THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 16/2012

Reportable

In the matter between:

FIRSTRAND BANK LIMITED t/a HONDA FINANCE **APPELLANT**

and

CHARMAINE CAROL OWENS **RESPONDENT**

Neutral Citation: *Firstrand Bank Ltd v Owens* (16/2012) [2012] ZASCA 167 (23 November 2012)

Coram: Lewis, Mhlantla and Tshiqi JJA and Erasmus and Plasket AJJA

Heard: **15 November 2012**

Delivered: **23 November 2012**

Summary: Where a credit provider terminates a debt review in respect of a particular credit agreement through a notice given in terms of s 86(10) of the National Credit Act 34 of 2005, it may proceed to enforce the agreement under ss 129 and 130 of the Act. No further notice need be served under s 129(1)(*a*) of the Act.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Legodi J sitting as court of first instance):

1 The appeal is upheld with costs.
2 The decision of the high court is set aside.
3 The matter is remitted to the North Gauteng High Court to determine whether summary judgment should be granted against the respondent.

JUDGMENT

LEWIS JA (…concurring)

[1] In *Sebola v Standard Bank of South Africa Ltd*[1] the Constitutional Court said (per Cameron J) that the core innovations of the National Credit Act 34 of 2005, with which this matter is concerned, are that the procedures prescribed by the Act are 'significantly consumer-friendly and court-avoidant'.[2] This case (and many others referred to in *Sebola*) demonstrate that while that may have been the wish of the legislature, the provisions in fact lead to considerable confusion and lend themselves to widely-different interpretations by both parties and their legal representatives, and courts. This results in an unfortunate proliferation of litigation.

[2] In this matter the high court (Legodi J in the North Gauteng High Court, Pretoria) chose to differ from a decision of another judge in the same high court[3] and to disregard the careful analysis of pertinent sections of the Act by this court.[4] It held that summary judgment could not be granted against the respondent, Ms C C Owens, who had defaulted on her obligations under an instalment sale agreement, because the appellant, FirstRand Bank Ltd trading as Honda Finance (FirstRand), had not given the requisite notice in terms of s 129(1)(*a*) of the Act. The appeal against that decision is with the leave of the high court.

---

[1] *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC).
[2] Para 59.
[3] Murphy J in *Changing Tides 17 (Pty) Ltd v Grobler* : Case 9266/2010, handed down on 2 June 2011.
[4] In *Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA), particularly in respect of ss 86(10) and (11), paras 9, 10 and 11.

[3] I shall deal with the provisions of the Act in question (ss 86, 129 and 130) after setting out the facts. Owens entered into an agreement with FirstRand on 16 November 2007, purchasing a Honda vehicle, the price to be paid in instalments over a period of 78 months. She took possession of the vehicle but defaulted in making payments.

[4] On 17 February 2010 she took the initiative of applying for 'debt review' under s 86(1) of the Act. No debt review process, as envisaged by the section, was in fact completed. More than a year after applying for debt review, she remained in default in respect of instalment payments to FirstRand. On 19 July 2011, acting in terms of s 86(10), FirstRand gave notice to her, to the debt counsellor appointed in terms of the section, and to the National Credit Regulator, terminating the debt review in respect of the agreement. Owens remained in default.

[5] FirstRand instituted action against her on 11 August 2011, repeating that the agreement was terminated and asking for the return of the vehicle and costs. Owens gave notice to defend the action. FirstRand applied for summary judgment against her on 7 September 2011. Owens opposed the application, which was first heard (together with several other such applications) by Legodi J on 31 October 2011. During the course of the application Legodi J asked counsel for argument on whether the application was competent. He enquired whether 'a credit provider, upon termination of debt review proceedings in terms of s 86(10), is entitled to enforce or to cancel the credit agreement without having taken steps set out in sections 129 and 130 of part C of Chapter VI of the National Credit Act . . .'. The learned judge postponed the applications for summary judgment in three matters to 2 November 2011 to enable counsel to prepare written heads of argument, and to argue in respect of this question.

[6] Section 86 appears in Part D of Chapter 4 of the Act. The chapter is headed 'Consumer Credit Policy' and Part D deals with 'Over-indebtedness and reckless credit'. The relevant provisions of s 86, which is headed 'Application for debt review', are:

'(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.

(2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.'

Subsections 3, 4 and 5 prescribe the procedures to be followed by the consumer and the debt counsellor; subsection 5 requires the consumer and credit providers to facilitate the evaluation of the over-indebtedness and to participate in the review and in any negotiations in good faith. Subsection 6 requires a debt counsellor to make an evaluation within the prescribed time and subsection 7 regulates the steps to be taken when an evaluation has been made. (Owens contended that the debt counsellor had undertaken an evaluation. FirstRand stated, however, that no rearrangement of Owens's debts had been made and that was not put in issue.) Subsection (8) prescribes the steps to be taken when the debt counsellor's recommendation is accepted by the consumer and her credit providers, and subsection 9 provides for the situation where a recommendation is not accepted: the consumer may apply to a court for an order that the consumer is over-indebted, or that credit has been issued recklessly, or both, and that the consumer's obligations be rearranged in one of several ways.

