REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 56527/2021

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

....
DATE
SIGNATURE

In the matter between:

ANOOSHKUMAR ROOPAL N.O. Applicant

and

MPHEPHU PETER TONY Respondent

JUDGMENT

MAKUME J:

[1] The Applicant is the duly appointed Liquidator of VBS Mutual Bank (in Liquidation) VBS was placed in liquidation by order of the High Court sitting in Pretoria on the 13th November 2018.

[2] The Applicant seeks an order that the Respondent be directed to make payment to it of certain sums of money due to it arising from certain finances agreements concluded by the Respondent with VBS during the years 2015 and 2018.

[3] The Finance agreements are in respect of 3 motor vehicles namely;

3.1 A Range Rover 5.0 V8 for which the Respondent owes the amount of R1 466 654.08,

3.2 A BMW 760i Sedan for which the Respondent owes the sum of R2 106 720.08

3.3 A Mercedes-Benze V250d for which the Respondent owes the amount R2 013 180.41

[4] The total amount due and payable to VBS under the 3 agreements the is sum of R4 119 901.00. The Applicant also seeks an order cancelling the agreements and that it be placed in possession of the 3 motor vehicle in accordance with the terms of agreements.

[5] The Respondent is a member of the Venda Royalty and was recognised as a Chief of the Venda Tribe in accordance with the laws of the Republic of South Africa. He in that capacity received not only royalties but a stipend or salary from the Government of South Africa.

[6] He has two addresses one at the upmarket Golf and Security Estate known as Dainfern the second address is in Louis Trichardt Makhado.

[7] The Respondent defaulted with payments in contravention of the agreements as a result letters of demand were addressed to him in terms of Section 129 (1) of the National Credit Act (the Act) which letters were received by the Respondent. He acknowledged receipt thereof though his attorneys

[8] In a letter addressed to VBS attorneys by the Respondent's Attorneys dated the 8th July 2021 he said the following:

> "Our client is fully committed to make the necessary payments of the instalments of all the vehicles alternatively to make payment arrangements, alternatively to surrender all or some of the vehicles depending on your settlement proposal."

[9] In response to the proposal the Applicant's Attorneys Messrs Werksmans wrote to the Respondent on the 13th July 2021 informing them that Applicant is prepared to accept voluntary surrender of all the 3 vehicles. The Respondent failed to return the motor vehicles and failed to make any payment of the outstanding amount.

[10] On receipt of this application the Respondent filed his Answering Affidavit and confirmed conclusion of the 3 agreements also that he is indebted to the Applicant. He however raises the following defences.

10.1 That at the time of the conclusion of the agreements VBS was not a registered credit provider.

10.2 That in view of what is stated in 10.1 above that renders the 3 agreements unlawful.

10.3 That VBS contravened Section 80 read with Section 81(2) of the Act in that VBS failed to properly assess the Respondent's ability to afford repayments and thus made themselves guilty of reckless credit granting and that a proper assessment would have demonstrated that the Respondent was over indebted.

[11] In paragraphs 25 and 26 of his Answering Affidavit the Respondent says he is financially distressed and cannot afford to make payments under the 3 agreements and requests the Court to discharge all his obligations arising from the agreements alternatively that his obligations under the agreements be suspended until his financial positon improves.

[12] In the further alternative he pleads that this Court allows him in terms of Section 85 of the Act to be declared over indebted and that he be

referred to a debt counsellor to evaluate his circumstances and then make recommendations in terms of Section 86(7) or 85(b) of the Act.

[13] Strange enough at paragraph 33.1 of his Answering Affidavit he now denies being indebted to VBS in any amount whatsoever and denies the existence of any valid agreement. He also raises prescription as a defence.

[14] In the Replying Affidavit the Liquidator dealt extensively in responding to the Answering Affidavit and in my view exposed the Respondent's dishonesty at various levels. The Respondent's evidence and version crawls with contradictions and inconsistence and has completely distorted the reality.

