IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 22/12/2016

Case Number: 44741/2014

(1) REPORTABLE: [redacted] / NO
(2) OF INTEREST TO OTHER JUDGES: [redacted]/NO
(3) REVISED.

22/12/2016 P.J. Molefe
DATE **SIGNATURE**

CHANGING TIDES 17 (PTY) LTD N.O. **APPLICANT**

AND

PETRUS JOHANNES DELPORT **RESPONDENT**

JUDGMENT

MOLEFE J

[1] This is an opposed application in terms of which the applicant seeks the following order:

1.1 Payment of the sum of R590 893, 66;

1.2 Interest on the sum of R590 893, 66 at the rate of 8,10% per annum compounded monthly in arrear from 1 March 2014 to date of payment;

1.3 An order in terms whereof the immovable property described below is declared specially executable and, to this end, that a writ of Execution be issued as envisaged in terms of Rule 46 (1) (a) of the Uniform Rules of Court:

Erf 2036 Crystal Park Extension 3 Township, Registration Division I.R., Province of Gauteng, Measuring: 863 Square meters, Held by Title Deed of Transfer T18927/2008, subject to the Conditions Therein Contained. (the immovable property);

1.4 That the Registrar of the above Honourable Court be authorized to issue warrant of attachment in respect of the immovable property;

1.5 Costs of suit on attorney and client scale.

[2] The applicant and respondent entered into a loan agreement on 16 October 2008. It was an express condition of the loan that such loan was to be guaranteed by an indemnity bond registered over the immovable property on 28 January 2009. In terms of the indemnity bond, the respondent bound specifically as a mortgage the immovable property as security for the respondent's obligations in terms of the loan agreement.

[3] The respondent has failed to timeously and punctually perform his obligations under the loan agreement by falling into arrears with the monthly instalments. The respondent is currently in arrears with his monthly obligations towards the applicant in an amount of R329 640, 46. The arrears equate to 56, 42 missed instalments (ie. 4.7 years missed instalments) which arrears the respondent, despite demand fails and/or neglects to pay. The total balance outstanding is R729 577, 97.

[4] The applicant complied with the provisions of the National Credit Act, Act 34 of 2005 ("the NCA") by sending a written notice in terms of the provisions of section

129 (1) (a) of the NCA by a pre-paid registered mail to the respondent's chosen *domicilium citandi et executandi.*

[5] The respondent's attention was drawn to the provisions of section 26 (1) of the Constitution of the Republic of South Africa, which accords to everyone the right to have access to adequate housing. The respondent was also forewarned that should judgment be granted, the Court shall be requested to order that the immovable property be declared executable and this could lead to his eviction.

[6] The respondent was at all material times legally represented by Blakes Maphanga Inc. Attorneys. Although the respondent's attorneys served and filed the respondent's heads of argument on 14 June 2016, they withdrew as attorneys of record on 7 November 2016. The respondent at the hearing of this application appeared in person.

[7] The respondent opposes the application and raised the following defences:

7.1 The application is premature (section 130(3)(c)(i)) considering the fact that the respondent referred the matter to an ombudsman with jurisdiction during the period provided for in the section 129 notice;

7.2 The authority of the applicant's deponent to the founding affidavit is denied;

7.3 The respondent refusal to sign the proposed settlement agreement. It was expected of the respondent to *inter alia* sign a consent to judgment in the event of the respondent breaching the terms of the settlement agreement which the respondent feels is against public policy.

Premature Application

[8] The respondent submitted that the applicant approached the Court during a time when the respondent had elected to refer the matter to an ombudsman with the necessary jurisdiction and the application is therefore premature in terms of section 130(3)(c)(i). The section 129(1)(a) notice dated 22 July 2013 was collected by the respondent from the post office on 27 July 2013. On 4 August 2013 the respondent notified the applicant of its election to refer the matter to an ombudsman with the necessary jurisdiction to adjudicate the matter. The respondent contends that the aforesaid election was effected within the 10 day period as provided for in the section 129 (1) (a) notice, as the 10 day period commenced on 24 July 2013 and expired on 7 August 2013.

[9] Section 5 of the NCA provides as follows:

"(5) When a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by –

(a) excluding the day on which the first such event occurs;

(b) including the day on or by which the second event is to occur; and

(c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b) respectively".

