THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 763/2013

REPORTABLE

In the matter between:

HELEN NOKUBONGA JILI **APPELLANT**

and

FIRSTRAND BANK LTD t/a WESBANK **RESPONDENT**

Neutral citation: *Jili v Firstrand Bank Ltd* (763/13) [2014] ZASCA 183 (26 November 2014)

Coram: ***Maya, Shongwe, Leach and Willis JJA and Mocumie AJA***

Heard: **13 November 2014**

Delivered: **26 November 2014**

Summary: National Credit Act 34 of 2005 – interpretation of s 88(3) thereof – an original credit agreement is enforceable against a defaulting credit consumer without further notice if the relevant debt re-arrangement order is breached – summary judgment – court to exercise its discretion to refuse it only where there exists a reasonable possibility that an injustice may be caused – no basis to interfere with order of the high court granting summary judgment against the appellant defaulting on her rescheduled repayments on an instalment sale agreement – appeal dismissed.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Kruger J sitting as the court of first instance)

The appeal is dismissed, the appellant to pay the respondent's costs.

JUDGMENT

Willis JA (Maya and Shongwe JJA and Mocumie AJA concurring):

[1] The appellant appeals, with the leave of this court, against the order of summary judgment which was granted against her in the Kwazulu-Natal High Court, Durban (Kruger J). The appellant was ordered to return a motor vehicle, which was a 2007 Volkswagen Jetta 1.6 Trendline, to the respondent (the bank), failing which, the Sheriff was authorized to attach it. The high court postponed, sine die, the question of judgment in respect of the damages which the bank may have suffered. The high court ordered the appellant to pay the costs of the application for summary judgment as well as the costs of the action to the date of the judgment.

[2] The National Credit Regulator has been admitted to these proceedings as an amicus curiae. It supports the appellant in her appeal but entered the fray only with regard to the correct interpretation of s 88(3) of the National Credit Act 34 of 2005 (the NCA).

[3] In November 2007, the appellant and the bank concluded an instalment (spelt with one l in the NCA and agreement) sale agreement in respect of the motor vehicle. By March 2011, the appellant was experiencing difficulties in meeting her financial obligations to the bank, which had arisen as a result of the instalment sale agreement. The appellant approached a debt counsellor, applying for debt review in terms of s 86(1) of the NCA. The debt counsellor thereupon, in terms of s 84(6) of

the NCA, notified all the credit providers to whom the appellant was indebted as well as every registered credit bureau.

[4] The debt counsellor found that the appellant was over-indebted and, in April 2011, forwarded a proposal to all the appellant's creditors, including the bank, for the rescheduling of the repayment of the appellant's debt. The debt counsellor proposed that the appellant's repayments in terms of her agreement with the bank be reduced to R1714.44 per month. The bank accepted the proposal.

[5] In October 2011, the debt counsellor brought an application, on behalf of the appellant, in the Magistrate's Court in Pietermaritzburg for an order that she was over-indebted and rescheduling her debt to various credit providers in terms of ss 86(8) and 87(1)*(b)(ii)* of the NCA. The magistrate granted the order on 4 November 2011.

[6] In March and April 2012, the appellant fell into arrears in respect of her rescheduled repayments to the bank but made this default good in July 2012. In the meantime, on 25 May 2012, the bank instituted an action against the appellant for the return of the vehicle and recovery of the debt. The action was defended. On 24 August 2012 the bank applied for summary judgment. The application was opposed. It was common cause that the appellant had not purged her default by the time the application for summary judgment was heard.

[7] In her affidavit resisting summary judgment, the appellant said the following:

'[16] . . .On 11 June 2012 my attorney confirmed in writing a proposal that I would bring the arrears up to date by paying the arrears of R3428.86, and requested the plaintiff's attorneys to take instructions in this regard… This proposal – which I respectfully submit was a most reasonable proposal – was made in the spirit of keeping alive the rearrangement order that had been made and enabling me ultimately thereby to satisfy in due course all my financial obligations to all of the credit providers concerned, including the plaintiff. However, it was summarily rejected by the plaintiff . . . .'

The appellant's defence is, in effect, a plea *ad misericordiam*.[1]

[8] The bank succeeded. Referring to the provisions of s 88(3) of the NCA, the high court relied strongly on the judgment of Eksteen J in *FirstRand Bank Ltd v Fillis & another*[2] to hold that, once a debtor has defaulted in terms of an order by a magistrate for the re-arrangement of debt, the order is automatically terminated. Correspondingly and simultaneously, in the view of the court, the termination of the order gave rise to the requisite jurisdictional facts that enable a creditor to proceed to obtain judgment against the debtor. The high court found that the appellant had no bona fide defence to the application for summary judgment and, in the result, granted the relief sought by the bank.

