

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

CASE NO: 1524/12

DATE HEARD: 19 JUNE 2012

DELIVERED: 10 JULY 2012

In the matter between:

NEDBANK LIMITED

PLAINTIFF

and

PHUMZILE NGQELENI

FIRST DEFENDANT

ID:

NOMPUMELELO TRYPHINA NGQELENI

SECOND DEFENDANT

ID:

JUDGMENT

MAGEZA AJ:

[1] This is an application for summary judgment against the defendants who are married to one another in community of property. Plaintiff claims the sum of R71 730.89 with interest at 9% per annum as well as an order declaring first and second defendants' jointly owned Kwa-Dwesi property

executable. Costs are also claimed on a scale as between attorney and client.

[2] The amount claimed arises from a credit agreement as defined in the National Credit Act 34 of 2005, hereinafter referred to as "the Act". The debt is furthermore secured through a mortgage bond registered over the immovable property situate at Kwa-Dwesi, Port Elizabeth.

[3] The particulars of claim set out that the loan agreement for the original sum of R110 000.00 was entered into on 28 November 1997. It is common cause that in 2010, the defendants commenced to experience financial difficulties as a result of which they took the decision to apply for debt review in terms of the Act and a debt re-arrangement was ordered. The details thereof appear hereunder.

[4] Plaintiff expands in its particulars by averring that,

"...defendants have defaulted on their obligations in terms of:-

7.1 the re-arrangement agreement granted by the Magistrate's Court inasmuch as they have failed to maintain the payments to the Plaintiff as stipulated in the re-arrangement agreement;
alternatively

7.2 the restructuring order granted by the Magistrate's Court inasmuch as they have failed to maintain the payments to the Plaintiff as stipulated in the restructuring order granted by the Magistrate's Court."

[5] First defendant (on behalf of both defendants) in turn is of the view that defendants have a valid defence to plaintiff's claim in that plaintiff is

not entitled to the relief sought. First defendant elaborates in support of this contention that on 18 May 2010, the defendants jointly approached accredited debt counsellors - DRC Debt Counsellors - to assist them to lodge an application for debt review in terms of the relevant provisions of the National Credit Act 34 of 2005. Five credit agreements in respect of which the defendants are indebted (inclusive of one in favour of plaintiff) are cited therein.

[6] Pursuant to this application, an order was granted by the Magistrate – Port Elizabeth on 27 October 2010, the terms of which were that the defendants collectively pay the sum of R3 747.23 on the 7th day of each month commencing 7 December 2010, to a Payment Distribution Agency for onward distribution to the cited credit providers. The aforesaid amount was regularly paid by the defendants without fail for a period of a year.

[7] On or about December 2011, the defendants, with their difficulties not abating, again approached DRC debt counsellors to assist in bringing a variation application. All the credit providers (including plaintiff) were aware of this application and were served with the necessary papers. On 7 March 2012 a new court order for the payment of the sum of R3668.02 to the Payment Distribution Agency was granted by the Magistrate – Port Elizabeth. A copy of this order is headed -‘Varied Court Order’- and is attached as annexure ‘E’ and paragraph 2 thereof provides that:

“... the first two payments due and payable by the consumer after the date on which the order has been granted to the PDA will be used for the payment of the Debt Counsellor’s fees as well as the attorneys legal costs. Thereafter all the remaining payments will be made to the Respondents as per the distribution schedule attach to the court order.”

[8] The distribution schedule incorporated by reference in the order sets out the gross amount to be paid by defendants to the Payment Distribution Agent as the sum of R3 668.02, of which the sum of R1282.12 is to be apportioned to defendants' indebtedness to plaintiff. Defendants assert that they have at all material times complied with this Court order and have regularly made the payment of R3 668.02 in accordance with the 'varied court order'. Accordingly, the alleged default on which plaintiff relies upon occurred in the month of April and occurred as a result of the costs deduction provision in the Court order and was implemented by the Payment Distribution Agency as outlined above. That being the position, plaintiff is barred in terms of section 88(3) of the National Credit Act from instituting action against the defendants.

[9] To the extent relevant, section 88(3) reads:

"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 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 to (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 Tribunal."

[10] As was stated in Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) para 31, 'summary judgement procedure was not intended to "shut (a defendant) out from defending" unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time by causing great loss to plaintiffs who were endeavouring to enforce their rights'. Whilst over-indebtedness is not a defence on the merits, because of its extraordinary and stringent nature a court has an over-riding discretion to refuse an application for summary judgment. – see also Collett v Firststrand Bank Ltd and Another 2011 (4) SA 508 (SCA); C van Heerden in JW Scholtz, J M Otto, E van Zyl, CM van Heerden and N Campbell – Guide to the National Credit Act (2008) para 12.16.

