

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

*Chief Judge
rules appeal to
Eastern*

CASE NO: 1321/2010
DATE HEARD: 27/07/10
DATE DELIVERED: 05/10/10

In the matter between
FIRST NATIONAL BANK LTD

PLAINTIFF

And

QUINTON PAUL MEIER

DEFENDANT

JUDGMENT

TSHIKI J:-

A) INTRODUCTION

[1] For the sake of convenience I shall refer to the parties as Plaintiff and Defendant respectively. This is an application for Summary Judgment. Plaintiff has instituted action against Defendant for payment of a sum of R298 411,01, together with other ancillary relief, which amount is due and owing by Defendant to Plaintiff pursuant to a credit agreement between the parties. The debt is secured by four mortgage bonds passed by Defendant in favour of Plaintiff whose bonds numbers are B23821/1999, B42146/2002, B 32235/2004, B 2211/2009 respectively.

[2] Defendant having filed a notice to defend, Plaintiff sought a request for judgment which Defendant has opposed.

[3] In his affidavit in terms of rule 32(3)(b) Defendant has raised defences all of which are based on the provisions of the National Credit Act 34 of 2005 (herein referred to as the NCA). According to him, due to over indebtedness,

he fell into arrears with his monthly repayments of the bond. Before receiving any notices or demands and on or about 27 November 2009 he approached a debt counsellor in terms of section 86(1) of the NCA for the latter to process his debt review application. He, therefore, completed all the necessary documents in that regard which he furnished to the debt counsellor as specified in Regulation 24(1)(c) of the NCA. Indeed the debt counsellor processed the debt review up to the stage when he made the application to the magistrate's Court to have the Defendant declared over indebted and at that stage the process was interrupted by the Plaintiff who, purportedly acting in terms of section 86(10) of the NCA, terminated the Defendant's debt review application by a letter to the Defendant sent by registered mail. The debt counsellor, on 17 February 2010, filed a notice to the Port Elizabeth magistrate's Court in terms of section 86(7)(c) of the NCA. The case was then set down for the 21 April 2010 under case no. 4634/2010, on which date the Plaintiff opposed the Defendant's application in terms of 86(8)(b) which was filed on 7 February 2010 and the matter was, therefore, postponed to 12 May 2010. On 12 May 2010 the case was further postponed to 2nd June 2010 for the reason that the Plaintiff wanted to take instructions on the Defendant's allegations that he was making payments which were processed by the Payment Distribution Agent. On 5 May 2010 the Plaintiff issued summons against Defendant.

B) ISSUES

[4] The crisp issues involved herein are as follows:

4.1 whether the Plaintiff had legally terminated the debt review process; and if so,

4.2 whether the enforcement of the debt, pursuant to the termination of the debt review process, applies to the present agreement in light of;

4.2.1 the Defendant's contention that the agreement is subject to the Court proceedings which could result in the Court ordering the restructuring of the debt and therefore not terminable in terms of section 129(2) of the NCA.

[5] Lastly the Defendant contends that the termination notice in terms of section 86(10) of the NCA was not sent to the Defendant's debt counsellors and, therefore, there was no compliance with section 86(10) of the NCA.

[6] Mr N.J Mullins appears for the Plaintiff and Mrs Zietsman represents the Defendant.

[7] Defendant does not dispute that he and the National Credit Regulator received the notice of termination of the debt review process. The debt counsellor also confirms not to have received the notice by e-mail. The question to decide, if necessary, on this point is whether the failure by the credit provider to send the notice of termination of the review process to the debt counsellor renders the whole process of termination defective to the extent that it is invalid.

C) WHETHER PLAINTIFF HAS VALIDLY TERMINATED THE DEBT REVIEW PROCESS.

[8] The decision of this issue encompasses a consideration of two issues which are-

- 8.1 whether the debt review process was terminated before the debt review of Defendant had been processed up to and including the stage covered by section 86(8) of the NCA; and
- 8.2 whether failure by the Plaintiff to inform the Defendant's debt counsellor of the termination of the debt review, renders the whole process of termination invalid.
- 8.3 if the answer to 8.1 above is decided in favour of the Defendant it will not be necessary for me to decide 8.2.

[9] In terms of the NCA termination of the debt review process can take place in terms of section 86(10) of the NCA only in situations where the debt review process is terminated prior to the process filed in the magistrate's Court in terms of section 86(8) of the NCA. It cannot be terminated when the debt review process is at the stage contemplated in section 87 of the NCA. This is so because at that stage the debt review process is already before the magistrate's Court which has to make a decision on the matter.

[10] 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 in the prescribed manner to-

- (a) the consumer
- (b) the debt counsellor; and
- (c) ***the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review.***

[11] The wording of section 86(10) clearly suggest, and can only be interpreted to mean, that a credit provider who wishes to terminate the debt review process in terms of section 86(10) may give notice of termination to the consumer, the debt counsellor and the National Credit Regulator. The important question to decide here is whether it is obligatory for the Credit provider to give the notice to all the three persons mentioned and if so, whether failure to inform any of them renders the whole termination process invalid and of no force and effect.