[9] Counsel for the parties agreed that the case turns on the following points of law:

(a) Could the bank rely on the appellant's default in March and April 2012 to proceed as it did, without first obtaining an order setting aside the magistrate's order re-arranging the repayment of the appellant's debt; and

(b) If the bank could so rely upon the appellant's default, did the court have a discretion not to grant judgment in favour of the bank; and

(c) In the event that the court had this kind of discretion, did the court exercise it in a judicial manner, having regard to all the circumstances of the case?

[10] Counsel for the appellant submitted that, even though the Constitutional Court had pronounced plainly on the interpretation of s 88(3) of the NCA in *Ferris & another v FirstRand Bank Ltd*[3], this was merely obiter and should not be followed. Relying on the Constitutional Court's judgment in *Sebola & another v Standard Bank of South Africa Ltd & another*,[4] the appellant also submitted that an important purpose of the NCA is to promote non-litigious methods of resolving consumer defaults and that 'weight must be given to constitutional considerations in assigning meaning to the statute's provisions. 'The appellant furthermore contended that a

[1] See for example *Saloojee & another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C-D.
[2] *FirstRand Bank Ltd v Fillis & another* 2010 (6) SA 565 (ECP) esp paras 14 and 16.
[3] *Ferris & another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC).
[4] *Sebola & another v Standard Bank of South Africa Ltd & another* 2012 (5) SA 142 (CC).

court always had a discretion to refuse to grant summary judgment and that in this particular case the discretion should so be exercised. The amicus submitted that there was a lacuna in the provisions of s 88(3) that did not have regard to the interests of the other credit providers. The respondent supported the Constitutional Court's reasoning in *Ferris v FirstRand Bank* and submitted that the discretion to refuse summary judgment was confined to situations where there was doubt about the indebtedness of the defendant, which obviously was not the position in the present case.

[11] Section 88(3) of the NCA provides as follows:

'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 subsection (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.' (My emphasis.) we use italics to emphasize

[12] In *Ferris v FirstRand Bank*[5] Moseneke ACJ, delivering the unanimous judgment of the Constitutional Court, approved the reasoning in *Fillis.* He said at para 16:

'It seems to me that an original credit agreement is enforceable without further notice if the relevant debt-restructuring order is breached.'

Moseneke ACJ said that this was 'clear from the wording of the relevant sections of the Act'.[6] He also noted that s 129(2) of the NCA 'expressly stipulates that the requirement to send a notice under s 129(1) is not applicable to debts subject to debt-restructuring orders'[7]

The Constitutional Court has therefore set it free from doubt that, once a debtor has defaulted in terms of an order by a magistrate for the re-arrangement of debt, a

[5] *Ferris & another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC).
[6] Para 14.
[7] Ibid

creditor is entitled to enforce the terms of the loan agreement, without having to apply for a variation or a setting aside of the order of the magistrate. In my opinion, these remarks by Moseneke ACJ were not obiter but were part of the ratio decidendi. In any event, remarks of the Constitutional Court, even if merely obiter, carry great weight indeed. To refuse to follow Moseneke ACJ's observations and remarks on this point would create huge confusion among credit providers and consumers. Moreover, if every other credit provider affected by a debt-restructuring order had to be given notice of an application for summary judgment, it would create a potentially never ending merry-go-round.

[13] Insofar as the question of the high court's discretion to grant or refuse the application for summary judgment is concerned, the critically relevant fact is that it is common cause that the appellant had no defence, recognised in law, to the fact that she was indebted to the bank. It is indeed trite that a court has a discretion as to whether to grant or refuse an application for summary judgment.[8] Although *Breitenbach v Fiat SA (Edms) Bpk*[9] has made it plain that a court should exercise a discretion against granting such an order where it appears that there exists 'a reasonable possibility that an injustice may be done if summary judgment is granted',[10] the context in which that was said indicates that this precaution applies in situations where the court is not persuaded that the plaintiff has an unanswerable case.[11]

[14] It is a different matter where the liability of the defendant is undisputed: the discretion should not be exercised against a plaintiff so as to deprive it of the relief to which it is entitled.[12] Where it is clear from the defendant's affidavit resisting

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[8] See for example *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 58D-59A and *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229B-H.

[9] *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 at 229H.This case has been referred to with approval by this court in *Tesven CC & another v South African Bank of Athens* 2000 (1) SA 268 (SCA); [1999] 4 All SA 396 (A) para 22 and *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd 2*004 (6) SA 29 (SCA) para 24.

[10] *Breitenbach v Fiat* at 229B-H. See also *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467E-H and *Jacobsen van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O) at 589D to which cases Colman J referred with approval in *Breitenbach v Fiat* at 229D and 229F-G respectively.

