

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 3156/2010

In the matter between:

FIRSTRAND BANK LTD

Plaintiff

and

BESTER: ARTHUR MARTIN CHARLES
JOHANNES
PRINSLOO: DEBBIE

1st Defendant

2nd Defendant

JUDGEMENT: RAMPAI J

HEARD ON: 2 SEPTEMBER 2010

DELIVERED ON: 16 SEPTEMBER 2010

[1] This is an application for summary judgment. The application stemmed from the action in which the plaintiff jointly sued the defendants for the payment of the amount of R562 906,63 and ancillary relief pursuant to monies lent and advanced. The defendants opposed the application.

[2] The case of the applicant was that it lent and advanced the money to the defendants on 30 October 2007. This was done by way of one account facility agreement (annexure “a”

second verifying affidavit). Such a special facility was embodied in a written mortgage loan agreement (annexure “b” second verifying affidavit). As security for the repayment of the money so lent and advanced the defendants registered a mortgage bond over their residential property in favour of the plaintiff to the tune of R660 00,00.

- [3] The plaintiff also averred that the defendants failed to make regular payments as agreed. The plaintiff further averred that as a result of such default the loan had become due and payable. The plaintiff then instituted an action against the defendant when its demand for the repayment was not met.

- [4] The following history of the matter is recorded:

On the 28 June 2010 the summons was issued;

On the 2nd July 2010 the sheriff served the summons;

On the 14th July 2010 the defendant filed notice to defend;

On the 22nd July 2010 the plaintiff launched summary judgment application;

On the 2nd August 2010 the defendants delivered notice in terms of section 86(4) National Credit Agreement, No 34/2005;

On the 26th August 2010 the defendants filed notice to oppose summary judgment application.

[5] The defendants averred that they, through a certain debt counsellor called Credit Matters, applied to be placed under debt review in terms of section 86 National Credit Act, No 34/2005. To this effect they annexed to the opposing affidavit a document signed at Parys on 14 October 2009 marked annexure “a”. The National Payment Distribution Agency was authorised in terms of this document to deduct a monthly instalment of R3 522,00 from the bank account of the first defendant as from 1 November 2009 for distribution among their creditors.

[6] They further explained that they were unaware of the problem concerning their application for debt review. They only realised that there was a problem when they received the plaintiff’s summons. They then consulted an attorney, Ms A van der Schyff, who advised them that Credit Matters did not follow the correct procedure in dealing with their debt review application. According to the attorney’s advice the problem was that the debt counsellor at Credit Matters never

obtained an appropriate court order to validate their debt review application. Moreover, they were unaware that the plaintiff had terminated the debt review process on account of such procedural mistake.

[7] Before they signed the aforesaid deduction authorisation, that is to say on 14 August 2009, they made direct payments to Credit Matters. Therefore, they prayed that the applicant should not be granted summary judgment since they had always had a serious intention to apply for debt review and to pay their debts in accordance with such an agreed distribution plan.

[8] The matter is governed by 32(3)(b) which requires that the defendant should set out, in his or her affidavit, facts which if proved at the trial, will constitute an answer to the plaintiff's claim.

BREYTENBACH v FIAT SA (EDMS) BPK 1976 (2) SA 226 (T); **MARSH v STANDARD BANK (SA) LTD** 2000 (4) SA 947 (W).

- [9] In determining whether the defendant has set out a *bona fide* defence all the court has to ascertain is:

Firstly, whether the defendant has disclosed the ground of his or her defence and secondly, whether on the facts so disclosed, the defendant has or appears to have, either the whole or part of the claim, a defence which is *bona fide* and good in law.

MAHARAJ v BARCLAYS NATIONAL BANK 1976 (1) SA 418 (AD).

- [10] The rule is concerned with the defence. It does not require the defendant himself or herself to establish his her subjective *bona fides*. It is the defence which must be objectively *bona fide*.

BREYTENBACH v FIAT *supra* at 227.

- [11] There are three questions to be answered in considering an opposed application for summary judgment:

Firstly, whether the defences are good in law; secondly, whether such defences are *bona fide*; and thirdly, whether the court should exercise its discretion in favour of the

defendant, if one or both of the first two questions are answered against the defendant.

