

SOUTH AFRICA / JUDGMENT

Nedbank v Fourie and Another (3589/2010) [2010] ZAFSHC 163 (25 November 2010) [2010] ZAFSHC 163

COURT

Free State High Court, Bloemfontein

BEFORE

B.C. Mocumie

CASE / FILE NUMBER

3589/2010

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. 3589/2010

In the matter between:-

NEDBANKPlaintiff

versus

STEPHANUS FOURIE1st Defendant

CICILIA HENDRINA FOURIE2nd Defendant

DELIVERED ON: 25 November 2010

SUMMARY JUDGMENT

MOCUMIE, J

- [1] The plaintiff instituted an action for summary judgment for payment of the sum of R362 998, 12 together with interest at the rate of 8,75% per annum from 1 June 2010 to date of payment. The plaintiff also seeks an order declaring the immovable property executable, namely a unit consisting of:

‘(a) section no. 11, as shown and more fully described on Sectional Plan No. SS47/1983, in the scheme known as Soete Inval, in respect of the land and buildings situated at Bloemfontein, Mangaung Local Municipality, of which section the floor area, according to the said Sectional Plan is 103 (one hundred and three) square metres in extent, and

(b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quote as endorsed on the said sectional plan held under Deed of Transfer No ST10453/2005 and costs of the suit.’

[2] The claim arises from the defendants’ (who are husband and wife) failure to effect payment of the monthly instalments to the bank, on the dates as stipulated in the loan agreement between the parties. The defendants’ indebtedness to the plaintiff is not in dispute. This notwithstanding, the defendants allege that the application is contrary to the provisions of the National Credit Act, 34 of 2005 (“the NCA”) in that the plaintiff terminated the debt review process unlawfully.

[3] In their opposing affidavit the defendants allege that on 18 February 2010 they completed the necessary forms to commence a debt review process in terms of the provisions of s86 (1) read with s86(4)(i) , s86(7) (c)(ii) and s86(11) of the NCA. The loan agreement with the plaintiff was included in the debt review process. On 22 February 2010 the plaintiff was informed of the application and did not oppose it. The defendants were subsequently declared over-indebted. On 26 March 2010 the plaintiff was informed of this decision and was furnished with a summary of the debt counsellor’s report.

[4] On 23 July 2010, in terms of s86 (10), the plaintiff withdrew from or terminated the debt review process by serving a notice on the first defendant based on an alleged defaulted payment on the main debt. The defendants took no further steps upon receipt of this notice. On 27 July 2010 applicant issued summons against the defendants. Upon receipt of the summons the defendants delivered a notice of intention to defend which triggered the application for summary judgment which application is opposed.

[5] On 2 August 2010 the debt counsellor referred the matter together with his proposal to the Magistrate Court of Welkom seeking an order that the defendants’ debts be re-arranged in terms of s87(1) read with s79(1)(a),s86(7)(c)(ii)(aa) & (bb)and s86(8)(b) of the NCA. The plaintiff was notified per facsimile on 26 August 2010 although it is dated 2 August 2010 that this enquiry will be held on the very day.

[6] The Court having heard the debt counsellor, and having had regard to the proposal and information before him or her and the defendants’ financial means, prospects and obligations, granted an order

(a) Declaring the defendants over-indebted as defined in s79 of the NCA and re-arranging the defendants’ obligations in terms of s86(7)(c)(ii) in accordance with the proposal of the debt counsellor by:

- (i) extending the period of the agreement and reducing the amount of each due payment ;
- (ii) postponing the dates on which payments are due under the agreement;
- (iii) extending the period of agreement and postponing to a specified period the dates on which payments are due under the agreement (s86(7)(c)(ii)(cc).
- (b) That the defendants pay the relevant payment distribution agent in favour of the cited credit providers; and
- (c) That the defendants pay the costs of the application.

