

In the KwaZulu-Natal High Court, Pietermaritzburg

Republic of South Africa

Case No : AR 6/11

In the matter between :

Edward John Reid

1st Appellant

Mandy Lynne Reid

2nd Appellant

and

The Standard Bank of SA Limited

Respondent

Judgment

Lopes J

[1] On the 25th November 2009 the learned judge in the court a quo granted summary judgment in favour of the respondent against the first and second appellants for payment of the sum of R859 850,87, interest thereon and costs together with a further order declaring the immovable property owned by the appellants to be executable.

[2] The action instituted by the respondent against the appellants was based upon a loan secured by three mortgage bonds. The respondent alleged that the appellants had defaulted on the repayments they were bound to make in terms of the agreement.

[3] This appeal comes before us by way of leave to appeal which was granted on the 23rd September 2010.

[4] The facts of the matter which can be gleaned from the record may be summarised as follows :-

- a) a loan agreement was concluded between the respondent and the appellants during 2005; and
- b) pursuant to that loan, continuing covering mortgage bonds were registered over the appellants' immovable property, the last one on the 28th June 2007; and
- c) pursuant to the appellants having failed to make payment of the relevant instalments, a notice in terms of sections 129 and 130 of the National Credit Act, 2005 ("the Act") was sent to them by the respondent by registered post at the end of March 2009; and
- d) thereafter a summons was issued on the 15th May 2009 which was served on the appellants on the 19th May 2009; and
- e) presumably pursuant to the entry of an appearance to defend, an application for summary judgment was served on the appellants' attorney on the 4th June 2009. Affidavits opposing summary judgment were delivered by both appellants. They raised the defence that on the 2nd July 2009 and the 11th August 2009 respectively, a magistrate in the Durban Magistrates' Court made orders in terms of sub-s 86(7)(c) of the Act in respect of their estates. Ex facie those orders the appellants' consumer debt

obligations were re-arranged in respect of, inter alia, the debts owed to the respondent;

- f) on the 24th November 2009 the respondent's attorney filed a further affidavit indicating that, notwithstanding those Magistrates' Court orders, the appellants had not paid any amounts in respect thereof.

[5] On that basis the respondent persisted in its application for summary judgment which was heard and granted on the 25th November 2009.

[6] The first issue which falls to be dealt with is the further affidavit deposed to by the respondent's attorney, at least insofar as that affidavit may have had any effect on the grant of summary judgment by the learned judge in the court a quo.

[7] Admission of the affidavit is clearly in contravention of the provisions of r 32(4) of the Uniform Rules which provides that no evidence may be adduced by a plaintiff otherwise than by the initial affidavit supporting summary judgment. The filing of the affidavit on the 24th November 2009 was an improper procedure and it should have been struck out by the learned judge.

[8] Central to the learned judge's reasoning for granting summary judgment was the assumption that the application for debt review was out of time, because the respondent had already taken the steps and the procedure contemplated in terms of sections 129 and 130 of the Act, between the 1st

April and the 19th May 2009. She also regarded the order of the Magistrates' Court as being void on the basis that it was contrary to sub-s 86(2) of the Act.

- [9] I have the following difficulties with the approach of the learned judge :-
- (a) there is nothing in the papers before us to indicate that the application by the appellants to the debt counsellor was made after the end of March 2009;
 - (b) in those circumstances there was no basis for the finding of fact by the learned judge that the respondent had already complied with the provisions of sections 129 and 130 when the application for debt review was made;
 - (c) in any event, the provisions of sub-s 86(2) do not necessarily render a decision by a magistrate pursuant to a debt review application void. It may well be that a debt counsellor is precluded from bringing such an application after the credit provider has taken steps in terms of s 129, but there is nothing in the Act to indicate that once having done so, it is visited with a nullity. In my view it was incumbent on the respondent to have applied to set aside the Magistrates' Court orders rather than seeking simply to ignore them. Once a court order is granted, it is valid and enforceable until and unless set aside. As pointed out by counsel for the appellants, any assumption of invalidity would possibly affect other parties to the order.

See : *Jacobs v Baumann* NO 2009 (5) SA 432 (SCA), para 20

Tödt v Ipser 1993 (3) SA 577 (A) at 589 C

Clipsal Australia (Pty) Ltd and others v Gap Distributors Ltd and others

[2009] 3 All SA 491 (SCA), para 22.

[10] In any event, and for the reasons set forth above, there was no evidence before the learned judge that the applications for debt review had been made after the issue by the respondent of the s 129 and 130 notice.

[11] In the premises I make the following order :-

- a) the appeal succeeds;
- b) the summary judgment granted on the 25th November 2009 is set aside and replaced with the following :-
‘The usual order is granted refusing summary judgment.’
- c) the respondent is directed to pay the costs of the appeal;
- d) the matter is to be set down for hearing on the expedited roll in accordance with practice directive 21.

Jappie J : I agree.

Ndlovu J : I agree.

Date of hearing : 8th August 2011

Date of judgment : 12th August 2011

Counsel for the Appellant :K J Kemp SC (instructed by Booysen & Co Inc)

Counsel for the Respondent : B S M Bedderson (instructed by Goodrickes)