

SOUTH AFRICA / JUDGMENT

First Rand Bank Limited v Kona and Another (13136/2012) [2014] ZAGPPHC 215 (7 March 2014)

[2014] ZAGPPHC 215

COURT

North Gauteng High Court, Pretoria

BEFORE

Phatudi

CASE / FILE NUMBER

13136/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No: 13136/2012

Date

heard: 10 February 2014

Date

of judgment: 07 March 2014

In

the matter between:

FIRST

RAND BANK

LIMITED.....Applicant

and

RANDMOND

CLAYDE

KONA.....First

Respondent

AMIE

GERTRUDE

KONA.....

Second Respondent

JUDGMENT

PHATUDI J:

- [1] Van Oosten J (court a quo) granted provisional sequestration order[1] against the joint estate of the first and second respondents (the respondents). The respondents were further ordered to show cause on the return day[2], why the provisional sequestration order should not be made final.
- [2] The respondents filed an application seeking an order to set aside the provisional order of sequestration handed down on 08 August 2013 and to dismiss the rule nisi issued consequent to the order. The applicant opposes the application.
- [3] It is common cause that the respondents are indebted to the applicant for monies lent and advanced by the applicant. Due to some financial challenges of life, Alberton Magistrate Court granted an order, on the respondents application, for a re-arrangement of debt review as contemplated in terms of section 86(7)(c) of the National Credit Act (NCA).[3] It is ordered that the [respondents'] [4] obligation to the [applicant's] [5] is rearranged as per annexures [6] thereto.[7]
- [4] On the 20 January 2011, the applicant instituted an action against the respondents with a view to enforce a debt.[8] The applicants applied for summary judgment for which leave to defend was granted.[9] The action is still pending.
- [5] On the 03 March 2012, the applicant applied for an order to sequester the respondent's joint estate. The provisional sequestration order was granted. The respondents intend to show cause why the provisional sequestration order should not have been granted. They contend that the provisional order granted should not be made final.
- [6] The respondents submit that the court a quo relied on the ratio in *Investec Bank v Mutemeri* [10] (Mutemeri) and that of *Firststrand Bank v Evans* [11] (Evans) in granting the provisional sequestration. The respondents submit that their situation is distinguishable from the abovementioned cases. The respondents submit that in *Evans*, the Magistrate's Court had ordered the re-arrangement on a provisional basis by way of a rule nisi. They lastly submit that it is established law that a court order is legally unassailable until set aside.
- [7] The applicant submits in rebuttal that the respondents' submissions are without merit in that a debt review and/or a debt

re-arrangement order is not a bar to a sequestration application. In addition to the decisions relied upon by the respondents, the applicant indicates that the Supreme Court of Appeal in *Naidoo v ABSA Bank Ltd* [12](Naidoo) confirmed and approved the decision in *Mutemeri* where it was stated that ‘sequestration proceedings are not in and of themselves “legal proceedings to enforce the agreement” within the meaning of section 129(1) (b) [of National Credit Act]’

- [8] The applicant further submit that the respondents defaulted by not complying with the debt re-arrangement order they rely on. It is on those bases that the applicant submits that they (applicant), by virtue of section 88(3) of the National Credit Act, may proceed with further enforcement action. Lastly, the applicant refers to the Constitutional Court decision in *Ferris v FirstRand Bank Ltd* [13](Ferris) in submitting that there is no merit in any of the respondents’ contentions.
- [9] It is common cause that the applicant caused issue of summons against the respondents in exercising their right to enforce a debt that arose when the respondents borrowed money from them. The action has not been finalised since the granting to the respondents the leave to defend.
- [10] It can be inferred from the applicant’s papers and submissions made that the applicant opted to pursue the recovery of the debt by way of insolvency proceedings. The applicant demonstrates this by stating that ‘it was specifically indicated in the summons that the Respondents defaulted on their obligation in terms of a re-arrangement order granted by the Magistrate Court and due to the aforesaid Applicant was entitled to enforce its claim by way of action or application.’[14] In the applicant’s heads of argument and submissions in court[15], the applicant stated: ‘I then proceeded to indicate that’ to [the respondents] that by virtue of section 88(3) of the National credit Act, the Applicant may then proceed with further enforcement action.’[16]
- [11] The applicant further submits that ‘I demonstrated that an application for sequestration is not the “enforcement of a contract and/or claim”, but indeed an application in order to declare a debtor insolvent by utilizing the machinery of the Insolvency Act. Consequently, the National Credit Act is not even applicable.’[17]

[12] Section 88(3) of the National Credit Act provides:

‘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 rearrangement agreed between the consumer and credit providers, or ordered by a Court or the Tribunal.’

[13] I find it prudent to first determine the meaning of the phrase “other judicial process” as used in section 88(3) of National Credit Act. The phrase “judicial process” is defined as ‘the rule that determines the role of the judge in a court room as well as the jurisdiction of the individual courts over definite areas of law.’[18]

[14] It is trite knowledge that sequestrations applications[19] “sui generis” as they may seem to be, are initiated by way of motion proceedings in the High Courts. The applications must comply with the relevant requirements of the Insolvency Act.[20] The courts[21] have the discretion to grant an application for sequestration[22] of a debtor if satisfied that the requirements thereto have been complied with.

[15] On the reading of the provisions of section 88(3) of the National Credit Act, I am unable to agree with the court’s ratio in Investec Bank Ltd v Mutemeri[23] where it is stated that ‘an application by a credit provider for the sequestration of a consumer does not constitute ...

other judicial process by which the credit provider exercises or enforces any right under the credit agreement between itself and the consumer’[24] I, however agree that ‘the credit provider may rely on its claim in terms of the credit agreement to qualify as a creditor for the sequestration[25] of the consumer.’

