IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO:**5200/2012**

In the matter between:

FIRSTRAND BANK LIMITED trading as WESBANKAPPLICANT

and

HELEN NOKUBONGA JILI RESPONDENT

JUDGMENT

(delivered on 25 February 2013)

KRUGER J:

[1] The Plaintiff seeks summary judgment against the Defendant for an order directing the Defendant to return a motor vehicle, viz, a 2007 Volkswagen Jetta 1.6 Trendline ("the vehicle"), to the Plaintiff. In the event of the Defendant failing to do so, the Plaintiff seeks an order authorising the Sheriff to attach the said vehicle and to hand over same to the Plaintiff. Ancilliary relief sought by the Plaintiff is that the Plaintiff's claim for whatever damages it may have suffered as a consequence of the Defendant's breach of the agreement, be postponed sine die, pending the

return of the vehicle to the Plaintiff, the subsequent valuation and sale thereof and the calculation of the amounts to which the Plaintiff is entitled in terms of the agreement.

[2] The facts of the matter are common cause and are briefly as follows:

[3] On 28th November 2007 the Plaintiff concluded a written instalment sale agreement ("the agreement") in respect of the vehicle with the Defendant. The agreed selling price was R176 460,00. The agreement provided for the payment of a deposit of R30 000,00; sixty instalments of R3 157,05 per month and a final instalment of R59 465,00.

[4] The Defendant experienced financial difficulties and during 2011 applied for debt review in terms of Section 86 of the National Credit Act, 34 of 2005 ("the Act"). On 4th November 2011 the Defendant was ordered, in terms of a Magistrate's Court Order, to pay to the Plaintiff a restructured instalment of R1 714,44 per month.

[5] The Defendant failed to pay the restructed instalments timeously and regularly and as at 15th May 2012 was in default in the sum of R3 428,86. On the 22nd May 2012, by virtue of the Defendant's breach, the Plaintiff cancelled the contract and issued a summons claiming the relief as hereinbefore stated. The Plaintiff averred that it was entitled, by virtue of the provisions of Section 88(3) of the Act, to enforce by litigation its rights or security under the agreement. On the 13th July 2012 the Defendant paid the sum of R3 428,86 to the Plaintiff in an attempt to make good the arrears.

[6] The Defendant entered an appearance to defend and the Plaintiff launched this application for summary judgment. In opposing the opposing the application for summary judgment, the Defendant raised three defences – firstly that her debts have been rearranged in terms of a debt rearrangement order of court and accordingly the Plaintiff is precluded from proceeding against her without first having rescinded or varied the existing court order; secondly, that the Plaintiff has failed to negotiate in good faith with her and thirdly, in the alternative, that given the circumstances of this case, the Court should order that the debt review should resume in terms of Section 86(11) of the Act.

[7] Mr Blomkamp, who appeared for the Defendant, did not pursue the latter two "defences". They were, in any event, without merit and doomed to fail.

[8] Section 88(3) of the Act provides:

> "(3) subject to Section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in Section 83 or 85, or notice in terms of Section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until –
>
> (a) The consumer is in default under the credit agreement; and
>
> (b) One of the following has occurred:
>
> (i) An event contemplated in sub-section (1)(a) through (c); or

(ii) The consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal."

[9] Mr Gounden, who appeared for the Plaintiff, submitted that once the Defendant was in default of the debt re-arrangement court order, the Plaintiff was entitled to proceed with the issue of a summons to enforce the agreement without further notice to the Defendant. In this regard he relied on the decision of Eksteen J in **FirstRand Bank Ltd v Fillis and another, 2010(6) SA 565 (ECP)**. At paragraphs 14 and 16, he held:

"The Act provides very extensive protection to a consumer who has become over-indebted, whether it be of his or her own making or through some circumstances beyond his or her control. Not only does a rearrangement afford him or her alleviation from the onerous monthly obligations that he or she has in all seriousness undertaken to his or her credit providers, but he or she also enjoys the protection of Section 103(5) against the ravaging effect of escalating interest whilst he or she remains in default under the credit arrangement. If, however, he or she fails to embrace this opportunity, or he or she is, notwithstanding this very considerable assistance, unable to comply with his or her restructured debt commitment, the Act permits the common law to run its course.

……..…

It follows, in my view, as a matter of interpretation, that once the jurisdictional requirement set out in Section 88(3)(a) co-exists with anyone of the jurisdictional requirements set out in Section 88(3)(b),the credit provider is at liberty to exercise and enforce, by

litigation or other judicial process, any right or security under his credit agreement, without further notice."

