IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 1896/2010
Date heard: 17 August 2010
Date delivered: 9 November 2010

In the matter between:

NEDBANK LIMITED Plaintiff

and

FRANCOIS KRUGER Defendant

J U D G M E N T

DAMBUZA, J:

1]The plaintiff seeks summary judgment against the defendant for payment of the sum of R778,053.54, interest at a variable mortgage bond rate from 2 June 2010 to date of payment, an order declaring Erf. 1105, Despatch, Nelson Mandela Bay Municipality executable, and costs of suite as between attorney and client. The application is opposed.

2]It is not in dispute that the defendant owes the amount claimed by the plaintiff. But the defendant contends, that he has a *bona fide* defence to the plaintiff's claim. Although the defendant raises several defects in the manner in which the claim is brought, his overall contention, as I understand it, is that the plaintiff has failed to prove that it is entitled to proceed with litigation enforcing the credit agreement. The defendant takes issue firstly with the failure by Jacques Pienaar, in the affidavit prepared in support of the application for summary judgment, to set out the source of his authority to depose to the affidavit. In this affidavit Pienaar describes himself as the *"Manager – Mortgage Legal Recoveries of the Plaintiff"* and states that he is duly authorised to make the affidavit. It has been held that in the case of artificial persons the deponent to the supporting affidavit ought to set out his authority for being of the application. But such allegations in express terms are not essential. See **East London Municipality v BKK Meats CC t/a Heinz Meats** 1993 (2) SA 67 (E) 72. In this case Pienaar establishes his authority by stating expressly that he is duly authorised to make the affidavit. Further, I am satisfied that by virtue of the position he holds within the plaintiff he would naturally have the necessary authority to make the affidavit in question.

3]The defendant contends further that there is no allegation in the summons that the plaintiff <u>delivered</u> the required notice as prescribed under sections 129(1)(b) and 130 of the National Credit Act, Act No. 34 of 2005 ("the Act"). Section 129(1)(b) of the Act provides that:

> "If a consumer is in default under a credit agreement, the credit provider-
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> b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –
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> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
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> (ii) meeting any further requirements set out in section 130."

Section 130 of the Act provides that:

(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 the 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(9), or 129(1), as the case may be."

(my emphasis).

4]Further to the complaint that the plaintiff has failed to state that the notice was delivered as provided for in the Act, the defendant complains that the plaintiff's particulars of claim is *"somewhat confusing"* in that in one paragraph it alleges that it *"caused a notice of termination to be sent"*, whereas in another paragraph it states that it terminated the debt review *"by way of email/registered mail or fax".* The defendant complains that the plaintiff fails to state which of the methods if used and has not attached any proof of delivery.

5]It is common cause that during the early months of 2010 the defendant applied for debt review in terms of section 86(4)(b)(i) of the Act. In a letter dated 26 January 2010, the debt counsellor advised the plaintiff together with the defendant's other creditors of the success of the defendant's application for debt review. On 17 February 2010, the debt counsellor issued an application to the magistrate's court for an order re-arranging the defendant's payments of his debts to his credit providers. The application was set down for 17 March 2010 and the creditors, inclusive of the plaintiff, were advised of the set down in a letter dated 19 February 2010. In a letter dated 13 May 2010 the plaintiff recorded its receipt of notification that the defendant applied for debt review on 13 January 2010 and recorded that 60 business days had lapsed since the inception of the debt review process. It warned that the debt review application would be terminated within 10 business days from the date of the letter if the defendant remained in default under the two credit agreements under review and requested proof of payment made by the debtor. There is however, no indication on the letter as to whom it was addressed. On 1 June 2010 the plaintiff addressed to the debt counsellor, the defendant and the National Credit Regulator, a letter headed *"Termination of Application for Debt Review in terms of Section 86(10) of the National Credit Act, No. 34 of 2005"*. In that letter it terminated, in terms of section 86 (10) of the Act, the debt review process in respect of the Credit Agreement which is the subject of these proceedings. It appears from the face of this letter that it was sent by e-mail to the debt counsellor and to the National Credit Regulator. It is addressed to the defendant care of his physical address at 5 Bosman Street, Despatch, that being the same address that appears in the summons and his *domicilium citandi et executandi* under the credit agreement.

