IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG)

JOHANNESBURG

CASE NO: 27333/2010

DATE: 12.04.2013

DELETE WHICHEVER IS NOT APPLICABLE.

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

22/5/13 .....
DATE

.....

In the matter between:

ROUGIER, KAREN BETH **APPLICANT**

and

NEDBANK LIMITED **RESPONDENT**

JUDGMENT

NOBANDA A.J

[1] The applicant seeks the rescission of a default judgement granted in favour of the respondent by the Registrar of this Court on 18 October 2011 on the following grounds:

1) that she was under debt review at the time summons were issued. Accordingly, the respondent failed to comply with the provisions of S86(10) of the National Credit Act 34 of 2005 (the Act) prior to instituting the action;

2) that the respondent failed to comply with the provisions of S129 of the Act prior to instituting the action in that she never received the S129 notice.

[2] Applicant submitted that had the court been aware that the respondent has failed to comply with the provisions of S129 read with S130 and S86(10) of the Act, the court would not have granted the default judgement.

[3] The applicant alleges that she only became aware of the default judgement when the Sheriff served her with a warrant of execution for

the attachment of the immovable property where she resides with her family in March 2012.

[4] The respondent avers that it was not necessary to serve the applicant with the S129 notice and /or comply with the provisions of S86(10) as the debt counsellor had "*withdrawn*" the debt review prior to the institution of the action. Notwithstanding, the respondent contended that it has issued the applicant with two(2) S129 notices delivered by registered post, one to the applicant's chosen *domicilium citandi et executandi* at P O Box 2394, Rivonia 1280 and the other to the applicant's residence at Portion 38 of Erf 38, Norscot Manor, 39 Turaco Street, Sandton, 2196.

[5] S129(1)(b) bars the credit provider from instituting action to enforce the credit agreement where the consumer is in default until certain requirements are met, namely – compliance with the provisions of S129(1)(a) or S86(10) of the Act[1].

[6] It is common cause that prior to the institution of the action by the respondent, the applicant had applied for debt review as contemplated in S86(1) of the Act. It is further common cause that the debt counsellor subsequently "*withdrew*" the debt review application apparently due to the applicant's uncooperativeness. In the

[1] Cotzee and Another v Nedbank Ltd 2011(2) SA 372 (KZD) [5]

circumstances, it can therefore be assumed that after the applicant's application in terms of S86(1), the debt counsellor acted in accordance with the provisions of S86(4)(b)(i) notifying the respondent about the application.

[7] In terms of the provisions of S86(6), after accepting the application, the debt counsellor must determine:

> *"(a) whether the consumer appears to be over-indebted; and*
>
> *(b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless."*

[8] To that end, S86 (7) provides for three(3) possible findings that the debt counsellor could make as a result of the assessment conducted in terms of subsection (6) and the actions the debt counsellor can take pursuant to those findings[2] namely:

[2] Nedbank Ltd & Others v National Credit Regulator and Another 2011(3) SA 581 (SCA) [23] – [24] approving the court a quo's findings

1) if he or she concludes that the consumer is not over indebted, the debt counsellor must reject the application[3]; or

2) if he or she concludes that although the consumer is not over-indebted, the consumer might experience difficulties in paying his or her debts timeously, the debt counsellor may recommend to the consumer and the credit provider to voluntarily agree on a debt re-arrangement plan[4]; or

3) if the debt counsellor concludes that the consumer is over-indebted, he may issue a proposal to the Magistrate's Court recommending certain orders to be granted[5].

[9] If the debt counsellor concludes that the consumer is not over-indebted and rejects the application as contemplated in S86(7)(a), with leave from the Magistrate's Court, the consumer can apply directly to the Magistrate's Court for an order contemplated in S86(7)(c)[6].

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[3] S86(7)(a)
[4] S86(7)(b) and Nedbank (supra) [23]
[5] S86(7)(c)
[6] S86(9) and Nedbank (supra) [23]

[10] If the debt counsellor has made a recommendation for a voluntary debt re-arrangement and the consumer and credit provider have accepted the recommendation, the debt counsellor must record the proposal in the form of an order and file it in terms of S138[7].

[11] If however the credit provider and the consumer had not consented to the recommended voluntary debt re-arrangement, then the debt counsellor must refer that recommendation to the Magistrate's Court[8].

[12] In the circumstances, the debt counsellor fulfils a statutory function[9]. As such, the debt counsellor is enjoined to act within the parameters of the empowering provision. Accordingly, the debt counsellor's powers in dealing with a S86(1) application are limited as set out above. I could not find any provision in the Act that empowers the debt counsellor to "*withdraw*" the debt review instituted in terms of S86(1). Neither was I referred to any authority by the respondent to that effect.

[13] In the premises, I find that in purporting to withdraw the debt review instituted by the applicant in terms of the provisions of S86(1), the debt counsellor acted *ultra vires*.

[14] In the light thereof, the debt review application by the applicant was still pending before the debt counsellor at the time of the institution of

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[7] S86(8)(a)
[8] Nedbank (supra) [23]
[9] Nedbank (supra) [21]

the action by the respondent. As such, the provisions of S88(3) of the Act applied.

[15] S88(3) provides:

"*Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until-*

(a) the consumer is in default under the credit agreement; and

(b) one of the following has occurred:

(i) An event contemplated in subsection(1)(a) through (c); or

(ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal".

