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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO  
 (2) OF INTEREST TO THE JUDGES: YES/NO  
 (3) REVISED.

CASE NO: HCA 14/2017

Signature .....

Date.....27/10/2017....

In the matter between:

**THE LAND AND AGRICULTURAL DEVELOPMENT  
BANK OF SA**

**APPELLANT**

and

**MARIANA WESSELS**

**RESPONDENT**

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## JUDGMENT

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### **MAKGOBA JP**

- [1] This is an appeal against a judgment of the Magistrate's Court for the district of Waterberg held at Modimolle on 12 December 2016 ordering that one Mr Andries Petrus Burgers ("the Credit Consumer") is over-indebted and re-arranging his debts in terms of Section 87(1)(b)(ii) of the National Credit Act 34 of 2005 ("the NCA").
- [2] The Respondent, a debt Counsellor, brought in the Court *a quo*, an application for debt review in terms of Section 86(7) of the NCA regarding the debts of the Credit Consumer, the First Respondent in the Court *a quo*.
- [3] The parties were cited as follows in the Court *a quo*:
- |                        |                   |
|------------------------|-------------------|
| Mariana Wessels        | Applicant         |
| and                    |                   |
| Andries Petrus Burgers | First Respondent  |
| ABSA Bank              | Second Respondent |
| Fisrt National Bank    | Third Respondent  |
| Wesbank                | Fourth Respondent |

Standard Bank Ltd

Fifth Respondent

The Land and Agricultural Development

Sixth Respondent

Bank of SA

[4] The Second to the Sixth Respondent are all creditors of the First Respondent (the Credit Consumer herein). For the sake of clarity it needs to be mentioned that the Credit Consumer initially entered into the relevant loan or credit agreements with Unigro, and the latter eventually ceded its rights, title and interest therein to the Land and Agricultural Development Bank of SA, the Appellant herein.

[5] The Credit Consumer has the following secured debts with the Appellant to which the Appellant holds the following security:

- 5.1. A first mortgage bond number B55895/2012 in an amount of R 3 000 000.00 (three million rand) plus R 600 000.00 (six hundred thousand rand) over farm K[...], the property of the Credit Consumer;
- 5.2. A second mortgage bond number B59751/2014 in an amount of R 3 000 000.00 (three million rand) plus a further R 600 000.00 (six hundred thousand rand) over farm K[...], the property of the Credit Consumer;
- 5.3. A third bond number B0655/2013 in an amount of R 800 000.00 (eight hundred thousand rand) plus a further amount of

R 160 000.00 (one hundred and sixty thousand rand) over Erf [...], the property of the Credit Consumer;

5.4. A special and general notarial bond number BN33041/2013 in the amount of R 1 000 000.00 (one million rand) plus a further amount of R 200 000.00 (two hundred thousand rand) registered over all movable assets of the credit consumer.

[6] In terms of the term loan agreement (clause 35) the Credit Consumer ceded and made over to the Appellant his rights, title and interest in any agricultural products produced or to be produced, as well as his rights, title and interest in respect of the proceeds of all agricultural products produced by him or to be produced as well as his right , title and interest on all payments in respect of loan agreements of agricultural products which might be owing to him or become owing to him in respect of products produced and delivered or to be produced in future.

[7] The Appellant was the only party that opposed the application in the Court *a quo*. The Credit Consumer filed a supporting affidavit to the Respondent's (Debt Counsellor's) founding affidavit. The rest of the four Respondents cited in the Court *a quo* did not oppose the application or give an indication that they abide the decision of the Court *a quo*.

[8] The Court *a quo* granted the following order which is the subject of the present appeal:

1. The First Respondent is found to be over-indebted;
2. The proposal in regard to monthly payments by the Debt Counsellor is hereby made an order of Court in terms of section 86(7)(c)(ii) of the Act; and
3. The seasonal and debt repayment is made an order of Court and to be revised after six months from date of this judgment or be re-evaluated after 2017 harvesting time whichever comes first and practical under the circumstances, being that the financial circumstances of the First Respondent has changed.

