

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

CASE NO: 1201/2013
Date heard: 27 August 2013
Date delivered: 3 September 2013
NOT REPORTABLE

In the matter between:

ABSA BANK LIMITED

Applicant / Plaintiff

and

PATRICK DOUGLAS WILKIE

Defendant

JUDGMENT

GOOSEN, J.

[1] The plaintiff seeks summary judgment against the defendant in respect of two claims in the amount of R1 335 134.61 and R18 540.31 together with interest on each of the amounts as well as an order declaring erf 182 Framesby, Port Elizabeth specially executable. The debts arise from credit agreements as defined by the National Credit Act 34 of 2005 secured by mortgage bonds registered over the immovable property.

[2] The plaintiff previously sought judgment by default, in support of which plaintiff filed an affidavit, as required by the Rules, dealing with various aspects including that relating to the execution order sought by the

plaintiff. However, prior to the application being heard the defendant filed a notice of intention to defend the action. The application for default judgment was accordingly abandoned and instead the plaintiff filed an application for summary judgment based upon the customary affidavit in which a duly authorised person swears positively to the facts pleaded in the summons, verifies the cause of action and alleges that the defendant has no *bona fide* defence to the claims. The defendant opposed the application for summary judgment.

[3] I may mention that neither the fact of the defendant's indebtedness nor the extent of such indebtedness is in dispute in this matter. The defendant's opposition to summary judgment turns upon a very narrow issue.

[4] In its summons the plaintiff alleges that the defendant is in default of his obligations to effect monthly payments due in terms of the said credit agreements. The following allegations are then made:

10. Prior to commencing these proceedings, and after the Defendant has been in default of his obligations arising from the abovementioned agreement for a period exceeding twenty (20) business days, the Plaintiff complied with the provisions of Section 129 and 130 of the National Credit Act by delivering a notice drawing the Defendant's attention to the aforesaid provisions of the National Credit Act, by Sheriff. A copy of the said notice is annexed hereto, marked "F1", together with a copy of the Sheriff's return of personal service dated 24 April 2013, marked "F2".

11. The Plaintiff is accordingly entitled to proceed to enforce the mortgage loan and bond by virtue of the provisions of section 88(3) of the NCA.

12. As such the Defendant's debt with the Plaintiff is not under a debt restructuring order.

13. The Plaintiff has in the circumstances complied with the requirements of the NCA.

- [5] It is these allegations of fact which are verified by the affidavit filed in support of the application for summary judgment.
- [6] The defendant, in his affidavit opposing summary judgment, denies that the plaintiff has complied with the provisions of the NCA. He states that, although the plaintiff delivered a section 129 notice to him in April 2013, the plaintiff failed to comply with section 86(10) and has failed to establish the jurisdictional facts which entitle it to proceed in terms of section 88(3) of the NCA. That is so because the defendant applied for debt review and was placed under a debt restructuring order by the magistrate, Port Elizabeth on 27 July 2011, which order incorporated the debts due to the plaintiff.
- [7] In support of the granting of summary judgment plaintiff's counsel submitted that this court is entitled to and indeed must have regard to the content of the plaintiff's affidavit filed in support of the application for default judgment since this application for summary judgment was filed after the application, for purposes of considering the facts of the matter. No authority was cited for this proposition. I am not aware of any such authority. In my view, at the stage of summary judgment, no regard may be had to any affidavits filed on behalf of a plaintiff in any prior application for default judgment. A court considering an application for summary judgment must confine itself to consideration of the matter upon the basis of the affidavit, as contemplated by rule 32(2), filed in support of the application for summary judgment.

[8] It was further argued that notwithstanding the defendant's reliance upon the fact that he was, at the time of the institution of proceedings, under a debt restructuring order, the effect of the notice delivered to him was to draw his attention to the fact that he was in default and accordingly that the plaintiff was entitled to proceed as it did. It was submitted that apart from the defendant's reliance upon the alleged failure to comply with section 88(3), the defendant does not allege any facts upon which any defence can be based. Accordingly, the defendant has failed to establish a *bona fide* defence to the plaintiff's claims and summary judgment should be entered in favour of the plaintiff.

[9] The section 129 notice annexed to the plaintiff's particulars of claim is in standard form. It does not address the fact that the defendant's debts have been restructured, nor that he is in default of the debt restructuring order. A reading of the notice suggests that the drafter was not aware of the fact that the defendant had already successfully applied for debt review and been placed under a debt restructuring order. In my view therefore the notice in terms of section 129 dispatched to the defendant does not serve to establish compliance with section 88(3) of the NCA.

[10] It is indeed so that the defendant does not set out any defence other than that, in the light of the fact that the defendant was placed under a

debt restructuring order, the plaintiff has failed to set out facts which found a cause of action. In my view, given the particular circumstances of this matter, the defendant need not have done more. It must be accepted that the defendant was indeed placed under debt review and that his estate is subject to a debt restructuring order which incorporates a debt repayment schedule. The plaintiff makes no allegations regarding this fact; does not allege that the defendant has defaulted on the terms of the debt restructuring order and that it is therefore entitled in terms of section 88(3) to proceed to enforce the terms of the credit agreements upon which it relies (see *Firststrand Bank Limited v Fillis* 2010 96) SA 565 (ECP) at par. 16).

[11] In order to establish its cause of action the plaintiff must allege the jurisdictional facts necessary to establish its entitlement to proceed to enforce the terms of the credit agreements which are subject to the provisions of the NCA. The defendant's opposing affidavit establishes, *prima facie*, that the plaintiff has failed to do so.

[12] In my view it matters not that the defendant has not put up any other facts to establish that it has, apart from the point raised, any other defence to the plaintiff's claim. Although summary judgment may no longer be considered to be "extraordinary" (see *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11G – 12D), it is nevertheless a remedy which is only to be given

where the plaintiff can establish his case clearly and where the defendant fails to set up a *bona fide* defence.

[13] In this instance the plaintiff's entitlement to prosecute its claim against the defendant is not clearly established. On the contrary, the plaintiff has failed to make any averments regarding its entitlement to proceed in terms of section 88(3) of the NCA. In my view that is the end of the matter.

[14] In the result I make the following order:

- a) The application for summary judgment is refused.
- b) The defendant is granted leave to defend the action.
- c) The costs of the application for summary judgment are to be costs in main action.

G. GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Plaintiff / Applicant

Mr. P. Marais

Instructed by Goldberg & De Villiers Incorporated

For the Defendant

Mr. B. Dyke

Instructed by Cecil Beyleveld Attorneys