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

CASE NO: 9226/2010

DATE:02-06-2011

In the matter between:

CHANGING TIDES 17 (PTY) LTD Applicant

and

DIRK CHRISTOFFEL JACOBUS GROBLER First Respondent

SUSARA JOHANNA ELIZABETH GROBLER Second Respondent

JUDGMENT

MURPHY J

1. This case is an application for summary judgment in which the applicant seeks judgment against the respondents for an amount of R670 809,55 with interest and costs arising out of the respondents' default under an "indemnity bond agreement", as well as an order declaring the subject

property to be specifically executable. The agreement is a credit agreement and the National Credit Act of 2005 ("the Act") applies to it.

2. The agreement was concluded in August 2006. It is common cause that prior to July 2009 the respondents defaulted on the agreement and fell into arrears.

3. As will appear more fully later, the respondents applied for debt review in terms of the Act on two different occasions to two different debt counsellors. The provisions of section 86 of the Act provide that a consumer may apply to a debt counsellor to have the consumer declared over-indebted. The debt counsellor conducts a debt review and an assessment, at the end of which he or she may conclude that the consumer either is or is not over indebted and in the event of the latter may recommend that the consumer's obligations be re-arranged by *inter alia* extending the period of the agreement and reducing the amount of each payment accordingly. That recommendation is made to the Magistrate's Court which may make an order in terms of section 87 re-arranging the obligations or may reject the recommendation. Where the debt counsellor decides that the consumer is not over-indebted, the consumer is entitled to make application himself or herself to the Magistrate's Court for a re-arrangement order. In terms of section 130(4)(c) of the Act if a court determines that a credit agreement is subject to a

pending debt review it must adjourn proceedings to enforce the agreement until final determination of the debt review; and in terms of section 130(4)(e) of the Act if the agreement is subject to a debt re-arrangement order and the consumer is in compliance with that order, the court must dismiss any action or application to enforce the agreement.

4. The facts set out in the opposing affidavit are incomplete. The respondents thus do not explain when they first applied for debt review to a debt counsellor in terms of section 86(1) of the Act, nor do they provide any details in that regard. They merely aver that they jointly applied to Mokopane Magistrate’s Court in terms of section 86 during July 2009. The one page application to that court annexed as Annexure A to the affidavit opposing summary judgment is made in the name of the first respondent, is dated 30 July 2009 and gives notice that an application will be made on behalf of the respondents on 11 September 2009 for an order that the respondents were over-indebted and that their debt obligations be restructured.

5. In the absence of full information regarding the prior involvement of the debt counsellor, and taking account of the fact that the application to the Mokopane Magistrate’s Court was brought in the name of the respondents, I must assume that this application (being the first of the two) was made in terms of section 86(9) of the Act which provides:

> "If a debt counsellor rejects an application as contemplated in subsection (7)(a), the consumer with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for an order contemplated in subsection (7)(1)."

Subsection (7)(c) governs the situation where the debt counsellor concludes that a consumer is not over-indebted and then rejects the application. Where the debt counsellor is of the opinion that the consumer is over-indebted it (not the consumer) normally will make the application for an order re-arranging the consumer's obligations - section 86(7)(b) and (c); and section 86(8), read with section 87(1) of the Act.

6. The opposing affidavit, as I have said, does not state when the application for debt review was made to the first debt counsellor. There is correspondence, to which I will refer presently, which intimates that the application was made in June 2008. From the Account Statement in respect of the bond, annexed as Annexure D to the particulars of claim, I am able to ascertain that the monthly instalment payable on the loan was an amount in the region of R5600 per month. It is clear from the statement that already in 2007 payment of the instalments became irregular and intermittent. Consequently, the respondents were in default when they made application for debt review in 2008.

7. The averment is made in paragraph 20 of the applicant's particulars of claim that the respondents had approached a debt counsellor and had applied for debt review (the date of such application is not stated), but that a written notice in terms of section 86(10) terminating the debt review had been delivered. The notice dated 7 September 2009 reads:

> "We acknowledge that the consumer applied for debt review on the 6 June 2008. We confirm that the Debt Review was previously terminated on the 8 October 2008.
>
> We advise that the consumer is in arrears with their home loan repayments and therefore in default with the credit agreement.
>
> Notice is hereby given, in terms of section 86(10) of the National Credit Act No 34 of 2005, that we terminate the debt review in respect of the consumer.
>
> The termination will be with immediate effect, as 60 days after the consumers have applied for debt review have already lapsed."