MNWEBA v MAHARAJ (2001) ALL SA 265 at 222 C –

E:

“At this stage the enquiry is whether there is a reasonable possibility that the defendant’s defence may be good.”

[12] On behalf of the applicant Mr Hefer contended that a proper case has been made out for the grant of summary judgment. However, Mr Bruwer disagreed. He contended firstly, that the plaintiff had failed to comply with a number of the provisions of section 86(10), National Credit Act, No 34 of 2005 as well as sections 129(1)(b), 130 and 66 thereof and secondly, that the defendants, acting *bona fide*, placed themselves under debt review which step bars litigation.

[13] It was contended on behalf of the defendants that the following annexures were not attached to the summons or the verifying affidavits. One account facility agreement; mortgage loan agreement; notice in terms of section 86(10); certificate of posting in respect of section 86(10) notices; and

the certificate of balance.

[14] As regards the required notice in terms of section 86(10) same was annexed to the summons – vide page 5 and 8, record). The annexure was unmarked but dated 8 April 2010. As regards the certificate of posting in respect of notices in terms of section 86(10) same was annexed to the summons. It was also unmarked. It was issued at Marshalltown Post Office on the 9th April 2010 – vide item 7 and 8, p 9, record). As regards the certificate of balance, the document was annexed to the summons. It was also unmarked. It was signed on the 8th June 2010 – vide p 3, record). I pause to point out that the summons was issued on the 28th June 2010.

[15] As regards the agreement, copies were not annexed to the summons. Only a brief history of the dual account was given – vide p 4, record). In my view nothing of significance turns on this point. At paragraph 3 of the opposing affidavit the first defendant confirmed that he entered into an agreement with the plaintiff on the 30th October 2007. The plaintiff by way of the first verifying affidavit verified the cause of action,

the facts, the amount of the claim and the grounds on which the claim was based – vide p 16, record.

[16] The defendant levelled no critique whatsoever against this first verifying affidavit. Their critique was aimed at the second verifying affidavit – vide p 18, record. Virtually all the documents specified in paragraph 13 *supra* were annexed to the second verifying affidavit and marked annexure “a” (one account facility agreement) annexure “b” (mortgage bond agreement) annexure c (certificate of balance) and annexure “d” (notice in terms of section 86(10)). I have already commented that save for annexures “a” and annexure b the other annexures were indeed attached to summons although they were not originally labelled. The only new documents attached to the second verifying affidavit which were not originally attached to the summons were the two agreements and nothing more.

[17] In the circumstances whether the second verifying affidavit is disregarded as counsel for the plaintiff urged me to do or whether it is taking into consideration as counsel for the defendant would have it, will not in any way prejudice the

defendants. The failure of the plaintiff to annexe copies of the agreements to the summons was, in the circumstances of this particular case, not a fatal procedural error. This is so because the defendants admitted the agreements. Therefore, it is my view that the preliminary points raised *in limine* were not well taken. I have no hesitation to dismiss each and every one of them.

[18] I find it hard to believe that no annexures were attached to the two copies of the summons served on the defendants. If that was indeed the case the defendant could easily have ascertained the correct situation. Had they taken such reasonable steps, they could have easily obtained copies of the annexures in question from either the registrar or the plaintiff's attorneys.

[19] Moreover, it will be readily appreciated that the first defendant did not complain about any missing annexures in the opposing affidavit. This is telling against their preliminary argument that no such annexures were attached to the copies served on them. It must also be realised that according to the returns of service, the sheriff served copies

of the summons and annexures upon each of them. (vide p 10 and p 11, record).

[20] I turn now to the merits. Here the defence of the defendants was that they, in good faith, I must stress, applied in terms of section 86(10) National Credit Act, No 34 of 2005 to be placed under debt review. They made their debt review application through a debt counselling entity called Credit Matters exactly. It does not appear on the opposing affidavit when they did so. I shall assume for their benefit that they did so on the 14 October 2009, some 8 months prior to the issue of the plaintiff's summons on the 28th June 2010.

[21] They averred that they made regular payments for the benefit of their creditors to their appointed debt counsellor and later to the National Payment Distribution Agency in accordance with the proposed distribution plan. Before the sheriff served the summons upon them on the 2nd July 2010, they honestly believe that their debts were regularly paid. They were not aware that their debt review application was never finalised and that such debt review process was terminated by the plaintiff.

