THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 577/2011

In the matter between:

JAN GEORGE STEPHANUS SEYFFERT **First Appellant**

HELENA SEYFFERT **Second Appellant**

and

FIRSTRAND BANK LIMITED t/a

FIRST NATIONAL BANK **Respondent**

Neutral citation: *Seyffert & Seyffert v Firstrand Bank Ltd* (577/2011) [2012] ZASCA 81 (30 May 2012)

Coram: Cloete, Malan, Leach, Wallis JJA and Ndita AJA

Heard: **21 May 2012**

Delivered: **30 May 2012**

Summary: Section 85 of National Credit Act 34 of 2005 – termination of debt review under s 86(10) – summary judgment – discretion of court – unrealistic proposals for restructuring repayment of debt

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ORDER

On appeal from: the South Gauteng High Court, Johannesburg (Willis J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

MALAN JA (Cloete, Leach and Wallis JJA and Ndita AJA concurring):

[1] This is an appeal against an order of the South Gauteng High Court (Willis J) granting summary judgment against the two appellants in the amount of R219 715,69 together with interest at the rate of 9 per cent per annum from 12 May 2010 to date of payment. The action was for the balance owing under a mortgage bond, but the high court declined to both declare the mortgaged property executable and make an order for costs. The appeal is with the high court's leave. There is no cross-appeal.

[2] The mortgage bond in favour of the respondent was registered over the appellants' property as security for a home loan on 1 July 2008. The loan was to be paid over a period of 20 years, with initial monthly instalments of R3 730,56. The appellants fell into arrears with their payments and, on 31 July 2009, applied for debt review in terms of s 86(1) of the National Credit Act 34 of 2005 (the NCA). On 3

August 2009 the respondent was informed of the application for debt review. On 21 April 2010 the respondent terminated the debt review under s 86(10) and thereafter, on 10 June 2010, instituted action against the appellants. After they filed their notice of intention to defend, the respondent applied for summary judgment which was eventually granted against both on 11 October 2010.

[3] In resisting summary judgment the appellants did not dispute their indebtedness to the respondent in either of the two sets of affidavits they filed. In the first affidavit of 4 August 2010 the first appellant averred that their 'current' instalment, as reflected in the debt counsellor's proposal, amounted to R2 474 and that the debt would have been settled within 142 months. The debt counsellor, however, had proposed an instalment of R474,97 which, so the appellants alleged, meant that the debt would be discharged in 239 months. The application for debt review had been referred to the Magistrates' Court in Oberholzer, but was postponed on 9 December 2009 in order to allow the first appellant to supplement his papers (by adding a fresh salary slip) and to enable the respondent to file opposing papers. The first appellant did not supplement his papers. Nor did the respondent file opposing papers. Instead, as I have said, it terminated the debt review on 21 April 2010.

[4] In a supplementary set of affidavits deposed to on 7 September 2010, the first appellant stated that he was constantly attempting to improve his position. He also requested the court below to make a draft order, annexed to his affidavit, an order in terms of s 85 of the NCA. A revised proposal by the debt counsellor envisaged payments of R808,45 per month with interest at a rate of 10,00 per cent per annum over 239 months. The last payment by the first appellant prior to filing this affidavit was made through a distribution agency on 27 August 2010 in an amount of R819,34.

[5] When the matter came before it, the high court granted summary judgment. In dealing with both the present matter and three similar applications, the learned judge remarked:

'The affidavits of the respondents have been cryptic to the extent of coyness. These affidavits are laconic, if not supine, with regard to the real possibility of extrication from

financial difficulties which the respondents face. Even where the respondents presented some acceptable evidence as to the fact that they had referred the matter to a debt counsellor, and in some instances annexed that person's recommendations, in no such instance does the proposal make any economic sense at all. Indeed, the proposals are devoid of economic rationality.'

He also said:

'The conundrum that arises from s 86(10) is this: may a debtor, who has made an application for debt review in terms of s 86(1) of the NCA, by the simple expedient of making such an application, indefinitely frustrate the enforcement of a debt to which he or she has no real defence and where no serious effort is being made to enter into some sensible arrangement for the rescheduling or re-arrangement of his or her debt (as is provided for in the NCA)?'

He concluded:

'[W]here a credit provider has given a consumer proper notice in terms of s 86(10) of the NCA, a court hearing an application for summary judgment upon a credit agreement, may, depending on the contents of the affidavit resisting summary judgment:

(i) grant the application; or

(ii) dismiss the application; or

(iii) adjourn the application on appropriate terms and conditions.