See also; **FirstRand Bank Ltd, formerly known as First National Bank of Southern Africa Ltd v Fester and another(14597/2011)[2011] ZAWCHC363**; **FirstRand Bank Ltd v Pieter Grobelaar2011 JDR0227 (FB)**; **FirstRand Bank Ltd v Mdila2012 JDR0729 (ECG)**; **Standard Bank of South Africa Bpk v Helene Du Randt(2985/2012)[2012] ZAFSHC219**.

[10] Mr Blomkamp's submission is that the Plaintiff is precluded from enforcing the credit agreement unless and until the court rearrangement order has been rescinded, irrespective of the fact that the Defendant is in breach of the provisions of the debt rearrangement order. The submission is based on a judgment of Lopes J in **Reid v Standard Bank of South Africa Ltd [2011] ZAKZPHC34**. At paragraph 9, he held:

> "…The provisions of sub-section 86(2) do not necessarily render a decision by a Magistrate pursuant to a debt review application void. It may well be that a debt counsellor is precluded from bringing such an application after the credit provider has taken steps in terms of Section 129, but there is nothing in the act to indicate that once having done so, it is visited with a nullity. In my view it was incumbent upon the Respondent to have applied to set aside the Magistrate's Court orders rather than seeking simply to ignore them. Once a Court Order is granted, it is valid and enforceable until and unless set aside. As pointed out by counsel for the appellants, any assumption of invalidity would possibly affect the other parties to the order."

[11] The facts in the **<u>Reid</u>** case however are clearly distinguishable from those *in casu*. In the **<u>Reid</u>** case the debt counsellor irregularly sought and obtained a debt rearrangement order from the Magistrate's Court after the credit provider had issued and served summons on the consumer. The Court held that this irregularity did not render the Magistrate's Court order null and void thereby entitling the credit provider to obtain summary judgment in the High Court. The Learned Judge was of the opinion that in these circumstances, the Magistrate's Court order had to be set aside on the basis of the irregularity, before the credit provider would be entitled to judgment.

[12] *In casu*, and as already outlined earlier in this judgment, the Defendant defaulted and was in breach of the court rearrangement order. There is no allegation of the said order having been sought and obtained irregularly. I am therefore of the opinion that the Plaintiff was entitled to proceed with the issue of summons to enforce its rights under the agreement.

[13] Finally, Mr Blomkamp has submitted that summary judgment ought to be refused as the Defendant made good the arrears in terms of the debt rearrangement order. In this regard he relied on the judgment of Phalatsi AJ in the case of **<u>FirstRand Bank Ltd v G Britz and another</u> (5243/2011) ZAFHC13**. The Court refused to grant summary judgment on the basis that:

(a) At the time of the hearing, the Defendants had made good the shortfall and were no longer in arrears and

(b) The Defendants had expressed and demonstrated a willingness and ability to comply with the restructured debt commitment.

[14] The facts in the **Britz** case are similar to those *in casu*. The Defendants defaulted and were in breach of the court rearrangement order. The Plaintiff then proceeded, in terms of the provisions of Section 88(3), to enforce the agreement. After the issue and service of the summons the Defendants made good the arrears in terms of the debt rearrangement order. I do not agree with the conclusions arrived at the **Britz** case. In terms of the provisions of Section 88(3) and the authorities cited earlier in this judgment, once "the jurisdictional requirement set out in Section 88(3)(a) co-exist with anyone of the jurisdictional requirements set out in Section 88(3)(b)"(per Eksteen J – **Fillis** – **supra**) the court re-arrangement order (in respect of that particular credit provider) automatically terminates. The Act does not provide for an automatic reinstatement of the debt rearrangement order once the consumer has made good the arrears. See also **FirstRand Bank v Fester** - **supra**.

[15] In the circumstances the Defendant has failed to show that she has a bona fide defence to the Plaintiff's claim.

[16] I accordingly make the following order:

1. The Defendant is ordered forthwith to return to the Plaintiff the motor vehicle described as 2007 Volkswagen Jetta 1.6 Trendline, with chassis number AAVZZZ1KZ7U009263 and engine number BSF030836, failing which the Sheriff is authorised to attach the vehicle wherever he may find same and to hand it to the Plaintiff.
2. That judgment for the amount of damages that the Plaintiff may have suffered, together with interest thereon be postponed sine die, pending the return of the vehicle to the Plaintiff, the subsequent

valuation and sale thereof and the calculation of the amount to which the Plaintiff is entitled.

3. The Defendant is ordered to pay the Plaintiff's costs incurred in respect of the application and the action to date hereof.

DATE OF CAV:	12 February 2013
DATE OF JUDGMENT:	25 February 2013
FOR THE PLAINTIFF:	K GOUNDEN
INSTRUCTED BY:	LEGATOR McKENNA INC.
FOR THE DEFENDANT:	P J BLOMKAMP
INSTRUCTED BY:	W H A COMPTON ATTORNEYS