Section 129 of the NCA provides that:

"(1) If the consumer is in default under a credit agreement, the credit provider –

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before –

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

Section 130 (3) (c) of the NCA provides that:

(3)Despite any provision 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 –

(a) . . . .

(b) . . . .

(c) that the credit provider has not approached the court –

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction;

[10] Delivery[1] of the section 129 notice entails that:

"[54] The Act prescribes obligations that credit providers must discharge in order to bring S129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that –

(a) The S129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;

(b) The Post Office issued a notification to the consumer that a registered item was available for her collection;

(c) The Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above".

[1] Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 CC

[11] It is common cause that the section 129 notice was sent by registered post on 22 July 2013 and the first notification was issued to the respondent on 24 July 2013 as deduced from the track and trace report. I agree with the submission made by the applicant's counsel[2] that considering the definition ascribed to "delivery", same occurred on 24 July 2013 and not 27 July 2013 when the respondent collected the notice. I am therefore satisfied that the 10 day period provided for in section 130 (1) (a) lapsed on 1 August 2013. The respondent referred the settlement agreement to the relevant ombud with jurisdiction on 4 August 2013, three (3) days after the expiry of the ten (10) day period. In my view, the application was not premature in terms of section 130(3)(c) as the applicant approached the court before the respondent elected to refer the matter to an ombud with jurisdiction.

Authority of Deponent

[12] It is contended by the respondent that the deponent to the applicant's founding affidavit lacks the necessary authority to act on behalf of the applicant.

[13] In a case of a company or co-operative society, there is judicial precedent for holding that objection may be taken if there is nothing before the court to show that the applicant has duly authorised the institution of notice of motion proceedings[3]. In addition, there is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so[4]. In **Eskom v Soweto City Council 1992 (2) SA 703 (W)**, Flemming DJP held:

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[2] Advocate P I Oosthuizen
[3] Langeberg Ko-operasie Beperk v Folsher and Another 1950 (2) SA 618 (C)
[4] Lurie Brothers Ltd v Arcache 1927 NPD 139

"I find the regularity of arguments about the authority of a deponent unnecessary and wasteful".

In **Ganes and Another v Telcom Namibia Ltd 2004 (3) SA 615 (SCA)**, Streicher JA held:

"In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. . . It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of the applicant. The appellants did not avail themselves of the procedure so provided".

[14] In my view, the respondent was ill-advised to raise the "lack of authority" point in that, the deponent Mlamuli Duma, was duly authorised by a resolution dated 9 April 2013 to institute the legal proceedings[5]. Furthermore, the respondent failed to avail himself of the Rule 7 (1) remedy if he wished to raise the issue of authority of the deponent. This defence should therefore fail.

Proposed Settlement Agreement

[15] The dispute referred to the ombudsman relates to the settlement agreement which the respondent was requested to sign, more specifically, the fact that the respondent contends that the terms of the agreement were against public policy. The clauses 3.2 and 3.3 in the settlement agreement required the respondent to consent to judgment for the outstanding amount on the bond, interest and legal fees and the property to be declared specifically executable and warrant of attachment be

[5] See record pages 18 and 19

granted without any notice to the respondent, should the respondent breach the terms of the settlement agreement. The respondent in this regard, relied on **Eke v Parsons**[6] at paragraphs [44]:

> *"[44] Our Courts have long recognised the detrimental effect of parties, by way of agreement, preventing each other from having a dispute heard by a court of law. The common law rightfully recognises that agreements of that nature may offend public policy. This was expressed thus by the Appellant Division in Schierhout:*
>
> *"If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding such an undertaking is against the public law of the land".*

[16] Respondent submitted that notwithstanding having referred the aforesaid complaint to the ombudsman for adjudication, to date the ombudsman has failed to make a ruling in respect of the complaint.

[17] According to the Parsons test[7], an agreement can be made an order of court if three requirements are met, namely: (a) the agreement must relate to an issue in dispute between the parties; (b) the agreement must be in accordance with the Constitution and the law; and (c) the agreement must hold some practical and legitimate advantage. This would be achieved if the agreement can be brought into operation sensibly and that the agreement must be just and equitable.