The notice was addressed to Basani Debt Counsellors, Pretoria, the first respondent and the National Credit Regulator. While there is no documentation from Basani Debt Counsellors providing proof that it conducted the debt review or made any proposal, it is safe to assume that the debt review occurred prior to the application to the Mokopane Magistrate's Court.

8. The respondents' application to the Mokopane Magistrates Court was struck from the roll later in September 2009 on the grounds that the court lacked jurisdiction, the respondents having relocated to Witbank. No application appears to have been made to the Magistrate's Court Mokopane to transfer the application to the court having jurisdiction.

9. On 4 January 2010 a debt counselor, WJ Le Roux, made application in respect of the respondents to the Witbank Magistrate's Court. The relevant prayers in the notice of motion read:

> "1. That the 1st and 2nd Respondent (the respondents herein) be declared over-indebted;
>
> 2. In terms of the draft Debt Re-arrangement Order Annexure D hereto under sections 79, 86(7)(c)(ii), 86(8) and 87(1)(b)(ii) of the National Credit Act 2005; …
>
> 4. An order in terms of Section 86(11) of the National Credit Act that the Credit Providers who gave notice to terminate the debt review process of the 1st and 2nd Respondent be ordered to resume the debt review in accordance with the draft order annexure "D" hereto."

10. On 18 January 2010, the attorneys for the seventh respondent in that application, SA Home Loans (Pty) Ltd, a company associated with the applicant in the present application, filed a notice to oppose the application

made to the Witbank Magistrate's Court. The application was set down for 28 January 2010.

11. The application to the Witbank Magistrate's Court was postponed on 28 January 2010 to 28 February 2010. On the latter date the matter was postponed again to 4 March 2010. On that day the magistrate removed the matter from the roll in order to afford the respondents an opportunity to make another application containing fuller information. The debt counsellor filed a fresh application on 5 March 2010 set down for 18 June 2010.

12. On 24 February 2010 the applicant served summons on the respondents seeking repayment of the principal debt and an order declaring the mortgaged property executable.

13. Application for summary judgment was made to this court on 18 March 2010 and was set down for 7 May 2010. It was postponed for various reasons thereafter. On 1 July 2010 the Magistrate's Court Witbank purportedly made a debt re-arrangement order in terms of section 87 in which the instalment in respect of the agreement was reduced from about R5600 to R2434,49 per month. It made no order as to the period for which such instalment would be paid. I accordingly assume such would have been for the full remaining period of the loan.

14. The summary judgment application was initially argued before me in September 2010. However, because of developments in the case law, counsel sought leave to file additional heads of argument with such being filed only in late February 2011.

15. Both parties have made detailed submissions drawing upon several decisions of various courts which have pronounced upon the interpretation of sections 86(10) and 86(11) of the Act. Ms Kollapen, who appeared for the respondents, placed much reliance on the approach articulated in *Wesbank a division of Firstrand Bank Ltd v Papier* 2011(2) SA 395 (WCC) in which it was held, on a contextual and purposive interpretation of section 86, that a section 86(10) notice terminating a debt review would not be competent if served after a referral in terms of sections 86(7)(c) and 86(8)(b), or an application in terms of section 86(9), had been made to the Magistrate's Court.

16. The relevant portion of 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 ….. at any time at least 60 days after the date on which the consumer applied for debt review."

Section 86(11) provides:

> "If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce the agreement in terms of Part C of Chapter 6 the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances."

