



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

17/2/15

CASE NO: 81205/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

2015/02/17

DATE



SIGNATURE

IN THE MATTER BETWEEN

FIRSTRAND BANK LIMITED

Plaintiff

and

HARRY WILLIAM BARRETT

First Defendant

MATILDA BARRETT

Second Defendant

JUDGMENT

LEGODI, J

[1] This is an application for summary judgment in terms of which the plaintiff, FirstRand Bank Ltd in addition to judgement sounding in money, it seeks an order declaring the property subject to mortgage bond be declared especially executable. The property in question is used as a primary residence by the defendants. The application is opposed on the following grounds. Firstly, that FirstRand Bank has unlawfully terminated the debt review process. Secondly, that the property in question is a primary residence and no grounds have been placed before the court to declare such a property especially executable. Lastly, that FirstRand Bank is fully aware that the applicants are over-indebted and that they were making payments in terms of the plan and that any fault in not transmitting payments to the FirstRand was not the defendants' fault.

[2] A background to the dispute is necessary. On the 26 April 2014 the defendants applied for a debt review. The debt counsellor, Russel Dickson accepted their application. He then made debt restructuring proposal in terms of which First Rand Bank was to be paid R3 987-95 per month. The first estimated proposal was made in terms of section 86(7)(c), the defendants having been found to be over-indebted. The subsection provides as follows:

“(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that-

(a) ...

(b) ...

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

(ii) that one or more of the consumer's obligations be re-arranged by-

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

- (cc) *extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or*
- (dd) *recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.*

[3] On the 1 September 2014 the debt counsellor filed an application in the Magistrate's court Springs in terms of which a relief was sought in the following terms:

- "1. *That the Applicant be granted leave in terms of section 86 of the National Credit Act 34 of 2005 to bring this application;*
2. *That the First and Second Respondents be declared over-indebted as set out in Section 79 of the National Credit 34 of 2005;*
3. *That the 1st and 2nd Respondents payments to the other Respondents be re-arranged in the following manner:*
 - (a) *that the period for payment in respect of each credit agreement with each Respondent be extended and the amounts payable per month be reduced according, as per the draft Court Order annexed to this application; and/or*
 - (b) *that such rearrangement to be reviewed at the court's discretion after a period of time to be determined by the above Honourable Court.*
4. *Ordering that any Respondent who opposes this application be ordered to pay the cost of this application.*
5. *Ordering that the Debt Review process be reinstated in terms of section 86(11) in so far as may be necessary in the event of the above Honourable Court finding that there has been any lawful termination of the debt review process by any of the credit providers".*

[4] On the 27 November 2014, the application was dismissed and the defendants were ordered to pay the costs of the application. In the meantime, the FirstRand Bank had issued a notices in terms of section 86(10) on the 3 and 7 October 2014 and summons on the 10 November 2014. The present application for summary judgement was launched after the defendants entered appearance to defend the action.

[5] The real issue before me is whether the defendants have a bona fide defence to the action, the crucial question being whether FirstRand Bank unlawfully terminated the debt review process. The contention was that FirstRand Bank was prohibited in terms of section 88(3), to enforce the credit agreement between itself and the defendants. Subsection (3) of section 88 provides as follows:

“(3) Subject to section 86(9) and (10), a credit provider who received notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce litigation or other judicial process any right or security under that credit agreement until-

(a) the consumer is in default under the credit agreement; and

(b) one of the following has occurred;

(i) an event contemplated in subsection 1(a) through (c); or

(ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and the credit providers, ordered by the court or the Tribunal”.

[6] In terms of section 86(4)(b)(i), on receipt of application for a debt review in terms of subsection (1), a debt counsellor must notify, in the prescribed manner and form, all credit providers that are listed in the application. Subsection (1) (a) through (c) of section 88 referred to in subsection (3)(b)(i) thereof provides as follows:

“(1) A consumer who has filed an application in terms of section 86(1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit

agreement, other than a consolidation agreement, with any credit provider until one if the following events has occurred:

- (a) The debt counsellor rejects the application and the prescribed time period for direct filing in terms of suction 86(9) has expired without the consumer having so applied;*
- (b) the court has determined that the consumer is over-indebted, or has rejected a debt counsellor's proposal of the consumer's application; or*
- (c) a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement".*

[7] There are therefore certain jurisdictional factors which FirstRand Bank was required to meet before instituting legal action against the defendants who have applied for a debt review in terms of section 86(1): Firstly, that the defendants were in default in terms of the credit agreement and secondly, that the court in terms of section 88(1)(b) has determined that the defendants are not over-indebted or that the court has rejected a debt counsellor's proposal or the defendants' application. In the present case, the court ruled in accordance with paragraph (b) of section 88(1) only on the 27 November 2014. It means that the FirstRand Bank prematurely proceeded to issue a letter of termination of debt review in terms of section 86 (10) on the 3 October 2014; and prematurely issued summons on the 10 November 2014.

[8] This however does not mean that the application for summary judgment must be dismissed. In terms of section 130(4)(b)(i) and (ii), in any proceedings contemplated in this section, if the court determines that the credit provider has not complied with the relevant provisions of the Act, as contemplated in subsection (3)(a) or has approached the court in circumstances contemplated in subsection (3)(c), the court must adjourn the matter before it, and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed. I therefore intend invoking the

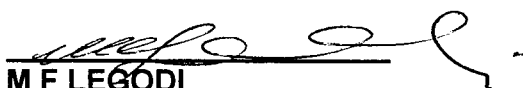
provisions of section 130(4). There is no need to deal with the other issues raised in this matter.

[9] Consequently, an order is hereby made as follows:

9.1 The application for summary judgment is postponed sine die,

9.2 FirstRand Bank Limited is hereby directed to comply with the statutory notice in terms of the Act,

9.3 FirstRand Bank Limited to pay the costs of the application for summary judgment.


M F LEGODI
JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF:
 INSTRUCTED BY:

ADV. M RILEY
 HACK STUPEL & ROSS
 2nd Floor, Standard Bank Chambers
 Church Square, PRETORIA
 REF: Mr D J FRANCES/N PAGE/SA1943
 TEL: 012 325 4185

FOR THE DEFENDANTS:
 INSTRUCTED BY:

ADV. KERRY HOWARD
 STANILAND ATTORNEYS
 C/O N VAN DOMMELEN ATTORNEYS
 1319 Paul Street
 MORELETTA PARK
 PRETORIA
 011 425 5557/074 910 2734

Matter heard on: 12 FEBRUARY 2015
 Judgment handed down: 17 FEBRUARY 2015