Reportable Judgment

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPEHIGH COURT, CAPE TOWN)

Case No.: **19179/2001**

Related Case No.: **8179/2011**

In the matter between:

REYNALD MARTIN GELDERBLOEM	First Applicant/Defendant
JANINE GELDERBLOEM	Second Applicant/Defendant

and

CHANGING TIDESNO.17(PROPRIETARY) LIMITED	Respondent/Plaintiff

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JUDGMENT delivered on **27TH OCTOBER 2011**

MEER J.

[1] The applicants apply for the rescission of a summary judgment granted by this court against them as defendants and in favour of the respondent as plaintiff on 9 September 2011. Theorder states as follows:

"**IT IS HEREBY ORDERED THAT:**

1. First Defendant and Second Defendant pay Plaintiff the sum of

R373 623,72 jointly and severally, the one paying the other being absolved;

2. First Defendant and Second Defendant pay Plaintiff interest on the aforesaid amount jointly and severally, the one paying the other being absolved, at the rate of 10.80% per annum, from 01 March 2011, to date of final payment;

3. The property described as:

ERF 1083 KUILS RIVER, IN THE CITY OF CAPE TOWN, STELLENBOSCH DIVISION, WESTERN CAPE PROVINCE AND HELD BY DEED OF TRANSFER NO. T 27773/2003

is declared specially executable;

4. First Defendant and Second Defendant pay the costs of this suit on the scale as between attorney and client.''

[2] The respondent has abandoned paragraph 3 of the above order.

[3] The background facts relevant to this rescission application are briefly as follows: The respondent issued summons against the applicants on 13 April 2011 for the sum of R373 623,72, being the balance alleged to be owing by the applicants under a home loan agreement. The basis for the

summons was that the applicants had fallen into arrears with the payment of their monthly instalments in terms of a loan agreement between themselves and RCS Home Loans Proprietary Limited, a company which administers loans on behalf of the respondent. The loan agreement dated 1 February 2007 provided for a monthly repayment of R4273.76. The agreement recorded at paragraph 15 that "a certificate by a director of RSCHL or an official of the Lender showing the indebtedness of the Borrower to the Lender," would be prima facie proof of such indebtedness. It recorded further at paragraph 19.1 that costs on an attorney and own client scale would be payable by the borrower to the lender in the event of the latter taking steps to enforce its rights under the agreement.

[4] During November 2009 the applicants applied for debt review in terms of s 86(1) of the National Credit Act 34 of 2005 ("the Act"). The applicants contend they were not in default of their loan agreement at the time they applied for debt review. As a consequence of the application for debt review a debt restructuring proposal by a debt counsellor was circulated to all the applicants' credit providers, including the respondent. The respondent did not accept the proposal. The proposal was nonetheless adopted and implemented by the applicants who began paying a monthly amount of R3,430.00 to debt collectors for payment to their respective

creditors. Annexed to the founding affidavit of the first applicant are slips indicating monthly payments of R3430 from 27 October 2010 to 30 August 2011. According to the applicants, of this amount, the sum of R971.50 was paid to the respondent each month in respect of the home loan. The matter was referred to the Kuilrivier Magistrate's Court in terms of s 86 (8) of the Actfor an order that the applicants be declared over-indebted and that their debt commitments be re-arranged. That application is pending.

[5] On 28 March 2011 the applicants were sent a notice by the attorneys acting for the manager of RSC Home Loans Guarantee Trust, in terms of Section 86 (10) of the Act terminating the debt review. The letter stated that the termination was with immediate effect as sixty days after the application for debt review had already lapsed.Thereafter on 13 April 2011 asaforementioned the summons was issued for the balance owing under the home loan agreement.

[6] The applicants' attorney filed a notice of intention to defend whereafter an application for summary judgment was served on 7 July 2011 which application was set down for hearing on 26 July 2011. The application was however postponed several times and ultimately heard on 9

September 2011. There was neither opposition to the summary judgment application nor appearance on behalf of applicants and summary judgment was accordingly granted against them. It is the rescission of such judgment which applicants now seek.

