

SOUTH AFRICA / JUDGMENT

Firststrand Bank Ltd v Steenkamp (57664/2011) [2012] ZAGPPHC 285 (11 May 2012) [2012] ZAGPPHC 285

COURT

North Gauteng High Court, Pretoria

BEFORE

Makgoka

CASE / FILE NUMBER

57664/2011

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IN

THE NORTH GAUTENG HIGH COURT,

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE

NO: 57664/2011

DATE:11/05/2012

In

the matter between:

FIRSTRAND BANK

LIMITED.....Plaintiff

and

STEENKAMP JACOBUS

PETRUS.....Defendant

JUDGMENT

MAKGOKA, J:

- [1] This is an application for default judgment. In a simple summons, the plaintiff alleges that the defendant has breached the terms of a loan agreement between the parties. The loan agreement was secured by a mortgage bond in favour of the plaintiff over the defendant's property. The plaintiff claims payment of a sum of R1 736 277.73, together with finance charges and interest. The plaintiff further seeks an order declaring the defendant's property executable for the amount claimed and costs.
- [2] Summons was properly served on the defendant, on 12 October 2011. The defendant has not entered an appearance to defend and remains in default. The loan agreement is a credit agreement envisaged in, and subject to, the National Credit Act, 34 of 2005 (the NCA). The defendant had applied for debt review in terms of s 86(1) of the NCA, which was later terminated by the plaintiff in terms of s 86(10) of the NCA, and the plaintiff now seeks to enforce the credit agreement.
- [3] The issue for determination is whether the plaintiff, as a credit provider, upon termination of debt review proceedings in terms of s 86(10) of the NCA, is entitled to enforce or to cancel the credit agreement, without having complied with s129 and s130 of the NCA. In *Changing Tides (Pty) Ltd v Grobler & Another*¹ Murphy J, although obiter, answered that question in the positive. A contrary view was expressed by Legodi J in *Toyota Financial Services and Van Biijon and First Rand Bank Ltd t/a Honda Finance v CC Owens*² where the learned Judge held that a credit provider is not entitled to terminate the consumer's debt review in terms of s 86(10) and enforce the credit agreement without having first met the further requirements of s 130 as contemplated in s 129(1)(b)(ii).
- [4] When this matter came up for hearing before me in the unopposed motion court, I raised with counsel the issue of the divergent judgments. Counsel urged me to prefer Murphy J's judgment to that of Legodi J. I indicated to counsel that it would be undesirable for me to simply ignore a judgment of this court, or prefer one over the other, without the benefit of full argument. I then requested counsel to submit written submissions. It was then anticipated that a Full Bench would be constituted to consider these judgments and that this matter would serve as one of the "test cases". The Full Bench is yet to be constituted and in order to avoid any injustice to the plaintiff, I have decided to deliver this judgment on the preliminary view I hold on this issue, which I succinctly set out.
- [5] The NCA prescribes a two-stage approach to debt enforcement, in distinguishing between procedures that have to be complied with
- before debt enforcement (s 129), and those that are to be applied in court (s130). Section 86(10) provides for termination of a debt review. It is necessary to quote in full, the provisions of those sections.
- [6] S 129 provides:

"(1) If the consumer is in default under a credit agreement, the credit provider-

- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring payment under the agreement up to date; and
- (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-
 - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
 - (ii) meeting any further requirements set out in section 130."

[7] S 130(1)(a) provides:

"Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and- (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;

(my emphasis)

[8] S 86(10) deals with termination of debt review. It provides:

'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 the National Credit Regulator, at any time at least 60 business days after the date on which the consumer

applied for the debt review."

[9] Before I consider the effect of the relevant sections, I need to dispose of one aspect. That is, the reference in s130 to a notice 'as contemplated in section 86(9)'. Legodi J held (in paras 36, 37 and 38 of the judgment) as one of the premises for the conclusion he arrived at, that that reference (to s 86(9) and not s 86(10)) was expressly made, and was deliberate, by the legislature. I do not agree. That reference is a patent error, as s 86(9) does not refer to any notice, but deals with the consumer's right to apply to a magistrate's court, should his or her application be rejected by the debt counsellor. It has been held by a Full Bench of this court³ that the reference to s 86(9) is an obvious error and that it should be a reference to s 86(10). (See also *Changing Tides*)⁴.