[22] The plaintiff's papers (vide p 4, record) show that the plaintiff took a decision on 2nd February 2010 to terminate the debt review process or debt review counselling. On Thursday, April 8th, 2010 at 08h45 the plaintiff e-mailed the required notices in terms of section 86(10) to appointed debt counsellor of the defendants informing the debt counsellor about the termination. Moreover the plaintiff also sent the required notices in terms of section 86(10) to the first defendant and to the second defendant on the same day advising them of the termination. Such notices were mailed to the defendants by registered post in terms of section 129 (vide p 4 – 9, record).

[23] Section 86(10), National Credit Act, No 34 of 2005 provides that if a consumer is in default under a credit agreement that is been reviewed in terms of section 86, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to the consumer, the debt counsellor and the National Credit Regulator. Such notice may only be given after 60 business days from the date on which the consumer applied for debt review.

[24] In his opposing affidavit the first defendant did not state the exact date on which they applied in terms of section 86 for the debt review relief. However, the opposing papers (annexure a, p 56, record) show that the first defendant authorised the National Payment Distribution Agency on the 14th October 2009 to deduct a fixed monthly instalment from his bank account. He was assisted by a certain Mrs Lee-Ann Benjamin of Credit Matters. From this document it may be reasonable to deduce that the defendants applied in terms of section 86 before or on the 14th October 2009 for the relief by way of debt review. Therefore the sixty day suspension period as envisaged in section 86(10) had already expired when the plaintiff terminated the debt review process on 2010-04-08.

[25] Section 88(3), National Credit Act, No 33 of 2005 provides that subject to section 86(9) and (10) a credit provider who receives notice of a court process contemplated in section 83 or section 85 or a 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 a credit agreement until

certain specified conditions are met. The section was clearly enacted for the benefit of debtors in a financial crises.

[26] Section 86 (2) of the National Credit Act, No 34 of 2005 provides that an application in terms of section 86 may not be made in respect of and does not apply to a particular credit agreement, if at the time of the application, the credit provider, under that credit agreement, had proceeded to take steps contemplated in section 129 to enforce the agreement. Once the summons is served to enforced the consumer's obligation court proceedings are commenced. This section was clearly designed for the benefit of the creditors who are struggling to recover what is due to them from the debtors.

[27] The defendants put up a defence of ignorance. They asserted that their debt counsellor, Ms Lee-Anne Benjamin of Credit Matters, was to blame for their current predicament. She, as they said, did not properly handle their debt review application; did not follow the correct procedure and did not inform them about the termination of the debt review process. Although there is nothing to gain-say their complaint, they failed to dispute the plaintiff's averment that

the plaintiff itself caused two letters dated the 8th April 2010 to be separately mailed to their residential address by registered post on 2010-04-08. The address in question was their *domicilium citandi et executandi*. Implicit in their failure to deal with such a crucial averment, is a tacit admission that each of them received the letter, in other words, section 86(10) notice. I am of the firm view that the defendants were duly notified of the termination of the debt review process and that they took no steps to do anything about the matter.

[28] The defendant consulted an attorney, Ms A van der Schyff after the service of the summons on 2010-07-02, about eleven weeks after the termination of the debt review process. It struck me as somewhat odd that they did not instruct their attorney to convey, with dismay, their serious complaint to their debt counsellor for failing them so badly and thereby plunging them deeper into a desperate financial crises.

[29] There is hardly any suggestion let alone any semblance of proof that the undisclosed sums of money they claimed they paid to Credit Matters was ever demanded back. It was their

case that before 2009-11-01 they made direct payments to Credit Matters (vide par 7, opposing affidavit – p 54, record). The only letter from Credit Matters dated 2010-07-28 (vide annexure “c”, opposing affidavit, p 58, record) did not refer to any refund to the defendants or transfer of funds to NCRDC 1217.

[30] It was further contended on behalf of the defendants that, from 2009-11-01, the defendants made regular payments by way of a stop order to the National Payment Distribution Agency and that they were taken aback to receive the plaintiff's summons. By 2010-07-01 the distribution agency must have received R31 698,00 from the first defendant's bank if the stop order was regularly honoured. However, the defendants apparently did not reclaim such a substantial sum of money from the distribution agency on the grounds that the funds were never distributed among the creditors because there was no approved distribution plan on account of the remissness of their debt counsellor at Credit Matters.