Active endeavours to exchange serious, sensible and reasonable proposals to resolve a consumer's debt problems will be among the factors which will weigh heavily with a court in deciding which order to make.'

[6] In this court it was argued on behalf of the appellants that the high court should have exercised its discretion in their favour by acting in terms of either s 85 or s 87 and referring the matter to a debt counsellor, or declaring them over-indebted and rearranging their repayments. It was submitted that the respondent had not acted in good faith by terminating the debt review after requesting a postponement to file papers opposing it. Moreover, it was suggested that the effect of the rearrangement would merely have been to extend the period of repayment for a short period without prejudice to the respondent.

[7] These contentions cannot be accepted. It was explained in *FirstRand Bank Ltd v Collett*[1] that –

[1] *Collett v FirstRand Bank Ltd v* 2011 (4) SA 508 (SCA) para 15.

'the right of the credit provider to terminate the review is balanced by s 86(11), which provides that, if the credit provider has given notice to terminate and proceeds to enforce the agreement, "the Magistrates' Court … may order that the debt review resume on any conditions that the court considers to be just in the circumstances". It is at this moment that the participation of the credit provider in the debt review becomes relevant. He is obliged to comply with the reasonable requests of the debt counsellor (s 86(5)*(a)*), and to participate in good faith in the review and any negotiations designed to result in responsible debt rearrangement (s 86(5)*(b)*). Should the credit provider fail or refuse to participate in the review, a resumption of the process may well be ordered. But where the credit provider on good grounds concludes that the proposed restructuring will not lead to the "satisfaction by the consumer of all responsible financial obligations" (s 3*(g)* and *(i)*) or a rearrangement as contemplated by s 86(7)*(c)*, the court considering the resumption of the debt review may well refuse to sanction its resumption.'

[8] Where, as in this case, debtors have applied for debt review, they and the credit provider are obliged not only to comply with any reasonable request by the debt counsellor to facilitate an evaluation of the debtors' indebtedness and the prospects for responsible debt restructuring, but also to participate in good faith in the review and negotiations. The duty to negotiate in good faith does not terminate on the debt counsellor's proposal being referred to the magistrate's court, nor when it is postponed.[2] The right to terminate the debt review in respect of a particular credit agreement is balanced by s 86(11) which gives the 'enforcing court'[3] the power to order the resumption of the debt review. It is at this stage that the participation of the credit provider in the debt review process becomes relevant and at which the conduct of both parties will be assessed. As was further stated in *Collett's* case:[4]

'Over-indebtedness is not a defence on the merits. However, because of its extraordinary and stringent nature, a court has an overriding discretion to refuse an application for summary judgment. It would be proper for a defendant to raise termination of the debt review by reason of the credit provider's failure to participate or its bad faith in participating when application for summary judgment is made. These issues may be raised, not as a defence to the claim, but as a request to the court not to grant summary judgment in the exercise of its overriding discretion. Of course, sufficient

[2] *Collett* para 13.
[3] *Collett* para 17.
[4] Para 18. Cf *Changing Tides 17 (Pty) Ltd v Grobler & another* [2011] ZAGPPHC 84 (2 June 2011) para 18.

information on which the request for a resumption of the debt review is based must be placed before the court.'

[9] The court considering the enforcement of a credit agreement may decide whether there is any benefit in postponing the application for summary judgment in order to determine the advantages of a resumption of the debt review. The conduct of both parties will be relevant in making such determination. Moreover, the terms of a proposed rearrangement will then also be relevant to assess whether it is likely to lead to the satisfaction of all responsible consumer obligations, if implemented. It is at this stage that a balance must be struck between the interests of the consumer and those of the credit provider.[5]

[10] As I have mentioned above, the first debt rearrangement proposal referred to in the first opposing affidavit was based on a monthly instalment of R474,96 which, it was suggested, would lead to the discharge of the debt over a period of 239 months. However, this suggestion is based on faulty arithmetic. The proposal envisaged payments from October 2009 when the balance owing was apparently R203 786,18 and, clearly, even with regular payments of the suggested instalment, the debt would not have been discharged within that period. Close examination of the proposal reveals that it is based on the monthly instalments being used to discharge some of the interest as it accumulated with no payments being made in respect of the capital amount of the loan. In the result there would be a balance of R288 898,64 still due in September 2029. Not even the accumulating interest (which the debt counsellor set at 10 per cent per annum) would have been covered by payment of the proposed instalments.