[10] Once it is accepted, as one should, that the reference to s 86(9) in s 130 should have been to s 86(10), it becomes clear then that in both s129 and s130, reference is made to a notice in terms of either s 129(1) or s 86(10), as being pre-requisite for the enforcement of a credit agreement. If either notice, depending on the circumstances, has been given, what remains for the credit provider is to comply with the “further requirements” in terms of s130.

[11] The essence of Legodi J’s reasoning is encapsulated in paragraphs 27 and 28 of the judgment:

"27. Therefore, the provisions of sections 129 and 130 must be seen in the context of the noble objective of the Act. Section 129(1) (a), unlike the proceedings under section 86, provides a consumer with a wide range of choice (sic) to make or alternatives to resort to, the sole purpose being, to resolve any dispute under the credit agreement.

28. For example, unlike the proceedings under section 86, where only a debt counsellor is involved, before approaching the court under section 129, a participative process by the parties to the credit agreement is envisaged. The process out of the consumer’s

choice, can be facilitated either by a credit counsellor, alternative dispute resolution agent, by consumer court or ombud with

jurisdiction. All of these people have their own expertise and some special negotiating skills”.

[12] The learned Judge clearly adopted a purposive interpretational approach. However, in applying the purposive approach, care must be taken not to violate the legislature’s language employed in the statute. Innes CJ said the following in *Dadoo Ltd and Others v Krugersdorp Municipal Council*⁵:

‘Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the Court according to recognized rules of construction, paying regard, in the first place to the ordinary meaning of the words used, but departing from such meaning under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. But there must, of course, be a limit to such departure. A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or objective of the particular measure’.

[13] The starting point in the interpretation of a statutory provision remains an endeavour to ascertain the intention of the legislature

from the words used in the enactment. Those words must be accorded their ordinary, literal, grammatical meaning and a court may depart from that meaning only where to do so ‘would lead to an absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the court is justified in taking into account ...’ (See *Venter v Rex* 1907 TS 910 - 915; *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) at 107B-

G).

[14] The clear and plain language of s129(b)(i) and (ii) envisages two distinct pre-requisites for enforcement of a credit agreement:

delivery of either s 129(a) or s 86(10) notice, and secondly compliance with “further requirements in terms of s 130”,

which are: (i) proof that the consumer had been in default for at least 20 business days, and (ii) that 10 business days had lapsed

after delivery of a notice contemplated in s 86(10) or s 129(1). The use of the words ‘as the case may be’ clearly envisages different and distinct considerations as to which section, (129(1)(a)(i) or s86(10)), should be applicable in giving notice.

[15] In para 29 of the judgment Legodi J states the following:

“Now, if a credit provider under section 86(10) was to be entitled upon termination of debt review proceedings, to either enforce or cancel the credit agreement without compliance with the provisions of sections 129 and 130, the consumer would, in my view, be disadvantaged by not been given the opportunity to make a choice under section 129(1)(a)\

[16] With respect, I do not see how the consumer is disadvantaged. In terms of s 129(1)(a), the consumer is restricted in his choice. He or she can refer the credit agreement to either of the entities mentioned in the section. In other words, he or she is not entitled

to refer the dispute intermittently to one entity after the other, should the dispute not be resolved by the one earlier chosen by him or her.

[17] By parity of reason, a consumer who avails himself or herself of the provisions of s86(1) by referring the matter to a debt counsellor, has thereby exercised the options afforded to him or her in s 129(1)(a), and is in the same position he would have been, had a notice in terms of s129 been given to him or her, as a debt counsellor is one of the entities to which the consumer may refer a credit agreement, the other entities being the alternative dispute resolution agent, consumer court, or ombud with jurisdiction. Put differently, by availing himself or herself of the provisions of s 86(1) the consumer is deemed to have availed himself or herself of the single option he would have exercised, had he received a notice in terms of s 129. Should that process (of debt review) be validly terminated, he or she does not have the right to refer the credit agreement to the other entities.

