

IN THE HIGH COURT OF SOUTH AFRICA

NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 1796/10
Date Heard: 3 August 2010
Date Delivered: 17 August 2010

In the matter between:

FIRSTRAND BANK LIMITED

Plaintiff

and

ANDRÉ ALROY FILLIS

First Defendant

MARILYN ELSA FILLIS

Second Defendant

JUDGMENT

EKSTEEN J:

[1] The plaintiff seeks summary judgment against the defendants, who are married to one another in community of property, in the sum of R101 508,58, together with interest thereon. The debt arises from a credit agreement, as defined in the National Credit Act, 34 of 2005 (herein “the Act”) and is secured by a mortgage bond registered over certain immovable property situated at Newton Park, in Port Elizabeth. The plaintiff accordingly seeks a further order declaring the property to be executable.

[2] Neither the existence nor the extent of the debt is in dispute. It is common cause that at some stage during 2009 the defendants fell upon bad economic times. They approached a debt counsellor and made application for debt review in terms of the provisions of section 86 of the Act. The

process took its course and on 21 October 2009 the magistrate for Port Elizabeth made an order restructuring the defendants' debts ("the re-arrangement order") pursuant to a proposal of the debt counsellor in terms of section 86(7)(c) of the Act. The order which the magistrate made was "that the consumer pay, with effect from 30/11/09 the amount of R2 850.00 (per month)".

[3] I pause to mention that although the order that the magistrate made enjoins the defendants to pay such amounts with effect from 30 November 2009 the defendants had in fact reduced their payments prior to the re-arrangement order and made payment through the Distribution Agent on the strength of the proposal of the debt counsellor.

[4] In its summons the plaintiff alleges that the defendants are both in default of the credit agreement and have defaulted on the re-arrangement order. In this regard I was advised from the Bar that the parties are agreed that over the period from the date of the granting of the re-arrangement order to the issue of summons on 23 June 2010 the defendants have paid R3 550,00 less, in total, than the amount stipulated in the re-arrangement order. The plaintiff accordingly alleges that the defendants are in default of the order and that it is entitled to exercise or enforce, by litigation, its rights and security under the credit agreement by virtue of the provisions of section 88(3) of the Act. I shall revert to this section below.

[5] The defendants raise three defences to the application for summary judgment. The first is essentially a point *in limine*. The defendants allege that Mr Freeborough, who attested to the affidavit filed in support of the application for summary judgment in terms of the provisions of rule 32(2), has not established that he is authorised to depose to the affidavit. On this basis it is argued that the application is not properly before me.

[6] The second defence raised relates to the interpretation of the Act. It is contended that once an order is made to re-arrange the defendants' debt no legal action may be taken by the credit provider to enforce a credit agreement which is subject to the order unless and until the re-arrangement order has been rescinded in terms of the provisions of section 36 of the Magistrates' Court Act, 32 of 1944, irrespective of the fact that the defendants are in breach of the provisions of the re-arrangement order.

[7] Finally, it was argued that, notwithstanding that the defendants have failed to meet the required payments stipulated in the re-arrangement order, they should nevertheless not be held to be in default.

[8] I consider first the point *in limine*. A simple summons was issued in this matter by Attorneys Spilkins in which they describe themselves as "attorneys for the plaintiff". The summons directs the sheriff to inform the defendants that "**FIRSTRAND BANK LIMITED** ... institutes action against the Defendants." Upon receipt of the notice of appearance to defend the action Attorneys Spilkins launched the application for summary judgment. The

affidavit as required in terms of rule 32(2) was attested to by one Freeborough. Mr Freeborough states that he is employed by the plaintiff as “Operations Manager Arrears – Legal” and that he is duly authorised to depose to said affidavit.

[9] In response to this averment the first defendant states as follows:

“I have no knowledge of the facts contained in this paragraph and I am as a consequence unable to admit same. I put the Applicant to the proof hereof.