REGISTRATION NATIONAL CREDIT ACT

[15] VBS has been a registered credit provider since the year 2007 it is still so registered whilst undergoing a process of winding up its affairs.

RECKLESSNESS

[16] The second defence is one of a dilatory plea that VBS failed to assess him and thus granted him finance in a reckless manner calling upon an order to declare the agreement unlawful and unenforceable. This has also been proved to be not the truth. The Applicant has in reply attached documents showing that the Respondent in his capacity as a regent of the VhaVenda people has at all times been receiving

remuneration from the Central Government in terms of Section 5(1) of the Remuneration of Public Office Bearers Act 20 of 1998.

[17] There is also proof that his personal bank account with VBS evidences various sources from which the Respondent received income. He also operated an account with Standard Bank of South Africa and received various large amounts into that account between the year 2015 to 2017.

[18] The Respondent also has interests in various companies like Mmapilo Petroleum (Pty) Ltd; Vele Investments and Venmont Holdings which companies at various times serviced his indebtedness to VBS. The Applicant has also demonstrated that Mmapilo Petroleum paid R341776.11 to the Respondent; Vele Investments paid him R4 38929.24 and Venmont Holdings paid him R145 370.56.

[19] In his application for finance which he submitted to VBS he indicated to VBS that his monthly income was R150 000.00 and that his net income after all deductions in respect of other vehicle finance, clothing accounts, groceries and transportation costs amounted to R62971.00. Later in January 2018 the Respondent declared to VBS that his monthly income was R300 000.00. This was at a stage when his bank records indicated that he was receiving R310 000.00 from Vele Investments on a monthly basis.

[20] I am persuaded that the argument advanced by the Applicant proves that there was proper assessment done by VBS based on information furnished by the Respondent. In the result the defence of reckless credit granting must fail. The Respondent's version is so far-fetched and legally untenable and requires no further consideration.

PRESCRIPTION

[21] The Respondent then proceeded to plead prescription on flimsy grounds even though he through his attorneys had as late as 2021 admitted liability and even proposed to voluntarily surrender the three motor vehicles. This defence must also fail. It was an afterthought judging by the various correspondence of admission of indebtedness by the Respondent.

DEBT REVIEW

[22] The Respondent should have raised this issue as early as 2017 when he fell into arrears he did not do so and that avenue is no longer available to him in terms of Section 86(2) of the National Credit Act.

[23] During the hearing of this matter the Respondent raised issues in respect of the contents of the Section 129(1) statutory letter sent to him. As a result, the matter was stood down and the Applicant was directed to re-send fresh Section 129(1) statutory letters in terms of the Act.

[24] On the 15th September 2022 the Applicant filed a Compliance Affidavit setting out that fresh Section 129(1) letters were dispatched and had been received by the Respondent's Attorneys in accordance with paragraph 3 of the order dated the 24th August 2022.

[25] The Respondent filed his own Affidavit in response to the Compliance Affidavit filed by the Applicant. In his Affidavit through the mouth of his Attorneys Mr Danie Barnard the Respondent says that on receipt of the fresh Section 129 letter he decided to lodge a complaint with the National Credit Regulator with a request that the complaint be referred to the National Consume Tribunal established in terms of Section 129 of the National Credit Act.

[26] In paragraph 7 of his Affidavit the Respondent says the following:

> "The matter has therefore been referred to the Credit Regulator and the Tribunal for adjudication."

[27] The central issue in the Complaint is that VBS in granting the Respondent credit failed to take reasonable steps to assess the Respondent's general understanding and appreciation of the risks and costs of the proposed credit as a result the three credit agreements were concluded recklessly and in contravention of Section 80 read with Section 81 (2) of the National Credit Act.

[28] Section 81(2) (a)(i) of the National Credit Act reads as follows:

> "A credit provider must not enter into a credit agreement without first taking reasonable steps to assess:
>
> a) The proposed consumer
> b) General understanding and appreciation of the risks and costs of the proposed credit and of the rights and obligations of a consumer under a Credit Agreement.