6]In the summons served on the defendant on 8 July 2010, the plaintiff alleges that 60 business days have lapsed since the inception of the debt review process and the defendant is in default under the credit agreement for a period of more than 60 days. It further contends that it caused a notice of termination to be sent to the defendant on or about 13 May 2010. The plaintiff further pleads that 10 days has lapsed since delivery of the section 86(10) notice and the defendant has neither raised a dispute nor surrendered the relevant property to the plaintiff as contemplated in section 127 of the Act, nor has the defendant brought payment due under the credit agreement up to date and no payment plan has been agreed to pursuant to such notice.

7]In terms of Rule 32 of the Rules of this Court, a defendant opposing an application for summary judgment is required to satisfy the court by affidavit that he/she has a *bona fide* defence. All that the Court requires, in deciding whether the defendant has set out a *bona fide* defence is whether the defendant has disclosed the nature and grounds of his or her defence and whether on the fact so disclosed the defendant appears to have a defence which is *bona fide* and good in law.[1] Whether a defence is *bona fide* or not depends upon the merits of the defence as raised in the defendant's replying affidavit.[2] The defendant is not required to satisfy the court that his/her allegations are believed by him/her to be true, it is sufficient if the defendant swears to a defence, valid in law, *in a manner which is not inherently or seriously unconvincing.*[3] If, for example, the defendant omits facts upon which a defence can be based or sets out the facts upon which he or she relies, in such a manner that the court is unable to say that, if they are established they will constitute a defence to the action or part of it he/she will fail in his/her defence.[4] Further a defendant will fail if it is clear from his/her affidavit that he/she is advancing a defence simply to delay the obtaining of a

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1 **Maharaj v Barclays National Bank Limited** 1976 (1) SA 418 (AD) at 426.
2 **Silverleaf Pastry and Confectionery Co (Pty) Ltd v Joubert and Another, NNO** 1972 (1) SA 125 (C) at 129.
3 **Breitenbach v Fiat SA (Edms) Bpk** 1976 (2) SA 226 (T).
4 **Trust Bank of Africa Ltd v Wassenaar** 1972 (3) SA 139 (D) at 144.

judgment to which the defendant well knows that the plaintiff is justly entitled.[5]

8]The defendant contends that the matter is still before (the magistrate's) court and the plaintiff is prohibited by the Act from commencing any legal proceedings to enforce the Credit Agreement. He relies on section 129(2) of the Act which provides that:

> "(2) Subsection (1) does not 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."

9]I am not satisfied that on its own, the failure by the plaintiff to state that the notice of termination was *"delivered"* to the plaintiff as raised by the defendant constitutes a *bona fide* defendant. The plaintiff does state that it terminated the debt review *"by giving notice to the defendant"* in its letter of 1 June 2010. As I have stated, the letter is addressed to the defendant as well as the debt counsellor and the National Credit Regulator. It is in this context that the averment in the plaintiff's particulars of claim that the termination notice issued in terms of section 86(10) was sent by way of e-mail/registered mail or fax must be viewed. I could find no prescribed manner of *delivery* in the Act except the reference in section 130(1)(a) to (notice) "*delivered as contemplated in section 86(9) or section 129(1)"*. The defendant does not rely on non compliance with a particularly prescribed manner of delivery. And it is not the defendant's case, as I understand it, that he never received the notice of termination.

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5 **Van Eeden v Sasol Pensioenfonds** 1975 (2) SA 167 (O).

