FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1368/2011

In the matter between:

IZAK MOSTERT	First Applicant
KLARA ERIKA MOSTERT	Second Applicant
versus	
THE STANDARD BANK OF SOUTH AFRICA LIMITED	First Respondent
ALEXANDER FOWLY HEWETSON	Second Respondent

HEARD ON: 16 MAY 2013

JUDGMENT BY: LEKALE, J

DELIVERED ON: 30 MAY 2013

INTRODUCTION AND BACKGROUND:

[1] On or about 3 October 2000, 3 October 2005 and 18 December 2006 the applicants, a couple married in community of property, and the first respondent concluded credit agreements in terms of which the former passed first, second and third mortgage bonds over their immovable property in favour of the latter as security for loan amounts advanced.

[2] On 14 February 2011 the first applicant was declared over-indebted by the Welkom Magistrates' Court and a debt re-arrangement order was issued which included the loan agreements with the first respondent. The said order, further, directed that the relevant debt review in respect of the first applicant resumes insofar as it may have been terminated by any of the respondents, inclusive of the first respondent. In terms of the order in question the first applicant was directed to pay R9 089.35 per month for the benefit of all the listed credit providers, inclusive of R557,57 per month in favour of the first respondent.

[3] On 23 March 2011 the first respondent issued summons out of this Court against the applicants on the basis of the mortgage bonds and eventually took judgment in default of appearance to defend against them on 23 May 2011. On 15 September 2011 the mortgaged property wasdeclared executable by this Court and, on 27 September 2011, a warrant of execution was issued against the same. The relevant property was, eventually, sold to the second respondent by way of public auction.

[4] The applicants feel aggrieved by the default judgment and the sale of the property in execution of the same and now move for an order:

> "**1. Rescinding the default judgment granted by this Honourable Court on 23rd May 2011 under case number 1368/2011;**

2. **Rescinding the order granted by this Honourable Court on 15th September 2011 under case number 1368/2011 in terms of which order the immovable property known as Erf 3347 Welkom, held by Deed of Title T38217/2000 was declared specially executable;**
3. **Rescinding the warrant of attachment and execution granted by this Honourable Court on 27th September 2011 under case number 1368/2011 in terms of which warrant the property known as Erf 3347 Welkom, held by Deed of Title T38217/2000 was declared specially executable.**
4. **Cancelling the Deed of Sale in terms of which the property known as Erf 3347 Welkom, held by Deed of Title T38217/2000 was sold by way of public auction;**
5. **Costs of the application be paid by the respondent.**"

[5] The first respondent opposes the motion on, *inter alia*, the ground that the applicants have no *bona fide* defence against its action insofar as it terminated the first applicant's debt review in terms of section 86(10) of National Credit Act, 34 of 2005 (the NCA), per notices dated 28 September 2010 which were sent to both applicants per registered mail as well as to the debt counsellor and the National Credit Regulator. The second respondent was joined in the application simply because he has direct and substantial interest in the prayer for cancellation of the Deed of Sale. No papers have been filed in respect of the second respondent. At the commencement of the proceedings the first respondent secured leave to file supplementary opposing affidavit and was ordered to pay the costs occasioned thereby.

ISSUE IN DISPUTE

[7] At the commencement of the proceedings the parties announced that the dispute between them is confined to the question as to whether or not the applicants have a *bona fide* defence with some prospects of success against the first respondent's claim.

CONTENTIONS FOR THE APPLICANTS

[8] Mr Pienaar submits, on behalf of the applicants, that the latter never received any notice of termination of debt review at any time prior to 14 February 2011 and that, if such a notice was sent, the first respondent has failed to allege and prove that same was sent to and received by the post office servicing the applicants insofar as proof of despatch is not sufficient for the purposes of a notice sent in terms of section 129 of the NCA and, by analogy, in terms of section 86(10) of NCA, That, even if the debt review process was terminated, same resumed when it was revived by the court order of 14 February 2011. At all times material to the summons the applicants complied with the debt re-arrangement order insofar as the first applicant paid R9 089,35 per month as ordered by the Court to the relevant payment distribution agent (PDA).

CONTENTIONS FOR THE FIRST RESPONDENT

[9] Mr Zietsman submits to the effect that the first applicant's debt review was properly terminated in terms of section 86(10) of NCA during September 2010 per notices despatched on 28 September 2010. That if it is found that the debt review in question was never terminated or that, if it was terminated, it was revived by the debt re-arrangement order of 14 February 2011, then and only in that event, the first respondent was entitled to enforce its rights against the applicants through legal process in terms of section 88(3) of NCA, because the applicants defaulted under both the credited agreement and the debt re-arrangement order insofar as only R541.40 was paid over to the first respondent for the months of February 2011 and March 2011 instead of R557.57 as ordered by the Court.