[11] The Act provides protection to consumers who find themselves in circumstances where unmanageable indebtedness to credit providers becomes an unwelcome but settled feature of their life. Sections 85 - 88 set out the procedure prescribed for a debt counsellor once in receipt of an application for debt review as well as the debt re-arrangement and powers of a Magistrate court to which a matter has been referred, and the effect of a re-arrangement order.

The terms of the availed collective protections must however be respected by the debtor, the object of Chapter 4 of the Act being:

"... to provide protection and assistance to an over-indebted consumer in an environment that encourages participation in good faith by both parties..." – see Wesbank a division of Firststrand Bank Ltd v Papier (with the NCR as Amicus Curiae) 2011 (2) SA 395 (WCC).

[12] Once a credit review is commenced in respect of a particular credit agreement and a debtor obtains a debt re-arrangement order from a competent court, a credit provider can only enforce that agreement if the consumer is in default under such 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 by way of order of court (or Tribunal).– See Firststrand Bank Ltd v Fillis 2010 (6) SA 565 (ECD).

[13] I have set out that plaintiff's application for summary judgment is founded on the contention that defendants have defaulted on their obligations in terms of the re-arrangement agreement granted by the Magistrate's Court inasmuch as they have failed to maintain the payments to the Plaintiff as stipulated in the re-arrangement order and, in the alternative, that defendants have failed to comply with the restructuring order granted by the Magistrate's Court inasmuch as they have failed to maintain the payments to the Plaintiff as stipulated in the restructuring order granted by the Magistrate's Court.

[14] It is common cause that the initial re-arrangement order made by the Magistrate - Port Elizabeth on the 27 October 2010 enjoined the defendants to pay a sum of R3 747.53 per month commencing 7 December 2010 to the Payment Distribution Agent. Plaintiff's debt being one of five, the admitted *net* proceeds from the payment distributing agents amounted from December 2010 to a sum of R1 310.62. Plaintiff was quite content receiving this amount without any discomfort until the variation order of 7 March 2012.

[15] Once the defendants again approached DRC debt counsellor's to

assist in bringing a variation application to this original order and there being a new court order commencing 7 March 2012 for the payment of the sum of R3668.02, the *net* amount due changed and plaintiff (as one of five creditors) received the sum of R1 282.12 (less the legal costs portion for the first two months) as its allocated monthly payment. This reduction was occasioned by the slightly reduced figure as well as the varied order that now provided that-

“... the first two payments due and payable by the consumer after the date on which the order has been granted to the PDA will be used for the payment of the Debt Counsellor’s fees as well as the attorneys legal cost”.

[16] The payments have been made to plaintiff by appointed Payment Distribution Agents. These agents are an integral part of the debt review process and are accredited after rigorous scrutiny by the National Credit Regulator to assist debt counsellors who serve a statutory function. The scrutiny placed on these agents includes probity checks, infrastructure evaluation to perform the function of payment distribution and insurance cover held to protect indebted consumers. The entities are vital to controlling monetary payments from indebted consumers for onward transmission to credit providers. They effect these payments in accordance with court re-arrangement orders. To the extent that in any given case the distributions made by such an entity accord with an order of court no default on the part of a consumer can be imputed.

[17] All that the defendant has done has been to comply with a lawful order of court by dutifully paying the sum of R3668.12 and any temporary effect of the order on plaintiff’s allocated portion arises therefore by operation of a lawful order and is not due to a breach by defendant. To date the defendants as debtors have since the first debt re-arrangement order proved to be model adherents and have made commendable use of

the opportunities and relief provided by sections 85 to 88 of the Act. The objects of the Act are stated in section 3 and are directed at providing protection for the consumer whilst addressing the imbalances that exist between consumers and credit providers. The Act seeks -

“to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient and accessible credit market and industry, and to protect consumers...”

The credit providers are also considered by the Act as the ultimate desired outcome -

“...places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.”

[18] Despite plaintiff becoming restive, this court can find no reason to come to the conclusion that defendants are in breach of the variation order of 7 March 2012.

[19] In the result:

19.1 The summary judgment application is refused and leave to defend is granted to the defendants to defend the action.

19.2 Costs of this application are to be costs in the main action.

MAGEZA AJ

FOR PLAINTIFF:

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