[7] The only defence raised in opposition to the summary judgment application is set out as follows in the opposing affidavit [paraphrased]:

“The notice in terms of s86(10) is defective in that the allegations made in para 10.1 of the particulars of claim are not contained in the said notice. Secondly, the notice was not served properly alternatively it was not properly brought to the attention of the defendants, the debt counsellor and or the National Credit Regulator. Thirdly, it is clear that Nedbank’s system and record keeping is confused as it appeared until late that, on its own version, the second defendant did not owe it any money as appears on SF17 appended to the papers...”

- [8] The critical issue to be decided is whether the plaintiff could validly give notice to terminate the debt review process in terms of s86(10) after the debt counsellor had declared the defendants over-indebted but before he referred the application to the Magistrate Court (“the Court”) for an enquiry in terms of s86(7). This involves the interpretation of s86 of the NCA.
- [9] The objective of the NCA, according to its preamble, is : “To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over-indebtedness...”

It is as a result important to keep this objective in mind whenever the interpretation of an agreement between parties in this context is brought before the courts.

- [10] In terms of s86 (1) a consumer may apply for debt review at a debt counsellor to be declared over-indebted. On receipt of the application the counsellor must first notify the creditors that are listed in the application about such application in the prescribed manner and form (s86 (4) (i)). Any credit provider referred to by such consumer in his application is required to participate in good faith in the debt review process and in any negotiation designed to result in a responsible debt rearrangement (s 86(5)(b). A Court may, on the recommendation by a debt counsellor after a hearing, order that one or more of the consumer’s obligations be re-arranged (s86 (7)

(c) (ii)).The credit provider may give notice to terminate the review process if the consumer is in default under a credit agreement that is being reviewed.(s86(10)).The credit provider must deliver a notice of his termination to (i) the consumer (ii) the debt counsellor and (iii) National Credit Provider, within sixty (60) days of the date on which the consumer applied for the debt review.(s86 (10) (a)-(c)).

[11] In terms of s87 a Court may re-arrange consumer's obligations under certain conditions. If a debt counsellor makes a proposal to the Court in terms of s86

(8) (b), or a consumer applies to the Court in terms of section 86 (9), the 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-

11.1 Reject the recommendation or application as the case may be; or

11.2 Make an order declaring any credit agreement to be reckless, and an order contemplated in s83 (2) or (3), if the Court concludes that the agreement is reckless;

11.3 Make an order re-arranging the consumer's obligations in any manner contemplated in s86 (7) (c) (ii); or

11.4 Make both orders contemplated in subparagraph (i) and (ii).

[12] Section 88 deals with the effect of a debt review, re-arrangement order or agreement. In terms of this section

a credit provider who receives notice in terms of s86 (4) (b) (i) may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until

12.1. the provisions of s86 (10) have been complied with;

12.2 the consumer is in default under the credit agreement; and

12.3 the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers or order made by a court (s86 (3)).

[13] An application for summary judgment is governed by Rule 32 of the Superior Courts Rules of Practice. Rule 32(3) (b) provides that a respondent may satisfy the court by an affidavit that (s)he has a bona fide defence to the action against the applicant. Such affidavit must disclose the nature and grounds of the defence and the material facts relied upon fully for the establishment of such defence. In its ordinary meaning the word “fully” connotes sufficient details of the nature and grounds of the defence.(Traut v Du Toit 1966

(1) SA 69 (O) at 70G-H and 71A). In the seminal judgment of Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426 B-D Corbett JA stated that

“One of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined

summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully', as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence. (See generally, Herb Dyers (Pty.) Ltd. v Mohamed and Another, 1965

- (1) SA 31 (T) ; Caltex Oil (SA) Ltd. v. Webb and Another, 1965 (2) SA 914 (N) ; Arend and Another v. Astra Furnishers (Pty.) Ltd., supra at pp. 303 - 4; Shepstone v. Shepstone, 1974 (2) SA 462 (N)). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. (See Estate Potgieter v. Elliott, 1948 (1) SA 1084 (C) at p. 1087; Herb Dyers case, supra at p. 32.)..."

