

**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 116/2015

In the matter between:

**FIRSTRAND BANK LTD T/A WESBANK**

Applicant

And

**JACOBUS DANIEL CONRADIE**

Respondent

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**CORAM:** MBHELE, AJ

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**HEARD ON:** 23 APRIL 2015

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**JUDGMENT BY:** MBHELE, AJ

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**DELIVERED ON:** 30 JULY 2015

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**INTRODUCTION AND BACKGROUND**

[1] First Rand Bank Ltd, the applicant in these proceedings, seeks summary judgment against the respondent for:

1.1 A cancellation of the agreement.

- 1.2 An order in terms of which the property which forms the subject matter of this application is delivered to the Applicant alternatively that the sheriff take the property into his possession and place the Applicant in possession thereof;
  - 1.3 Damages to be postponed until return of the property.
  - 1.4 Leave to approach the court on the same papers, supplemented by a damages affidavit, evaluation thereof and calculations of damages;
  - 1.5 Interest on the amount of damages yet to be determined, and
  - 1.6 Cost of the action.
- [2] The application is opposed by the Respondent. Adv. Benade appeared for the applicant and Adv. Le Roux for the respondent.
- [3] On 12 November 2009 the Respondent was placed under debt review by the Bloemfontein Magistrate Court under case number 36282/2009.
- [4] On 13 March 2013 Respondent and Applicant entered into a written instalment sale agreement, in terms of which the Respondent purchased a 2013 Volkswagen Polo Vivo 1.4 Blueline 5 DR motor vehicle with engine number [CLP 1.....] and chassis number [AA.....]
- [5] The Respondent would pay the loan amount in 73 monthly instalments of R2810.39.

- [6] During April 2014 Respondent approached his debt counsellors for an order involving the Applicant in the debt restructuring order.
- [7] On 16 January 2015, an application was made by the debt counsellors for an amendment of the Respondent's debt review order to include Applicant as one of the creditors in the court order.
- [8] On 20 October 2014 the Applicant gave notice of the debt review process in terms of section 86 (10) of the National Credit Act (the Act). The notice was served on the chosen *domicilium citandi et executandi* by the sheriff.
- [9] Summons was issued in this court on 12 January 2015 and served on the Respondent. Respondent's chosen *domicilium citandi et executandi* on 20 January 2015.
- [10] On 21 January 2015 the Respondent sent an application for amendment of the order provided on 12 November 2009 to the Applicant.

### **ISSUES IN DISPUTE**

- [11] I am being called upon to determine whether the applicant's termination notice is valid as the respondent disputes service.
- [12] The parties are, further, in dispute as to whether the Respondent's opposition of summary judgment has merit.

### **APPLICANT'S CONTENTIONS**

- [13] Mr Benade, on behalf of the Applicant submits that the respondent has failed to disclose a defence which is *bona fide* and good in law.
- [14] It is further, submitted on behalf of the Applicant that the section 86 (10) notice was properly served on the *domicilium* address, the respondent's debt counsellor and the National Credit Regulator.
- [15] It is contended that the fact that the respondent does not disclose how he came into possession of the section 86 (10) notice attached to his opposing affidavit is an indication that the respondent was aware of the section 86(10) notice issued by the Applicant

### **RESPONDENT'S CONTENTIONS**

- [16] Mrs. Le Roux, on behalf of the Respondent submits that the credit provider is not entitled to terminate the debt review process after an application for debt review has been filed in the court or the tribunal. She finds support for her argument from section 86(10)(b) of the National Credit Amendments Act, Act 19 of 2014.
- [17] The amendment Act only came into operation on 13 March 2015 after all the events had taken place in this matter, it is therefore, not applicable in the current case.

[18] It is further argued that the application to include the Applicant in the debt review process was filed prior to the action being taken against the respondent.

[19] She contends further that the applicant continued to receive payments from the Payment Distribution Agency and the fact that payment was not made for January 2015 cannot be blamed on the respondent. It is the Payment Distribution Agency that defaulted on payment for the month of January 2015.

### **APPLICABLE LEGAL PRINCIPLES**

[20] The prescribed manner for filing termination notice is defined as follows in the Government Notice R489, Government Gazette 28864 of 31 May 2006 as follows:

“Unless otherwise provided for, means sending a document by hand, by fax, by email or registered mail to address chosen in the agreement by the proposed recipient.”

[21] The notice was delivered by the sheriff on the address chosen by the respondent in the agreement entered into between the parties.

[22] The copy of the notice was sent per email to the debt counsellor chosen by the Respondent. It is correctly pointed out on behalf of the applicant that the debt counsellor does not anywhere in the papers dispute receipt of the said email.”

[23] It is correct as pointed out by Mr. Benade that a credit provider, in the position of the Applicant, is entitled to enforce its rights under the credit agreement where the consumer is in default in terms of the credit agreement.

(See: **Firststrand Bank Limited v Fillis and Another** 2010 (6) SA 565 **ECP and Collet v First Rand Bank Limited** 2011 (4) SA 508 (SCA).

Section 86(10) provides as follows:

“If a consumer is in default under a credit agreement that is being received 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
- (c) the National Credit Regulator of any fine at least 60 business days after the date on which the consumer applied for the debt review.”

[24] In the current matter it is clear that the above requirements have been met.

[25] It is clear from the papers that the respondent only filed the application for the amendment of the court order to include the Applicant after the notice to terminate was served and summons was issued.

[26] The defendant must disclose a defence which is *bona fide* and good in law. (See: **Joob Joob Investment v Stocks Mavundia** 2009 (5) SA (1) (SCA).

[27] I am not persuaded that the respondent has a fairly triable and arguable issue. The Respondent has failed to make out a defence to the Plaintiff's case. He has not set out facts upon which I can exercise my discretion in his favour.

[28] I accordingly make the following order.

Summary Judgment is granted against the respondent in terms of prayers 1, 2, 3, 4, 5 and 6.

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**N.M. MBHELE, A.J**

On Behalf of the Applicant: Adv. Benade  
Instructed by:  
Simington & De Kok  
BLOEMFONTEIN  
9301

On Behalf of the Respondent: Adv. L Le Roux  
Instructed by:  
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