[16] In simpler terms, I am of the view that where compulsory sequestration is sought against a consumer whose obligations has been

re-arranged by an order of the magistrate court[26] by the time of the application for sequestration is instituted, such an order of re-arrangement or debt review contemplated in section 86(7)(c)(ii) constitute a bar against sequestration. Put differently, the magistrate court order placing the debtor on debt review or where the magistrate orders the debtor’s debt re-arrangement as envisaged in terms of the provisions of section 86(7) (c) (ii) of the National Credit Act, the credit provider may not exercise or enforce by litigation or other judicial process until the magistrate’s order has been set aside. The words: “other judicial process” means, in my view, any motion proceedings including the sequestration applications.

[17] The facts in Ferris v FirstRand Bank Ltd[27] differ materially with the facts in this matter in that in Ferris, the credit provider instituted the action proceedings (litigation) up to judgment. The credit provider invoked the litigation process that enforces a credit agreement. In casu, the litigation proceedings with which the credit provider (the applicant) instituted is still pending before this court. It is difficult to predict what the outcome of the said case would be.

[18] It is not clear if the applicant instituted the sequestration proceedings as a means to enforce the action. I infer from the applicants submission[28]that the applicant placed in motion the sequestration application to enforce a debt. It is further not clear as to which process the applicant intends to invoke. If the applicant proceeds with the sequestration application as a tool to enforce the debt, the provisions of the NCA must be adhered to.

Can the magistrate order be set aside by section 86(10)

- [19] The respondents submits that the principle of legality dictates that the magistrate's re-arrangement order made in terms of section 87(1)(b)[29] of NCA is a valid order that stands until set aside[30]. The respondents further submit that such an order cannot be set aside as envisaged in terms of section 86(10) of the NCA.
- [20] It is trite law that the Magistrate Court Orders are valid until set aside by a competent court. In my view, the legislature did not enact section 86(10) to bypass that principle of legality. The Magistrate Court Orders cannot in my view be set aside by a notice envisaged in terms of section 86(10) of NCA. It is further in my view that section 86(10) provides for termination of the debt review application process and not the Magistrate's Court Order.
- [21] The purpose of the National Credit Act has recently been revisited in *Kubanya v Standard Bank of SA Ltd.*[31] where the court stated that 'the Act is a legislative effort to regulate and improve relations between consumers and provider of credit. The main purpose is "to promote and advance the social and economic welfare of South African, promote a fair, transparent, competitive, sustainable, responsible, efficient ... and to protect consumers"'[32]
- [22] The NCA is enacted to assist the consumers who may have fallen in the pit of debt to recover from their economic recession.
- [23] The applicant instituted an action. The applicant did not succeed to obtain judgment at summary judgment level. Had the applicant succeed with the summary judgment, execution of the respondents' properties including the house would have been effected. Failure to secure such judgment prompted the applicant to approach the court by way of sequestration without first applying to set the magistrate's order aside. The applicant, in my view, knew or reasonably expected to know that sequestration applications, "sui generis" as they may seem to be, will ensure the execution of the respondents' house to enforce the debt. The conduct such as the applicant's does not improve relations between consumers and providers of credit.
- [24] It is trite that costs follow the event. The respondents succeed in opposing the granting of the final sequestration order and are thus entitled to their costs. I thus make the following order:

Order:

1. The provisional order of sequestration granted by Van Oosten J on 08 August 2013 is hereby set aside.
2. The Rule Nisi is hereby discharged.
3. The applicant is ordered to pay the respondents' costs.

A.M.L. Phatudi

Judge of the High Court

On Behalf of the Applicant: Rorch, Wolmarans & Luderits Inc

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Brooklyn

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Adv. L. Meintjies

On Behalf of the Respondent: Ledwaba Attorneys

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Adv. S.S. Cohen

[1]

Judgment

handed down on 8 August 2013.

[2] 03 October 2013. See order and judgment by Van Oosten J.

[3] National Credit Act 34 of 2005.

[4] The respondent is the applicant in the Alberton, debt review application.

[5] The applicant is one of the respondents in that application.

[6] The annexures are marked A1 – A9.

[7] The order issued on 29/08/2009.

[8] Summons issued by this court under case number 3331/2011

- [9] Ibid: page 507 paragraph 19
- [10] 2010(1) SA (GSJ)
- [11] 2011(4) SA 597 (KZD)
- [12] 2010(4) SA 597 (SCA)
- [13] CCT 52/13 [2013] ZACC 46 (12 December 2013)
- [14] Applicants Founding Affidavit. Paragraph 29 paginated page 37.
- [15] Adv. Meintjies represents the applicant
- [16] Applicant's Supplementary Heads of Argument: paragraph 7
- [17] Applicants Supplementary Heads of Argument: Ibid
- [18] www.ask.com – what is – the – meaning –judicial - process
- [19] Voluntary surrender or compulsory sequestration
- [20] Section 3 - 7 in cases of voluntary surrender and section 8 – 12 in cases of compulsory sequestration.
- [21] High Court with a judge presiding
- [22] Either voluntary or compulsory
- [23] 2010(1) SA 265
- [24] Ibid paragraph 34
- [25] Ibid
- [26] Section 87(1) (b) (ii) (my emphasis in bold.)
- [27] CCT52/13
- [2013] ZACC 46
- [28] Supplementary Heads of Argument paragraph 7: 'I then proceeded to indicate that by way of virtue of section 88(3) of the National Credit Act, the Applicant may then proceed with further enforcement action.
- [29] 87 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 obligations, may- (a)... (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).

[29] 87 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 obligations, may-

(a)...

(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).

[30] The respondents rely on V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd & others 2006(1) SA 252 (SCA).

[31] CCT 65/13 [2013] ZACC1 (20 February 2014)

[32] Ibid paragraph [19]

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