

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

Case No.: 165/2014

In the matter between:

**CHANGING TIDES 17 (PROPRIETARY)
LIMITED N.O.**

Applicant

And

ROUCHE WAGG (formerly Weitsz)

First Respondent

RUDOLF VISAGIE WAGG

Second Respondent

JUDGMENT

REVELAS J:

[1] In the present application the applicant seeks the following relief against the two respondents, jointly and severally, the one paying the other to be absolved:

- 1.1 Payment of the amount of R826 875.50;
- 1.2 Interest on the aforesaid amount in rate of 7,3% per annum, compounded monthly in arrears, from 5 October 2013 to date of payment;
- 1.3 An order declaring the immovable property over which a bond has been registered, executable;
- 1.4 An order that the Registrar be authorized to issue a warrant of attachment in respect of said property;
- 1.5 Costs of suit on the attorney and client scale.

[2] The judgment sought against the respondents by the applicant, is pursuant to a home loan agreement. The applicant is a registered credit provider. According to the applicant the respondents failed to adhere to the terms of the loan agreement and therefore the applicant intends to foreclose on the property secured by a bond in favour of the applicant.

[3] The applicant argues that the respondents failed to adhere to the terms of a debt review order which entitled the applicant to enforce

the terms of the loan agreement, without having to apply for a variation or a setting aside of the order of the magistrate who made the rearrangement or debt review order.

[4] The debt review referred to was first entered into on 22 September 2010. The Magistrates' Court in Port Elizabeth declared the respondents to be over indebted in terms of the National Credit Act 34 of 2005 ("the Act") and ordered the respondents' debt to be rearranged to the effect that the respondents pay R4 139.39 per month to a Public Distribution Agency ("PDA") as the "gross available amount". The PDA in turn, was responsible to make direct payments to the applicant. The applicant was to be paid R2 000.00 per month with an interest rate fixed at 15,5% over a period of 554 months, the current balance then was R760 624.27. In terms of paragraph 5 of the magistrate's order all "parties are responsible for their own costs relative to this application and order, unless otherwise ordered."

[5] Two years later, on 26 September 2012 the aforesaid order was varied. In terms of the varied order, the respondents were once again declared to be over indebted. The monthly "gross available amount" was set at R5 581.08 per month in the order, and payable to the PDA. The proposed payment to the applicant was to be R4 834.60 per month with an interest rate of 8,7% over a proposed period of 269

months. At that point the respondent's current balance was R825 315.50. The respondents were ordered to pay the costs of the application for a varied order. Paragraph 6 of the magistrate's order reads as follows:

"The distribution payments by The Distribution Agent only occur once the Applicant's debt counseling fee, as shall be determined and calculated in accordance with the guidelines laid down by the National Credit Regulator and the legal costs related and incidental to the consumers application in terms of section 8(1) of the National Credit Act 34 of 2005, as well as the legal fees has been paid by the PDA from the gross available amount payable in terms of this order."

[6] When the respondents defaulted on the stipulated payments in terms of the magistrates' order of 26 September 2012, wherein the respondents' obligations were rearranged the applicant gave notice of the respondents in terms of Rule 129(i) of the Act on 11 January 2013. On 22 January 2014 the applicant, in motion court proceedings sought the relief as set out in its notice of motion. Subsequently, the respondents' debt arrangements were once again amended.

[7] On 12 June 2015 the Magistrates' order was varied once again. The gross available amount was set at R6 871.56 and the same order was made as in paragraph 6 of the order cited above. The monthly

payment payable by the PDA to the applicant was set at R5 636.91 per month. The interest rate thereon was fixed at 7,9% over a proposed period of 190 months. The current balance of the respondents' debt was then R803 297.19. On 12 June 2015 the order was varied and it was agreed between the parties that the full amount outstanding from time to time shall bear interest at the standard variable rate calculated on the daily outstanding balance as from the advance date. The standard variable interest rate shall always be comprised of the base rate plus the margin. The margin for the "*super lo*" rate was set at 1,5%".

[8] The respondents dispute being in breach of the debt review order on the basis that any short payment by them was caused by payment of the debt counsellor's fee as well as legal costs that was catered for in the debt arrangement order.

[9] In its replying affidavit filed in May 2017 (the answering affidavit of the respondents was filed in March 2014, three years earlier) the applicant challenged the debt review order of September 2010, almost seven years earlier.

[10] The applicant contended that in the 2010 order the respondent was ordered to pay the amount of R2 000.00 to the applicant.

Whereas the contractual instalment was R5 589.09. Interest was ordered at the rate of 5,5% per annum whereas the contract between the parties provided for a rate of 8,7%. The magistrate also extended the period over which the loan was to be repaid. By making the aforesaid order the applicant contends that the magistrate acted *ultra vires*.

[11] The applicant raised this challenge to the magistrate's order almost seven years later, because of subsequent judgments¹ wherein it was held that magistrates making orders for debt arrangements in terms of the Act, lacked jurisdiction to vary the material terms of a credit agreement.