However, I am advised that any person acting on behalf of a legal person must be authorised to do so either by pre-incorporation charter or by way of a specific resolution of that company. In the instance no such basis of authority is attached. I submit that under the circumstances the deponent has no *locus standi* to depose to this affidavit.”

[10] Mr **Curtain**, who appears on behalf of the defendants, supports this contention in argument and relies upon the judgment in the matter of **Pretoria City Council v Meerlust Investments (Pty) Limited** 1962 (1) SA 321 as authority. That case concerned a petition for leave to appeal. At p. 325 Ogilvie Thompson JA stated as follows at C-F:

“The question of authority having been raised, the *onus* is on the petitioner to show that the prosecution of the appeal in this Court has been duly authorised by the Council; that it is the Council which is prosecuting the appeal, and not some unauthorised person on its behalf (cf. *Mall (Cape) (Pty.) Ltd v Merino Ko-operasie Bpk.*, 1957 (2) SA 347 (C) at pp. 351-2). As was pointed out in that case, since an artificial person, unlike an individual, can only function through its agents, and can only take decisions by the passing of resolutions in the manner prescribed by its constitution, less reason exists to assume, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorised by the artificial person concerned. In order to discharge the abovementioned *onus*, the petitioner ought to have

placed before this Court an appropriately worded resolution of the Council. ... This the petitioner has failed to do so.”

[11] What was in issue in that matter was the authority to lodge the petition, not the authority to depose to an affidavit. It is important to recognise that the ***Pretoria City Council*** matter concerned a petition to the Supreme Court Appeal which was decided in 1962 in accordance with the Rules of Court which applied at the time. The authority to prosecute any action in the High Court is governed by rule 7 of the Uniform Rules of Court. Prior to 1987 the rule required the attorney acting on behalf of a plaintiff to file a power of attorney with the registrar before the issue of summons. The extent of the mandate of the attorney was to be set out in this document. Where the power of attorney was signed on behalf of the party giving it proof of the authority to sign on behalf of such party had to be produced to the registrar who then noted it.

[12] In 1987 the Uniform Rule of this Court were considerably revised. In terms of the revised rule 7 of the Uniform Rules of Court a power of attorney establishing the authority to act on behalf of a litigant need no longer be filed as a matter of course. If, however, an attorney's authority to act on behalf of a party is challenged, then in terms of rule 7 of the Uniform Rules of Court, the attorney is required to satisfy the Court that he is properly authorised to act on behalf of the litigant. Until he has done so he is precluded from acting further. In order to do so he is required to produce proof of his mandate, usually a power of attorney, and, where necessary, an appropriate resolution authorising the signature of the power of attorney.

[13] The obligation to establish this authority only arises when the authority to prosecute the process is challenged. In the present matter Attorneys Spilkins authority to prosecute the action and the application for summary judgment has not been challenged and is accordingly not in issue. What is contested is the authority of the deponent Freeborough to depose to an affidavit. Accordingly the reasoning in the **Pretoria City Council** matter finds no application in this matter. The challenge to the authority to depose to an affidavit is, in my view, entirely misconceived. The same point was raised in the matter of **Ganes and Another v Telecom Namibia Ltd** 2004 (3) SA 615 (SCA). In that matter Streicher JA disposed succinctly of this argument at 624F-H where he said.

“There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.”

This reasoning is equally applicable to summary judgment proceedings.

[14] The second argument raised is, in my view, equally lacking in merit. The Act provides very extensive protection to a consumer who has become over-indebted, whether it be of his or her own making or through circumstances beyond his or her control. Not only does a re-arrangement

afford him or her alleviation from the onerous monthly obligations that he or she has in all seriousness undertaken to his or her credit providers, but he or she also enjoys the protection of section 103(5) against the ravaging effect of escalating interest whilst he or she remains in default under the credit arrangement. If, however, he or she fails to embrace this opportunity, or he or she is, notwithstanding this very considerable assistance, unable to comply with his or her restructured debt commitment, the Act permits the common law to run its course.

[15] Thus, once the credit review process has commenced section 88(3) of the Act prevents a credit provider from exercising or enforcing, by litigation or other judicial process, any right or security under any 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.”

