



**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: 4304/2014

In the matter between

FIRSTRAND BANK LTD t/a WESBANK

Applicant/ Plaintiff

and

MICHELLE BERGH

Respondent/Defendant

CORAM: NAIDOO, J

HEARD ON: 2 MAY 2017

JUDGMENT BY: NAIDOO, J

DELIVERED ON: 25 AUGUST 2017

INTRODUCTION

[1] This matter came before me as a special case for adjudication in terms of Rule 33 of the Uniform Rules of Court. The parties agreed

upon and presented a written statement of facts, the details of which I will elaborate on hereunder. I shall refer to the parties as they are cited in the summons. Mr J Els represented the applicant/plaintiff and Mrs L Collins represented the respondent/defendant in this court.

- [2] The parties agreed with their identities, as cited in the summons as well as the jurisdiction of this court. Other facts agreed on are inter alia, that on or about 14 December 2012, the plaintiff and defendant entered into an instalment sale agreement, as categorised in section 8(4)(c) of the National Credit Act 34 of 2005 (NCA), in terms of which the defendant purchased a 2013 Nissan Livina motor vehicle for a total amount of R263 607,84, payable in monthly instalments of R3661.22, commencing 1 February 2013. Such payments would continue for Seventy One (71) months thereafter and conclude on 1 January 2019. The agreement made provision for the defendant to apply for debt review, in the event that she should experience financial difficulty or consider herself to be over-indebted.
- [3] On 17 July 2014, the defendant served on the plaintiff an application (for debt re-structuring) in terms of section 86(7), read with sections 86(8)(b), 87 and 79 of the NCA. A brief timeline of the proceedings thereafter is as follows:
- 3.1 The plaintiff opposed the application on 23 July 2014, in terms of section 86(7).
- 3.2 On 23 September 2014, the plaintiff issued summons against the defendant

- 3.3 On 20 November 2014 the plaintiff filed its opposing affidavit in the defendant's debt-restructuring application.
- 3.4 The defendant filed her replying affidavit in the application on 11 December 2014.
- 3.5 The application was set down for hearing on 6 February 2015, but was postponed to 20 February 2015.
- 3.6 On 20 February 2015, the debt re-structuring application was postponed sine die, pending the finalisation of this action.

[4] The questions of law in dispute between the parties and which this court was called upon to adjudicate are:

- 4.1 Whether the plaintiff was entitled to send a notice in terms of section 86(10) of the NCA, if the defendant was in arrears with her obligations in terms of the credit agreement for a period of more than 60 business days after her application for debt review, which was made on 20 May 2014, and notification of which was given to the plaintiff on 24 May 2014;
- 4.2 Whether the plaintiff was entitled to send the notice in terms of section 86(10) whilst there was an opposed debt restructuring application pending;
- 4.3 Whether the plaintiff's notice in terms of section 86(10) was invalid and premature;
- 4.4 Whether the plaintiff's summons is premature due to the fact that prior to the issuing thereof, there was already an application pending in the Magistrate's Court.

[5] The plaintiff's contentions are that the defendant breached the credit agreement by failing to pay the monthly instalments due to the

plaintiff, and that she remained in default by not paying a full monthly instalment since April 2014. The defendant was in default under the agreement whilst she was under debt review, as a result of which the plaintiff was entitled to send a notice in terms of section 86(10) of the NCA, terminating the debt review, especially as 60 business days had elapsed from 20 May 2014, being the date on which the defendant applied for debt review. The notice in terms of section 86(10) was sent on 2 September 2014. The plaintiff further contends that it was entitled to terminate the debt review as this was prior to the amendment of section 86 of the NCA, and at a stage when section 86 permitted the termination of debt review, in spite of the matter being referred to a Magistrate's Court for a debt re-arrangement order. As a result, the plaintiff contends, its notice in terms of section 86(10) was valid and effective, and that its summons was not premature.

