IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1010/2017

In the matter between:

P.M.T (Pty) Ltd	**APPLICANT**
AND	
STANDARD BANK LIMITED	**1st RESPONDENT**
REXY'S INVESTMENT (PTY) LTD	**2nd RESPONDENT**

Neutral citation: *P.M.T. (Pty) Ltd vs Standard Bank Limited and Another [1010/2017] [2018] SZHC 13 (21st March, 2018)*

Coram: FAKUDZE, J

Heard: 6th February, 2018

Delivered: 21st March, 2018

Summary: *Civil Procedure – application for declaratory order after main prayer withdrawn by Applicant – without main prayer, exercise becomes academic – each party to bear its own costs.*

JUDGEMENT

BACKGROUND

[1] In the main, the Application is for review and setting aside of Court Orders issued by a Magistrate's Court. The Applicant claims its rights to a fair hearing which were derogated upon when the Manzini Magistrate issued an exparte *Interim Court* by virtue of which the Applicant was dispossessed of a motor vehicle which it was leasing from the 1st Respondent Bank.

[2] When the matter was argued before me, the Applicant indicated that she is no longer pursuant the issue of reviewing and setting aside of the Exparte I*nterim Order* that was issued by the Magistrate. His focus is now on the declaration that there should have been compliance with Section 100 of the Consumer Credit Act, 2016.

THE PARTIES' CONTENTION

The Applicant

[3] The Applicant states that Section 100 (1) of The Consumer Credit Act, 2016 provides that *"if the consumer under a credit agreement is in default, the creditor shall deliver a notice to the consumer in writing drawing the attention of the consumer to the default and propose in the case of inability to pay, that the consumer refer the credit agreement to a debt counsellor with the intent that the parties develop and agree on plan to bring payments under the agreement up to date……."*

[4] The Applicant contends that the above mentioned provision of the Consumer Credit Act, 2016 makes it a must that the notice as stated therein be served upon the debtor. Therefore when the credit provider institutes legal proceedings to enforce the agreement, it must satisfy the court that such notice was delivered to the consumer. The credit provider is obligated to prove this fact and the court should refuse to issue out an *Interim Order* if there is no proof that Section 100 (1) has been complied with.

[5] The Applicant further states that Section 100 (3) (a) of the Consumer Credit Act, 2016, states that a consumer may at any time before the credit provider has cancelled the agreement, reinstate a credit agreement that is in default by paying to the credit provider all amounts that were overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatements……..

[6] The Applicant does acknowledge that at the time of the institution of the proceedings he was in arears. He further states that in *casu*, the Applicant paid an amount of Seventy Two Thousand Emalangeni (E72,000.00) on the 3rd April, 2017. He paid the Seventy Two Thousand Emalangeni (E72,000.00) notwithstanding that the arrears were about Sixty One Thousand Emalangeni (E61,000.00). The amount paid was therefore enough to cover the arrears and default charges. Upon such payment, the Applicant argues, the agreement was re-instated and the bank ought to have restored the motor vehicle.

[7] The Applicant is therefore imploring the court to declare that the credit agreement was reinstated when the Applicant was paid the Seventy Two Thousand Emalangeni (E72,000.00). The court must also take into account the fact that the 1st Respondent Bank did not give the required Notice in of Section 100 (1) of the Consumer Credit Act, 2016.

[8] On the issue of costs, the Applicant contends that he is entitled to costs on an attorney-client basis. This arises from the fact that following the issuance of the order by the Magistrate attaching the motor vehicle, the Applicant wrote a letter to the 1st Respondent indicating that there had been no compliance with the provisions of the Consumer Credit Act, 2016. The Applicant's attorneys forced to withdraw this letter following that a certain manager within the 1st Respondent's employ indicated that the matter could not be best resolved if lawyers are involved. The only available remedy for the Applicant was to come to court for an interdict stopping the sale of the motor vehicle by auction. This therefore justifies the attorney-client costs being levied against the 1st Respondent.

The Respondent

[9] The Respondent states that since the motor vehicle was finally sold to a third party, this was the basis upon which the Applicant approached the court for an interdict. The applicability or non-applicability of the Consumer Credit Act, 2016 is now academic.

[10] The 1st Respondent further argues that the 1st Respondent is not a credit provider as defined in Section 2 of the Act. This is by virtue of the fact that it is licenced under the Financial Institutions Act, 2005. Even if the 1st Respondent was to be categorised as a credit provider, it still would be practically impossible to comply with Section 100 of the Act given that there are no Regulations to operationalise the Act.