[31] The opposing affidavit was signed by the first defendant on the 18th August 2010, some six weeks or so after the sheriff

had served the summons upon them. There was no annexure attached to the opposing affidavit in support of the allegation that the stop order signed in favour of the distribution agency was regularly honoured by his bank. At paragraph 8, opposing affidavit (p 54 of the record) the first defendant explained such omission or failure by saying:

“8. I have not been able to obtain copies of all my bank statements since I went under Debt Review, since Absa Bank in Parys kept informing me that they were off line and thus having trouble with their computer system.”

[32] I cannot understand what Absa Bank had to do with the monthly stop order deduction signed against the First National Bank in favour of the National Payment Distribution Agency. The opposing affidavit, its confirmatory affidavits and some of its annexures were characterised by vagueness. The actions of the defendants and the opposing papers raise more questions than answers. The failure of the defendants to provide proof of the alleged regular payments they made to the distribution agency and to meaningfully deal with the plaintiff's averments that debt

review process was terminated on account of accumulated arrears suggest that no regular payments were received from the defendants through the distribution agency. All this acts of neglect by the defendants and the vagueness of the averments they make strongly militate against their alleged *bona fides* and their assertion that it has always been their serious intention to apply for debt review relief.

[33] The sincerity or honesty, in other words, their *bona fides* are not relevant in considering whether to grant them leave to defend. After all, it is the defendants defence which must be *bona fide*. Their *bona fides* cannot redeem their defence if their defence lacks *bona fides*. The defendants have delivered the notice to oppose the summary judgment and belatedly embarked on another debt review expedition for the sole purpose of delaying the action.

[34] At paragraph 12, opposing affidavit the first defendant stated:

“12. The current debt counsellor, Pricilla Trollop of Dynamic Debt Solutions, has given notice to all Credit Providers

on the 2nd of August 2010, and I annex hereto a copy of the From 17.1 letter, marked Annexure “D”, as well as a confirmatory affidavit by her, marked Annexure “E”.

[35] On behalf of the plaintiff it was argued that the only steps were taken by the defendants were in fact taken after the institution of the present case and service of the summons. Their second debt review application of the defendants which was delivered on the 2nd of August 2010 four calendar weeks after the summons was served on them was belated. The second attempt to seek relief by way of debt review was contrary to the provision of section 86(2) which was designed to protect credit providers. Therefore the plaintiff was not precluded by the second debt review application of the defendants from applying for summary judgment.

[36] In the circumstances I have come to the conclusion that none of the procedural or substantive defences, if there were any, raised by the defendants were good in law and none of them was *bona fide*. On the facts, it would be a travesty of justice to refuse the summary judgment application and to give the defendants leave to defend the action. If I were to

do so my decision would not be compatible with the proper exercise of judicial discretion. The defendants have disclosed no defence which if proved at the trial, will constitute an answer to the plaintiff's action. They are playing for time. That is the sole purpose of their notice to defend the action. I would, therefore, decline to grant them leave to defend.

[37] Accordingly, summary judgment is granted against the defendants, jointly and severally, the one paying the other to be absolved in the following terms:

36.1 The defendants are directed to pay an amount of R562 906,63 to the plaintiff.

36.2 The defendants are directed to pay interest on the aforesaid amount at the rate of 10,30% per annum calculated and capitalised monthly in advanced in terms of the mortgage bond agreement from the 4th June 2010 until the date of final payment.

36.3 The defendants' property, mortgage under mortgage bond B23187/2007, is hereby declared specially executable for the said sum of money, interest plus costs. The property in question is described as:

Erf 543 VREDEFORT (EXTENTION 11), district VREDEFORT, Province Free State. Measuring 1155 (ONE THOUSAND ONE HUNDRED AND FIFTY FIVE) square metres. Held under Deed of Transfer T33301/2004.

36.4 The defendants are also ordered to pay the costs of the action.

M. H. RAMPAL, J

On behalf of applicant: Adv. J. Hefer
Instructed by:
Hill McHardy & Herbst
BLOEMFONTEIN

On behalf of respondents: Attorney M Bruwer
Instructed by:
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