IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 2502/10
Date Heard: 19 October 2010
Date Delivered: 26 October 2010

In the matter between:

FIRST RAND BANK LIMITED Plaintiff

and

NEIL MARTIN MOODALEY First Defendant

SORAYAH MOODALEY Second Defendant

JUDGMENT

EKSTEEN J:

[1] This is an application for summary judgment. The plaintiff claims payment of R987 213,44, which represents the principle debt together with finance charges thereon, which is due and owing to the plaintiff pursuant to a credit agreement. The debt was secured by means of a mortgage bond registered over certain immovable property situated in Lorraine, Port Elizabeth. The plaintiff accordingly seeks a further order that the said property be declared executable.

[2] In the summons the plaintiff alleges that it has complied with the provisions of the National Credit Act of 2005 ("the Act"). In particular it alleges that the defendants are in default of the credit agreements which are being reviewed in terms of section 86 of the Act. In addition it is alleged that the

plaintiff has given notice to terminate the debt review as contemplated in section 86(10) of the Act as it was entitled to do by virtue of the lapse of more than 60 days from the date of application for debt review. It annexes the notices of termination which find application from which it is apparent that the notice of termination was given on 18 June 2010. Summons was issued in August 2010.

[3] It is accordingly the plaintiff's case that the defendants applied for debt review. After the lapse of 60 days the process had not come to finality and the plaintiff gave notice to terminate the process. The defendants remain in default of the credit agreements and accordingly the plaintiff has issued summons.

[4] The defendants oppose the application for summary judgment. A very brief affidavit by the debt counsellor, one Abrahams, has been filed in opposition. From the opposing affidavit the following may be gleamed:

1. The defendants applied for debt review in terms of section 86 of the Act on 21 January 2010. Abrahams states that the defendants only provided portion of the required information on 21 January 2010 and thereafter compliance with section 86(1) occurred piecemeal over the period February 2010 to 12 October 2010. It appears that notice in terms of section 86(4) was given as and when information was provided to the credit counsellor. From these averments I understand that further credit agreements were added to the process from time to time. The affidavit

does not reveal when notice was given in respect of the credit agreements which form the subject of the present proceedings. It is, however, not contested that the necessary 60 days had lapsed at the time that the plaintiff gave notice to terminate the process.

2. On 21 January 2010 "it was established" on the information which was then provided that the defendants were over-indebted.

3. At some stage during the process the defendants had no income "as a result of their business closing down due to the severe economic downturn". This state of affairs appears to have persisted for some three months and accordingly the defendants were "in default of their debt re-arrangement proposal" for three successive months.

[5] The affidavit does not reveal what the debt re-arrangement proposal contained or when that particular proposal was made. It is difficult to understand just how such proposal could have been formulated when full compliance with section 86(1) and the regulations relating thereto has not occurred. I have referred above to the piecemeal manner in which further credit agreements were being added to the review process over a period from February 2010 to October 2010. Abrahams reveals that at least seven dates upon which further information was received. He further reveals that proposals were forwarded to all credit providers on at least four different occasions over the period March 2010 to June

2010. I shall assume that the proposals changed on each occasion so as to provide for further agreements added to the process from time to time although this is by no means clarified in the affidavit.

[6] Be that as it may, Abrahams does state that the defendants have since found employment and have sold a freehold property in order to bring their arrears in terms of the proposal up to date. Whilst the laudable objective for this sale is recorded Abrahams does not say whether such arrears have in fact been brought up to date and, if not when this could be expected.

[7] On the basis of this rather terse factual scenario Abrahams raises one defence only. It is stated as follows:

> "According to the Eastern Cape case of *First National Bank Ltd v Quinton Paul Meier* under case number 1321/2010 and the matter of *Standard Bank of South Africa Limited v Kruger, Standard Bank of South Africa Limited v Pretorius* the Applicants termination of the debt review process is not in order, as the matter is before Court in terms of Section 86(8)(b) of the National Credit Act and that once it reaches this stage the process cannot be terminated in terms of Section 86(10) of the National Credit Act."

[8] In addition to the defence raised Abrahams asks this court to exercise a discretion in favour of the defendant. In paragraph 7 of the opposing affidavit Abrahams states as follows:

> "I humbly request this Honourable Court to consider re-instating the respondents credit agreements under the debt review in terms of

section 86(11) …."

[9] In the alternative hereto he requests in paragraph 10 of the opposing affidavit as follows:

> "Should the above Honourable Court find that the Respondents process was terminated by the issuing of a Notice in accordance with Rule 86(10), it is my humble and respectively submission and request that the Respondents be afforded the opportunity to bring an Application in terms of Section 86(11) to remedy the situation, for the matter to be postponed *sine die* and for the costs to be costs in the cause."