[9] In its Notice of Appeal filed in the Court *a quo* the Appellant put the grounds of appeal rather widely to an extent of referring to decided cases and its heads of argument (which were filed at the hearing of the application in the Court *a quo*). Such widely stated grounds of appeal come down to essentially the following:

1. The Court *a quo* erred in finding that the “questions” to be determined are, inter alia, whether the terms of a credit

agreement can exclude the application of the National Credit Act 34 of 2005 and / or whether a cession agreement, either absolute or an out-and-out cession, can exclude the NCA;

2. The Respondent, in bringing the application, did not comply with Rule 55 of the Rules of the Magistrates' Court;
3. That the Respondent did not properly and correctly apply the relevant provisions of the NCA to a debt review application;
4. That the Court *a quo* incorrectly concluded that the assets of the Consumer secured in favour of the Appellant can be utilized in debt restructuring proposals to pay the debts of other creditors;
5. The Court *a quo* erred in finding that the Respondent was *bona fide* and acting in accordance with the law in not disclosing the First Respondent's (Consumer) financial information to the Sixth Respondent (Appellant);
6. Whether the application for debt review brought by the Respondent was viable, meritorious and economically rational taking into consideration the financial position of the Credit Consumer.

[10] In my view the main issue in the main application, in the Court *a quo*, was whether or not the Respondent was correct in her interpretation of the NCA by including the proceeds of the debtor's farming activities

under the circumstances where such proceeds / property are subject to a cession held by the Appellant.

The Court *a quo* found that the cession and the consequences thereof is security as provided for in the NCA and would consequently be suspended pending the finalization of the debt review.

[11] At the hearing of this appeal the Respondent raised the following points *in limine* and prayed that the appeal be struck from the roll or be dismissed:

11.1. That the Notice of Appeal does not comply with Rule 51(7) of the Magistrates Court Rules;

11.2. That the order of the Magistrate's Court (Court *a quo*) appealed against is not appealable;

11.3. That numerous interested parties have not been joined in the appeal.

[12] I proceed to deal with the points *in limine* raised by the Respondent before deciding the appeal on the merits.

### **NOTICE OF APPEAL**

[13] The Respondent contends that the notice of appeal consistently and relentlessly refers to authorities and documents, not part of the record or part of the appeal and that same is thus too vague.

Rule 51(7) of the Magistrates' Court Rules provides:

*"A notice of appeal or cross-appeal shall state –*

- (a) Whether the whole or part only of the judgment is appealed against, and if part only, then what part; and*
- (b) The grounds of appeal, specifying the findings of fact or rulings of law appealed against"*

[14] Whilst I agree with the Respondent that the grounds of appeal are widely stated, I have in paragraph [9] above been able to paraphrase the grounds of appeal to the extent that this Court is able to understand what part of the judgment is appealed against.

[15] I am of the view that in the Appellant's notice of appeal the grounds of appeal are specifically raised as well as the fact that the Court *a quo* erred in making certain findings. A notice of appeal must be fairly interpreted and it is not invalid because of bad formulation. See: **Civil Procedure in Magistrate Courts, Harms, Lexi Nexis, Service Issue 40, p B – 446.**

[16] The Appellant's notice of appeal, on careful consideration thereof, is not badly drafted and the factual and / or legal grounds relied upon are



clearly defined. The point *in limine* raised by the Respondent herein has no merit and is consequently rejected.

### **APPEALABILITY**

[17] The order granted by the Court *a quo* found the debtor to be over indebted and made the proposal an order of Court in terms of the provisions of Section 86(7)(c)(ii) of the NCA to be revised after six months or to be re-evaluated after the 2017 harvesting time whatever comes first. The Respondent contends that the order will clearly be revised, is provisional / temporary, and not appealable.

[18] There is no merit in the Respondent's contention. The Court *a quo* came to a decision in terms of Section 87(1)(b)(ii) of the NCA to re-arrange the Consumer's obligations as recommended by the Respondent (Debt Counsellor). This order as made by the Court *a quo* has the effect of a final judgment and may be appealed against. The Court *a quo* has determined the main dispute as to whether the Credit Consumer is over-indebted and that his debt payments have to be re-arranged.