- [14] Colman J delivering the judgment of the Full Bench in Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) at 228 reaffirmed this statement stating that:

"It must be accepted that the sub-rule was not intended to demand the impossible. It cannot, therefore, be given its literal meaning when it requires the defendant to satisfy the Court of the bona fides of his defence. It will suffice, it seems to me, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing."

- [15] It is trite that in applications of this nature, summary judgment, the court does not scrutinise the evidence presented by the respondent in order to see whether there is a balance of probabilities that a defence raised will succeed nor does the court at this stage have to weigh up or decide disputed factual issues. All that is required is that the court should be satisfied that the respondent has presented, where the defence is based upon facts, all the material facts upon which his or her defence is founded and that they appear to disclose a bona fide defence. The respondent is in all fairness not required to demonstrate the corrections of the facts stated by him or her. (Muller and Others v Botswana Development Corporation Ltd 2003 (1) SA 651 (SCA) at 656.)

It is against this background that I have to decide if the defendants have proved that they have a bona fide defence.

- [16] It is common cause or at least not seriously disputed on the papers that no order had been made by any Court "re-arranging" any of the defendants' obligations under s87 as on the date on which the plaintiff terminated the credit review process (23 July 2010) and issue of the summons (27 July 2010).

- [17] It is also common cause that the NCA applies to the defendants' loan agreement and that they are consumers as defined in the NCA and further that the plaintiff is a credit provider as defined therein.
- [18] Mr Reinders, on behalf of the plaintiff, argued that the plaintiff was entitled to issue the s86(10) notice in terms of the provisions of s86(4) which is to the effect that the plaintiff can resort to instituting legal action upon the defendants' failure to pay in terms of the principal debt. He contended that in any event the defendants have not made a full disclosure to this Court, in their opposing affidavit explaining, for instance, whether they have complied with all their obligations in terms of the re-arranged debt payment. According to counsel the following is the high water mark of the defendants' case:

“Op die datum waarop Nedbank uit die skuldberadings proses onttrek het, synde 23 Julie 2010, is minstens twee betalings gedoen. Ter stawing daarvan heg ek aanhangsels SF26 tot SF27 hierby aan, waaruit voormelde blyk.”

- [19] Plaintiff's counsel also submitted that after the plaintiff had withdrawn from or terminated the review proceedings the defendants despite been notified in terms of section 86(10) did not apply for a reinstatement of the application in the Court in terms of s86(11). This, he submitted, entitled the applicant to resort to the rights it had in terms of the loan agreement between the parties and issue summons.
- [20] Mr Buys, on behalf of the defendants, submitted that the plaintiff terminated the review proceedings unlawfully as it was aware of the application for review which was made prior to the issue of summons. He submitted further that the defendants were not in default on the re-arranged payments as they have made payment in compliance with the Court's order.
- [21] The interpretation of s86 has come before the courts and evoked divergent views as shown in the judgments of Standard Bank of South Africa (Pty) Ltd v Kruger; Standard Bank of South Africa Ltd v Pretorius 2010
- (4) SA 635 (GSJ); S A Securitisation (Pty) Ltd v Matlala, Gideon (an unreported judgment in Case No. 6359/10 (SGJ) dated July 2010; S A Securitisation (Pty) Limited v Nako and Others (an unreported judgment in Case No's 19/10; 21/10; 22/10; 77/10; 89/10; 104/10; 842/10 (ECB); and First Rand Bank (Pty)Ltd v Wayne Thomas Evans (unreported judgment Case No. 1593/10); Sa Taxi Securitisation (Pty) Ltd v Mbatha, and Similar cases 2010 JDR 0473 (GSJ).
- [22] In the matter of Standard Bank v Kruger & Pretorius supra at 641 paras [16] and [17] Kathree-Setiloane AJ held that:

