IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH **CASE NO. 540/2012**

Date heard: 22 May 2012

Date Delivered: 24 May 2012

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA APPLICANT

AND

SUNIL RANCHOD DAYA N.O (in his capacity as Trustee for the Time being of Sunrise Nishtash Family Trust, IT 147/1998) First resp.

RASEELA DAYA N.O. (In her capacity as Trustee for the Time being of Sunrise Nishtash Family Trust, IT 147/1998) Second resp.

SUNIL RACHOD DAYA Third respondent

RASEELA DAYA Fourth respondent

JUDGMENT ON APPLICATION FOR SUMMARY JUDGMENT

DAMBUZA, J

[1] The plaintiff seeks an order of summary judgment against the defendants for payment of R890 640,22 and interests on R632 000,00 of that amount at 8,9% per annum, plus interest on R158 000,00 of the amount claimed at 10.45% per annum. An order declaring the defendants' property executable is also sought, together with an order for payment of costs on an attorney and client scale.

[2] The plaintiff's claim is founded on credit agreements concluded by the parties in Port Elizabeth on 4 April 2008. In terms of a loan agreement concluded on that day the plaintiff lent and advanced to the Sunrise Nishtash Family Trust (the Trust) an amount of R853 200,00 which was to be repaid in monthly instalments of R10 275,37. As security for the loan a mortgage bond was registered in favour of the plaintiff in the amount of R853 200,00, over an immovable property described as the Remainder of Erf 7 Westering, Port Elizabeth. Further, the third and fourth respondents, (who are the Trustees of the defendant Trust) executed a written Deed of Suretyship in favour of the plaintiff, binding themselves as sureties and co-principal debtors for all repayments under the loan agreement.

[3] In the summons the plaintiff alleges that "*the Trust failed to make payments to the plaintiff in terms of the foresaid order* (a debt - restricting order)" and that as at 1 February 2012, when the proceedings were launched, the Trust was in arrears with payments under the credit agreement to the amount of R30 392,02.

[4] In the answering affidavit, the third defendant states that he, being the person primarily responsible for making repayment instalments of the loan, became over-

indebted. It is not in dispute that the third and fourth respondents obtained a debt re-arrangement order on 22 October 2010 in the Port Elizabeth Magistrates Court. The monthly instalment payable by the defendants in terms of the debt review order was R19 733,00.

[5] According to the third defendant he then "*made regular and timeous payments"* to DC Partner, a payment Distribution Agent. However, several notices of default were received by the defendants' debt counsellor, from Nedbank, another creditor of the defendants. As a result thereof and for fear that the creditors might move for cancellation of the debt re-arrangement order, on 2 November 2011, an application was launched in terms of section 36 of the Magistrates Court Act 32 of 1944, for variation of the debt re-arrangement order. The intention was to have the amount payable thereunder, increased. On 11 November 2011 the plaintiff caused to be served upon the third defendant a *"Notice of Termination"* in terms of section 88(3) of the National Credit Act 34 of 2005 (the Act).[1] On 8 February 2012 the debt-rearrangement order was varied by increasing the instalment payable under thereunder to R20 833,00. On 16 February 2012 the defendants received the summons in this case.

[6] It is trite that the remedy of summary judgment is an extraordinary relief and a very stringent one in that it closes the doors of the court to the defendant and permits a judgment to be granted without a trial[2]. But a defendant who seeks to avoid

1 Although a credit provider is entitled to enforce, by litigation or other judicial process, any right or security under a credit agreement without further notice once there is a default set out in S 88 (3) – see FirstRand Bank v Fillis 2010 (6) SA 565.
2 See Erasmus; Superior Cort Practice; at B-1.

summary judgment against him or her, must satisfy the court that he or she has a *bona fide* defence to the plaintiff's action. The defence must be good in law.