[16] It follows, in my view, as a matter of interpretation, that once the jurisdictional requirement set out in section 88(3)(a) coexists with any one of the jurisdictional requirements set out in section 88(3)(b), the credit provider is at liberty to proceed and to exercise and enforce, by litigation or other judicial process, any right or security under his credit agreement without further notice.

[17] On behalf of the defendants it is argued that because the application for a re-arrangement order in terms of section 86(7)(c) is an application governed by the Rules of the Magistrates' Court a credit provider cannot proceed to enforce its rights until it has first moved to rescind the re-arrangement order in accordance with the provisions of section 36 of the Magistrates' Court Act. The provisions of section 88(3), so it is argued, simply give the plaintiff the right to now apply for a rescission of the re-arrangement order. This, it is contended, is so because orders of Court do not automatically fall away unless specifically authorised by an Act.

[18] In my view the restraint placed upon a credit provider in consequence of a credit review process and a re-arrangement order does, in this instance, fall away on the express authority of section 88(3). This interpretation accords too with the provisions of section 129(2) of the Act.

[19] For the third argument raised it is contended that once the debt review process commences in terms of section 86 of the Act a consumer is not required to make any payment at all in respect of his liability under a credit agreement until such time as a re-arrangement order is granted or the application for credit review is rejected. Accordingly, so it is argued, any payments made prior to the grant of the re-arrangement order should in effect, be set off against the obligations which arise subsequent to the granting of the order.

[20] In the present instance, it is argued, payments were made in accordance with the proposal of the debit counsellor prior to the re-arrangement order. These, so it is argued, were not due and if these sums are added to those paid pursuant to the re-arrangement order then the defendants are not in default. Distribution certificates commencing prior to the re-arrangement order are annexed in support of this contention. Mr **Curtain**, in the course of argument, appreciated the difficulty associated with this reasoning and conceded, correctly in my view, that it cannot succeed.

[21] Whatever the obligations of the consumer may have been during the debt review process, and I express no view in that regard, the magistrate hearing the application for a re-arrangement order is required to investigate the position of the consumer as it is at that time. The magistrate is then required to make a re-arrangement order which finds application from the time the order is made, unless otherwise ordered. In this instance the magistrate ordered that the defendants were to make monthly payments of R2 850, “with effect from 30 November 2009”. This the defendants have failed to do. The defendants are accordingly in default of the re-arrangement order.

[22] It follows that I consider that the defendants have not made out any defence to the plaintiff’s case. The plaintiff seeks, however, a further order declaring certain immovable property executable. In the summons the attention of the defendants was specifically drawn, in bold letters, to the provisions of section 26(1) of the Constitution of the Republic of South Africa. The defendants were advised that should they “claim that the order for

execution will infringe“ their right to housing it was incumbent upon them to place information supporting such claim before court. This invitation elicited no response and the opposing affidavit is silent in respect of the immovable property. The court is not informed whether the property is vacant or developed. To the extent that it may be developed I am not told whether it is residential or commercial in nature. If I were to assume that it is developed as a residential property I am not told whether it is used as a primary residence or held as a commercial asset.

[23] In all the circumstances the defendants have made out no defence to the plaintiff's claims. They have set out no facts upon which I could exercise a discretion in their favour, whether in respect of the summary judgment or in respect of the order declaring the property executable.

[24] I accordingly make the following order:

1. The defendants are order to pay to the plaintiff the sum of R101 508,58.
2. Defendants are to pay interest on the amount of R101 508,58 at a rate of 10% per annum calculated and compounded monthly, from 30 May 2010 to the date of payment.
3. The property being Erf 2224, Newton Park, in the Nelson Mandela Bay Metropolitan Municipality and Division of Port Elizabeth, Province of the Eastern Cape is declared executable.

4. The defendants are ordered to pay the costs of suit on a scale as between attorney and client.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv N Mullins instructed by Spilkins, Port Elizabeth

For Defendants: Mr Curtain instructed by J R Bester & Associates, Port Elizabeth