

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION- PRETORIA

CASE NO: 22676/2016

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

Signature

Date

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA

Applicant

and

A[...] M[...]

First Respondent

Identity number: [...]

M[...] M[...]

Second Respondent

Identity Number: [...]

JUDGMENT

Introduction

[1] The applicant in this matter brought three applications against the respondents namely; a default judgment, a summary judgment and a Rule

46A of the Uniform Rules of Court. Only the summary judgment application was opposed by the second respondent. I granted the default judgment and Rule 46A application and dismissed the summary judgment against the second respondent with costs. The applicant has requested reasons for my refusal of the summary judgment against the second defendant which I will deal with hereunder.

[2] These applications essentially stem from a breach of a loan agreement by the respondents, which are secured by mortgage bonds. The applicants alleged that the respondents failed to make due and punctual monthly payments to the applicant in terms of the credit agreement and in terms of the restructuring order.

[3] On 18 March 2016, the applicant served summons on the respondents. The second respondent applied for debt review (for debt re-structuring) on 14 February 2015 in terms of section 86(1) of the National Credit Act. The second respondent informed the applicant of its application for debt review on 16 February 2015. The application for debt review was accepted on 9 March 2015. The second respondent submitted that the applicant was precluded from instituting action in terms of section 88(3) of the NCA and further that the applicant did not terminate the review in terms of section 88(10) of the NCA.

[4] The questions of law in dispute between the parties and which this court was called upon to adjudicate are:

4.1 If the applicant was entitled to issue summons against the second respondent where the second respondent was under debt review in terms of section 86 of the National Credit Act; and;

4.2 Whether the applicant can contend that the debt review of the second respondent is of no consequence as the Magistrate's Court made no order in terms of section 87 of the National Credit Act.

[5] The applicant's contentions are that on 2 February 2012 the first respondent had applied for debt review and a debt restructuring order was granted. The first respondent has defaulted on this order and as a result the applicant became entitled to exercise its rights to enforce litigation¹. The applicant confirmed that no agreement existed between the applicant and the second respondent as the second respondent did not agree to any proposals². It further alleged that the first and second respondents were married in community of property on terms of customary law and that the first respondent instituted divorce proceedings under case number 86667/2014 which is proof that the respondents were married in community (of property). As a result, the respondents are jointly and severally liable in terms of the credit agreement. Further that in terms of section 88 (3) it was entitled to institute action where there is a default on a debt restructuring agreement without further notice. Lastly it averred that the second respondent failed to raise any triable issue and that the defences raised are a sham.

[6] The second respondent contends that the applicant has never served a notice in terms of section 86(10) of the NCA and therefore the summons was premature, as there was an application pending in the Magistrate's Court. It

¹ Index to application, Applicant's Heads of Argument, page 0024

² Index to application, Applicant's Heads of Argument, page 0025

submitted that the applicant did not refuse the application for debt review which was served on it or terminate the debt review as required in terms of section 86(10).

[7] Section 86(10) originally read as follows:

“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
- (c) The National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review”

[8] Section 86(10) was amended by the National Credit Amendment Act 19 of 2014, and such amendment took effect on 13 March 2015. The amended section 86(10) reads as follows:

“(a) 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, at any time at least 60 business days after the date on which the consumer applied for the debt review, give notice to terminate the review in the prescribed manner to-

- (i) the consumer;
- (ii) the debt counsellor; and
- (iii) the National Credit Regulator; and

(b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.”

[9] The issue of whether a credit provider may terminate a debt review while there is a pending application in the Magistrate’s Court has been dealt with by the Courts. In **Collett v First Rand Bank Ltd 2011(40 SA 508 (SCA)** the court undertook a thorough analysis of the relevant provisions of the NCA and section 86 in particular. The court also discussed some of the conflicting decisions, and remarked at p516 C-F that

“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 that the credit provider 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.”

[10] The court ultimately held that if the consumer is in default under the credit agreement, the credit provider has the right to terminate the debt review even after the debt counsellor referred the matter to the Magistrate's Court for an order envisaged in section 86 (7)(c).

[11] In this matter it is common cause or not in dispute that the applicant did not serve a notice in terms of section 86(10) and that the second respondent was not in default, as full and timeous payments of the monthly instalments were received by the applicant until July 2016, when the summons was served. The applicant alleged that there was no agreement between itself and the second respondent as the second respondent did not agree to the proposals. However, the applicant is silent on the allegation by the second respondent that she paid duly in terms of an agreement with one Mr Harry Green, in the employ of the applicant, an agreed amount of R5000 per month from the period April 2015 until July 2016 when she was served summons and therefore was not in breach of the restructure agreement at the time of the action being instituted. Therefore, I find that the second respondent was not in default for a period of 60 business days after the date on which she applied for debt review which was in February 2015 and her first payment to the applicant in terms of the restructure was April 2015. The summons was only served in July 2016 almost a year and a half after the applicant was receiving payments of R5000 per month from the second respondent.

[12] The applicant has not denied receipt of the second respondent's application for debt review or the payment of R5000 per month by the second

respondent. It has also not provided this Court with proof that it terminated the debt review by way of a notice in terms of section 86(10) of the NCA. The applicant had not, at any stage complied with the requirements of section 86(10) of the NCA. In light of the *Collet* decision *supra* there was no breach and in fact the applicant failed to participate and acted in bad faith by instituting this application against the second respondent. In view thereof, the applicant was not entitled to proceed to enforce the credit agreement and by issuing summons did so prematurely and invalidly, against the second respondent. I note that the second respondent has exercised the option of approaching the Court for an order in terms of section 86(11), to resume the debt review, however she must do so at the Magistrate's Court where the review is being dealt with. I cannot, therefore, see any reason to grant the application.

ORDER

[13] In the circumstances, I make the following order:

13.1 The application for summary judgment against the second respondent is dismissed with costs.

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C SARDIWALLA
Judge of the High Court

REPRESENTATION

On behalf of Plaintiff	:Adv DJ Van Heerden
Instructed by	:Hannes Gouws & Partners Inc.
On behalf of second respondent	:Adv AJ Swanepoel
Instructed by	:Jay Inc Attorneys
Date of trial :	21 April 2023
Date of reasons:	6 OCTOBER 2022