[11] *Breitenbach v Fiat* at 229D-E. See also *Shepstone v Shepstone* at 467E-H to which, as mentioned in footnote 7 above, Colman J referred with approval in *Breitenbach v Fiat* at 229D-E.

[12] *Breitenbach v Fiat* at 229C-G. See also *Shepstone v Shepstone* at 467E-H and *Jacobsen van den Berg SA (Pty) Ltd v Triton Yachting Supplies* to which cases, as mentioned in footnote 7 above, Colman J referred with approval in *Breitenbach v Fiat* at 229D and 229F-G respectively.

summary judgment that the defence which has been advanced carries no reasonable possibility of succeeding in the trial action, a discretion should not be exercised against granting summary judgment.[13] The discretion should also not be exercised against a plaintiff on the basis of mere conjecture or speculation.[14] The consequences of refusing summary judgment in this particular case are entirely speculative.

[15] In all the circumstances of the matter, the high court cannot be faulted for having granted summary judgment. Although this case has raised issues of constitutional importance, it was not primarily driven by either party in order to test its constitutional rights. This is not a case where the principles relating to costs, set out in *Biowatch Trust v Registrar, Genetic Resources & others*,[15] should apply.

[16] The following order is made:

The appeal is dismissed, the appellant to pay the respondent's costs.

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N P WILLIS

JUDGE OF APPEAL

[13] *Breitenbach v Fiat* at 229E. See also *Shepstone v Shepstone* at 467E-H.
[14] *Breitenbach v Fiat* at 229E-F.
[15] *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC).

Leach JA (Maya and Shongwe JJA and Mocumie AJA concurring):

[17] I have read the judgment of Willis JA, but while I agree that summary judgment was correctly granted by the high court and that the appeal should be dismissed, the judgment does not fully reflect my views on the matter.

[18] The instalment sale agreement concluded between the appellant and the respondent in November 2007 resulted in the appellant becoming indebted to the respondent in a total sum of R245 468 inclusive of financial charges and VAT. The debt was repayable by way of 60 monthly instalments commencing on 16 January 2008, the first 59 instalments being in a sum of R3 100,05 with a final so-called 'balloon' payment of R62 565,05 payable on 27 November 2012 (these details are reflected in a payment scheduled attached to the agreement; they differ slightly from those reflected in the agreement itself but nothing turns on this for present purposes).

[19] Some three years later the appellant, who was then in financial difficulties, approached a registered debt counsellor and applied for a debt review under s 86(1) of the NCA. Pursuant to procedures outlined by that Act, a debt re-arrangement order was made in the Pietermaritzburg Magistrate's Court by consent under s 86(8) of the NCA. Under such order the obligations of various of the appellant's credit providers, including the respondent, were re-arranged and the appellant became obliged to pay the respondent a much reduced monthly instalment of R1 714,44 over an estimated period of 68 months in order to repay the balance of R117 130,31 then still owing. Not only was this new instalment substantially less than that set out in the initial credit agreement but it was payable over a period far in excess of the original period.

[20] Despite the terms of this debt re-arrangement order extending substantial relief to the appellant in regard to her monthly commitments, she failed to pay her instalments for March 2012 and April 2012. The respondent accordingly issued summons against her, claiming the return of the motor vehicle that was the subject of the instalment sale agreement as it was entitled to do under the contract. It was only on 13 July 2012, after the institution of the respondent's action, that the appellant paid the instalments due for March and April 2012. But, as this did not extinguish her debt in respect of further amounts that had since become due under the debt re-arrangement order, the respondent proceeded to apply for summary judgment for return of the motor vehicle.

[21] In seeking to avoid summary judgment the appellant argued, both in the court below and in this court, that the respondent had not been entitled to simply issue summons while the re-arrangement order remained in force and that, without that order being rescinded or varied, any action to enforce its terms was premature. In this regard, the appellant relied upon the unreported judgment in *Reid v Standard Bank of SA Ltd* [2011] ZAKZPHC 34. In that matter, the respondent bank had sought summary judgment against the appellants arising from their liability to pay certain amounts under three mortgage bonds. The appellants sought to oppose by alleging that their debt obligations had been re-arranged under an order granted by a magistrate under s 86(7) of the NCA although the respondent alleged that the appellants had not paid any amounts under that order. A high court had granted summary judgment but, on appeal to a full bench, its order was set aside by Lopes J (with whom Jappie J and Ndlovu J concurred), who inter alia stated:

'In my view it was incumbent on the respondent to have applied to set aside the Magistrates' 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 other parties to the order.'

[22] This decision, however, applies in the face of the provisions of s 88 of the NCA which deals with the effect of debt review on a re-arrangement order or agreement. Section 88(3) provides that a credit provider who has received notice of an application for debt review:

'. . . 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) . . .; 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.'