[7] By now it has become firmly established in our law that the proper interpretation of section 88(3) of the National Credit Act is that once the credit review process has commenced in respect of a particular credit agreement, a credit provider can only enforce that agreement if the consumer is in default under the credit agreement **AND** when either, an event contemplated under section 88(3)(1)(a) has occurred, or when the consumer defaults on any obligation in terms of a re-arrangement agreement between the consumer and the credit providers or a debt re-arrangement order.[3] As I have stated, in this case the plaintiff relies on the latter.

[8] In their answering affidavit the defendants refer to a schedule of payments extracted from the ledger of the Payment Distribution Agent, which, according to them shows that from April 2010, prior to the debt re-arrangement order being granted, they have made regular monthly payments to the Payment Distribution Agent. The schedule, records that during the 16 months starting from November 2010 (the month immediately following the debt re-arrangement order) until 22 February 2012, when the summons was issued, 15 instalments of R20 033,00 per

3 Firstrand Bank v Fillis and another 2010 (6) SA 565 (ECP); S 88 (13) (1) (a) of the Act provides that: "*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
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."

month were made by the defendant(s) to the Payment Distribution Agent (**PDA**). A further instalment was paid on 22 February 2012, subsequent to service of summons on the defendants.

[9] Mr Smith who appeared on behalf of the plaintiff submitted that even if I were to accept that monthly payments were made to the **PDA** in the amount stipulated in the order, the defendants remain in breach of the debt re-arrangement order as payments were made later than the date specified in the order. Indeed that much is apparent from the schedule. The order provides that payments are to be made on the 5th day of the month. However, I am not satisfied that on that, basis alone, an order of summary judgement is justifiable in this case.

[10] Firstly it is significant in my view that the plaintiff only alleges in the summons that *"the Trust failed to make payments to the plaintiff in terms of the aforesaid order"* it is common cause that the **PDA**'s are "*responsible for collecting and distributing renegotiated payments for and on behalf of customers to credit providers"* [4] Further the plaintiff does not set out in the summons the respects in which the defendants *"failed to make payment"* in terms of the order.

[11] A submission is made in the plaintiff's supplementary Heads of Argument that the defendants' breach resulted in the plaintiff receiving a lower instalment than that stipulated in the debt re- arrangement order. As proof thereof, a schedule of amounts received, drawn on behalf of the plaintiff, shows that from October 2010 the plaintiff has consistently received less than the amount of R4500 stipulated in the order as

4 Guide to the National Credit Act; at 5.2.5)

the instalment due to the plaintiff. According to this schedule for most months during this period the plaintiff received R4 471,50; in some months the plaintiff received instalments of about Three Thousand Rand. However it does not appear to be in dispute that during this whole period defendants paid to the Payment Distribution Agent slightly more that they were ordered to (i.e R20 033,00 instead of R19 733,00). There is no evidence from the Payment Distribution Agent as to the reason for remittal to the plaintiff, of less that the instalments stipulated in the order. The variation in the instalments paid by the Payment Distribution Agent to the plaintiff is unexplained. The submissions by Mr Smith that Payment Distribution Agents are agents of customers as envisaged in common law would, in my view, be properly determined at trial.

[11] That being the case even the second leg of the application (i.e late payment) may not, in my view be as conclusive of the issues at the plaintiff makes it to be; because the amount of arrears referred to in the summons may not necessarily be attributable to the late payment by the defendants.

[12] It appears from the papers that for the 12 months preceding the application by the defendants to have the debt re-arrangement order varied, the plaintiff accepted the payments received from the Distribution Agent without so much as a complaint. The move to cancel the debt re-arrangement order was sparked, it would seem, by service on the plaintiff, of the application for variation for debt re-arrangement. I am of the view the question of whether the plaintiff is entitled to enforce the credit agreement can only be properly be determined at a trial.

In the circumstances the following order shall issue:

1) The summary judgment is refused and leave is granted to the defendants to defend the action.

2) The cost of this application shall be cost in the main action.

N. DAMBUZA

JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Adv. Smith Instructed by Counsel Chambers, Port Elizabeth.

For the the respondents: Adv. Govender Instructed by 16 Brooklands Avenue, Weybridge Park, Port Elizabeth