REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG HIGH COURT
PRETORIA

20/11/2013

CASE NO: 4317/2010

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

20.11.13
DATE

SIGNATURE

In the matter between:

BURNADETTE IDA VAN ROOYEN	Applicant
and	
ALEXANDER ANTONIO JORDAAN	First Respondent
STANDARD BANK	Second Respondent
In re:	
STANDARD BANK	Plaintiff
and	
ALEXANDER ANTONIO JORDAAN	Defendant

JUDGMENT

TEFFO, J:

[1] The first and second respondents are parties to a home loan agreement to which the National Credit Act 34 of 2005 ("*the Act*") applies. The mortgage bond in favour of the second respondent was registered over the first respondent's property as security for a home loan. The original monthly instalment of the home loan account was R9 346,02. The first respondent fell into arrears with his payments and on 23 April 2009 he applied for debt review to the debt counsellor in terms of section 86(1) of the Act. Notice of the application was given to all listed credit providers including the second respondent.

[2] Subsequent thereto the first respondent's obligations had to be re-arranged by extending the period of the agreement and reducing the amount of each payment due accordingly. This re-arrangement of the first respondent's obligations was sent to all affected credit providers including the second respondent.

[3] The applicant is a debt counsellor registered with the National Credit Regulator in terms of the Act.

[4] The first respondent is the consumer and the second respondent is the credit provider in terms of the Act.

[5] On 23 November 2010 the second respondent sent a notice in terms of section 86(10) of the Act terminating the debt review of the first respondent.

[6] Thereafter the second respondent issued summons against the first respondent for payment of the amount of R949 227,54 with interest that is due in terms of the home loan agreement. After the first respondent had filed a notice of intention to defend, the second respondent applied for summary judgment which application was eventually postponed *sine die* to afford the first respondent an opportunity to bring an application in terms of s86(11) of the Act.

[7] The applicant has now brought an application in terms of section 86(11) of the Act whereby she seeks an order in the following terms:

7.1 That the termination of the debt review process by the second respondent be set aside.

7.2 That the second respondent be ordered to participate in the debt review process that is pending in the magistrate's court.

[8] The second respondent brought an application for condonation of the late filing of its opposing affidavit to the present application. The application was not opposed and it was accordingly granted.

[9] In her founding affidavit, the applicant raises the following issues in support of her application:

9.1 She contends that the second respondent has not at any time during the first respondent's application for debt review tried to settle the payment proposal with her, nor has the second respondent, actively and *bona fide* formed part of the debt review application.

9.2 She challenges the validity of the section 86(10) notice that the second respondent sent to the first respondent for the following reasons:

9.2.1 Although she concedes that the first respondent failed to pay the monthly instalments in terms of the existing home loan agreement with the second respondent, she contended that the first respondent was not in default for the purposes of section 86(10) of the Act as she was making monthly payments in terms of the proposals made by her which proposals were sent to the second respondent.

9.3 It is further contended that the first respondent's indebtedness was assessed and it was determined that the monthly balance for restructuring was R16 856,00.

9.4 She mentions in her affidavit that the debt review had been referred to the magistrate's court for determination.

9.5 In his confirmatory affidavit the first respondent alleged that the second respondent has not responded to the applicant's correspondence that was sent to it in respect of his application for debt review. Further that the applicant just received the notice in terms of section 86(10) of the Act for termination of the debt review. He also mentioned that despite the fact that the applicant after receipt of the section 86(10) notice sent proof of payments made in terms of her proposals, the second respondent never responded.

9.6 It was therefore submitted that by so doing the second respondent failed to participate in good faith in the debt review process as was required of it and it was not entitled to terminate the debt review.

[10] The second respondent disputes that the first respondent at all relevant times after he had applied for debt review, made regular payments to it according to the applicant's restructuring proposal. It contended that

according to Annexure "E" there is an indication that there were short payments for ten of the twelve payments. Furthermore that Annexure "E" only indicates payments from 31 March 2010, although the first respondent had applied for debt review on 23 April 2009, nearly a year prior to that.

[11] It further contended that having regard to the fact that the original monthly instalment payable by the first respondent in terms of the home loan agreement was R9 346,02 and the payment history of the first respondent, it cannot be expected of it to participate in a process where the consumer is proposing to pay less than 50% of the original instalment. It maintained that throughout the debt review process the first respondent has made inconsistent and irregular payments.

[12] A submission was made on behalf of the second respondent that the application for debt review was only made to the Magistrate's Court, Pretoria North on 15 December 2010 from 23 April 2009 when the first respondent applied for debt review before the applicant and that this was done 20 months later.

[13] It was also submitted that the second respondent was therefore entitled to terminate the debt review process.