[10] I shall deal firstly with the defence raised. Rule 32 of the Uniform Rules of Court provides for two possible responses for a defendant who seeks to oppose an application for summary judgment. He may either provide security for the debt (rule 32(3)(a)) or he may satisfy the court by affidavit or oral evidence that he has a *bona fide* defence to the claim (rule 32(3)(b)). If the defendant chooses the latter course, as the defendants have in this matter, he must, in his affidavit or evidence, disclose "fully" the nature and the grounds of his defence and the material facts relied upon therefore.

[11] What the rule requires in order to satisfy the court that a defendant has a *bona fide* defence is that he must allege in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim (see for example ***Breitenbach v Fiat (SA) Edms Beperk*** 1976 (2) SA 226 (T); ***Marsh v Standard Bank of South Africa Limited*** 2000 (4) SA 947 (W)). The rule

requires further that he must disclose "fully" the nature and the grounds of his defence and the material facts relied upon. The grounds for the defence referred to in the rule is the factual basis for the defence (see for example ***Chairperson Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Beperk*** 1997 (1) SA 244). It has been held that "while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence". (See ***Maharaj v Barclays National Bank Limited*** 1976 (1) SA 418 at 426C-D.)

[12] The defence relied upon in this case is founded upon the judgment in ***Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius*** 2010 (4) SA 635 (the ***Standard Bank*** judgment), which was allegedly followed in ***First National Bank Limited v Meier*** (EC case number 1321/10).

[13] In the ***Standard Bank*** judgment it was held that it was not competent for a credit provider to give notice to terminate the debt review process in terms of section 86(10) of the Act after the debt counsellor has referred his recommendation/proposal to the Magistrate's Court in terms of section 86(7)(c) (read with ***National Credit Regulator v Nedbank*** 2009 (6) SA 295 at 310G-H) or section 86(8)(b)). The effect thereof is that where a credit provider attempts to

terminate the debt review process by notice in terms of section 86(10) after an application has been launched in the Magistrate's Court for an order in terms of section 87 of the Act the notice in terms of section 86(10) is ineffectual and the moratorium imposed upon the enforcement of the credit agreement by section 88 of the Act remains undisturbed.

[14] The ***Standard Bank*** judgment was considered at length in the Eastern Cape High Court in ***First Rand Bank v Collett*** (case number 1819/10 (Grahamstown) and in ***First Rand Bank v Evans*** (case number 1693/10 (Port Elizabeth)). In both these matters I concluded that the ***Standard Bank*** judgment was incorrectly decided. If that is correct then the defence raised in the present matter would not avail the defendants. The matter of ***First Rand Bank v Collett*** is, however, currently pending appeal in the Supreme Court of Appeal and accordingly I shall assume, for purposes of this judgment, in the defendants' favour, that the ***Standard Bank*** judgment is correct.

[15] The defence founded on the reasoning in the ***Standard Bank*** judgment requires that the necessary factual basis must be laid in the affidavit in opposition to the summary judgment. The facts alleged in this affidavit must be such as to establish, if proved at the trial, that an application had been launched in the Magistrate's Court in terms of section 86(7)(c) (read with ***National Credit Regulator v Nedbank*** (*supra*) or section 86(8)(b) prior to 18 June 2010, the date upon which the plaintiff gave notice in terms of section 86(10).

[16] The high-water mark of the averment in paragraph 9 of the affidavit is that the matter is currently "before Court". Firstly, there are no facts set out from which it may be determined whether this conclusion is correct or not. It is not alleged that the debt counsellor has referred the matter to the Magistrate's Court and it is not alleged that the debt counsellor has forwarded his proposals to the Magistrate's Court. This failure strikes both at the validity of the defence and at the *bona fides* thereof. Secondly, it is irrelevant whether the matter is now before court. What would have to be established to make out this defence is that it was "before Court" prior to 18 June 2010. Third, it seems to me from all the facts set out, not only that it cannot be inferred that the proposal of the debt counsellor was before court, but that it is indeed improbable. I have set out above the content of the affidavit of Abrahams. It reveals that various proposals were forwarded to credit providers, the last on 15 June 2010, just three days before the section 86(10) notice. There is no suggestion that any of the proposals had been forwarded to the Magistrate's Court. It appears further that even on 15 June 2010 the debt counsellor was still not in possession of all the information which he required in order to proceed with an application. This is apparent from his assertion that notice in terms of section 86(1) was complied with in a piecemeal manner. He then sets out the dates upon which he received further information, the last being 12 October 2010. In the result I am constrained to hold that the defendants have not made out any valid defence to the summary judgment application.