17. The *Papier* decision has been overruled recently by the Supreme Court of Appeal (SCA) in *Collett v Firstrand Bank* (766/2010) [2011] ZASCA 78 (27 May 2011). The SCA drew an important distinction between cases where the consumer is in default under the credit agreement and when not. Where the consumer is not in default he or she may apply for review and the credit provider may not terminate the review under section 86(10), because section 86(10) gives the right to terminate the debt review only where the consumer "*is in default*". Where the consumer is in default then the credit provider may enforce the agreement, once the debt review has been terminated in terms of section 86(10). In rejecting the approach in *Papier*, Malan JA (at para 12) stated as follows:

> "A sounder approach is to recognise the express words of section 86(10) which gives the credit provider a right to terminate the debt review in respect of the particular credit transaction under which the consumer is in default, and only when he is (in) default, at least 60 business days after the application for debt review was made. It must be emphasised that it is only when the consumer is in

> default that the credit provider has this right ….. If the consumer applies for debt review before he is in default the credit provider may not terminate the process. But if the consumer is in default the consumer is entitled to a 60 business days' moratorium during which time the parties may attempt to resolve their dispute."

18. The learned judge of appeal held further that the right of the credit provider to terminate the debt review is balanced by section 86(11) which provides that if the credit provider has given notice to terminate and proceeds to enforce the agreement "the Magistrate's Court may order that the debt review resume on any conditions that the court considers to be just in the circumstances". The appeal court further endorsed the decision in *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011(1) SA 374 (WCC) in which the words "or High Court" were read into subsection (11). Consequently, once a debt review has been terminated under section 86(10) and the credit provider seeks to enforce the agreement in either the High Court or the Magistrate's Court, such court may order the debt review to resume. This means that a court to whom the debt counsellor or the consumer has applied in terms of section 87(1) to re-arrange the consumer's obligations has no such jurisdiction. It is only the court "hearing the matter" in the proceedings to enforce the agreement that may order the resumption of the debt review.

19. It is thus clear that the SCA considered that the enforcement of a credit agreement should not be postponed indefinitely simply once steps have

been taken to seek a re-arrangement order. The purpose and objects of the Act will best be served by allowing the consumer a 60 day period of grace during which alternative means of resolving the dispute may be attempted and thereafter for the enforcing court (being either the Magistrate's Court or the High Court) to exercise the discretion to resume the debt review on the basis of more complete evidence regarding the earlier debt review process. The enforcing court is required to decide whether there would be any benefit or meaningful prospect of a better outcome in the event of the debt review resuming. In this regard the court will take into consideration the history of the dispute, the good faith participation of both parties in any prior negotiations designed to result in responsible debt re-arrangement, and the prospect of any satisfactory re-arrangement and compliance with it. An approach along these lines, the SCA held, would strike a fairer balance between the interests of consumers and those of credit providers and would give effect to the intention of the legislature as expressed in the language of sections 86(10) and 86(11) of the Act.

20. In this case, the applicant terminated the initial debt review on 7 September 2009 when the respondents were in default and 60 days had lapsed since the initial application for debt review. Thus, even had the Magistrate's Court in Mokopane enjoyed jurisdiction it would not have been permitted to proceed with re-arranging the respondents' obligations

under this credit agreement, because only a court asked to enforce the credit agreement would have had jurisdiction to order the resumption of the debt review process.

21. The present matter has become further complicated by the fact that a second debt review process was conducted by another debt counsellor, WJ Le Roux, who brought the application to the Witbank Magistrate's Court in January 2010.

22. The question arising from this is whether the consumer is entitled to further suspend enforcement of the agreement by initiating a new debt review process under section 86(1) once the credit provider has terminated the earlier review under section 86(10), but prior to the credit provider seeking to enforce the agreement. Section 86(1) does not impose any express limitation upon the number of times a consumer may apply for debt review in respect of a specific credit agreement. Section 86(2) does provide though that no such application will be competent if at the time of the application, the credit provider has proceeded to take the steps contemplated in section 129 to enforce the agreement. Section 86(2) reads:

> "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 agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement."

The relevant part of section 129(1) provides:

> "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; …

23. At the time the application was filed at the Witbank Magistrate's Court, no court process had been issued by the applicant. Summons was served on 24 February 2010, about seven weeks after the debt counsellor referred

the proposal to the Magistrate's Court Witbank. It is not clear from the evidence whether a section 129 notice was issued after the section 86(10) notice was issued on 7 September 2009. That however was in any event not necessary by reason of section 129(1)(b)(i) which provides that a section 86(10) notice will be sufficient. It is common cause that no section 86(10) notice was served in respect of the second debt review, but there is also no evidence indicating whether the second debt counsellor, WJ Le Roux, complied with section 86(4) requiring him to notify the credit provider of the application for debt review. Assuming that he did, the question therefore remains: Were the respondents entitled to delay enforcement by making a second application for debt review in November or December 2009? I would think not.