[14] The second respondent's counsel also raised an objection to the applicant's *locus standi* to bring the application in terms of section 86(11) of the Act in that the first respondent being the defendant in the main action was

the proper person to bring this application and not the debt counsellor who is not a party to the main action. Further that if the debt counsellor was interested in pursuing the matter on behalf of the first respondent, she should have brought an application for her to be joined as a party to the action between it and the first respondent.

[15] It was submitted on behalf of the applicant that it is the applicant and not the first respondent who is pursuing the matter. It was further submitted that the applicant (debt counsellor) and a consumer should not be treated as separate entities for the purposes of pursuing a debt review in terms of the Act. I do not intend to entertain this objection as it is my view that it is better to determine the application on the merits and dispose of the issues raised in the papers. It will accordingly be assumed for purposes of this judgment that the applicant does indeed possess the necessary *locus standi* to bring this application.

[16] The issues for determination are whether the second respondent was legally entitled to terminate the debt review of the applicant and whether it should be ordered to participate in the debt review process that is pending before the magistrate's court.

[17] Section 86(10) of the Act provides:

> *"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 at any time at least 60 days after the date on which the consumer applied for debt review."*

[18] Section 86(11) of the Act provides:

> *"If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce the agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances."*

[19] Section 130(1)(a) of the Act provides that a credit provider may approach the court for an order to enforce a credit agreement if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days, and at least 10 business days have lapsed since the credit provider delivered a notice for the consumer as contemplated in section 86(10), or section 129(1); as the case may be.

[20] Griesel J in *Wesbank a division of Firstrand Bank Ltd v Papier* 2011 (2) SA 395 (WCC) held that a credit provider may not terminate the debt review after it has been referred to the magistrate's court. This decision was recently overruled by the Supreme Court of Appeal (SCA) in *Collet v Firstrand Bank* (766/2010) [2011] ZASCA 78 (27 May 2011) where the court held as follows:

> *"I am unable to find anything in the structure of section 86 or the Act in its entirety which is indicative of an intention on the part of the Legislature to limit the right of the credit provider under section 86(10) to the process prior to the reference to the Magistrate's Court. On the contrary I consider that the credit provider's right to give notice in terms of section 86(10) continues until the Magistrate's Court has made an order as envisaged in section 87."*

[21] The SCA in the Collet matter referred to *supra* also drew a distinction between cases where the consumer is in default under the credit agreement and when not and concluded that where the consumer is not in default under a credit agreement he or she may apply for review. In that case the credit provider may not terminate the review under section 86(10) because section 86(10) gives the right to terminate the debt review only where the consumer "*is in default*". Where the consumer is in default then the credit provider may enforce the agreement once the debt review has been terminated in terms of section 86(10). In rejecting the approach in the *Papier* matter as referred to *supra*, Malan JA (at para [12]) stated as follows:

> *"A sounder approach is to recognise the express words of section 86(10) which gives the credit provider the 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 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."*

[22] Malan JA further held as follows:

> "*The right of the credit provider to terminate the review is balanced by s 86(11) which provides that if the credit provider has given notice to terminate and proceeds to enforce the agreement, the Magistrate's Court may order that the debt review resume on any conditions that the Court considers to be just in the circumstances. It is at this moment that the participation of the credit provider in the debt review becomes relevant. He is obliged to comply with the reasonable requests of the debt counsellor (s 86(5)(a)) and to participate in good faith in the review and any negotiations designed to result in responsible debt re-arrangements (s 86(5)(b)). Should the credit provider fail or refuse to participate in the review, a resumption of the process may well be ordered. But where the credit provider on good grounds concludes that the proposed restructuring will not lead to the 'satisfaction by the consumer of all responsible financial obligations' (s 3(g) and (i) on a re-arrangement as contemplated by s 86(7)(c)), the Court considering the resumption of the debt review may well refuse to sanction its resumption.*"

[23] Malan JA held that the words "*hearing the matter*" in this subsection relates to the proceedings to enforce the agreement and consequently refer to the enforcing court, which may either be the High Court or the Magistrate's Court (at 518D). I agree with my brother, Murphy J's view expressed in *Changing Tides 17 (Pty) Ltd v Grobler and Another* ([2012] 3 All SA 518 (GNP) that based on the decision arrived at in the *Collet* matter, it is only the court "*hearing the matter*" in the proceedings to enforce the agreement that may order the resumption of the debt review.