[12] I must say though, that the wording of some of the sections of the NCA is so confusing and that it is sometimes not easy to reconcile them. For instance section 130(1)(a) which I will deal with in detail later in this judgment, refers to a notice which the credit provider ***'delivered to the consumer as contemplated in section 86(9)'*** yet section 86(9) refers to a situation where the ***'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)(c)'***. It follows from the wording of section 86(9) that no action should be taken by the credit provider and that only the consumer is required to take action if the debt counsellor rejects his application that he or she be declared over indebted. The

reference I make to this particular section, which is confusing, is important because in this judgment I have to frequently refer to sections 86, 129(1) and 130 of the NCA, which sections are read correspondingly thus making their correct understanding important when dealing with the new NCA.

[13] Reverting back to the issues and without having to waste time by making unnecessary analysis of the section it is clear from the evidence presented in the Defendant's opposing affidavit that when the Plaintiff terminated the debt review the debt counsellor had already processed the debt review to the extent that it no longer fell within debt review termination in terms of section 86(10) of the NCA but had reached a stage to be dealt with in terms of section 87 of the NCA because it was now in the hands of the magistrate's Court. Therefore, section 86(10), which applies to debt review termination before the debt review has been referred to the Court in terms of section 86(8)(b), does not apply in the present scenario. It is clear from the Defendant's opposing affidavit that when the plaintiff wrote the notice to the Defendant purportedly acting in terms of section 86(10) of the NCA his debt counsellor had already processed the debt review to the stage where the magistrate's court was already seized with the matter. Consequently section 86(10) of the NCA is of no application herein and, therefore, the Plaintiff, at that stage, could not act in terms of section 86(10) when terminating the debt review process. [vide **Standard Bank of SA Ltd v Kruger – Standard Bank of SA Ltd v Pretorius 2010 (4) SA 635 (GSJ)**].

[14] Having said that, notwithstanding the Plaintiff's letter of termination of the Defendant's debt review stating that Plaintiff was acting in accordance with section 86(10) of the NCA, at the stage the Plaintiff's debt review was no longer terminable in terms of that section. This is so because the debt review under section 86(10) can only be terminated if it was still handled by the debt counsellor and had not yet been forwarded to the magistrate's Court in terms of section 86(8)(b) of the NCA. The question therefore is whether at that stage the Defendant's debt review could still be terminated. The answer to this question lies with the correct interpretation of section 129(2) and section 130(1)(c) of the NCA. It would make sense if I quote *verbatim* section 129(1) and (2) and 130(1)(c):

'129 Required procedure before debt enforcement – (1) 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; and
 - (ii) meeting any further requirements as set out in section 130.

(2) Subsection (1) doesn't apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order. [My emphasis]

[15] The parties' debt review process has been referred to court by the debt counsellor in terms of section 86(8) of the NCA with recommendations, inter alia, that the defendant be declared over indebted and that he be dealt with in terms of section 86 (c) of the NCA. The court has not yet made a decision on the above matter and that the purported termination of the debt review by the plaintiff is invalid because of reasons stated in the preceding paragraphs in particular paragraph 12. It, therefore, follows that at the finalisation of the application currently before Court, one of the orders which the magistrate's court may grant is that the credit agreement be subject to a debt restructuring. For the above reasons in terms of section 129(2) of the NCA subsection (1) of section 129, therefore, does not apply to the parties' credit agreement.

[15.2] The relevant provisions of section 130 of the NCA are:

'130. DEBT PROCEDURES IN A COURT.

- (1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only 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 –
 - (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10) or section 129(1) as the case may be;
 - (b) in the case of a notice contemplated in section 129(1) the consumer has –
 - (i) not responded to that notice ; or
 - (ii) responded to the notice by rejecting the credit provider's proposals; and

(c)

(2)

[16] However, the question whether the Plaintiff can still enforce the credit agreement is still begging. Subsection 130(3) of the NCA provides:

"Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that –

- (a) in the case of proceedings to which section 127, 129 or 131 apply, the procedure required by those sections have been complied with;
- (b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issue to be determined by the court; and
- (c) that the credit provider has not approached the court -
 - (i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction or
 - (ii)
 - (aa).....
 - (bb).....
 - (cc).....
 - (dd).....

[17] As already alluded to *supra* section 86(9) is confusing and does not appear to be relevant to the giving or delivery of notices in terms of section 130 of the NCA. As for section 129 (1), in view of the fact that the agreement under discussion is subject to proceedings in a Court that could result in an

order for the restructuring of the debt, section 129(1) therefore does not apply herein.

