IN THE NORTH GAUTENG HIGH COURT
PRETORIA
REPUBLIC OF SOUTH AFRICA

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

29. 03. '11
DATE
SIGNATURE

CASE NO: 47312/2009

31/3/2011

:

NEDBANK LIMITED

PLAINTIFF

v

BENEDICT THAMSANQA HLONGWANE
FIRST DEFENDANT

ZANDILE ESME HLONGWANE
SECOND DEFENDANT

JUDGEMENT

SAPIRE, AJ:

The Plaintiff sued the Defendants claiming payment of the sum of R583 339.,82, being the balance of monies due owing and payable by the Defendants to the Plaintiff as at the 1st of July 2009 on two mortgage bonds. The bonds hypothecated immovable property being Erf 4141 of the Orchards Extension 21 Township as first and second mortgage bonds. The amounts claimed included capitalized interest. . Plaintiff also claimed interest at the rate of 9.5 % per annum from the 2nd of July 2009. The Plaintiff asked that the court declare the mortgaged property executable. The defendants are husband and wife who as principal debtor and surety respectively borrowed the money to acquire the property, which is their home.

The Plaintiff alleged that it had complied with the provisions of Section 129 read with Section 130 of the National Credit Act, No 34 of 2005.

The Plaintiff lastly claimed costs to be taxed on the scale as between attorney and client.

The Summons was duly served. The Defendants after successfully opposing an Application for Summary Judgment were granted leave to defend. They filed a Plea, in which they *inter alia* denied the contents of paragraph 16 of the Declaration. In this paragraph it was alleged that in June 2009 the Plaintiff duly in terms of Section 86(10) of the Act terminated the pending debt review by the defendants in respect of the two bonds

The Defendant admitted having received a letter in terms of Section 129 but denied the other allegations in that paragraph. Of particular importance is the content of paragraph 19 of the Plea, which deals with paragraph 17.4 of the Declaration in which it is alleged:

"The Plaintiff has not approached the Court during the time the matter was before a debt counsellor, alternatively a dispute resolution agent, Consumer Court or the Ombud with jurisdiction, in that inter alia the Plaintiff terminated the debt review in respect of the relevant credit agreements as pleaded in paragraph 16."

Apart from the general denial of indebtedness, the only defence on which the Defendants rely is that based on the provisions of Section 86 of the National Credit Act.

The matter was enrolled for trial and a pre-trial conference was held. Attending the conference, representing the Plaintiff, were Mr F R van den Heever, plaintiff's counsel, and Mr John Saunders its attorney. Only the Defendant's advocate, Mr Manala, was present representing the Defendant.

Plaintiff's representatives put a series of questions to Defendants' counsel in a Notice in terms of Rule 37(4). Defendants' counsel indicated that he would revert to the Plaintiff in respect of the issues therein raised by no later than close of business on 9th February 2011. In the event, the reply was only delivered on February the 14th. The parties attended to other housekeeping items at the conference.

The Plaintiff's questions were wide ranging but Defendants' reply indicated that the case was to be fought on the question of whether payments made by Defendant through PDA and accepted as such by Plaintiff constituted payment.

The Minute of the Pre-Trial Proceedings was filed.

At the hearing, both Plaintiff and Defendants testified.

For the Plaintiff the witness was Denise Naomi Hartley (Hartley). She was an employee of the Plaintiff and described herself as the Senior Manager for Attorney Management and Terminations in the debt review department of the Plaintiff Bank. The department is referred to as the Debt Recovery Services.

She had access to the Plaintiff's records insofar as they are pertinent to this matter. She then referred to documents in a bundle with which the parties provided the court. The bundle had its usual status

The first was a Notice being a Form 17.1 received on the 6th of February 2009.This form tells the creditor to whom it is addressed that the debtor has made application to a debt counsellor for debt review. According to her, the Plaintiff received no Form 17.2. is the follow up in which the debt counsellor informs the creditor whether the application is to be acceded to and the proposal for restructuring of the debtor's indebtedness

She referred to letters that Plaintiff sent to the debt counsellor on the 31st of March 2009 and again on the 14th of April 2009. In these letters, the Plaintiff asked the debt counsellor for a proposal to be made on the Defendants behalf. According to her, no such proposals were received. She testified that as at the date of her testifying no Form 17.2 had been received.

On the 25th of May 2009 the Plaintiff sent out a Notice of Termination which is not itself the termination in terms of 86(10). In the letter it is stated that the Plaintiff did not receive proof of payment or some sort of correspondence from the debt counsellor within ten days the Plaintiff would terminate in terms of Section 86(10).

Hartley was unable to produce proof that this letter was sent out.

According to the witness the actual Termination Notice in terms of Section 86(10) was sent on the 24th of June 2009. The document was produced and according to the witness it was sent electronically in accordance with the practise operating between Banks and Credit Counsellors. In terms of this Notice the Application for Debt Review lapsed.

The witness then informed the Court that on the 29th of July 2009 a Notice in terms of Section 129 was sent to the Defendants. The Plaintiff had no record that the letter was in fact sent.

The Summons commencing this action was issued on the 5th August 2009 and served personally on the Defendants on the 12th of August 2009.