10]As to whether it was proper for the plaintiff to terminate the *"debt review"* or the referral of the debt re-arrangement to the magistrate's court, it has been held that section 86(10) of the Act only makes provision for termination of a debt review prior to referral thereof to the magistrate's court in terms of section 86(7). Once the debt review process has been referred, by a debt counsellor, with recommendations to a magistrate's court for consideration, section 86 (10) of the Act has no application. See **Standard Bank of South Africa Limited v Kruger and Standard Bank of South Africa v Pretorius,** unreported decisions of the South Gauteng High Court, Case Nos. 09/45438 and 09/39057, 23 April 2010; **SA Securitisation (Pty) Limited v Matlala**, an unreported decision of the South Gauteng High Court, 29 July 2010; **First Rand Bank Limited v Sally Ann Collett** and unreported decision of the Eastern Cape High Court, Grahamstown, Case No. 1819/10, 2 September 2010. In these cases the Learned Judges considered extensively the provisions of section 86 of the Act and in particular the issue of whether it is open to a credit provider to issue a notice of termination of a debt review process in terms of Section 86(10) where the proposal for debt re-arrangement has already been referred to a magistrate's court in terms of section 86(7). I am in respectful agreement with their decision(s) that it is not.

11]Consequently it was improper for the plaintiff in this matter to issue a notice of termination in terms of section 86 of the Act. Once the debt rearrangement proposal was referred to the magistrate's court the credit provider was obliged to await the order of the magistrate's court made under s

87(1). But as held by Eksteen J in **First Rand Bank Limited v Collett *(supra)***:

> "Where a referral to the Magistrate's Court is being prosecuted with due efficacy it would appear to me that, more often than not, it would be inappropriate for the credit provider to serve a notice in terms of section 86(10). There may however be circumstances where the debt counsellor and the consumer may intentionally delay the hearing in terms of section 87 to the prejudice of the credit provider whilst the consumer might cease all payments under the credit agreement. In such circumstances the credit provider might be justified in terminating the debt review process. Where, however, the credit provider attempts to enforce the credit agreement pursuant to such notice the consumer is entitled urgently to approach the magistrate hearing the matter to exercise his judicial oversight. Where justice requires the process will be ordered to resume."

12]The manner in which the defendant has set out his defence and, in particular, the history or progress of the matter in the magistrate's court leaves me unconvinced that he has a *bona fide* defence. It is not the defendant's case before me that, contrary to the allegations in the notices, he did make payments in terms of the debt review process. Consequently I can only conclude that he has defaulted in terms of the debt review arrangement that was, according to the debt counsellor, approved. It follows therefore that the requisite circumstances set out in section 88(3) were fulfilled and the plaintiff was entitled to proceed. Section 88(3) of the Act provides that:

> "(3) *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."

13] Further as I have stated the defendant merely states that the matter was enrolled (for hearing in the magistrate's court) on a date prior to the expiry of a period of 60 days after the inception of the debt review process. Although the date of set down was 17 March 2010 and the answering affidavit is dated 5 August 2010 there is no explanation in the defendant's affidavit as to what happened on 17 March 2010 or thereafter. His bald allegation that *"the matter is before a debt counsellor"* does not, in my view, set out a defence good in law. I am not in a position to conclude on the bare allegations before me, that at a trial a defence would be established to the plaintiff's claim or some portion thereof.

14]It might be that on 17 March 2010 the recommendation by the debt counsellor was rejected by the magistrate's court or some other order was granted as provided for under section 87(1)(b) of the Act; or the matter was, for some reasons postponed and still remains unheard or was never heard and the application has since lapsed. Whatever the position it was incumbent upon the defendant to place before me such facts form which I would be able to determine that the matter is indeed still pending in the magistrate's court and is being prosecuted with due efficacy.

15]Consequently the following order shall issue:

(a) Payment of the sum of R778,053.54

(b) Payment of interest on the said amount of R778,053.54 at the variable mortgage bond rate, currently 8.20% per annum, charged by the plaintiff from time to time, from 2nd June 2010 to date of payment.

(c) An order declaring executable the immovable property specially hypothecated being:

Erf 1105 Despatch	In the Nelson Mandela Metropolitan Municipality, Division of Uitenhage, Province of the Eastern Cape
In Extent :	854 (Eighty Hundred and Fifty Four) Square Metres

Held by Deed of Transfer No. T.93532/2004

(d) Costs of suit to be taxed, as between Attorney and client.

N. DAMBUZA
JUDGE OF THE HIGH COURT

<u>Appearances</u>:

For the plaintiff: Adv G.J. Gajjar instructed by Pagdens Attorneys of Port Elizabeth

For the defendants: Mr A. Curtain instructed by J R Bester & Associates Attorneys of Port Elizabeth