[18] The only consideration now is whether section 130(3) can assist the plaintiff herein. Evidence in this case clearly shows that the credit provider approached this Court for debt review cancellation during the time when this matter was before the magistrate's Court in Port Elizabeth. At the time the Plaintiff terminated the debt review purportedly acting in terms of section 86(10) of the NCA. the debt counsellor had complied with all the requirements of the NCA and had already referred the defendant's debt review process to the magistrate's Court in terms of section 86(8) of the NCA. I have already ruled that such termination is invalid and of no force and effect by reason of the fact that in terms of section 86(10) of the NCA it is not procedurally competent to terminate a debt review process which is before the Court. There is no provision in the NCA which entitled the credit provider to simply, unilaterally and/or without leave of the Court, terminate a debt review process which is dealt with by the magistrate's court in terms of section 87 of the NCA. No party can willy-nilly terminate proceedings in progress in a court without leave of that court. Such conduct, in my view, would result in chaos and, therefore, should be discouraged. (**See STANDARD BANK OF SOUTH AFRICA LTD v KRUGER – STANDARD BANK OF SOUTH AFRICA LTD v PRETORIUS 2010 (4) SA 635 (GSJ) where at 642 para 29 KATHREE – SETILOANE AJ held:**

'Accordingly, I am of the view that, once the debt review process has been initiated, which thereafter results in the referral of the debt review to the magistrate's Court, the credit

provider is not entitled to institute Court proceedings to enforce its claim until the magistrate's Court has made a determination in terms of section 87 of the Act'.

[19] I agree with the above conclusion reached by the learned judge. The introduction of the provisions of the NCA does not have the effect of displacing the rules applicable in the magistrate's Court nor have the provisions of the magistrate's Court Act 32 of 1944 been replaced by those of the NCA in any manner whatsoever. When a matter has been referred to the magistrate's Court the purpose is for the magistrate to exercise his or her judicial functions in that matter and at the end make an appropriate order which would be enforceable and/or appealable in terms of the relevant Rules of that court. Any notice to withdraw or terminate any proceedings in the magistrate's Court has to comply with the requirements of the Rules of that Court in that it has to be referred, served and filed in that Court. If the matter is contested the magistrate has a duty to listen to the parties and/or their legal representatives, where applicable, and, thereafter, make the appropriate order. There is no short cut which would simply entitle the credit provider to cancel the debt review notwithstanding the fact that the matter is now before the magistrate's Court for the latter's adjudication. In a recent unreported judgment, Kemp AJ does not agree in **[SA TAXI SECURITISATION (PTY) LTD v NAKO and 6 Others. Case no's 19,21,22,77,89, 104 and 842/2010 delivered on 8 June 2010 in EASTERN CAPE, BHISHO]**.

[20] I do not agree with the submissions by Mr Mullins that the termination of the debt review process by the Plaintiff was in order in herein. Mr Mullins contends that section 86(10) read with section 130 of the NCA have been

complied with and that as the debt review process had not been finalised the Plaintiff was entitled to terminate it. I disagree and as already alluded to *supra* the Defendant's debt counsellor had processed the debt review up to the stage when the matter was before Court in terms of section 86(8)(b) of the NCA. Once it reaches that stage the process cannot be terminated in terms of section 86(10) of the NCA. I agree with Mrs Zietsman for the Defendant that the Plaintiff had no legal justification for terminating the debt review process.

[21] Defendant has shown that he has a bona fide defence to the Plaintiff's action and that Plaintiff should never have applied for Summary Judgement herein.

[22] In view of the fact that the debt review process has not been finalised and that it may also be decided in favour of the Plaintiff, for instance if the finding is that the Defendant is not over-indebted. An order dismissing the application for summary judgment will not be proper in the circumstances, so is the order of costs. The proceedings have to be postponed *sine die* in terms of the provisions of section 130(4)(c) of the NCA which provides:

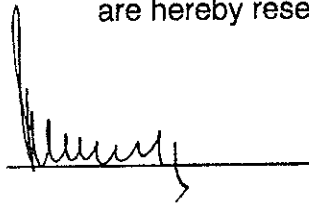
'In any proceedings contemplated in this section if the Court determines that-

- (c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, The Court may-
 - (i) adjourn the matter, pending a final determination of the debt review proceedings
 - (ii)
 - (iii)'

[23] I the result I make the following order:-

23.1 The application for Summary Judgment is hereby stayed pending the finalization of the Defendant's debt review application.

23.2 The costs occasioned by the application for Summary Judgment are hereby reserved.

A handwritten signature in black ink, appearing to read 'P.W. TSHIKI', is written over a horizontal line.

P.W TSHIKI

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff – Adv N.JMullins instructed by Spilkins Attorneys
– Port Elizabeth

For the Defendants- Adv T. Zietsman instructed by Burmeister De
Lange Soni Inc Attorneys – Port Elizabeth