[19] The fact of the matter is that the Court *a quo* has made a final determination regarding the Consumer's over-indebtedness and the re-

arrangement of its obligations in terms of Section 86(7)(c)(ii) of the NCA.

It was held in the case of **First Rand Bank Limited and Another v Michelle Barnard and Another**, case number A801/2014 High Court: Gauteng Division, Pretoria delivered on 6 August 2015 at **paragraph 17** that a re-arrangement order made under Section 87(1)(b)(ii) of the NCA is final relief.

The point *in limine* is accordingly dismissed

## **JOINDER**

[20] The Respondent contends that there are numerous interested parties who ought to have been joined in the appeal, alternatively ought to have been notified in the notice of appeal. In this regard the Respondent refers to the other creditors who were cited as second, third, fourth and fifth Respondents in the Court *a quo*.

[21] It is common cause that none of the other Respondents in the Court *a quo* showed any interest to oppose or to join issue with the application as brought by the Respondent (Debt Counsellor). The Appellant's Counsel submitted that due to the nature of the application, a debt review application, as brought by the Debt Counsellor (the Respondent herein) where only the Appellant decided to oppose the application and

the other Respondents showed no interest neither to join issue or to oppose, there is in law no duty on the Appellant to keep such Respondents abreast of further developments. I agree. This is so because the lodging of the appeal by the Appellant is a continuation of the *lis* between the Appellant and the Respondent in the Court *a quo*. It is not expected from the Appellant to give any notice to non-interested parties.

- [22] In **Motor Finance Corporation (Pty) Ltd v Joubert and Others 2013 JDR 1912 (GNP)** it was held that in circumstances such as in the present case it is not necessary to cite such Respondents in the appeal. Chetty AJ (as he then was) said the following:

*“[31] For these reasons the appeal must succeed. However, as the Appellant was one of the seven creditors whose debts were re-arranged, and the only creditor to have opposed the order sought by the Consumers in the Court a quo and the only creditor to have lodged an appeal against the decision of the learned Magistrate, any relief following from this appeal must relate only to the Appellant’s interests in the debt review application. We would be acting beyond the scope of this appeal if the relief we grant is to impact on the restructuring of debts involving amounts owing to the other creditors who are satisfied with the outcome in the Court a quo. Accordingly the order we grant below seeks to ensure that the interests sought to be protected by the Appellant are dealt with, as best as possible, to the exclusion of the debt re-arrangement scheme applicable to the remaining creditors”*

- [23] The Respondent’s point *in limine* regarding the non-joinder of the other creditors is accordingly dismissed.

## MERITS

[24] The issue in this appeal is whether the Court *a quo* was correct in concluding that the assets of the Credit Consumer secured in favour of the Appellant can be utilized in debt restructuring proposals to pay the debts of other creditors. The Appellant's case is that the Credit Consumer was hopelessly insolvent, that there was insufficient proceeds to be used towards restructuring of debt repayments mostly due to security as held by the Appellant, and that the proposals made by the Respondent were not economically viable.

[25] Furthermore it is the Appellant's contention that the Respondent did not act *bona fide* in bringing the application for debt review in the Court *a quo* and that in the process adopted a partisan attitude in bringing the application.

[26] The debt Counsellor should not adopt a partisan approach.

See: **First Rand Bank Limited v Michelle Barnard and Another**, **supra at par 44**. Good faith is furthermore a requirement that should be strictly adhered to by a debt Counsellor. The interpretation of the NCA calls for a careful balancing of the compelling interests sought to be

protected, and not for a consideration of only the interests of either the consumer or the credit provider – **Nedbank v The National Credit Regulator 2011 (3) SA 581 (SCA) at 585.**

[27] The NCA aims to provide for a consistent and harmonised system of debt restructuring, enforcement and judgment which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements. See: **First Rand Bank Ltd v Mvelase 2011 (1) SA 470 (KZP) AT 473.**

[28] It is common cause that the Credit Consumer has ceded his agricultural products to the Appellant as security for the debts owed by him to the Appellant. Irrespective of the aforesaid cession the Respondent and / or the Court *a quo* took into account the proceeds of the Credit Consumer's agricultural activities as projected income for purposes of debt re-arrangement. In my view the Court *a quo* erred in that regard. The cession provisions in the loan agreement cannot and should not be regarded as "security" as envisaged by Section 88 (3) of the NCA.