- [6] The defendant, for her part, contends that the plaintiff's notice in terms of section 86(10) was invalid, of no force and effect and was premature, as there was an application pending in the Magistrate's Court. Similarly, the issue of the summons in this matter was premature, as there was a pending application for debt review in the Magistrate's Court, which was opposed by the plaintiff, and which was not finalised. The NCA remained the same on this issue, even after the amendment thereto. The plaintiff was not entitled to enforce the credit agreement, pending the finalisation of the debt review application, and pending default by the defendant in terms of the debt restructuring order.

[7] Section 86(10) originally read as follows:

“If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to-

- (a) the consumer
- (b) the debt counsellor; and
- (c) The National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review”

[8] Section 86(10) was amended by the National Credit Amendment Act 19 of 2014, and such amendment took effect on 13 March 2015. The amended section 86(10) reads as follows:

“(a) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may, at any time at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review in the prescribed manner to-

- (i) the consumer;
- (ii) the debt counsellor; and
- (iii) the National Credit Regulator; and

(b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.”

[9] The plaintiff contends that section 86(10), prior to its amendment, applies in this case and that it was not precluded from terminating the debt review in terms thereof. In this regard the defendant argues that the Act has always required that the parties act in good faith in respect of debt review proceedings in order to find a way to address the financial distress of the consumer. The defendant further contends that the plaintiff failed to act in good faith in this matter, as the defendant’s notice in terms of section 86 (7)

informing the plaintiff that an application was being made for a debt re-arrangement order was served on the plaintiff on 17 July 2014, and such application was opposed by the plaintiff on 23 July 2014. The plaintiff was thus aware that there was an application for debt re-arrangement pending in the Magistrate's Court, but in spite of this issued summons against the defendant on 23 September 2014.

- [10] The plaintiff asserts that the aspect of good faith was not part of the agreed facts between the parties which the court was called upon to decide. The issue between the parties is not one of good faith but whether the summons was issued prematurely. Mr Els argued that if good faith were raised as an issue, the plaintiff may well have put forward further arguments or explanations, for example, the reason for the late filing of its opposing affidavit in the debt re-arrangement application. The raising of the issue of good faith at the stage of written and oral arguments is, therefore, prejudicial to the plaintiff
- [11] One of the procedures that Uniform Rule 33, in terms of which the current matter has been brought before this court, provides for is a special case in the form of a written statement of facts agreed upon by the parties to any dispute after institution of proceedings. Subrule (1) and subrule (2) provide for the disposal of a case without the necessity of leading evidence. There must be actual agreement between the parties on the stated facts, at least for the purposes of the special case. Subrule 1 makes it clear that the resolution of a stated case proceeds on the basis of a written statement of *agreed facts*. **[Erasmus Superior Court Practice Pages B1-233/4. See also Bane v D'Ambrosi 2010(2) SA 539**

(SCA) at 543 C-F and Mighty Solutions v Engen Petroleum 2016(1) SA 621(CC) at 637/8].

- [12] In the Mighty Solutions case, the parties signed a joint practice note, when the matter came before the High Court, in which they listed only two issues to be determined by the court. In its written and oral argument before the Constitutional Court, the applicant, Mighty Solutions, raised a new issue of enrichment, which was not raised in the practice note. The respondent, Engen, argued that Mighty Solutions went beyond the common-cause facts and issues agreed in the joint minute, and introduced false and misleading allegations, which did not form part of the evidence in the High Court. Engen further contended that the joint practice note settled all the common-cause facts and factual disputes between the parties, and was signed by counsel for both sides. The joint note was the basis upon which the High Court adjudicated the matter. Mighty Solutions argued that the joint practice note was no more than a guideline with regard to the common cause facts between the parties and that it was not binding on the Constitutional Court.
- [13] The Constitutional Court, in applying the Bane decision, held (at para 63) that the joint practice note in the High Court was not only an agreement on facts, it was an agreement on the issues to be decided by the High Court. The High Court regarded itself as bound by the note and confined itself to the two issues in it. The Constitutional Court held that if it were to entertain anything beyond the two issues (raised in the joint practice note), Engen would be prejudiced as it had no opportunity to rebut the claim, whether on the facts or the law. The court found that it was not in the interests of justice to overturn the judgment of a lower court on the basis of

an issue it was not asked to decide. This is precisely the point that Mr Els raised on behalf of the plaintiff in this matter, arguing that the plaintiff did not have the opportunity to reply to or rebut the allegations of failing to act in good faith in the debt review. In my view, his submissions were validly made, and are fortified by the approach of the Constitutional Court in this regard. I accordingly align myself with the ruling of the Constitutional Court.