In *FirstRand Bank Ltd v Fillis* 2010 (6) SA 565 (ECP) para 16 Eksteen J, in dealing with the NCA and s 88(3) in particular, stated:

'It follows . . . that once the jurisdictional requirement set out in s 88(3)(*a*) co-exists with any one of the jurisdictional requirements set out in s 88(3)(*b*), the credit provider is at liberty to proceed and to exercise and enforce, by litigation or other judicial process, any right or security under his credit agreement, without further notice.'

[23] It was argued on behalf of the appellant that *Fillis* had been wrongly decided, but the insurmountable problem facing the appellant in this regard is the fact that the Constitutional Court has already reached the contrary conclusion in *Ferris v*

FirstRand Bank Ltd 2014 (3) SA 39 (CC) and, in doing so, cited with approval the passage from the *Fillis* judgment quoted above.[16] In regard to the effect of s 88, Moseneke ACJ, in delivering the unanimous judgment of the court in *Ferris*, said:[17]

'Once the restructuring order had been breached, FirstRand was entitled to enforce the loan without further notice. This is clear from the wording of the relevant sections of the Act. Section 88(3)(*b*)(ii) does not require further notice — it merely precludes a credit provider from enforcing a debt under debt review unless, among other things, the debtor defaults on a debt-restructuring order.'

[24] Counsel for the appellant argued that the conclusion of the Constitutional Court in regard to s 88 was both obiter and clearly wrong, and that this court was entitled to reach a contrary conclusion. I do not agree. In the first instance, such conclusion is in my view clearly right. But in any event, the contention that it was obiter is unsustainable. The appellants in *Ferris* had sought to rescind a default judgment on the basis that it had been erroneously sought or granted against them as there was a debt re-arrangement order in place. Although that order recorded that the rights and obligations amended by the order would be 'fully enforceable' in the event of the order being breached, this did no more than spell out the effect of s 88(3). The clear *ratio decidendi* of the case was that the breach of the debt re-arrangement order entitled the bank to enforce the loan without further notice.

[25] In these circumstances, *Reid* was wrongly decided in so far as it held that a debt re-arrangement order that had been breached had to be varied or set aside before the affected creditor could seek to enforce its claim. In the present matter, therefore, the appellant's default under the debt re-arrangement order entitled the

[16] *Ferris* para 16.
[17] *Ferris* para 14.

respondent, without further ado, to proceed to recover the motor vehicle in question from her. The appellant had neither purged her default at the time the summary judgment application was heard nor had any defence to the respondent's claim at that stage.

[26] I turn to the appellant's submission that even if she has no defence, the court a quo should have exercised its discretion to refuse summary judgment and thereby afforded her the opportunity of fulfilling her obligations under the debt re-arrangement order. In advancing this argument, counsel for the appellant emphasised that the NCA was intended to protect consumers and to promote social and economic welfare and a fair, transparent, competitive, effective and accessible credit market.

[27] The simple answer to this argument is, of course, that a court's discretion to refuse summary judgment is limited to those cases where there may be some doubt as to the defendant's liability. There is no such doubt in this case. It is not disputed that the respondent is entitled to the order that it seeks if the debt re-arrangement order earlier granted by the magistrate does not bar the respondent's claim which, for the reasons already given, it does not.

[28] Moreover, as this court stressed in *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA) para 2, a passage cited with approval by the Constitutional Court in *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) para 40, notwithstanding the objective of the NCA to protect consumers, there has to be a careful balancing of the competing interests sought to be protected and further that the interests of creditors should 'also be safeguarded and should not be overlooked'.

[29] The appellant has already enjoyed the considerable benefit afforded by a debt re-arrangement order that substantially reduced her monthly instalments and at the same time increased the period available to her to effect repayment. As Eksteen J observed in *Fillis*:[18]

'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 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 s 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.'

[30] To allow the appellant, who has spurned the advantages flowing from the magistrate's order of 4 November 2011 by defaulting in her payments, a yet further opportunity to attempt to get her affairs in order at the expense of the respondent who is entitled to the relief it seeks, would not be in the interests of justice. To refuse summary judgment would be to afford the appellant a further advantage not envisaged by the NCA — and a second bite at the cherry, so to speak — to the detriment of the clear rights of the respondent.

[31] For these reasons the appeal should be dismissed with costs. The amicus curiae, to whom this court is grateful, sought no order as to its costs and no order need be made in that regard.

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[18] Para 14.

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L E LEACH

JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	PJ Blomkamp Instructed by: WHA Compton Attorneys, Pietermaritzburg c/o Lovius Block, Bloemfontein
For the Respondent:	N Konstantinides Instructed by: Legator McKenna Inc, Durban c/o Matsepes Inc, Bloemfontein
For the Amicus Curiae:	AJ Van Lapaan Instructed by: Nyapotse Inc, Johannesburg c/o McIntyre & Van der Post, Bloemfontein.