

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 1487/2011

In the matter between:

ABSA BANK LIMITED

Applicant

and

PIETER WILLEM JOHANNES HANEKOM

First Respondent

MADELEIN HANEKOM

Second Respondent

CORAM:

LEKALE, J

HEARD ON:

31 JULY 2014

JUDGMENT BY:

LEKALE, J

DELIVERED ON:

7 AUGUST 2014

INTRODUCTION AND BACKGROUND

- [1] This is an application for an order declaring the respondents' immovable property specially executable in favour of the applicant pursuant to a judgment entered in default against them on the 30th October 2013.

- [2] Between April 2000 and June 2008 the respondents, who are a married couple, secured loans from the applicant which were secured by mortgage bonds. On the 16th August 2011 the first respondent was declared over- indebted by the Welkom Magistrate's Court and his debts to, *inter alia*, the applicant were rearranged.
- [3] Subsequent to the debt restructuring order payments less than the instalments ordered by the court were, however, received by the applicant who, eventually, terminated the debt restructuring process and issued summons against the respondents claiming, *inter alia*, an order declaring the hypothecated property specially executable. The prayer for the said declarator was, however, referred to the open court by the registrar of this court.
- [4] The application for the declarator in question was, eventually, dismissed with costs on the 30th January 2014 after the court found that the applicant was not entitled to rely on section 86(10) of the National Credit Act 34 of 2005 (NCA) when it pursued the respondents legally.
- [5] The applicant, however, proceeded to bring the instant application which the respondents still resist on the ground that they were not in default of any obligations under the rearrangement order.

ISSUES IN DISPUTE

- [6] The parties are *ad idem* that the dispute between them entails determination of the question whether or not the respondents were in default under the restructuring order and if so, whether or not the applicant is entitled to the relief it seeks in this matter.

CONTENTIONS BY THE PARTIES

- [7] It is common cause between the parties that the respondents complied with the restructuring order by effecting regular monthly instalments to the Payment Distribution Agency (PDA) as directed by the court and that the PDA, on its part, failed to transmit full monthly payments to the applicant.
- [8] It is, further, not in dispute that the PDA acknowledged its failures in this regard and attributed same to problems it had in transferring funds to the applicant. The PDA also undertook to sort out its problems and to effect payment to the applicant immediately it becomes able to make transfers.
- [9] Mr Rautenbach, for the applicant, submits that the respondents were in default under the restructuring order because the failures of the PDA are attributable to them insofar as the agent in question is theirs and acts on their behalf. In his view the applicant was, in law, entitled to institute action and take judgment against the respondents simply because of failure by

the PDA to pay full instalments as ordered by the court. Although Mr Rautenbach concedes that a declarator sought by the applicant would not be fair and equitable regard being had to the responsible conduct on the part of the respondents of effecting instalments to the PDA in accordance with the rearrangement order, he believes that the applicant had a just cause to bring the present proceedings.

- [10] Mr Louw, for the respondents, eloquently contends that the default judgment was unlawful because there existed no cause whatsoever to sustain the same in the light of the fact that the applicant was, as at the date of summons, aware that the respondents were, on their part, in compliance with the order which effectively required the appointment of a PDA for purposes of distributing funds to all the affected creditors inclusive of the applicant. In his view the applicant did not place any grounds before the court showing that it is entitled to the relief it seeks save for effectively relying on the default judgment.

EVALUATION AND FINDINGS

- [11] It is correct, as submitted for the applicant, that the PDA distributes funds to the creditors such as the applicant on behalf of the respondents in line with the court order and the PDA is, as such, the consumer's agent for that purpose. Failure by the PDA to fulfil its mandate cannot, in law and equity, be visited

upon the creditor in the position of the applicant. To the extent that the PDA failed to transfer correct funds to the applicant, the PDA, and not the respondents, failed in its duty insofar as the order, as correctly pointed out by Mr Louw, directed the first respondent to appoint the PDA **“with the responsibility of distributing all funds received in terms [t]hereof to the creditors”**. In accepting appointment in terms of the court order, the PDA in the present matter assumed the responsibility of distributing all funds received from the respondents to the creditors listed in the relevant annexures inclusive of the applicant. As Mr Louw painstakingly points out, the relevant court order did not require the respondents to make payment of the rearranged instalments to the applicant but to the PDA which they did religiously and without fail.

(See: **Standard Bank of South Africa v Daya N.O and Others** [2012] ZAECPEHC p 33 at par [10].)

- [12] The respondents are, therefore, not in default of the rearrangement order. Even if I am wrong in this finding, I am not persuaded that the circumstances of the instant matter warrant execution of the respondents’ primary residence regard being had to the fact that they are demonstrably able to comply with the restructuring order and they never ever failed to comply with the same.

COSTS

- [13] The respondents seek a punitive costs order against the applicant with Mr Louw pointing out that, when a similar application was heard and dismissed on 30th January 2014, the applicant was already aware that the respondents were not in default of their obligations in terms of the court order but it nevertheless elected to bring a fresh application relying on the same facts.
- [14] Mr Rautenbach retorts that the applicant had just cause to approach the court with the present application because it had not received the instalments stipulated by the court. In his view the circumstances of the present matter do not justify a special costs order.
- [15] The conduct of the applicant is, in my opinion, reprehensible regard being had to the fact that when it issued summons it was already aware that the fault lied with the PDA and not with the respondents. It was, further, aware that the PDA had undertaken to effect payment immediately after it had sorted out the problem relating to transfers. To burden the consumer who is already in financial distress with unnecessary legal costs is, with respect, malicious and spiteful in my view. An established creditor with the applicant's status and global standing in financial matters is reasonably expected to show understanding, maturity and fairness in its dealings with its struggling, but honest and responsible debtors.

ORDER

[16] The application is dismissed.

[17] The applicant shall pay the respondents' costs on the scale as between attorney and client.

L. J. LEKALE, J

On behalf of applicant:

Adv J.S. Rautenbach
Instructed by:
E G Cooper Majiedt Inc
BLOEMFONTEIN

On behalf of respondents:

Adv M.C. Louw
Instructed by:
Hill, McHardy & Herbst Inc
BLOEMFONTEIN

/spieterse