24. As I understand the line of reasoning of the SCA in *Collett*, the purpose of section 86(10) is to give a *defaulting* consumer a 60 day period of grace to attempt to resolve the dispute. Failing that, the credit provider may enforce the agreement and only the court seized with enforcement may resume the debt review process. The bar to enforcement proceedings enacted in section 129(1)(b) endures only until a section 129(1)(a) or section 86(10) notice has been provided. If there is neither a debt review pending (that is one which has not already been terminated) nor a re-arrangement order in existence, such providing defences under section 130(4), the credit provider may enforce the agreement if it has complied

with section 86(10). The notice in terms of section 86(10) is a step contemplated in section 129 to enforce the agreement and the bar in section 86(2) accordingly applies. It would be unduly burdensome to the credit provider to hold that the defaulting consumer could further delay the enforcement of the credit agreement once the debt review had been terminated under section 86(10) by the simple expedient of a new application under section 86(1). Once there has been termination of a debt review under section 86(10), it is for the enforcing court to decide in terms of section 86(11) if there will be benefit in a further debt review.

25. Moreover, section 130(1)(a) of the Act expressly provides that a credit provider may approach the court for an order to enforce a credit agreement 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 at least 10 business days have elapsed since the credit provider delivered a notice for the consumer as contemplated in section 86(10), or section 129(1), as the case may be. The section actually refers to a notice as contemplated in section 86(9). That is obviously a drafting mistake. Section 86(9) does not contemplate any notice. The reference to section 86(9) in section 130(1)(a) was clearly intended to be to section 86(10). In the premises, therefore, the applicant was not precluded from enforcing the agreement after it had terminated the debt review in September 2009;

and nor did the second debt review application impose any impediment to enforcement.

26. The respondents have raised no further defence in the application for summary judgment. On 6 September 2010 the respondents filed a supplementary affidavit confirming that the Magistrate's Court at Witbank purported to make a debt re-arrangement order on 1 July 2010 in which their obligations under the credit agreement were re-arranged to provide for an instalment of R2434,49. It is not clear if they since have remained in compliance with the order by making that payment. In any event, as already explained, the Magistrate's Court Witbank, not being the enforcing court, had no jurisdiction under section 86(11) to resume the debt review that was terminated on 7 September 2009.

27. In the circumstances, the affidavits opposing summary judgment do not disclose a *bona fide* defence. However, as pointed out by the SCA in *Collett* (para 18), because of the extraordinary and stringent nature of the remedy of summary judgment, a court has an over-riding discretion to refuse an application for summary judgment - *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 10-11. And that discretion could be exercised in favour of a consumer were it to be shown that the credit provider did not participate meaningfully in the debt review process - *Collett* (para 18). By the same token, the

court may adjourn the summary judgment application to afford the consumer an opportunity to persuade it that a debt review should be resumed.

28. The proposal purportedly made an order by the Magistrate's Court Witbank is for less than half of the bond payment and presumably for the length of the bond. That may prove insufficient to justify the resumption of the debt review. The difficulty though is that the order is invalid and has not yet been set aside, and the full facts and circumstances pertaining to the debt review are not properly before the court. In the premises, I believe it will be in the interests of justice in this case to adjourn the application for summary judgment to afford the respondents an opportunity to bring an application for resumption of the debt review and for the applicant to bring a counter-application to set aside the order of the magistrate. Such a course is justifiable on grounds of the law having been in a state of uncertainty until the SCA recently brought welcome clarity in *Collett*.

29. In the result, I make the following orders:

1. The application for summary judgment is postponed *sine die*.

2. The respondents are directed to bring an application for resumption of the debt review in terms of section 86(11) of the Act within 10 days of this order, failing which the applicants may set the application down without further notice to the respondents.

3. Costs are reserved.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 10 September 2010
For the Applicant: Adv Z Schoeman, Pretoria
Instructed By: Edelstein Bosman Inc, Pretoria
For the Respondent: Adv K Kollapen, Pretoria
Instructed By:Thys Cronje Inc, Pretoria