[7] Section 86(10) provides:

'If a consumer is in default under a credit agreement that is being reviewed 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; and

(c) the National Credit Regulator,

at any time at least 60 business days after the date on which the consumer applied for the debt review.'

Section 86(11) then provides that if a credit provider has given notice to terminate under subsection (10), and proceeds to enforce the agreement under Part C of Chapter 6, the court hearing the matter[5] may order that the debt review resumes on conditions it deems just in the circumstances.

[5] In *Collett* this court held (para 17) that although the subsection refers only to a magistrate's court, a reference to a high court must be read in to make sense of the provision. It is the court that hears the proceedings to enforce the agreement that must order the resumption of the debt review.

[8] Chapter 6 of the Act regulates 'Collection, repayment, surrender and debt enforcement'. Part C (ss 129-133) sets out the procedures for 'debt enforcement by repossession or judgment'. The sections deal thus with how a credit provider should proceed to enforce an agreement. Section 129 is headed 'Required procedures before debt enforcement'. Subsection (1) reads:

'If the consumer is in default under a credit agreement, the credit provider –

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before –

(i) first providing notice to the consumer, as contemplated in paragraph *(a)*, *or in section 86 (10), as the case may be;* and

(ii) meeting any further requirements set out in section 130.' (My emphasis.)

[9] Section 130 is headed 'Debt procedures in a court'. Subsection (1) reads:

'(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

(a) at least 10 business days have elapsed since the credit provider *delivered a notice to the consumer as contemplated in section 86 (9), or section 129 (1), as the case may be;*

(b) in the case of a notice contemplated in section 129 (1), the consumer has-

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.' (My emphasis.)

[10] A reading of subsections (1) of each of s 129 and s 130 shows that where it is the credit provider that wishes to enforce the debt, a notice must[6] be given by it to the consumer in terms of s 129(1)(*a*). That subsection also makes it clear that the credit provider must draw to the consumer's attention the possible methods of resolving the debt default. Section 86(10), on the other hand, assumes knowledge

[6] A reading of s 129(1)(*a*) with s 129(1)(*b*), and 130(1) shows that compliance is compulsory.

on the part of the consumer of these methods: it applies only where the consumer has already applied for debt review. A notice under s 129(1)(*a*) is thus redundant where the consumer has already taken steps to rearrange her debts. That is why s 129(1)(*b*)(i) states that in order to commence legal proceedings, a credit provider must give notice *either* under s 129(1)(*a*) *or* s 86(10). The former applies where there has been no debt review. The latter applies where there has been. The requirement of two notices to the consumer where these are meant to serve different purposes, and in different contexts, is absurd.

[11] I accordingly agree with the decision of Murphy J in *Changing Tides*[7] that a notice in terms of s 129(1)(*a*) is not required where a notice under s 86(10) has been given. I also agree that the reference in s 130(1)(*a*) to a notice under s 86(9) must be a reference to s 86(10).[8] It is an obvious error. Section 86(9) does not deal with notices at all. And s 130(1)(*a*) must be read with s 129(1)(*b*)(i), which refers to s 86(10): they both refer to the requisite notice to be given to the consumer.

[12] It follows that the appeal must be upheld, and the judgment of the high court set aside. Because of the diversion by the high court in requiring argument on the need for a notice in terms of s 129(1)(*a*), when a notice has been sent under s 86(10) of the Act already, no argument would have been addressed to the court below on whether there is any bona fide defence to the application for summary judgment. In her opposing affidavit Owens set out the reasons for her default and explained what steps she had taken to rearrange her debts. These were confirmed by her debt counsellor. In the circumstances I consider that the matter must be remitted to the high court to determine whether summary judgment should be granted. That court may not require, however, that any further notice under s 129(1) be given by FirstRand.

[13] Owens advised this court that she could not afford legal representation for the appeal. At the request of the court Mr C D Pienaar of the Free State Bar furnished heads of argument for her, and represented her in court. This was done pro bono and the court is indebted to him.

---

[7] Above, paras 24 and 25.
[8] Para 25.

[14] In the result, the following order is made:

1 The appeal is upheld with costs.

2 The order of the high court is set aside.

3 The matter is remitted to the North Gauteng High Court to determine whether summary judgment should be granted against the respondent.

C H Lewis

Judge of Appeal

APPEARANCES

Counsel for Appellant:N Konstantinides

Instructed by:	Hack Stupel & Ross
	Pretoria
	Lovius Block Attorneys
	Bloemfontein
Counsel for Respondent:	C D Pienaar
Instructed by:	Moyo Attorneys
	Pretoria