[29] I have already made a finding in this judgment that the Respondent in making application for credit had furnished VBS with documents indicating that he as a member of the Royal Family in the VhaVenda Community was receiving remuneration from the Government of the Republic of South Africa in terms of Section 5 (1) of the Remuneration of Public Office Bearers Act 20 of 1998.

[30] The Respondent also received income from various sources as indicated in my judgement above. He never disputed the information. The Applicant based on the information properly assessed the Respondent. In fact, as early as when the Respondent received the first Section 129 letter he through his attorneys made proposal to settle the debt and never raised the issue of reckless credit granting.

[31] It is trite law that the effect of a Section 129(1) letter read together with the provisions of Section 130 of the NCA prevents a credit provider from commencing any legal proceedings before meeting certain

requirements. When a Section 129(1) letter is received it is very instructive and precisely tells the debtor what his or her options are in view of the default. Such a debtor may choose any of the following:

a) He or she may refer the credit agreement to a debt counsellor;
b) A dispute resolution agent;
c) The Consumer Court; or
d) Ombuds with jurisdiction.

[32] When the Respondent's previous attorneys and the present attorneys received the Section 129(1) letter they did not advise their client to take advantage of what is offered by the provisions of Section 129(1). The definition of "Ombud with jurisdiction" does not refer to the Tribunal nor the Credit Regulator it refers to a financial institution as defined in the Financial Sector Regulations Act of 2017.

[33] The referral of a complaint in terms of Section 136 read with Section 141 of the NCA is a new tactic by the Respondent to avoid the inevitable. This referral is flawed and is a delaying tactic.

[34] At the commencement of the further hearing of this matter the Applicant indicated that it is no longer praying for return of the three motor vehicles. The revised draft order only prays that the sale on suspensive condition agreements concluded by VBS and the Respondent in respect of the three motor vehicles be cancelled and

that the Respondent pays to the Applicant the amounts due in respect of the three agreements plus interest and costs on the scale as between attorney and client which costs shall include the costs of two Counsel.

[35] On the other hand Counsel for the Respondent conceded that the second batch of the Section 129(1) demand letter had been properly served in accordance with the Court order dated the 24th August 2022. Secondly the Respondent also abandoned the defence of non-registration as a credit provider by VBS. This the Respondent did after receiving confirmation of registration from the National Credit Regulator.

[36] The Respondent argues that in view of the complaint he has referred to the NCR this Court's jurisdiction is ousted and that the application be postponed *sine die* pending the outcome of the finding of the Tribunal. As I have indicated the referral to a tribunal is a new version it is not canvassed in the original Answering Affidavit nor has the Respondent filed any heads in that regard. The only thing that the Respondent says in his affidavit at case lines 016-5 paragraph 7 is the following:

> "The matter has therefore been referred to the Credit Regulator and the Tribunal for adjudication. Proper legal argument will be presented on behalf of my client on the legal consequences of the referral of the matter to the Credit Regulator and the Tribunal."

[37] Counsel for the Respondent placed reliance on the provisions of Section 130(3) (b) and 130(4) of the Act which reads as follows:

> "[130(3) (b)] Despite any provisions of law or contract to the contrary in any proceedings commenced in a Court in respect of a credit agreement to which this Act applies, the Court may determine the matter only if the Court is satisfied that there is no matter arising under credit agreement and pending before the Tribunal that could result in an order affecting the issues to be determined by the Court."

