OF HEARING: 01 November 2017
DATE OF JUDGMENT: 22 November 2017

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FOR THE RESPONDENT:

NO APPEARANCE