APPLICABLE LEGAL PRINCIPLES

[10] One of the essential elements of "sufficient cause" for rescission is existence of a *bona fide* defence which *prima facie* carries some prospects of success. It suffices, for the purposes of rescission, if the applicant makes out a *prima facie* defence by setting out averments which, if established at the trial, would serve as a defence to the claim. (See **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A) at 765 B – C and **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 470 (O).)

[11] In order to prove adequately that a notice in terms of section 129 of NCA has been delivered as required by section 130 of

NCA, the credit provider must allege that the relevant notice was delivered to the relevant post office and that the post office in question would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. (See **Sebola and Another v Standard Bank of South Africa Ltd and Another** 2012 (8) BCLR 785 (CC) at par [77].)

[12] As Mr Zietsman correctly points out, only the court which is seized with the enforcement of the credit agreement relating to the credit provider, who has terminated a debt review in terms of section 86(10) of NCA, has the power to revive such debt review in terms of section 86(11) of the NCA. (See **Collett v Firstrand Bank Ltd** 2011 (4) SA 508 (SCA).)

[13] A credit provider is entitled to enforce its legal rights against the consumer by way of litigation where the latter is in default under the credit agreement as well as in terms of the debt re-arrangement order. (See section 88(3) of NCA.)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

[14] The parties are, effectively, in agreement that, if the consumer complies with a debt re-arrangement order, the credit provider is not entitled to enforce its rights in terms of the credit agreement. The dispute in this regard is limited to the question whether or not the debt review of the first applicant was terminated in the sense that summons

contained sufficient allegations leading to the conclusion that termination notices were delivered to the applicants. If so, they are in dispute over whether or not such debt review was, in law, revived by an order of 14 February 2011. In the event of the aforegoing question being decided in the affirmative, they are at variance on whether or not the applicants were in default in terms of the debt re-arrangement order, insofar as it relates to the first respondent, as at the date of summons.

[15] I am, however, not satisfied that the determination of the question as to whether or not the debt review in question was terminated is of any consequence in the instant application in the light of the fact that the court order, which purports to revive such debt review, has not been set aside. Its *prima facie* effect, in my view, reflects on the *bona fides* of the applicants' defence and its *prima facie* prospects of success. The question as to whether or not the first applicant was in default in respect of the debt re-arrangement order, as at the date on which the proceedings that gave cause to the impugned judgment were commenced, falls to be determined, with certainty, by the trial court. For the purposes of this court, sitting as it is, the question is whether or not the applicants' defence that the first applicant was not in default in terms of the court order at the relevant time, when summons was issued, is *bona fide* and carries some prospects of success. In my judgment that question stands to be answered in the affirmative regard being had to the fact that, it is not in dispute that, the first applicant was ordered to

pay a global amount of R9 089.35 per month and that he was in compliance with that part of the debt re-arrangement order as at the date of summons.

COSTS

[17] The parties are, further, in dispute over the question of costs with the applicants contending that costs should follow the event in line with applicable principles while the first respondent, on its part, submits thatapplicants should, in any event, be saddled with costs, inclusive of reserved costs, because they seek an indulgence.

[18] Having regard to the reason furnished by the applicants for the default, which explanation has, correctly and effectively, been conceded as sufficient and acceptable by the first respondent, I am of the view that it is only fair to allow costs herein to be costs in the cause. In this regard it should be noted that the applicants attribute the default to efforts, on the part of the debt counsellor, to resolve the matter with the first respondent extra-judicially by drawing the latter's attention to the debt re-arrangement order and payments already made in its favour.

ORDER

[19] An order is, therefore, granted in terms of prayers 1, 2, 3 and 4 in the notice of motion.

[20] Applicants are granted leave to defend the matter by entering appearance to defend the action within 10 (ten) days of the date of this judgment and generally in terms of applicable rules of court.

[21] Costs of the rescission application, inclusive of reserved costs, are costs in the cause.

L.J. LEKALE, J

On behalf of applicants:	Adv C.D. Pienaar Instructed by: Wessel & Smith Attorneys BLOEMFONTEIN
On behalf of respondents:	Adv P Zietsman SC Instructed by: Matsepes Inc. BLOEMFONTEIN

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