

17/6/2010
NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
17/06/2010

Case No: 13381/2009
Date heard: 14/06/2010
Date of judgment: 17/06/2010

In the matter between:

Richard Evan Keenan-Smith	1 st APPLICANT
Bianca Keenan-Smith	2 nd APPLICANT

and

Changing Tides 17 (PTY) Limited N.O.	RESPONDENT
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In re:

Changing Tides 17 (PTY) Limited N.O.	PLAINTIFF
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and

Richard Evan Keenan-Smith	1 st DEFENDANT
Bianca Keenan-Smith	2 ND DEFENDANT

JUDGMENT

DU PLESSIS J:

Based on a home loan secured by a mortgage bond over their property, the applicants owe money to the respondent. The applicants fell into arrears with the repayment of their bond instalments. The respondent issued summons claiming payment of the amount owing. Despite service of the summons on them in terms of the court rules, the applicants did not enter a timely appearance to defend the action. On 17 June 2009 the respondent obtained default judgment against the applicants. The applicants now apply for the rescission of the default judgment. The respondent opposes the rescission.

As will appear later, the applicants contend that the default judgment should be set aside as the respondent proceeded against them and obtained judgment contrary to the provisions of the **National Credit Act, 34 of 2005** ("the NCA"). It is not in issue that the loan to the applicants is a credit agreement in terms of the NCA and that the respondent is a credit provider.

The chronological sequence of events leading up to this application is of central importance. On 8 August 2008 the applicants applied for debt review under the provisions of section 86 of the NCA. I shall refer to this application for debt review as the first application. The respondent was duly notified of the first application on 11 August 2008. After they had made the first application, the applicants' income structure changed. The debt counsellor, Ms Van Rooyen, advised them to make a new application for debt review. Accordingly, the debt

counsellor made no proposal pursuant to the first application and it was not referred to the Magistrate's Court under the provisions of section 86 of the NCA.

Following the debt counsellor's advice, the applicants on 10 December 2008 made a second application for debt review. On 11 December 2008 the debt counsellor, as is required by section 86(4)(b)(i) of the NCA, notified the respondent of the second application.

On 30 January 2009 the respondent gave notice to, *inter alia*, the debt counsellor and the applicants of its decision to terminate the debt review as provided for in section 86(10) of the NCA. The notice pertinently refers to the first application. In any event, the respondent was at that stage not entitled to terminate the debt review in respect of the second application. That is so because, when the respondent gave notice to terminate the debt review, sixty business days after the date on which the applicants made the second application had not passed (See the proviso to section 86(10)). It is of note that in response to the respondent's section 86(10) notice, the debt counsellor wrote to it and pertinently drew attention thereto that the termination could only apply to the first application and not to the second.

On 25 February 2009 the debt counsellor found the applicants to over-indebted as provided for in the NCA. The respondent was notified of this finding. It is not in issue that the second debt review is now pending in the Magistrates' Court.

Contending that it had cancelled the debt review, the respondent issued summons against the applicants on 11 March 2009. The summons was served on the applicants by affixing it to the principal door of their residence on 13 March 2009. The applicants do not say exactly when, but they admit that the summons came to their notice. I assume in the respondent's favour that the applicants took notice of the summons on 13 March 2009. The applicants immediately handed the summons to their debt counsellor who advised them that they would have to appoint an attorney to defend the action. Being over-indebted, the applicants did not have the funds that would have enabled them to instruct an attorney. Only on 3 July 2009 were they in a financial position to instruct their present attorneys of record. On 7 July the attorneys entered an appearance to defend the action.

When the applicants' attorneys entered the appearance to defend, default judgment had already been granted (on 17 June 2009). A warrant of execution had also been served on the applicants on 6 July. It follows that the applicants became aware of the judgment on 6 July 2009. They informed their attorney who required a further deposit so as to enable him to apply for rescission of the judgment. The applicants were unable to make the deposit at that stage. They did so later, and the present application was launched in September 2009.

In terms of rule 31(2)(b) of the court's rules, the application had to be brought within 20 court days from 6 July 2009, when the applicants learnt of the judgment. It follows that the present application is 1½ months out of time. In my

view the delay is adequately explained. It is self evident that, having been found to be over-indebted, the applicants needed a reasonable time within which to raise the money to apply for rescission of the judgment. The time they took is reasonable in the circumstances.

The same applies to the explanation for the applicants' default.

For reasons stated earlier, the respondent did not terminate the second debt review. It follows that when it issued summons, the applicants' second application for debt review was pending. In terms of section 88(3) of the NCA the fact that the respondent had received notice of the second debt review application precluded it from proceeding against the applicants to enforce the credit agreement. It follows that the applicants have also set out a defence to the respondent's claim.

For the respondent Mr Prinsloo submitted that the second debt review application should not be allowed to preclude the respondent from proceeding against the applicants. Counsel argued that the applicants should not be allowed to frustrate the respondent's right to terminate a debt review by the simple expedient of re-applying for debt review. On the facts of this case that is not what happened: The second application for debt review was made nearly two months before the respondent sought to cancel the first debt review. It is true, as was submitted, that the applicants should have withdrawn the first application before they made the second. The fact that there may have been two

applications pending at the same time did not, however, entitle the respondent simply to disregard the second application. The court also cannot ignore the second application. It is pending and has not been terminated. Moreover, the applicants, while they did not formally withdraw it, clearly abandoned the first application and there is no basis for holding that the second is not a bona fide application based on new facts.

The application for rescission must therefore succeed. As to costs, the applicants are seeking an indulgence. They did not in their founding papers inform the court of the first application. While I do not hold that they did so in bad faith, they should have given the full picture in the founding papers. On the other hand, the respondent, fully aware of the second application, proceeded to obtain judgment on the basis that it had terminated the first debt review. The respondent should have disclosed in the summons that there is a second debt review pending. If it had been advised that, for some reason or another the second application did not preclude it from proceeding against the applicants, allegations to that effect should have been made in the summons. In the circumstances the fair order as to costs to me seems to be to order that costs of this application be costs in the cause.

In the result the following order is made:

1. The judgment that was granted by this court on 17 June 2009 in case number 13381/2009 is rescinded.

2. The costs of this application shall be costs in the action under case number 13381/2009.

A handwritten signature in black ink, consisting of a large, stylized capital 'B' followed by a horizontal line that extends to the right and then curves slightly upwards.

B.R. du Plessis

Judge of the High Court

On behalf of the applicant:

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On behalf of the Respondent:

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