[7] It is trite that to succeed in their application the applicants are required to show good and sufficient cause why a court should exercise its discretion in favour of granting an order for rescission. The applicants must provide a reasonable explanation for their default and show that the application is bona fide and not made merely to delay the respondent's claim. They must also show that they have a *bona fide* defence to the claim which *prima facie* has some prospect of success. See *Grant v Plumbers (Pty)Ltd* 1949 (2) SA 470 (O) at 476-477; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at paragraph 11.

Applicants' explanation for their default

[8] In explaining their default the applicants must furnish an explanation sufficiently full to enable the court to understand how it really came about, and to assess their conduct and motive. See *Silber v Ozen Wholesalers (Pty) Ltd* 1954(2) SA 345 (A) at 353 A.

[9] The first applicant explains that due to an administrative error on the part of his attorneys, immediately after service of the summary judgment application and before the matter could be diarised by the attorneys, the papers relating to the summary judgment application were inadvertently delivered to the office of the debt counsellor. The debt counsellor had appointed the attorneys and the first applicant was under the impression that contact was to take place between the attorneys and the debt counsellor. He explains that he was not informed of the service of documents, was not aware of the circumstances surrounding the application for summary judgment or that the file was not in possession of his attorneys, until he learnt of the judgment. Had he known the facts surrounding the summary judgment application and that he could appear without an attorney, he would have done so. On being informed on 12 September 2011 that summary judgment had been granted, the applicants immediately instructed their attorneys to apply for its rescission.

[10] In *Cavalinias v Claude Neon Lights S.A.* Ltd 1965 (2) SA 649 T, it was found that a court is entitled to refuse an application for rescission even where the fault is that of the applicant's legal representative. In that case the attorney concerned was said to be guilty of more than mere negligence. His conduct was found to be deliberate and wilful and to have

shown a total and contemptuous disregard for the process of the court. *Cavalinias supra* 652 Bto H. The same does not, I believe, apply in the instant case. From the explanation that has been furnished it is clear thatthe default was due to an error and was not wilful. Moreover, neither gross negligence nor a contemptuous disregard for the court process was displayed. The applicants themselves were certainly not in wilful default. I am satisfied in the circumstances that the applicants have furnished a reasonable and sufficiently full explanation for their default, which casts aspersions on neither their nor their attorneys' conduct and motives.

Bona Fide Defence

[11] To establish a *bona fide* defence it is sufficient for applicants to make out a *prima facie* defence in the sense of setting out averments which if established at the trial, would entitle themto the relief asked for. They need not deal fully with the merits of the case and produce evidence that the probabilities are actually in their favour. See *Grant v Plumbers supra* at 476 – 7.

[12] Ms Lawrenson for the applicants submitted that the main thrust of applicants' defence is that they were not in default of their obligations under the loan agreement at the time when they applied for debt review

and hence the respondent was precluded from terminating the debt review in terms of section 86 (10) until such time as the debt review process has been finally adjudicated upon. This contention was not substantiated. No documents or statements were furnished to show that applicants were not in default when they applied for debt review. In support of her argument Ms Lawrenson relied on the recent decision of *Collet v Firstrand Bank Limited* 2011 (4) SA 508 SCA. The reliance is misplaced. For that judgment, whilst precluding a termination under s 86 (10) at a time when a consumer is not in default, does not suggest that such a termination cannot occur once such consumer falls into default. It acknowledges the right to terminate when the consumer is in default. The relevant extracts from paragraphs 9 and 12 of the judgment state as follows:

"[9]…An application by a consumer to apply for debt review, be declared over-indebted and have his debts arising from credit agreements re-scheduled are novel concepts introduced by the NCA. Their purpose is to assist not only consumers who are over-indebted, but also those who find themselves in 'strained' circumstances. A consumer who finds himself in either of these circumstances may apply for debt review in terms of s 86(1). He may do so whether or not he is in arrears under any particular credit agreement. Where the consumer is not in default of any of his obligations, the credit provider is unable to terminate the process because s 86(10) gives the right to terminate the debt review only where the consumer is in default. In such a case the credit provider must await the hearing in terms of s 87. Nor can the credit provider proceed to enforce the credit agreement because the consumer is not in default. Where the consumer, however, is in default the credit provider is entitled to enforce that credit agreement provided the consumer has not made application for debt review pursuant to s 86(1) and the credit provider has complied with the

requirements of s 129 and 130.