[12] The applicant also challenged the validity of the two subsequent orders made on 22 September 2012 and July 2015. In terms of the order of 22 September 2012, the period for repayment was reduced from the initial 554 months to 269 months and the amounts payable to the applicant was increased to R4 834.60. The applicant complains that the agreement did not provide for an escalation of repayments to the applicant. However, the two last orders do tend to address the shortcomings of the previous order and the respondent's belated complaint.

¹ Nedbank v Norris and Others 2016(3) SA (ECP) and Nedbank v Jones 2017(2) SA 473 (WCC)

[13] The respondent further argues that the order of 26 September 2012 was not granted in terms of section 86(1) but was the order granted on 22 September 2010 and therefore the respondents are therefore only allowed to deduct the costs for the 2010 application from the amounts that should be distributed towards all the creditors, including the applicant.

[14] The applicant alleged that the respondents breached the agreements by failing to make payments towards the applicant for the months November and December 2012 and therefore breached the restricting order which is in any event not enforceable.

[15] According to the applicant, the respondents also failed to make payment under the debt restricting order for July 2015. When queried on the aspect of the fixed interest rate, the debt counsellor for the respondents responded to the applicant on 31 January 2017 that he reviewed the account of the respondents annually and that the programme utilized by the debt counsellor does not cater for variable interest rates.

[16] The applicant highlights the anomaly created by the debt counsellor's application of the debt review provisions of the Act and the precarious situation the parties find themselves in. The debt counsellor apparently prepares the application in terms of section

86(1) by utilizing a fixed interest rate. Should the debt counsellor then conduct his annual review of the matter and exercise his own discretion as to whether the amount due to the applicant should be increased. If the debt counsellor sees it fit to do so he proceeds with a “a variation application” of the debt review order. The cost of such application is then born by the consumers i.e the respondents. This, the applicant contends, results in a situation where for every twelfth payment made by the respondents, only ten thereof is allocated to the applicant, the other two payment is utilized for the purpose of bring the “variation application”, as in the present instance the payments for November and December 2012.

[17] The applicant argue that the discretion which the respondents debt counsellor has vested in him, is *ultra vires* the Act. It results in a situation whereby the time periods provided for in the court order in which the debt was to be settled being undeterminable due to the constant need for a “variation application”.

[18] The applicant further argued that the current method of utilizing the debt review provisions of the Act by the respondents, has the result that the debt due to the applicant will only be settled in terms of the debt restructuring order in the event that the applicant agrees to have the interest rate fixed and provided that the insurance premiums

remain fixed, should the debt counsellor of the respondent not annually adjust the interest rate. This is an undesirable state of affairs but that does not entitle the applicant to the relief sought.

[19] In my view, the applicants complaints in relation to the validity of the orders have little merit since those orders were granted by consent, and the respondent was ordered to pay increased instalments. In addition it was not clear at the time the application was brought, to what extent the respondents were in default. The respondents disputed the accuracy of the applicant's calculations. The applicant did not deal sufficiently with this aspect in the replying affidavit which was deposed to by an attorney and not an official of the applicant who would have access to, and personal knowledge of the applicant's records pertaining to the indebtedness of the respondents.

[20] The respondents relied on the judgment in *Van Zyl v Government of the Republic of South Africa* 2008(3) SA 294 SCA (at 306 D-E) it was held that it was not open to an applicant to merely annex documentation to affidavits without identifying portions thereof on which reliance is placed. Another case relied on by the respondents was *Minister of Land Affairs and Agriculture v Wevell Trust* 2008(2) SA 184 SCA at 200 D. It was held in that case that litigants ought not to

be expected to trawl through lengthy annexures to the opponents affidavits and to speculate on the relevance of facts therein contained.

[21] The applicants did not attach all that many annexures to its papers and such as there were, could not be described as irrelevant.

[22] However, the applicant's papers do fall short in demonstrating to what extent the respondents are in arrears, or in breach of the debt review orders. They also do not show why, in the light of the respondent's denial that they are in breach of any debt arrangement, the applicant alleges they are in default. That can only be illustrated with figures. Mere allegations are inadequate. The same can be said with regard to the applicant's complaint about the manner in which the debt collector calculated month interest. The debt collector has not been cited as a party either. Given the lengthy period between the debt restructuring complained of and present position, there are insufficient facts before me to make a proper finding.

[23] In the circumstances the applicant is not entitled to the relief it seeks on these papers.

[24] The following order is made:

1. The application is dismissed with costs.

E REVELAS

Judge of the High Court

Appearances:

For the Applicant: Adv. Gagiano instructed by Jacques De Preez
Attorneys, Port Elizabeth

For the Respondents: Adv. Kroon instructed by Pierre Kitching
Attorneys, Port Elizabeth

Date heard: 21 September 2017

Date delivered: 22 February 2018