IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 5055/2016

In the matter between:

INVESTEC BANK LTD Applicant

and

ELLIOT MOTLOUNG 1st Respondent

MING-HAN MOTLOUNG 2nd Respondent

CORAM: NICHOLSON, AJ

HEARD ON: 2 March 2017

JUDGMENT BY: NICHOLSON, AJ

DELIVERED ON: 9 March 2017

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[1] The applicant has applied for an order;

(a) Granting judgement against the first and second respondents jointly and severally, the one paying the other to be absolved, for payment of R 1,982 962.65. The second Respondent's liability being limited to R 1,905 000.00;

(b) Requiring Respondents to pay interest on aforesaid amount at the Investec Prime Rate less 1% per annum from 7 October 2016, calculated daily and compounded monthly until paid in full;

(c) That First and second Respondents' property situated at Erf [....] B. B., Buffalo City Metropolitan Municipality, Division of East London, Eastern Cape held under Deed of Transfer T4384/2011 (the property) be declared specially executable;

(d) That First and Second Respondents pay the costs of the application on an Attorney and own client scale as provided for in terms of the restructured loan agreement.

[2] It is common cause that the Applicant and the First Respondent entered into a loan agreement on or about 2 November 2011 and that the Second Respondent stood surety for the loan. Said loan agreement was restructured on or about 4 March 2013 and Second Respondent bound herself as surety in respect of the loan agreements on 31 October 2011 and 31 December 2013 respectively. The Applicant performed against the loan agreement and that the loan was secured against the property by

way of a registered Mortgage Bond (registered in or about 30 November 2011) in favour of the Applicant.

[3] It is also common cause that the First Respondent was placed under debt review pursuant to a Debt Review Order issued by this honourable court on or about 15 June 2015, in terms of which the First Respondent was ordered to pay R 18 000.00 per month, as from 30 July 2015 to an appointed Payment Distribution Agency (PDA) for distribution to his creditors. The Applicant was to receive a monthly payment of R 8 484.60.

[4] It is clear from the papers that the First Respondent made a short payment in terms of the debt review order in July 2016 in that he paid only R 13 000.00. The First Respondent does not dispute that he made this short payment. This short payment resulted in proportionately short payment to the Applicant. (Applicant received only R 6047.99 instead of the R 8484.60 that it was entitled to receive.)

[5] The Court is required to determine:

(a) whether or not the short payment made by the First Respondent in July 2016 constitutes a default/ breach of its obligations in terms of the Debt Review Order as envisaged in s 88(3)(b)(ii) of the National Credit Act (34 of 2005) (the Act); and

(b) whether Applicant is entitled to proceed with the enforcement of the credit agreement by instituting the current action.

[6] In their Heads of Argument and oral presentation to the court, First and Second Respondents referred the court to various authority:

ABSA Bank Ltd v Hanekom and another ([2014] ZAFSHC 120); *ABSA Bank Ltd v Lubbe and another* ([2012] ZAWCHC 253); *Firstrand Bank Ltd v Britz and another* ([2012] ZAFSHHC 13); *Firstrand Bank Ltd v Fillis and anothe*r (2010 (6) SA 565 (ECP)); *Millman and another N.O. v Masterbond Participation Bond Trust Managers (Pty) Ltd* (Under curatorship)(1997 (1) SA 113 (C)); *Moller v Standard Bank of South Africa Ltd* ((2016) ZAFSHC 75) and *Nedbank Ltd v Thompson and another* ([2014] ZAGPJHC 88; 2014 (5) SA 392 (GJ)). As will appear from the comments below, the authority did not advance the Respondents' position in any way.

[7] The Respondent's defence rests upon his bald denial that he is in default in terms of the Debt Review Order and his assertion that he cannot be penalised for a default on the part of the PDA in paying his creditors. This contention cannot be supported as, as the Applicant pointed out, the PDA short paid creditors as a direct consequence of the First Respondent's short payment to themselves.

[8] The First Respondent asserts that he has complied in full with the Debt Review Order and thus, no grounds exist to terminate same as he has made "all due and punctual payments to the National Payment Distribution Agency".

[9] The First Respondent contends that his alleged default was in fact default by the PDA and cannot, in accordance with *ABSA v Lubbe* (*supra*), be regarded as his default. This case can however be distinguished from *ABSA v Lubbe* (*supra*) on the basis that in that case, the PDA had not received short payment from the debtor. Likewise*, Nedbank v Thompson* can also not find application as it too relates to default by the PDA, not the consumer. These cases are clearly distinguishable from the present case and are thus not appropriate authority for this court in making its determination.

[10] Second Respondent's defence herein is simply that, as surety, her obligations are ancillary to those of the First Respondent and thus, Applicant's action against her is premature.

