

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO.: 5345/2010

In the matter between

FIRST RAND BANK

PLAINTIFF

and

NAGINE RAFUQ ABDYK RAHEMAN

FIRST DEFENDANT

KURSGEDA BANU ABDUL RAHEMAN

SECOND DEFENDANT

JUDGMENT

MOKGOHLOA J

[1] The plaintiff instituted action against the defendants for:

[1.1] payment of R220 858.82 together with interest calculated daily on such amount at the rate of 8.65% per annum and compounded monthly from 29th April 2010 to date of final payment;

[1.2] costs of suit on the attorney and client scale;

[1.3] an Order declaring executable, the mortgaged property more fully described as:

Erf 361, Trenance Manor, Registration Division FU, Etheklwini Municipality, Province of KwaZulu-Natal, In extent 458 (Four and Fifty Eight) squire metres, held by Deed of Transfer No.T42039/2008

be declared executable.

[2] The defendants admitted that they failed to pay the necessary instalments in terms of the bond agreement. They however raised a special plea that:

[2.1] They were placed under debt review on 8 January 2010 in terms of the provisions of the National Credit Act 34 of 2005 ("the Act").

[2.2] On 15 February 2010 the debt counsellor representing the defendants forwarded a proposal to the plaintiff in regard to the repayments of monies owed under the mortgage bond.

[2.3] On 4 March 2010 the defendants forwarded a revised proposal increasing the contribution to be made by the defendants in respect of monies owed to the plaintiff.

[2.4] The plaintiff did not object to the revised proposal nor did the plaintiff make a counterproposal to the suggestions of the debt counsellor.

[2.5] The defendants proceeded to make monthly payments to the debt counsellor in terms of the revised proposal.

[2.6] An application to make the proposal an Order of Court was instituted in the Durban Magistrates Court. On 10 May 2010 the Court made the following order:

1. That the joint estate of the first and second respondents be declared to be over-indebted in terms of section 79 of the Act;
2. that the first and second respondents' obligation to the third and seventh respondents to arrange in terms of section 86 and 87 as per annexure "A";
3. the payment to the credit providers is made through a credit payments division agent;
4. that all parties bear their own costs to the application."

[3] The plaintiff submitted that it terminated the debt review in terms of section 86(10) of the Act and a notice to that effect was posted by pre-paid registered post to the defendants on 13 April 2010.

[4] The issue to be determined is whether the credit provider is entitled to terminate a debt review in terms of section 86(10) after the debt counsellor has referred the matter to the magistrates' court.

[5] Section 86 reads as follows:

“(10) 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.”

(11) If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that 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.”

[6] This section has to be read with sections 87 and 88 (3) which read:

“87 The Magistrate's Court may re-arrange consumer's obligations. –

(1) if a debt counsellor makes a proposal to the Magistrate's Court in terms of Section 86(8)(b), or a consumer applies to the Magistrate's Court in terms of section 86(9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligation, may-

- a) reject the recommendation or application as the case may be; or
- b) make-

- (i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the Magistrate's Court concludes that the agreement is reckless;
 - (ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or
 - (iii) both orders contemplated in subparagraph (i) and (ii).
- (2) The National Credit Regulator may not intervene before the Magistrate's Court in a matter referred to it in terms of this section.

88 (3) Subject to section 86(9) and (10), a credit provider who receives 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 by 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 agreement between the consumer and the credit providers, or ordered by a court or the Tribunal

[7] In *Wesbank , a Division of FirstRand Ltd v Papier (National Credit Regulator as Amicus Curiae) 2011 (2) SA 395 (WCC) and First Bank Limited, trading as Wesbank v Kishore Sewsunker 22 February 2011*, the court held that once a debt review has been referred to the magistrates' court, any litigation proceeding for the recovery of the debt should be stayed.

[8] However **Eksteen J** , held that in *FirstRand Bank Ltd v Collett 2010 (6) SA 351 (ECG)* that a credit provide is entitled to terminate a debt review in terms of section 86(10) even after the debt counsellor has referred the matter to the magistrates' court. This decision was confirmed by the Supreme Court of Appeal in *Collett v FirstRand Bank Ltd 2011 (4) SA 508 (SCA)* where the Court held at 515:

“[11] ...The role of the debt counsellor does not end with his referral of the matter to the magistrates’ court. His ‘proposal’ takes the form of an application governed by the rules of the magistrates’ court and he is required to be present in court, participate in the hearing and assist the court by way of furnishing evidence, making submissions or answering questions. It is no answer to contend that contextually s 86(10) forms part of s 86 and thus part of the ‘debt review’, as opposed to the ‘hearing’ before the magistrates’ court in terms of s 87. The words in s 86(10), ‘that is being reviewed in terms of this section’, rather emphasise that it is not a debt review pursuant to s 83(3) (b) or 85(a) and (b). Entirely different considerations apply to the review under these sections: they are not necessarily initiated by the consumer and the court has a discretion whether to proceed under those provisions. The credit provider is not entitled to terminate either of them. Under ss 86 and 87 there is only one unified process, the purpose of which is the restructuring of the consumer’s debts by amending the terms of credit transaction between the parties. If the parties agree, they may amend the agreement in terms of s116 or file a consent order as envisaged by s 86 (8)(a). If they do not, the hearing envisaged by s87 takes place. It follows that I am in agreement with the conclusion reached in the court below:

‘I am unable to find anything in the structure of s86, or of the Act in its entirety, which is indicative of an intention on the part of the legislature to limit the right of a credit provider under s86(10) to the process prior to the reference to the magistrate’s court. On the contrary ... I consider that the credit provider’s rights to give notice in terms of s86(10) and to legitimately terminate the debt review process continue until the magistrates’ court has made an order as envisaged in s 87.’”

[9] In *casu* , not only is the matter pending before the magistrate, an order has been made in terms of sections 86 and 87 to re-arrange the debt. The plaintiff has not alleged that the defendant has defaulted the terms of the court order granted on 10 May 2010. Therefore the plaintiff is not entitled to exercise or enforce by litigation any right under the credit agreement.

[10] Another issue raised by the defendants is that the plaintiff failed to respond to the proposals made by the debt counsellor in restructuring the debt which in terms of section 86(5) obliges both the plaintiff and defendants to cooperate in debt reviews. According to the defendants, the plaintiff has been reckless in failing to participate in such arrangement and they asked for a punitive costs order against the

plaintiff.

[11] I agree, section 86(5) obliges both the consumer and credit provider to participate in good faith in the review and any negotiations designed to result in responsible debt rearrangement. Should the credit provider fail to participate in the review, the court may, on request by the consumer, order that the debt review resume. No such request was made by the defendants because the court has already made an order in terms of section 86 and 87.

[12] Having stated the above, I am of the view that the plaintiff's failure to participate in the review proceedings is reckless but not to an extent of attracting punitive costs against it.

Order

1. The plaintiff's action is dismissed with costs.

MOKGOHLOA J

COUNSEL

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Date of hearing : 22 March 2011

Date of Judgment : 10 February 2012