

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

05/05/2011
Case No: 22859/09

In the matter between:

CHANGING TIDES 17 (PTY) LIMITED NO. 12345678901234567890 APPLICANT

And

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	YES
(3) REVISED.	
05/05/2011 DATE	 SIGNATURE

ALEXADER MCDONALD

1ST RESPONDENT

AUDREY JANE GOODSIR

2ND RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] This is an opposed application for summary judgment against the defendants, jointly and severally, the one paying the other to be absolved, for payment in the amount of R974, 343.69 together with interest on the aforesaid amount calculated at the rate of 16.10% per annum from 1 March 2009 to date of

payment. The applicant further prays for an order declaring executable certain immovable property Erf 352 Croydon Township, Registration Division I.R. PROVINCE OF GAUTENG, MEASURING 992 SQUARE METRES, HELD BY DED OF TRANSFER NO T11981/07, as well as costs of suit on attorney and own client.

- [2] The plaintiff's claim arises from moneys lent and advanced to the defendants as borrowers. The loan was secured by a registered bond over the immovable property referred to herein above.
- [3] The defendants, in opposing the summary judgment application, proffer as a defence, that the plaintiff has failed to remit to them a letter of demand in terms of s129(1) of the Credit Act, 34 of 2005. They further contend that on 21 October 2008, they had applied to Nicola Bridgette Da Silva for debt review. In this regard they refer to annexure "MG1", which was however not attached to the papers. They further allege that Da Silva prepared payment proposal which was agreed upon by

the plaintiff and the defendants. They further alleged that they made monthly payments in accordance with the aforesaid proposal since December 2008.

[4] The defendants also filed an affidavit of Ms Da Silva who confirmed the debt review process. According to Ms Da Silva, on 11 June 2009 the defendants signed affidavits in terms of section 86(7) to be lodged in the Magistrate' Court but she delayed in the lodgement thereof. She takes responsibility for the delay. She had given notice to bring the s86(7) application to Stadler attorneys on 7 November 2008 to bring the application but it was not done. She further stated that the respondents have complied with her restructuring and therefore believes that that there are good prospects of success of an order being granted in terms of s86 and refer this Court to s130(3)(cc).

[5] The only way the respondents can successfully avoid summary judgment being granted against them, is to satisfy the court that they have a *bona fide* defence to the action. They must disclose

fully the nature and grounds of the defence and the material facts relied upon.¹

[6] With regard to the defendants' defence that the plaintiff did not comply with s129², I am of the view that there is no substance in this submission. The chosen *domicile citandi et excutandi* address of the defendants is 37 Jacoba Loots Road, Croydon, Kempton park, Gauteng.³ The plaintiff remitted per registered post a letter dated 4 March 2009 to the defendants' aforesaid domicile citandi. In the said letter, the defendants were informed that the plaintiff had not received a debt restructuring proposals and the debt restructuring has not been agreed upon. They were further advised that the 60 business days from which the consumers applied for debt review have lapsed, and that the notification that the matter has been referred to court has not been received.⁴ In the said letter the defendants were informed of the plaintiffs' termination of the debt review and the

¹ *Vide Maharaj v Barclays Bank Ltd* 1976 (1) SA 418 (A) at 426AB.

² Act 34 of 2005.

³ Paginated page 36 clause 10.1 of the loan agreement between the parties, attached to the summons.

⁴ Paginated page 49-51 is the relevant letter titled Application for debt review of section 86 of the national credit Act, together with copies of the registered slips showing the address of the defendants' chosen domicile address.

reason thereof. In my view, once the plaintiff informed the respondents of the termination of the debt review, it was not necessary that another separate letter in terms of section 129 be sent because it would have been superfluous⁵.

[7] In the matter of JNO. G Teale & sons Ltd v Vrystaatse Plantediens Ltd:

*"In the circumstances it seems to me that one should in the case of an irregularity of the kind I am dealing with look at the purpose of Rule 32, viz. that a defendant who has no defence should pay the Plaintiff's claim and should not be able to shield behind a technical irregularity as to the procedure prescribed by Rule 32(3) which is entirely in his discretion and at his option."*⁶ (my emphasis). The fact that a letter in terms of s129 has not been sent, in the light of the remission of the letter of termination of the debt review would be too technical and should not be permitted. The provisions of the Credit Act should not be a sanctuary to hide behind for defendants who do not have any defence to the plaintiff's action.

⁵ Vide BMW Financial Services (Pty) Ltd v Donkin 2009 (6) SA 63 (KZD

⁶1968 (4) SA 371 A at 374 G – H.

[8] The defendants have attached annexure AMG7. This is an affidavit deposed to by the applicants on 11 June 2009 filed at the Magistrate's Court, Germiston in respect of their debt review application. The summons were, however, issued on 17 April 2009. The debt review at the Magistrate's Court was in my view, a belated action which cannot stand in the way of the duly issued summons.

[9] The defendants do not dispute their indebtedness to the plaintiff in the amount claimed. Neither do they proffer any defence to this claim. I am therefore of the view that the plaintiff is entitled to the summary judgment application.

[10] The plaintiff also seeks an order in terms of which the immovable property is declared executable. However, in my view, the plaintiff has not made a case for this order. There is no evaluation of the property placed before me. An order for execution of immovable property is in my view not there for a take. Immovable property is a pricy commodity for the defendants. It must also have further appreciated from 2007.

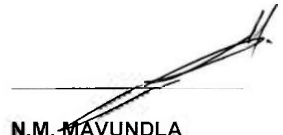
There has been no evidence presented before me regarding the movable properties of the defendants and whether these would not substantially reduce the capital amount claimed. I am therefore disinclined to order executable the immovable property of the defendants.

[11] In the result I make the following order:

1. That summary judgment is granted against the defendants, jointly and severally, the one paying the other to be absolved for :

1.1 Payment in the amount of R974, 343.69 together with interest on the aforesaid amount calculated at the rate of 16.10% per annum from 1 March 2009 to date of payment.

1.2 Costs of this application on attorney and client scale.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 05/05/2011

APPLICANT'S ATT : VELILE TINTO & ASS.

APPLICANT'S ADV : ADV W J ROOS

RESPONDENT'S ATT : NEIL KAPLAN ATT

RESPONDENTS ADV :