[16] Accordingly, I agree with Govern J's findings[10] that the respondent is barred by the provisions of S88(3) from instituting action against the applicant until one(1) of the five(5) situations contemplated therein has materialised namely -

> "1. *Where the debt counsellor [had rejected] an application by finding that the consumer is not over-indebted, and the consumer [has] not thereupon apply to the magistrates' court for an order as envisaged in s86(7)(c) within the stipulated time period.*
>
> 2. *Where a credit provider terminates the debt review process on notice to the relevant parties if more than 60 days have elapsed after the consumer applied in terms of s86(1).*
>
> 3. *If the court has determined that the consumer is not over-indebted, or [the court] has rejected a debt counsellor's proposal or the consumer's application.*

[10] Cotzee [10]

4. *If a court, having made an order or the consumer and credit providers having made an agreement, rearranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless the consumer fulfilled the obligations by way of a consolidation agreement.*

5. *If the consumer defaults on any obligations in terms of a re-arrangement agreed [to] between the consumer and [the] credit providers, or ordered by a court or the tribunal*[11]".

Neither one of these situations was contended by the respondent.

[17] As such, having received a notice from the debt counsellor in terms of S86(4)(b)(i), the respondent was barred from instituting action against the applicant until it had acted in accordance with the provisions of S86(10) of the Act[12]. Therefore, the respondent's contention that it was not required to terminate the debt review as contemplated in S86(10) is unfounded.

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[11] Cotzee [8]
[12] S88(3)

[18] In the light thereof, It is not necessary for me to deal with the issue of whether or not the respondent was required to give the applicant notice in terms of S129 of the Act prior to instituting the action.

WILFUL DEFAULT

[19] The applicant alleges that she has defended the matter from the onset. That after the issuing of summons, her debt counsellor, one Pirie had instructed her attorneys of record to defend the matter. The attorneys filed a notice of intention to defend on 5 August 2010. That when the respondent applied for summary judgement, the matter was defended and she was granted leave to defend.

[20] Applicant contends that she was not aware that her attorneys were not handling the matter at the time of the respondent obtaining default judgement. That, all along she was under the impression that her attorneys were defending the matter as before. Applicant alleges that, she only became aware of the default judgement in March 2012 when the Sheriff served her with a warrant of execution for the attachment of the immovable property. As such, the applicant submitted that she has always intended to defend the matter and was accordingly not in wilful default.

[21] In response, the respondent's counsel submitted that the non-filing of the applicant's plea by her attorneys should be imputed to the applicant. In support thereof, the respondent's counsel referred me to a Supreme Court of Appeal case[13] (Saloogee). The Supreme Court of Appeal was dealing with an application for condonation for the late filing of an appeal. Steyn CJ (as he then was) stated that[14]:

> *"a litigant, moreover, who knows as the Applicant did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it....If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself...*[15]".

[22] It is common cause that after the summons were issued, the applicant's attorneys filed a notice of intention to defend and when summary judgement was applied for, the applicant opposed it.

[23] In **Buckle v Kotze** [16] an appeal from the Magistrate's Court where rescission of a default judgement was refused on almost similar facts to the matter *in casu*, Van Oosten J adopted the approach by Jones J

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[13] Saloogee and Another, NNO v Minister of Community Development 1965(2) SA 135(A)
[14] Page 140
[15] Page 141
[16] 2000(1) SA 453(W)

in **De Witt's Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd**[17] that in such circumstances:

> *"the correct approach is not to look at the adequacy or otherwise of the reasons for the failure to file a plea in isolation. Instead, the explanation be it good, bad or indifferent, must be considered in the light of the nature of the defence which is an all important consideration and in the light of all the facts and circumstances of the case as a whole. In this way the magistrate places himself in a position to make a proper evaluation on the Defendant's bona fide and thereby to decide whether or not in all the circumstances it is appropriate to make the client bear the consequences of the fault of its attorneys...*[18]".

After analysing Jones J approach, Van Oosten J concluded:

> *"In my view the effect of the Magistrate refusal of the application for rescission would be to penalise the Appellant for his attorneys failure to file a plea within the time allowed.* ***The Appellant's conduct, which clearly shows his intention to defend the respondent's claim, does not support any***

[17] 1994(4) SA 705(E) at 711D
[18] Page 458

inferences that the application was not bona fide or that there is no bona fide defence[19]*"* (emphasis provided).

[24] In the light thereof, I find that the applicant's attorneys conduct cannot be imputed to the applicant as it is clear that the applicant has always intended to defend the matter. Accordingly, I find that the applicant was not in wilful default in filing a plea.

[25] In any event, the applicant has raised a *bona fide* defence that she was under debt review at the time the respondent instituted action against her. Accordingly, I agree with the applicant's contention that the respondent was required to terminate the debt review in terms of S86(10) of the Act prior to instituting action enforcing that agreement.

[26] In the premises, I make the following order:

1) The default judgment granted by the Registrar in favour of the respondent on 18 October 2011 is hereby rescinded.

2) The respondent is ordered to pay the costs of this application.

HEYNS & PARTNERS INC.

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[19] Pages 458 - 459

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Date of hearing: 12/04/2013

Date of judgment: 28/05/2013