[18] Flowing from the above reasoning, on Legodi J’s interpretation of the relevant sections of the NCA, the s 129 notice to be given to the consumer (after termination in terms of s86(10)), would necessarily have to exclude a debt counsellor as an option to which the consumer could refer the credit agreement. It has to be so as the very termination of the debt review is preceded by the consumer having referred the credit agreement to a debt counsellor. Necessarily therefore, the s 129 notice, under those circumstances, would be different to what is envisaged in the section, lest an absurdity results.

[19] I think Legodi J's concerns are adequately addressed by reading s 86(10) in conjunction with s 86(11) which provides that a credit provider who has given notice to terminate the debt review and proceeds to enforce the agreement, a magistrate court (or a High Court)⁶ hearing the matter, may order that the debt review resumes on any conditions the court considers to be just in the circumstances. In *Collett v Firststrand Bank*⁷ the Supreme Court of Appeal pointed out that s 86(11) tempers the right of the credit provider to terminate the debt review.

[20] To sum up: I think it is manifestly clear on a plain reading of ss 129, 130 and 86(10) that they mean what they say: before enforcement of a credit agreement a credit provider must give notice in terms of either s129 or s 86(10), as the case may be. The credit provider is therefore not obliged, after having terminated the debt review in terms of s 86(10), to give the consumer a notice in terms of s129(1)(a).

This view finds support of the learned authors of *Guide to the National Credit Act*,

"A credit provider wishing to terminate a pending debt review and institute proceedings in court to enforce the credit agreement

against a consumer who is in default need only give the consumer notice of termination of the review, as required by section 86(10), before proceeding to court. In such instances it is not necessary for a section 129(1) (a) notice to precede litigation, as is clear from section 129(1) (b) which stipulates that a credit provider may not commence any legal proceedings before first providing to the consumer a notice as contemplated in section 129(1)(a) or section 86(10)"T.

[21] For these reasons I prefer Murphy J's obiter view. The final word would obviously be left to the Full Bench if and when

constituted.

[22] The plaintiff has met the jurisdictional requirements for the exercise by it of its rights in terms of s 86(10). Those are:

- (a) the defendant is in default of the credit agreement being reviewed;
- (b) at least 60 business days have elapsed from the date on which the defendant applied for debt review;
- (c) at least 10 business days have elapsed since the plaintiff delivered the s86(10) notice prior to the institution of these proceedings to enforce its rights in terms of the agreement.

[23] Furthermore, the plaintiff has complied with the directives of the Full Bench of this division as laid down in *FirstRand Bank Ltd v Folscher and Another, and Similar Matters*⁸, with regard to the authorization of a writ of execution of the immovable property. I am satisfied that the plaintiff is entitled to judgment. Costs are sought on an attorney and client scale as provided for in the agreement.

[24] In the result default judgment is granted against the defendant for:

1. Payment of the sum of R1,736,277.73;
2. Interest on the amount in 1 above at the rate of 7.45% per annum from 31 August 2011 to date of payment;
3. The property described as Erf 27, BRACKENHURST, Registration Division IR, the Province of Gauteng, measuring 1478 square meters and held under Deed of Grant No. T68630/2007 subject to the conditions contained therein, is declared executable;
4. Costs on an attorney and client scale.

TM MAKGOKA

JUDGE OF THE HIGH COURT

DATE HEARD : 14 DECEMBER 2011

JUDGMENT

DELIVERED : 11 MAY 2012

FOR THE PLAINTIFF: ADV J H MOLLENTZE

INSTRUCTED BY : BICCARI BOLLO MARIANO INC,

PRETORIA

NO APPEARANCE FOR THE DEFENDANT.

1Case number 9226/2010

2Case number 31752/2011

3African Bank Ltd v Myambo NO and Others 2010 (6) SA 298 (GNP) at 311G.

4Above, para 25.

5 1920 AD 530 at 543

6 As per Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga 2011 (1} SA 374 (WCC).

7 2011

(4) SA 508 (SCA)

8 2011 (4) SA 314 (GNP).

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