“[16] It is clear from a proper reading of s 86 of the Act that the only E review process that may be terminated in terms of s 86(10) of the Act is the one which is undertaken by a debt counsellor - in other words, any of the review steps taken by the debt counsellor in terms of s 86(6) to 86(8)(a) of the Act prior to a referral to the magistrates' court. I am of the view that any contrary interpretation in terms of which a credit F provider would be entitled to terminate the debt review process after a period of 60 days, despite it having been referred to a magistrates' court, would lead to an absurdity, in that any

delay by any party to such application, any delay occasioned at the instance of the court, or even any delay due to unforeseen circumstances, would deprive the consumer of the opportunity to have the matter properly determined by that court. G

- [17] Furthermore, s 86(10) clearly contemplates that the debt review process before a debt counsellor will be completed at least 60 business days after the date on which the consumer applied for the debt review, failing which the credit provider may terminate the review in the H prescribed manner. Therefore, having regard to lengthy delays when attempting to obtain a date for a hearing in the magistrates' court, the likelihood of multiple postponements in a review which has a multitude of credit providers, and other similar factors, I am of the view that an unqualified entitlement to terminate proceedings in which a court has been seized with the review, without reference to that court, is clearly not I consistent with a core objective of the Act, which is the promotion and protection of consumers.
- [23] On this basis she held that it was not competent for a credit provider to give notice in terms of section 86(10) of the Act where the debt counsellor has already referred the debt review to the Court taking into account the context in which the words are used in the Act as a whole and the surrounding circumstances relating to the apparent scope, purpose and limits of the Act as well as its background. See also *First Rand Bank v Wayne Thomas Evans* at page 8 para
- [15] with reference to *Jaja v Dönges, No and Another*; *Bhana v Dönges, No and Another* 1950 (4) SA 653 (A) at 662 H); *List v Jungers* 1979 (3) SA 106 (A) at 118 D & *Swart en 'n Ander v Cape Fabrics (Pty) Ltd* 1979 (1) SA 195 (A) at 202 C.
- [24] I am in agreement with Eksteen J as he correctly held in *First Rand Bank v Wayne Thomas Evans* supra, at page 11 para [20] that the credit provider's obligation to give notice in terms of s86(10) and its right to legitimately

terminate the debt review process continues until the magistrate court has made an order envisaged in section 87. Section 86(10)

contains no limitation on the creditor's right to give notice under s86(10). The only provisos are that the consumer must be in default and sixty days must have lapsed since the debt review process commenced. See *SA Taxi Securitisation (Pty) Ltd v Mbatha*, and *Similar Cases* 2010 JDR 0473 (GSJ) at page 5 para [6]. However these powers can only be exercised if the credit provider has given notice to three entities:

- (a) the consumer;
- (b) the Debt Counsellor; and
- (c) the National Credit Regulator; within sixty (60) days from the date on which the consumer made an application for a debt review.