[11] Section 3 of the NCA sets out the purpose of the Act and the Respondents drew the court's attention to section 3(g) and (i) of the NCA in which it appears that the NCA is designed to promote social and economic welfare of all South Africans and to promote a fair, transparent, competitive sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers by "addressing and preventing over indebtedness of consumers, and providing mechanisms for resolving over-indebtedness, based on the principle of satisfaction by the consumer of all responsible financial obligations", and "providing 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".

[12] A thorough examination of the Act however reveals in section 3(d), that that the Act seeks to balance the respective rights of consumers and credit providers. It is thus clear that the court may not only take account of the needs of the consumer for protection but must also take note of the credit provider's legitimate right to seek relief.

[13] The Respondents contended that in upholding the purposes of the NCA the court should view the short payment in July 2016 not as a default in terms of s 88(3)(b)(ii) but rather as a minor, unwitting and excusable default which does not meet the requirement set out in the aforementioned section. Again, Respondents rely upon authority (*Thompson*) which is not apposite, given that it relates to default by the PDA and not the debtor himself.

[14] The First Respondent requests the court to regard him, based on his pattern of behaviour, as both willing and able to comply with the Debt Review Order and to dismiss the application. The Respondents proceed to point out to the court, on the basis of *Fillis* (*supra*) that the Act offers extensive protection to consumers. Be that as it may, this does not mean, however, that the court is at liberty to ignore the interest of the credit provider. The authority cited by the Respondents protect the consumer against breach of obligations to creditors where the breach is the

consequence of the PDA's default, not where the default is that of the consumer him or herself as is the case here.

[15] The consumer here has squandered the opportunity afforded him by the Debt Relief Order and the Applicant is at liberty to pursue the ordinary remedies available to it.

[16] The First Respondent has breached the Debt Review Order by making a short payment in respect of July 2016. The Debt Review Order was terminated thereby and subsequent overpayments to the PDA therefore do not address the arrears in his payments which have, in any event not been fully addressed to date.

[17] The Second Respondent's liability arose when the 1st Respondent breached the Debt Review Order. It is thus now enforceable against her.

[18] The Court is bound by the Constitutional Court authority in *Ferris and another v Firstrand Bank Limited* and another (2014 (3) SA 39 (CC)) where Moseneke ACJ stated (in par [21]) that actual compliance with debt relief orders is required in terms of the NCA and that substantial compliance is insufficient. The original credit agreement is enforceable without further notice should any breach occur (Par [16]). This approach was adopted in the Supreme Court of Appeal in *Jili v Firstrand Bank Limited t/a Wesbank* ([2014] ZASCA 183; 2015 (3) SA 586 (SCA)) where the court stated (par [30]) that the debtor who has been granted relief and who has spurned the advantage offered him by defaulting

cannot be allowed another opportunity to resolve his difficulties at the expense of the credit provider who is entitled to relief.

[19] Section 3(d) of the Act requires the court to balance the interests of consumers and credit providers, and this is what the court has done in this case.

[20] The Applicant is clearly entitled to bring the current action in terms of s 88(3)(b) of the Act as the First Respondent is in default under the credit agreement and has defaulted with regards to his obligations in terms of the Debt Review Order. This default took the form of making a short payment to the PDA in July 2016. This short payment constitutes a breach of the Debt Review Order as contemplated in s 88(3)(b)(ii) of the Act. This breach, when taken together with the First Respondent's breach of the loan agreement, forms a basis for the current proceedings.

[21] The Second Respondent's contention that the application against her cannot succeed because it was commenced whilst a debt review process was underway is without merit. The principle debt became due and payable when the Debt Review Order was breached by the First Respondent and the debt review was terminated. The obligation of the surety is thus also enforceable.

[22] The property that Applicant seeks to have declared specially executable is not a primary residence and no hardship should be created by making such an order.

Having considered the papers in this matter and the arguments presented by both parties, the court issues the following order:

1. The applicant is granted judgement against the First and Second Respondents jointly and severally, the one paying the other to be absolved, for payment of R 1 982 962.65.
2. The second Respondent’s liability is limited to R 1 905 000.00
3. Respondents to pay interest on aforesaid amount at the Investec Prime Rate less 1% per annum from 7 October 2016, calculated daily and compounded monthly until paid in full.
4. First and Second Respondent’s property situated at Erf [....] B. B., Buffalo City Metropolitan Municipality, and Division of East London, Eastern Cape held under Deed of Transfer T4384/2011(the property) is hereby declared specially executable.
5. First and Second Respondents to pay the costs of the application on an attorney and own client scale as provided for in terms of the restructured loan agreement.

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C. NICHOLSON, AJ

On behalf of Applicant: Mr Quixley

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On behalf of Respondents 1 & 2:	Adv L Collins
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