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[12] ….. A sounder approach is to recognise the express words of s 86(10) which gives the credit provider a 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 he is not, the debt review continues without the credit provider being entitled to terminate it. It is not the credit provider that is is 'derailing' the process when he terminates the debt review: it is the consumer that is in breach of contract, not the credit provider. 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. "

[13] Whilst in theabove extracts it is stated that if a consumer applies for debt review before he is in default, the credit provider may not terminate the process, it is neither stated nor implied that atermination under s 86 (10) cannot validly occur once such a consumer comes to be in default. The interpretation relied upon by the applicants which seeks to protect such a defaulting consumer is thus misplaced. It is now settled law that when a consumer is in default a credit provider may terminate debt review proceedingsin terms of Section 86(10) of the Actafter the lapse of 60 days from date of application for debt review, even when such an application is pending before a Magistrate's Court. The fact that the consumer might not have been in default when the application for debt review was made, does not render the termination invalid. The right of the credit

provider to terminate the review is balanced by s 86(11), as is pointed out in *Collet* at paragraph 15. The section 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.

[14] The applicants argue further that that they have at all times complied with their payment agreement with the respondent in terms of the debt review process and in light thereof, the respondent has unlawfully terminated the debt review process in terms of Section 86(10) of the Act. This argument cannot be sustained as there was no debt restructuring agreement with the respondent flowing from the debt review process.

[15] As a further defence the applicants deny that they were in default and challenge the amount claimed in the summons. This defence is however not borne out by their own annexures. The monthly repayment amount is recorded in the loan agreement as R4273,76,yet the applicants' annexures illustrate that they were paying the lesser amount of R3 430,00 since 27 October 2010. On their own version, of this amount, R971.50 was received by the Respondent. In addition the applicants' supplementary affidavit makes unsubstantiated allegations of double

charging and of interest and service charges being charged in advance, contrary to the Act. These allegations do not detract from the fact that on their own version they were paying less than the monthly instalment of R4273,76.

[16] In respect of the amount claimed, the first applicant's founding affidavit denies that such sum is due and payable, states that the erroneous interest rate has been applied to a "mis-stated capital sum" and adds that the amount has been calculated in a manner which is contrary to the agreement between the parties. The affidavit does not however substantiate such bare denial by indicating what precise sum is due and payable, what the correct interest rate is, nor what the agreed manner is between the partiesfor calculation of the amount due. Bank statements reflecting what was paid are not furnished. As against this bare denial there is a certificate of balance reflecting the amount claimed by Nirvana Singh, manager of SA Home Loans, which in terms of paragraph 15 of the loan agreement provides prima facie proof of the amount owing.

[17] A bare and unsubstantiated denial of this ilk does not disclose fully the nature and grounds of Applicant's defence and the material facts relied upon. Nor can such be said of any of the other defences furnished. The defences raised by the applicants have not set out averments which if established at the trial would entitle the applicants to the relief asked for.

They are inherently unconvincing.In the circumstances the applicants have not satisfied the requirements of a *bona fide* defence to the claim which *prima facie* has some prospect of success.

Costs

[18] The loan agreement at paragraph 19.1 makes provision for legal costs on a scale as between attorney and own client to be paid by the borrower for costs incurred by the lender in taking steps to exercise and enforce its rights in terms of the agreement. This rescission application constitutes such a step and hence costson such scale applies.

[19] I grant the following order:

The application for rescission of judgment is refused with costs such costs to be on the scale as between attorney and own client.

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Y.S. MEER J.