Court's observation and conclusion

[11] The issue this court must decide is whether the applicability of the Consumer Credit Act, 2016 is academic or not. It was stated earlier that the Applicant did indicate that he is no longer persuing the issue of the review and the setting aside of the Court Orders issued by the Magistrate's Court. If

the court comes to the conclusion that is academic, that ends the matter. If it concludes that it is not, consideration will be given to the issue of whether the 1st Respondent should have complied with Section 100 of the Consumer Credit Act, 2016 or not.

[12] In the Supreme Court case of **Martha Nokuthula Makhanya and Others v Sarah B. Dlamini Case No. 23 of 2016,** the Supreme Court endorsed the South African case of **Goldenhuys and Neething v Beuthei 1918 A.D**. as regards the circumstances under which a declaring order may be made. The Supreme Court observed as follows:

"As regards to the power of the court to grant declaration of right where such rights have been interfered with, there can be no manner of doubt…… There, however, consequential relief is also claimed; and, I have been unable to discover any Roman Dutch authority sanctioning the issue of a declaratory order where there has been no interference with the right sought to be declared. Turning to the decisions of our own courts, there is a weight of South African authority against the issue of such orders in the absence of such interference. It was laid down by ***De Villiers C.J. in Colonial Government v Stephen (17SC***

39) *that a Plaintiff is not entitled to claim a declaration of rights merely because those rights have been disputed by the dependant; he must prove some infringement."*

In its final and concluding remarks, the Supreme Court observed at paragraphs [36] and [40] as follows:-

[36] What is important in our law as stated by His Lordship Nathan CJ in Exparte Special Tribunal Under Immigration Act is that courts of law exist for the settlement of concrete controversies and actual infringement of rights and not to pronounce upon abstract questions or to advise upon differing contentions. The legal position of our law is in sharp contrast to the South *African legal position that courts should also inquire into and determine future or contigent rights or obligations.*

[40] Whatever the position of the law in South Africa may be, it is clear that in this country that courts of law exist for the settlement of concrete controversies and actual infringements of rights, and not to

pronounce upon questions which are abstract, hypothetical or academic or to advise upon differing contentions of law.

Court's observation and conclusion

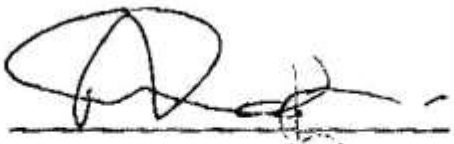
[13] Having considered the case of **Martha Nokuthula Makhanya and Others** (Supra), it is this court's humble view that what the court is called upon to determine is academic. The Applicant paid no attention to the issue of the orders that were issued by the Magistrate because the merx was sold to a third party. The truth we cannot avoid, as proven by the above mentioned legal authorities, is that courts of law exist for the settlement of concrete controversies and the actual infringement of the right and not to pronounce on abstract questions. In the Appeal Case of **Johannes Nkwanyana v The Attorney General and the Ministry of Natural Resources Civil Appeal No. 36 of 2004**, the Appeal Court buttressed the point that a court is responsible for dealing with infringement of rights when it said at paragraph [12]-

"[12] This Court is a Court of Appeal which hears appeals from lower courts and is the final Court of Appeal in this Kingdom. In no sense is it a Legal Advice Bureau giving advice to litigants."

[14] This court is therefore inclined to agree with the Respondent that the issue of the applicability of the Consumer Credit Act, 2016 with respect to the matter between the litigants is now academic. This arises from the fact that the merx which formed the subject of the litigation was sold to a third party. The Application is therefore dismissed.

[15] On the issue of costs, the Applicant has motivated that he is entitled to costs on an attorney-client basis because following the attachment of the vehicle, the Applicant wrote a letter to the 1st Respondent indicating that there had been no compliance with Section 100 of the Consumer Credit Act, 2016. This letter was withdrawn after the 1st Respondent's manager threatened the Applicant. This led to the Applicant resorting to a court process. All these factors, when taken cumulatively, entitled the Applicant to costs at attorney client scale. The 1st Respondent did not say much on the issue of costs

except to say that the Applicant is not entitled to costs because there is no substance in the Application. The issue of costs is discretionary. I therefore exercise my discretion that each party should bear its own costs.



FAKUDZE J.

JUDGE OF THE HIGH COURT

Applicant: Nkomondze Attorneys

1st Respondent: T.L. Dlamini and Associates