[24] It was further held in the *Collet* matter that:

> "*Over-indebtedness is not a defence on the merits. However, because of its extraordinary and stringent nature, a court has an overriding discretion to refuse an application for summary judgment. It would be*

> *proper for a defendant to raise termination of the debt review by reason of the credit provider's failure to participate or its bad faith in participating when the application for summary judgment is made. These issues may be raised, not as a defence to the claim, but as a request to the court not to grant summary judgment in the exercise of its overriding discretion. Of course, sufficient information on which the request for a resumption of the debt review is based must be placed before the court.*"

[25] It is common cause between the parties that when the first respondent applied for debt review in terms of section 86(1) of the Act before the applicant on 23 April 2009, he was in default in terms of his obligations under the credit agreement between him and the second respondent. The debt review application was only made on 15 December 2010 to the Magistrate's Court, Pretoria North. This happened 20 months after the date when the first respondent applied for debt review before the applicant. Notice in terms of section 86(10) of the Act which terminated the debt review, was given on 23 November 2010. This means that the debt review application of the first respondent was terminated before it was referred to the magistrate's court. In terms of the provisions of section 86(10) of the Act referred to *supra*, the credit provider has the right to terminate the debt review in respect of the particular credit transaction under which the consumer is in default when he is in default at least 60 business days after he had applied for debt review in terms of section 86(1).

[26] From the facts referred to *supra* it is clear that 60 business days as contemplated in section 86(10) of the Act had lapsed after the first respondent referred his application before the applicant in terms of section 86(1) when the

second respondent sent a notice in terms of section 86(10) for termination of the debt review. For these reasons I find that the submission by the applicant that the first respondent was not in default for purposes of section 86(10) entitling the second respondent to terminate the debt review as he was paying his monthly instalments in terms of the applicant's proposal, without merit. I have already found that he was in default with his payments under the credit agreement that was reviewed prior to him applying for debt review. After applying for debt review before the applicant, 60 business days lapsed and the second respondent terminated the debt review process prior to the applicant bringing the application before the magistrate's court. I am therefore persuaded that the second respondent was legally entitled to terminate the debt review process in terms of section 86(10).

[27] The right to terminate the debt review in respect of a particular credit agreement is balanced by section 86(11) of the Act referred to *supra* which gives the enforcing court the power to order the resumption of the debt review. Malan JA in the *Collet* decision emphasised that it is at this stage that the participation of the credit provider in the debt review process becomes relevant and at which the conduct of both parties will be assessed.

[28] In *Seyffert and Another v Firstrand Bank Ltd t/a First National Bank* 2012 (6) SA 581 (SCA) Malan JA made the following remarks:

> *"The court considering the enforcement of a credit agreement may decide whether there is any benefit in postponing the application for summary judgment in order to determine the advantages of a resumption of the debt review. The conduct of both parties will be*

> *relevant in making such determination. Moreover, the terms of a proposed re-arrangement will then also be relevant to assess whether it is likely to lead to the satisfaction of all responsible consumer obligations, if implemented. It is at this stage that a balance must be struck between the interests of the consumer and those of the credit provider.*"

[29] The summary judgment application in this matter was postponed to afford the consumer an opportunity to bring an application for resumption of the debt review in terms of section 86(11). From the papers filed of record it is clear that the original monthly instalment in terms of the bond repayments was R9 346,02. It is also clear that prior to applying for debt review before the applicant, the first respondent was in default of his bond monthly repayments. Even after a proposal was made by the applicant, the first respondent did not make regular payments in terms of the restructuring proposal of the applicant as evidenced on Annexure "E". In terms of the restructuring proposal the monthly instalments had been reduced to almost 50% of the original monthly bond payment that the first respondent had agreed to pay in terms of credit agreement between him and the second respondent and the payment period has also been extended. The applicant submitted that the first respondent has been declared over-indebted. It is trite law that over-indebtedness of a consumer is not a defence on the merits where the credit provider who has terminated the debt review process seeks to enforce the agreement.

[30] Borrowing from the words of Malan JA in the *Seyffert* matter, I am of the view that in the light of the applicant's failure to present any realistic proposal to pay the debt, and the payment history of the first respondent as

discussed above, there is no basis for alleging that the second respondent had failed to negotiate in good faith in the debt review process. I am convinced that the applicant's proposals if accepted, would not lead to the discharge of the debt. Even if the first respondent is well over-indebted, there is no reason why the second respondent should have accepted the applicant's proposals. The second respondent can therefore not be faulted for his conduct in not participating in the debt review as alleged. The second respondent was therefore entitled and justified to terminate the debt review under the circumstances. No sufficient information was placed before me on which the request for a resumption of the debt review is based. I cannot therefore find any basis to order the resumption of debt review as prayed for.

[31] In the result I make the following order:

The application in terms of section 86(11) of the National Credit Act 34 of 2005 is dismissed with costs.

M J TEFFO
JUDGE OF THE NORTH GAUTENG HIGH COURT, PRETORIA

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