[18] In my view, the inclusion of a *"consent to judgment"* in a settlement agreement is not contrary to the purposes of the NCA nor does it offend the provisions of the Parson test. The purpose of the settlement agreement is to promote cost and time-

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[6] 2015 JDR 2064 (CC) at par

[7] Eke v Parsons supra

effective collection procedures that are fair and decreasing the costs of debt collections which consumers will ultimately have to pay. I am satisfied that *in casu*, the terms of the settlement agreement were not against public policy.

Leave to file Further Affidavits

[19] A substantive application seeking condonation for the filing of a further set of affidavits to supplement the applicant's replying affidavit and/or to the extent necessary to take precedence of the contents of the applicant's replying affidavit was made by the applicant. The respondent has filed an opposing affidavit in reply in which he raised a point in *limine* that any reference to the credit ombudsman by the applicant amounts to hearsay and should accordingly be struck out.

[20] The issue surrounding the ombudsman became relevant in the respondent's answering affidavit when he raised the point that the application is premature as the matter is currently serving before an ombudsman[8]. In reply, the applicant referred to correspondence exchanged between its attorneys of record and a case manager in the employ of the credit ombudsman in terms of which the applicant was informed that the matter was closed on the ombudsman's system as far back as 19 November 2012 and that the applicant may proceed with its application for default judgment against the respondent[9].

[21] The respondent then brought it to the attention of the applicant after the filing of the replying affidavit that the contents of the aforesaid paragraph is in fact incorrect as the matter was still pending[10]. The applicant then immediately

[8] Answering affidavit, page 96 par 4
[9] Replying affidavit pages 158 and 159 "Annexure D"
[10] Further affidavit page 7 par 4

suspended further actions pending finalization of the "*settlement dispute*" by the ombudsman.

[22] The final outcome from the credit ombudsman dated 13 July 2015 was that the file in the matter of the respondent was closed as the respondent "*has proven to be quite difficult and his attorney has now advised that he has reserved his rights herein, and will not be providing any further documentation*".[11]

[23] The Court has a discretion to admit further affidavits if there is a proper and satisfactory explanation as to why the information contained in the affidavit was not put up earlier and that no prejudice is caused to the opposite party[12]. I am satisfied that the applicant's explanation for additional affidavits negatives *mala fides* and that the respondent stands to suffer no prejudice. In the circumstances, condonation for the filing of further affidavits is granted.

[24] It is evident that the high watermark for the respondent's case is his contention that both applications were issued prematurely at the time when the matter served before the credit ombudsman. In my view, this contention is without any merit, considering that after a protracted delay of more than 2 years, nothing stand to be gained from the referral to the ombudsman as the issue has now become academic. I have also noted that the respondent is willing to sign a settlement agreement and has acceded to a consent judgment if he receives a notice of such application prior to the applicant applying for judgment, should he fail to honour the provisions of the settlement agreement[13].

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[11] Further affidavit page 22 "Annexure F"
[12] See Standard Bank of South Africa v Sewpersadh and Another 2005 (4) SA 148 CPD at par 10
[13] See Answer to further affidavit page 33 par 5.10

[25] The respondent *in casu* is currently in arrears equate to 56, 42 missed instalments, which arrears the respondent despite demand, fails and/or neglects to pay. The immovable property is not the respondent's primary residence and is being occupied by a tenant. The applicant has complied with the National Credit Act and the defendant's defences are all without any merit.

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

1.1 Payment of the sum of R590 893, 66;

1.2 Interest on the sum of R590 893, 66 at the rate of 8,10% per annum compounded monthly in arrear from 1 March 2014 to date of payment;

1.3 An order in terms whereof the immovable property described below is declared specially executable and, to this end, that a writ of Execution be issued as envisaged in terms of Rule 46 (1) (a) of the Uniform Rules of Court:

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1.4 That the Registrar of the above Honourable Court be authorized to issue warrant of attachment in respect of the immovable property;

1.5 Costs of suit on attorney and client scale.

D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	**Adv. P Oosthuizen**
Instructed by	:	**Velile Tinto and Associates Inc.**
Counsel on behalf of Respondent	:	**In person**
Instructed by	:	———
Date Heard	:	**23 November 2016**
Date Delivered	:	**22 December 2016**