[11] Although in the supplementary affidavit reference is made to a proposal to pay an instalment of R808,42 per month, the proposal annexed is neither signed nor dated. But even if this later proposal were to be implemented, it would not lead to the appellants' debt being discharged by September 2029. In fact a sum of R193 968,90 would then still be outstanding ex facie the proposal itself.

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[5] *FirstRand Bank Ltd v Burton Evans & another* [2011] ZAWCHC 474 (23 September 2011) at 11 and 14.

[12] No reference was made by the appellants to any negotiations between the parties from 9 December 2009 (when the debt review was postponed) and 7 December 2010 (the date of the supplementary affidavit). In the light of the appellants' failure to present any realistic proposal to pay the debt, there is no basis for alleging that the respondent had failed to negotiate in good faith. The contention that it had not acted in good faith as it failed to file opposing papers despite having sought the postponement is also without merit. The appellants intended amending their debt review application. They never did that. The respondent therefore had no reason to file further papers. The appellants have not shown any facts on which an inference of bad faith on the part of the respondent can be drawn.

[13] The appellants did not apply for a resumption of the debt review in terms of s 86(11). Nor did they demonstrate any basis upon which the respondent was not entitled to terminate the debt review. Their restructuring proposals were simply, as the court below found, 'devoid of economic rationality', and would have left a substantial part of the debt unpaid.

[14] The appellants also relied on s 85 which allows a court 'in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted' to –

'(*a*) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86 (7); or

(*b*) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.'

The appellants contended that the high court erred in not declaring the appellants over-indebted under this section and by not making their proposal an order of court, alternatively, not making an order as contemplated by s 87.

[15] A 'review' as contemplated by s 85 is not necessarily initiated by the consumer as in the case of a debt review under s 86. Nor can the credit provider

terminate the 'review' under s 85.[6] It has been suggested that, despite the wide introductory words of s 85,[7] -

'reference to the broader context of the statute impels the conclusion that the section was not intended to provide a basis for a repetition of the process already provided for in terms of s 86, or to draw back within the ambit of debt review debts already excluded therefrom by the operation of other provisions of the Act, such as s 86(2), s 86(10) or s 88(3). To construe s 85 otherwise would be conducive to the most unwholesome circularity, at odds with the basic principle – *interest rei publicae ut sit finis litium*.'

This conclusion is too absolute and loses sight of the discretion given a court by the word 'may' in s 85 to make either of the two orders envisaged by it, and the commencing words of the section 'Despite any provision of law or agreement to the contrary'.[8] However, before the court can exercise the discretion, the material facts relied upon must be placed before it.[9] It may well be pointless in most cases where the matter has already been referred to a debt counsellor to do so again.[10] Indeed, a court should be slow to exercise its discretion to make either of the orders envisaged in s 85 where the matter has been dealt with by a debt counsellor, or a debt review has justifiably been terminated, and where no material change in circumstances has been demonstrated.

[16] In any event, as I have already mentioned, the appellants' proposals, if accepted, will not lead to the discharge of their debt. They may well be over-indebted but this is no reason why the respondent should have accepted their proposals. The respondent was entitled in law to terminate the debt review and, on the facts, justifiably did so. Only scant material was presented by the appellants to the court below, and their evidence falls short of inspiring confidence that their affairs will improve so as to enable them to eventually discharge their obligations. Neither of the proposals envisages the discharge of the debt within the agreed period or within any suggested, and feasible, extended time. This is not a case where a debt review can usefully be employed.

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[6] *Collett* para 11.

[7] *The Standard Bank of South Africa Limited v Panayiotis Kallides* case [2012] ZAWCHC 38 (2 May 2012) para 8; and see *Matimba Management and Labour CC & others v SA Taxi Securitization (Pty) Ltd & another* [2010] ZAPJHC 32 (14 April 2010) para 24.

[8] *FirstRand v Olivier* 2009 (3) SA 353 (SE) para 14; *Standard Bank of South Africa Ltd v Hales & another* 2009 (3) SA 315 (D) paras 12-13; *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD) paras 36-7.

[9] *Standard Bank of South Africa Ltd v Hales & another* 2009 (3) SA 315 (D) paras 12-13.

[10] *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD) para 37.

[17] In the result the appeal is dismissed with costs.

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F R MALAN

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	A P Bruwer
	Instructed by:
	Smit & Grové Attorneys
	Johannesburg
	Andries Spangenberg Inc
	Bloemfontein
For Respondent:	N Konstantinides and GTS Eiselen
	Instructed by:
	Charl Cilliers Inc
	Johannesburg
	Steyn-Meyer Inc
	Bloemfontein