- [25] It is not in dispute that the plaintiff served this s86 (10) notice on only one defendant on 22 July 2010, almost a month after it had issued the s86 (10) notice terminating the debt review process. It is also not in dispute that the plaintiff did not serve the notice on the Debt Counsellor or the National Credit Regulator (“NCR”) as the Act prescribes. Contrary to what the plaintiff alleges there is no return of service or confirmation of receipt of the notice by the second defendant, the debt counsellor or a representative of the NRC.
- [26] The NCA would not identify the three entities (the consumer, the debt counsellor and the national credit regulator) that must be notified in terms of s86
- (10) for no good reason. They have different interests and serve different purposes in the debt review process. The consumer must be notified to protect his or her personal interests. The debt counsellor has been designated as the entity that presents the case to the Court for its consideration. Although not defined in the Act the debt counsellor weaves through the entire Act like a golden thread. Thus it goes without saying that a debt counsellor is a critical and key role player in this whole process. The NCR also serves an important function as set out in sections 12 to 18 of the NCA. In essence it ensures that the aims and objectives of the NCA are upheld through different machineries built into the system of credit agreements and related matters. Failure on the part of the credit provider to serve the s86(10) on the said entities not only invalidates its actions but negates the purport of the NCA.
- [27] In *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) Naidu AJ came to the correct conclusion on the notice contemplated in s129(1)(a) of the NCA that a creditor should bring the s129 notice to the attention of the consumer and draw its intention to proceed against the consumer to the consumer in writing before approaching the court to enforce a credit agreement. By the same analogy, I am of the view that, a creditor who intends to terminate the debt review process should notify the consumer in writing as contemplated in s86 in the spirit of the NCA, before approaching the court to enforce a credit agreement. In this case the first defendant, the debt counsellor and the NRC were overlooked. See *First Rand Bank Ltd v Dlamini* 2010(4) SA 531 (GNP). The s86(10) notice in this case was in any event served long after the sixty days period permitted by s86
- (10) had lapsed if one considers that the defendants applied for a review of their debts in February 2010 and the process was terminated in June/July 2010.
- [28] It is important in this era of educating consumers on their rights but yet not depriving the creditors of their rights, that all the parties concerned, actively engage in the process to create a consistent and accessible system and harmonised system of debt restructuring, enforcement and judgment to the benefit and satisfaction of all responsible consumer obligations under credit agreements. (De Rebus: Section 129 and section 86(10) notice in terms of the National Credit Act: Conflicting Judgments, September 2010, 42 at 43).

[29] It is not clear on the papers what happened after the date on which the plaintiff issued the s86(10) notice terminating the debt review process and the date on which the application was placed on the roll for consideration by the Court in terms of s87. If anything the defendants cannot be penalised for this delay. Clearly they had to wait for an indication from the debt counsellor on what to do next or in the worst scenario assumed that the declaration of the debt counsellor was all they needed.

[30] I also take cognisance of the fact that the NCA makes no provision for any penalty for a creditor that does not act in good faith. Yet this lacuna in the NCA cannot be imputed on any consumer such as in this case.

[31] I however am of the view that it will only be fair and just to both parties to:

- (a) Afford the plaintiff to address what it failed to do and
- b) also enable the defendants to approach the court to apply to the court for relief in terms of s86(11).

I am also of the view that it will also be fair to the plaintiff not to dismiss the application for summary judgment but simply to postpone it sine die to enable the defendants to act in terms of s86(11) urgently.

[32] When action has been instituted precipitately as in this case that may well be a bona fide defence sufficiently to avoid summary judgment although courts avoid dismissing such applications on such grounds alone. The plaintiff has failed to notify the designated entities including the first defendant. By the same token the defendants have also failed to put up a defence on the merits. It may be that if the process contemplated in s86(10) is followed without success summary judgment should be granted. It would be unfair to the credit provider to deny it that possibility on the grounds of a procedural defect. Having regard to the approach set out in *First Rand Bank v Thomas Wayne Evans supra* the following order is made.

ORDER

Application for summary judgment is postponed sine die.

The defendants to pay the costs occasioned by the postponement.

The plaintiff is granted leave to re-enroll the matter for re-consideration on 5(five) days notice after the re-enrolment.

The defendants are granted leave to file a supplementary affidavit in respect of steps taken by them pursuant to the provisions of section 86(11) of the National Credit Act 34 of 2005.

The plaintiff is directed to comply with section 86(10) of the National Credit Act 34 of 2005 in its entirety with specific reference to the entities to be notified.

B.C. MOCUMIE, J

On behalf of the plaintiff: Adv. S. J. Rheinders

Instructed by:

Hill, McHardy & Herbst

BLOEMFONTEIN

On behalf of the defendants: Adv. J. J. Buys

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BCM/sp

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