[38] There is no complaint at this stage pending before the Tribunal what is before this Court is a letter of complaint addressed to the National Credit Regulator… Willis J in the matter of **FirstRand Bank t/a FNB v Seyffert 2010 (6) SA 429** alluded to this notion of "pending" and at paragraph 5 page 432 he says the following:

> "Section 130 (3) of the Act prevents a Court from determining a matter in respect of a Credit Agreement to which the NCA applies if it is "pending before" the National Consumer Tribunal or during the time that the matter was before a Debt Counsellor, alternatively Dispute Resolution Agent, Consumer Court or the Ombud with jurisdiction. The most common defence in otherwise hopeless cases for Respondents attempting to resist Summary Judgment in this division is that the matter is before a debt counsellor awaiting debt review in terms of the provisions of the NCA."

[39] Willis J in the same matter at paragraph 15 thereof makes reference to a number of decisions and finally referring to a judgment by Eloff J in

the matter of **Noah vs Union National South Africa Insurance Co. Ltd 1979 (1) SA 330 (T) at 332** in which the following was said:

> "Indeed Eloff J as he then was said of the very word "pending" that its meaning depends much upon its context. It seems to me that in context the words "pending" in Section 130(3) (b) and also in Section 130(4) (c) and "before" in Section 130(3) (c) denote a certain immediacy to the event rather than merely a formal referral having been made."

[40] This is precisely the situation in this matter all that the Respondent relies on is the letter to the Regulator there is nothing pending immediately before the Tribunal or before a Debt Review Counsellor.

[41] The Applicant has in my view correctly referred this Court to the provisions of Section 166(1) of the Act which reads as follows:

> "(166) Limitation of Bringing Action
>
> 166(1) A complaint in terms of this Act may not be referred or made to the Tribunal or to a Consumer Court more than three years' after
>
> (a) the act or omission that is the cause of the complaint."

[42] The last of the three Credit agreements was concluded in January 2018 it is more than three and half years ago. The Respondent is

accordingly barred specifically to raise this complaint. I see no reason why when this matter eventually comes before the Tribunal this lateness issues will not be successfully raised. Willis J as he then was in the mater of FirstRand Bank vs Seyffert (supra) correctly described persons of the calibre of the Respondent in the following words "the debt-review mechanism of the NCA do not provide a safe haven for pirates and dilatory sunbathers"

[43] The Respondent has failed to provide this Court with valid and credible reason why this application should be postponed sine die pending the outcome of a complaint still on its way to the Tribunal. In the result I make the following order:

ORDER

1. The sale on Suspensive conditions of the Range Rover Finance Agreement concluded between the parties in respect of the vehicle fully described as Land Rover Range Rover 5.0 V8 2015 Vin number SALAZEE4FA209863 is hereby cancelled.

2. The sale on Suspensive conditions of BMW Finance Agreement concluded between the parties in respect of the vehicle fully described as BMW 760i Sedan 2016 Vin number WBA7F02040GL98196 is cancelled.

3. The sale on Suspensive conditions of the Mercedes-Benz Finance Agreement concluded between the parties in respect of the vehicle fully described as Mercedes-Benz V250d 2018 Vin number WDF44781323403216 is hereby cancelled.

4. The Respondent is directed to pay the Applicant the following sum;

4.1 The sum of R1466654.08 plus interest at the agreed rate of 10.25% calculated daily and compounded monthly in arrears from 1st April 2022 until date of full payment.

4.2 The sum of R2106720.67 plus interest at the agreed rate of 11.59% calculated daily and compounded monthly in arrears from 1st August 2022 until date of full payment.

4.3 The sum of R2013180.41 plus interest at the agreed rate of 12.50% calculated daily and compounded monthly in arrears from 1st August 2022 until date of full payment.

5. The Respondent is ordered to pay the costs of this application on the scale as between attorney and client.

DATED at JOHANNESBURG this the 29th day of NOVEMBER 2022.

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M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING	:	11 NOVEMBER 2022
DATE OF JUDGMENT	:	29 NOVEMBER 2022
FOR APPLICANT	:	ADV VAN VUUREN
WITH		ADV ISLES
INSTRUCTED BY	:	
FOR INTERVENING PARTY	:	ADV VAN DER MERWE
INSTRUCTED BY	:	