[29] It is trite law that in the case of a cession no right whatsoever remains in the cedent. It makes no difference whether the cession is an

out-and-out cession or a cession in *securitatem debiti*. In **Moola v Estate Moola 1957 (2) SA 463 (NPD) at 464 E** it was held that during the currency of a cession *securitatem debiti* nothing remains in the cedent except this somewhat nebulous reversionary right. That in all other respects, the effect of such a cession is as complete as if it had been out-and-out. See also **Thos. Barlow & Sons (Natal) Ltd v Dorman Long (Africa) Ltd and Another 1976 (3) SA 97 (D) AT 103 E**. In *casu*, the proceeds of all agricultural products having been ceded to the Appellant, cannot be construed as being an asset in the hands of the Credit Consumer as by ceding these rights the Credit Consumer has divested himself of these rights in ownership.

- [30] The real dispute in this matter is the rationality and viability of the re-structuring proposals and whether agricultural produce and / or proceeds ceded to the Appellant in terms of the notarial bonds can be utilised in the repayments to all the Creditors of the Consumer. The Court *a quo* was wrong in deciding this issue in favour of the Consumer. My finding in this appeal is that the Respondent and / or the Court *a quo* should not have regarded the ceded agricultural produce or proceeds as part of the Consumer's income for repayment to all other Creditors of the Consumer.

[31] I make a finding that the debt review proposals made by the Respondent (as Debt Counsellor) were not economically rational and / or viable and should therefore not have been accepted and made an order of the Court *a quo*. In the circumstances the appeal should succeed.

## **COSTS**

[32] The general rule is that costs follow the event and the award of costs is usually in the discretion of the Court. In this matter the Respondent in the Court *a quo* and on appeal acted in her capacity as a debt Counsellor and on behalf of or for the benefit of the Credit Consumer. Courts are slow to grant costs orders against persons acting in a statutory capacity on the basis that this could dissuade them from carrying out their statutory functions. In this matter I have not made any finding that the Respondent acted *mala fide* when bringing the debt review application before the Court *a quo*. She might have committed a *bona fide* error of law. She is accordingly absolved from payment of the legal costs.

[33] The following orders are granted:

1. The appeal is upheld.
2. The order of the Magistrate, in so far as it relates to the Appellant

as a credit provider and to the restructuring of the debt owed to it by the Credit Consumer is set aside.

3. The application to re-arrange the debt owed to the Appellant arising from the credit agreements and notarial bonds reached between the Credit Consumer and the Appellant, including the Appellant's right, title and interest in any agricultural products produced or to be produced, as well as the Appellant's right, title and interest in respect of the proceeds of all agricultural products produced by the Credit Consumer or to be produced as well as the Appellant's right, title and interest on all payments in respect of loan agreements of agricultural products which might be owing to the Credit Consumer or become owing to him in respect of products produced and delivered or to be delivered or to be produced in future, is refused.
4. There shall be no order as to costs.

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**E M MAKGOBA  
JUDGE PRESIDENT OF THE  
HIGH COURT, LIMPOPO  
DIVISION, POLOKWANE**



I agree,

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**M S SIKHWARI  
ACTING JUDGE OF THE HIGH  
COURT, LIMPOPO DIVISION,  
POLOKWANE**

**APPEARANCES**

**Heard on : 13 October 2017**

**Judgment Delivered : 27 October 2017**

**For Appellant : Adv. H S Goosen**

**Instructed by : Strydom & Bredekamp Attorneys  
c/o Pratt Luyt & De Lange Attorneys  
Polokwane**

**For Respondent : Adv. R Raubenheimer**

**Instructed by : Geyser & Ferreira Inc  
Modimolle**