

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 536/2010

Date heard: 20 May 2010

Date delivered: 25 May 2010

In the matter between:

ANNA MAGDALENA STOW

Applicant

and

**FIRSTRAND BANK LIMITED
(formerly FIRST NATIONAL BANK OF
SOUTHERN AFRICA LIMITED)**

First Respondent

**SHERIFF OF THE HIGH COURT,
PORT ELIZABETH**

Second Respondent

J U D G M E N T

DAMBUZA, J:

[1] This is an application for rescission of a default judgment granted by this Court against the applicant in favour of the first respondent during October 2009. The debt relates to a loan agreement in terms of which the first respondent lent money to the applicant. The loan is secured by a mortgage bond registered over an immovable property owned by the applicant. The application is opposed.

[2] The application is founded on the ground that the judgment was erroneously sought by the applicant and erroneously granted by this Court as envisaged in Rule 42 (1) of the Rules of this Court.

[3] The factual background against which the application is brought is that during October 2008 the applicant applied to be placed under debt review in terms of the provisions of the National Credit Act, Act No 34 of 2005 ("the Act"). On 27 February 2009 the first respondent notified the applicant that it was terminating the debt review as provided in section 86 (10) of the Act. During July 2009 the first respondent served summons on the applicant for recovery of the debt. It is common cause that the applicant's debt review was cancelled in August 2009. On 15 October 2009 the first respondent obtained the judgment which is the subject of this application. On 12 February 2010 the applicant obtained an order in the magistrate's court in the following terms:

"That the first and second applicants (the applicant being the second applicant in that application) debt review be ordered to resume in terms of section 86 (11) of the National Credit Act 2005, **as if uninterrupted.**" (my emphasis)

[4] The applicant now contends that the effect of the order of the magistrate was to place the application for default judgment in this Court within the ambit of section 88(3) of the Act, effectively prohibiting the granting of the judgment.

[5] Section 88(3) of the Act reads:

“Subject to Section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in Section 83 or 85 or notice in terms of Section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until:

(a) The consumer is in default under the credit agreement; and

(b) one of the following has occurred:

- (i) an event contemplated in subsection (1)(a) through (c);
or
- (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the tribunal.”

[6] Firstly section 88(3) deals with reckless trading. Further no case has been made that the first respondent received a notice of court proceedings contemplated in sections 83 and/or 85 as provided for in section 88(3). I therefore agree with the submission on behalf of the first respondent that section 88(3) has no application in this matter.

[7] Section 86 (11) of the Act reads:

“If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that 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.”¹

[8] In these proceedings the applicant's case is that the order granted by the magistrate, re-instating the debt review process applies retrospectively. Consequently, so the argument goes, when judgment was granted by this court on 15 October 2009 the applicant was under debt review and the judgment, having been granted in error, falls to be rescinded so that the debt to which it relates can be included in the debt review. *Mr Moorhouse* who appeared on behalf of the applicant submitted that the effect of the Magistrate's court order is that the applicant's debt review process is to be treated as if it never lapsed and that it must be deemed that the debt review process was still ongoing when the summons was issued and when judgment was granted.

[9] I do not agree. It is not in dispute that prior to the granting of judgment and in particular, from August 2009, to when judgment was granted, the applicant was not under debt review. It is not the applicant's case that the credit agreement could not, for some reason, be validly enforced when the judgment was granted. The judgment was therefore not granted in error. The

¹ Part C of Chapter 6 of the Act relates to debt enforcement by repossession or judgment

applicant's contention that on re-instatement, the debt review process became applicable to the judgment granted almost four months prior to the order of re-instatement can simply not stand. Her reliance on the words "*as if uninterrupted*" in the order of the magistrates court does not assist her. The agreement has now been enforced. As it was submitted on behalf of the first respondent the Act under which the applicant claims protection applies only to credit agreements (with certain exemptions) rather than judgments of courts.²

[10] I do not think that it was the intention of the Legislature that re-instatement of debt review under section 86 (11) of the Act should nullify or create a fiction which renders valid judgments granted prior to such re-instatement, ineffective as it was submitted on behalf of the applicant. Such a process would, in my view, lead to wanton abuse of the procedures provided for under section 86 and to chaos. This matter is, in my view, comparable to **Theodore Peter Damon and Another v Nedcor Bank Limited** an unreported decision of the **Western Cape Division, Case No.: 3970/2004**³ in which the applicants sought rescission of a judgment that had been granted against them in default in respect of a loan secured by a mortgage bond registered against immovable property owned by them. When default judgment was sought the applicants had not opposed the

² See section 4(1)

³ Also [2007] JOL 19310 (C)

application as they had no valid defence. The application for rescission was now brought in order to “amend credit records”. Binns-Ward AJ, as he then was, held that the court had no power to rescind the judgment and added that even if it did have such powers it would not have been proper to give relief which would have the effect of falsifying credit record by allowing an impression to be created that default judgment had never been properly given against the applicants. Although the issues are not exactly the same in this case, in my view the applicant seeks the rescission of judgement on a similar basis; namely that a false impression be created that the judgment against her had been granted improperly so that she is legible for the procedure provided for in section 86 of the Act and in particular that the debt to which the judgment relates can be included in the debt review process. That, in my view is not a proper basis for which this court should order rescission of the judgment. The application can therefore not succeed.

[11] Consequently:

The application is dismissed with costs.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Adv. A.C. Moorhouse instructed by Pierre Kitching Attorneys.

For the respondent: Adv. J. Nepgen instructed by Pagdens Attorneys.