[17] In the alternative, however, Abrahams urges this court to order, in terms of section 86(11), that the debt review process resume, alternatively to postpone the matter so as to enable the defendants to approach the Magistrate's Court for such relief.

[18] In the matters of ***First Rand Bank v Collett*** and ***First Rand Bank v Evans*** I held that the clear wording of section 86(11) showed that the High Court did not have the power to order the process to resume, this was reserved for the "Magistrate's Court hearing the matter". This view accords, I think, with that adopted by Binns-Ward J in the Western Cape High Court in ***Wesbank v NA Martin*** (case number 13564/10, delivered on 13 August 2010) at paragraph [11] thereof.

[19] In a subsequent unreported judgment in the Western Cape High Court, however, Blignaut J came to a different conclusion. He considered that section 86(11) contained an obvious *omisus* and that the words "or High Court" should be read into section 86(11). See ***Mercedes-Benz Financial Services, South Africa (Pty) Limited v PG Dunga***, case number 9222/10 delivered on 20 September 2010.

[20] For purposes of this application, and in view of the differing interpretations that have been given to section 86(11), I do not consider it appropriate for this

court to make an order in terms of subsection (11).

[21] I do nevertheless have a discretion to postpone the matter so as to permit the defendants to approach the Magistrate's Court for an order in terms of section 86(10). Indeed I have a general discretion to refuse summary judgment in an appropriate case, although I have not been asked to exercise such a discretion.

[22] A discretion in summary judgment proceedings should not be exercised capriciously or the basis of mere conjecture or speculation so as to deprive the plaintiff of a remedy to which he is entitled, but upon material before the court from which it appears that a reasonable possibility exists that an injustice may be done if judgment is granted. Compare **Breitenbach v Fiat (SA) Edms Beperk** *supra* at 229F-G.

[23] It seems to me, therefore, that a defendant who wishes to ask the court to exercise its discretion in his or her favour, on the basis that the Magistrate's Court may order that the debt review process resume, must at least place sufficient information before the court to enable it to assess whether a reasonable prospect exists that the Magistrate's Court may make such a finding.

[24] In the present matter no such information has been placed before me. Information which would clearly be important to the exercise of my discretion

would include information relating to the total liabilities of the defendants, the current monthly commitments of the defendants in respect of such liabilities; the defendants income, if any; the required living expenses of the defendants; whether the property hypothecated is a primary residence of the defendants or an investment asset; what the extent of the arrears is; and the proposal which the debt counsellor has made in respect of the re-arrangement of debts. None of this information has been placed before this court. In the circumstances there is nothing before the court which could lead me to conclude that there is any reasonable prospect that a Magistrate's Court may order the debt review to be resumed. In the circumstances I am of the view that the plaintiff is entitled to summary judgment in respect of the capital sum.

[25] In addition to the claim sounding in money, however, the plaintiff seeks an order declaring the property hypothecated to secure the loan to be executable. In the matter of ***Jaftha and Schoeman and Others; Van Rooyen v Stoltz and Others*** 2005 (2) SA 140 (CC), Mokgoro J concluded that in order to ensure the prevention of unjustified execution against immovable property, judicial oversight prior to such execution was appropriate. I consider accordingly whether this is justified on the papers.

[26] I have already stated that in this matter there is no evidence to show whether the immovable property is a primary residence or an investment asset. The defendants, who are represented in this court, have not placed any

information before me to indicate any other possible means whereby the debt may be paid. They have not placed before me the proposal made by the debt counsellor or put forward any other proposal which may result in the repayment of the loan. The debt which the plaintiff seeks to recover is not insignificant. In all the circumstances I consider that a proper case has been made for the order declaring the property to be executable.

[27] In the result:

1. There will be summary judgment against the defendants, jointly and severally, the one paying the other to be absolved, in the amount of R987 213,44.

2. The defendants are ordered to pay interest on the aforestated amount at a rate of 8,7% per annum, calculated and compounded monthly with effect from 1 August 2010 to the date of payment, both dates inclusive.

3. Erf 2266 Lorraine, in the Nelson Mandela Bay Metropolitan Municipality and Division of Port Elizabeth, Province of the Eastern Cape, in extent 1292 square metres held under deed of transfer no. T58315/1997 is declared to be executable.

4. The defendants are ordered to pay the plaintiff's costs on a scale as

between attorney and client.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv P Scott instructed by Spilkins, Port Elizabeth

For Defendants: Mr W Tee instructed by Van Niekerk Huisamen & Tee, Port Elizabeth