- [14] As I indicated earlier in this judgment, the plaintiff argued that section 86(10), as it was prior to being amended on 13 March 2015, is applicable in this matter. The section was amended some six months after the termination of the debt review and issue of summons by the plaintiff in this matter. Such amendment does not apply retrospectively, in accordance with the presumption that a statute does not apply retrospectively unless the relevant legislation expressly or by necessary implication provides otherwise. Mr Els referred me in this regard to **Kaknis v Absa Bank Ltd 2017 JDR 0027 (SCA)**, where the court dealt with the question of retrospectivity of another section inserted by the National Credit Amendment Act, and found that the amendment does not apply retrospectively. There did not appear to be any dispute from the defendant that the amendment to section 86(10) does not apply retrospectively.

- [15] There have been a number of cases which dealt with the issue of whether a credit provider may terminate a debt review while there is a pending application in the Magistrate's Court. Many of these decisions, emanating from the provincial divisions of the High Court conflict with each other on this issue. Both counsel referred to a number of these cases. The matter that both Ms Collins and Mr Els

also referred to, and which binds this court, is **Collett v First Rand Bank Ltd 2011(40 SA 508 (SCA))**. The court undertook a thorough analysis of the relevant provisions of the NCA and section 86 in particular. The court also discussed some of the conflicting decisions, and remarked at p516 C-F that

“A sounder approach is to recognise the express words of s 86(10), which gives the credit provider a right to terminate the debt review in respect of the particular credit transaction under which the consumer is in default, and only when he is in default, at least 60 business days after the application for debt review was made. It must be emphasised that it is only when the consumer is in default that the credit provider has this right. If he is not, the debt review continues without the credit provider being entitled to terminate it. It is not that the credit provider is 'derailing' the process when he terminates the debt review: it is the consumer that is in breach of contract, not the credit provider. If the consumer applies for debt review before he is in default the credit provider may not terminate the process. But if the consumer is in default the consumer is entitled to a 60 business days' moratorium, during which time the parties may attempt to resolve their dispute.”

The court ultimately held that if the consumer is in default under the credit agreement, the credit provider has the right to terminate the debt review even after the debt counsellor referred the matter to the Magistrate's Court for an order envisaged in section 86 (7)(c).

- [16] In this matter it is common cause or not in dispute that the defendant was in default under the credit agreement, as full and timeous payments of the monthly instalments were not received by the plaintiff. The defendant remained in default for a period of 60 business days after the date on which she applied for debt review. The plaintiff thereafter terminated the debt review by way of a notice in terms of section 86(10). The plaintiff had, at that stage complied with the requirements of section 86(10), and validly terminated the debt review. In view thereof, the plaintiff was entitled

to proceed to enforce the credit agreement and did so by issuing summons, again validly and in the proper time, against the defendant. I note that although the defendant has the option of approaching the Magistrate's Court for an order in terms of section 86(11), to resume the debt review, she has not invoked the provisions of section 86(11). I cannot, therefore, see any reason to deny the plaintiff its right to enforce the credit agreement.

ORDER

[17] In the circumstances, I make the following order:

- 17.1 The plaintiff was entitled to send a notice in terms of section 86(10) of the National Credit Act 34 of 2005, to the defendant, in view of the defendant's default in terms of the credit agreement, and remaining in breach thereof for a period of sixty days after the date of application for debt review;
- 17.2 The plaintiff was entitled to send the notice in terms of 86(10), although there was an application for a debt restructuring order pending in the Magistrate's Court;
- 17.3 The plaintiff's notice in terms of section 86(10) was valid and timeously sent;
- 17.4 The summons issued by the plaintiff was not premature, and the validity thereof was not affected by the pending application in the Magistrate's Court.
- 17.5 The defendant is directed to pay the plaintiff's costs.

S. NAIDOO J

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