On the 13th of August 2009, the Plaintiff received a second Form 17.1 dated the 13th of August 2009, significantly the day after the service of the Summons.

The witness was then asked whether the Plaintiff had received any payments from the Defendants since the first application for debt review. She replied that the Plaintiff did not receive any payments from February 2009 until August 2009. Payment was made on the 13th of August 2009 being the day after the service of Summons. The amount paid was R563,90. The witness also testified to a number of credits on the Defendants' account but pointed out that these credits were later reversed indicating that the debit order was refused by the Bank concerned. The reason for this was insufficient funds.

The witness also indicated that a further payment in a nominal amount was made on the 17th of August 2009, the amount being R237, 00. The next payment of R6 147,83 was reversed. It also emerged that other payments in insignificant amounts had been made and appeared to have been remitted by the distribution agent CPE. No arrangements were made in respect of these payments and they were certainly not made or accepted with prejudice to the Plaintiff's rights.

There was a further payment on the 17th of August 2010 in an amount of R1 8011,80. Again this came from the Distribution Agent. In September R5 334,41 was received and again in October a similar amount was received. On the 24th of December 2010 another R4821,40 was received. Further payments of R561,36 were received in December 2010 and January 2011. These are the last payments that have been received. The witness pointed out that no letter or any sort of documentation accompanied these payments or were received referring thereto. The payments were initially placed in a suspense account. Later they were transferred to the accounts of those persons who the Distribution Agency indicated.

The witness was then requested to comment on page 9 of the Bundle and requested to identify the document. She recognised it as copy of an application to the Magistrates Court in respect of a debt rearrangement. She was positive that the first time she saw that document was on the morning of the trial in counsel's chambers. Such a document was never received by the Plaintiff. The witness stated that she did not know of any order that the Magistrate could have made. The date of the document was the 2nd of July 2009 and refers to an application that would be made on the 5th of May 2010. Hartley confirmed that since the first time that the Defendants applied for debt review in February 2009 until the dates of the hearing no documentation whatsoever was received from the Defendants debt counsellor other than the Form 17.1 to which he referred. She was positive that no proposal had been given to the plaintiffs had been submitted to the plaintiff, no Form 17.2's have been furnished, no and she repeated that at no time was there any agreement to any proposal made by the debt counsellor.

Hartley was cross-examined by Defendants' counsel but the essential facts to which the witness deposed were undisturbed.

The defendant gave evidence to support his case.

The First Defendant testified that he applied for debt review at the beginning of 2009. A week or so after the date of the application the debt counsellor informed him of the banking details of where he was to deposit R7 360,00 per month. This account is that of CPE which apparently distributes monies received from debtors whose indebtedness is under review.

Hlongwane says that he paid the amounts on February 2009 until November 2010 when a change was made because the collector had some difficulty. He then made payments into a different account. He was not able to prove what payments were in fact made by him. But he claimed to be paying this amount of R7 360,00 per month every month.

He was unable to testify whether the Plaintiff received money from the distributing agent. He referred to a time in 2009 when a Sheriff came to his house. Obviously because Plaintiff was not being paid. He rushed to the debt counsellors and enquired from them how this came about as he had been paying every month. He received a reply that there had just been a miscommunication and the distributing agency had some problems and that it would be sorted out. He also confirmed that this took place the day after the Summons was served. The Defendant claims that he has been paying until the present time.

Clearly the Defendants' evidence does not accord with that of the Plaintiff. There is nothing which emerged from the Defendants' evidence to establish that the Defendants was indeed under debt review and that a magistrate had made an order as contemplated in Section 86. The First Defendant was the only witness called by the defence and the counsellor and the distribution agency did not testify as to what had happened.

In view of this the only defence raised by the Defendants cannot be maintained. This will have very unfortunate results for the Defendant who seems not to have been well served by his legal advisors and by the debt counsellor whom they consulted. The payments which were received by the Plaintiff have been taken into account but by accepting such payments the Plaintiff has not compromised its right to proceed as provided for by the terms of the bonds.

There is no evidence that any proposed restructuring of the Defendants' debts was ever suggested to the Plaintiff. This is so notwithstanding that there was a first notice of an application to the debt counsellor which was apparently not proceeded with. The second application was made only after the Summons had been served and this application was also not proceeded with in that no proposed restructuring was ever intimated to the Plaintiff. There is also no evidence that any application to a Magistrate was served on the Plaintiff or that the Magistrate made any order.

Although the Summons in paragraph 3 draws the Defendants' attention to Section 26(1) of the Constitution of the Republic of South Africa, which accords to everyone the right to have access to adequate housing the Defendants have not placed information before the Court that the order for execution will infringe on that right.

This is an instance where because the provisions of the National Credit Act have not been followed, the defendant has been prejudiced.

Plaintiff is therefore entitled to the relief claimed in the Summons.

Therefore the order of the Court is:

There will be judgment for the Plaintiff for the relief claimed in the Summons namely

(a) Payment of the sum of R583 339,82;

(b) Interest on the said amount of R583 339,82 at the agreed rate of 9,5 % per annum as from the 2nd of July 2009 to date of payment;

(c) The mortgaged property, namely Erf 4141, The Orchards Extension 21 Township executable;

(d) Costs of the suit to be taxed as between attorney and client.

SAPIRE, A J

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