HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not reportable

Not of interest to other Judges

CASE NO: **21180/2015**

In the matter between: 31/3/2016

FIRSTRAND BANK LIMITED Applicant

and

THEODOR CLAUDE MUTHEN First Respondent

DEBORAH MUTHEN Second Respondent

J U D G M E N T

MAKGOKA, J

[1] This is an opposed application for summary judgment. The applicant seeks, as against the first and second respondents, payment of R2 429 659.15, interest and costs, as well as an order declaring two of the respondents' properties to be specially executable. The application results from a credit facility agreement concluded between the applicant and the respondents during 2008. The National Credit Act 34 of 2005 (the Act) is applicable to the agreement. The credit facility was secured by a mortgage bond in favour of the applicant over the respondents' properties. The respondents utilised the credit facility and drew sums of money from it.

[2] Subsequent thereto the respondents experienced financial problems. During August 2014 the first respondent applied for debt review. The applicant made a counter-proposal, and a final debt restructuring agreement was reached. The counter-proposal by the applicant, which was accepted by the respondents, reads:

'... you are informed that none of the existing respective rights and obligations of the original credit agreement/loan agreement are waived or amended. All rights and obligations remain fully enforceable in the event that the consumer is in default of an agreed rearrangement proposal.

If you are in default of this Facility, then the Bank may withdraw the Facility and caim immediate repayment of the full outstanding balance, or terminate your Facility without affecting any of its other rights.'

[3] The monthly installment due in terms of the facility agreement as at September 2014 was R23 517.38. As a result of the restructuring agreement, the respondents had to pay R19 357.39 after September 2014. In October and November 2014, the respondents only made payments of R15 707.59 and R5 250, respectively. The respondents did, however, make extra payments in the subsequent months up to January 2015.

[4] On 9 February 2015 the applicant issued a certificate of balance in the outstanding amount of R2 429 659. 15, and launched the application the present application, on 24 March 2015. The applicant alleges that the first respondent failed to comply with his obligations in terms of the debt restructuring agreement. On that basis, the applicant asserts that the full outstanding amount in terms of the facility agreement has become due and payable. It seeks payment of that amount in this application. The respondents say that they were not in default when the application was launched, as they had made up for the shortfalls in payment by making extra payments in the months subsequent to October and November 2014.

[5] In my view, there is no merit in this argument, and it is mentioned only to be dismissed. The respondents did not make payments in terms of the restructuring agreement, as illustrated in para 4 above. In the very first two months of the re-structuring agreement, the respondents failed to make payments in the agreed amount, and they were accordingly in default of that agreement. In the

circumstances the applicant was entitled to claim the full outstanding balance. As correctly argued by Ms *Riley*, counsel for the applicant, the indulgences granted by the applicant to the respondents in not proceeding with legal action once default occurred, did not amount to a waiver of applicant's rights in terms of the facility agreement.

[6] Having reached that conclusion, I turn now to the respondents' contention based on s 86(10) of the Act. The argument is that, given that they were in debt review, the applicant could only commence legal proceedings against them after giving them notice of termination of debt review in terms of s 86(10) of the Act. That section provides that before a credit provider proceeds to enforce a credit agreement against a consumer who has applied for debt review, that should be preceded by a notice in terms of which the consumer and his/her debt counselor is informed that the credit provider is cancelling the agreement.

[7] In reply, the applicant says that it is entitled to proceed against the respondent in terms of s 88(3) of the Act. That section provides:

'Effect of debt review or re-arrangement order or agreement'

(1) ...

(2) ...

(3) 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) ...

(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.

[8] The applicant places reliance on the judgment of the Constitutional Court in *Ferris v FRB*,[1] in which it was held, among others, that s 88(3)(b)(ii) does not require further notice – it merely precludes a credit provider from enforcing a debt under debt review unless among others, the debtor defaults on a debt-restructuring order.[2] Furthermore, the bank was entitled, in terms of s88 (3) (b) (ii) to enforce the loan on the basis of the breach of the debt-restructuring order.[3]

[9] The only different between the *Ferris* matter and the present one, is that in the former, there was a debt restructuring order in place and in the present matter there is only an agreement. As is clear from the reading of s 88(3)(b)(ii), provision is also made in the event the consumer defaults on 'the terms of a re-arrangement agreed between the consumer and credit providers ...'

(my underlining for emphasis)

[10] The upshot of the above is that the conclusions reached by the Constitutional Court in the *Ferris* matter, are apposite, and apply equally, to a situation where the consumer is in default of a debt restructuring agreement, as is the case here. There are no further defences raised to the applicant's claims. In order to stave off summary judgment, the defendant has to disclose a *bona fide* defence. This means a defence set up *bona fide* or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim (*Bentley Maudesley & Co. Ltd v "Carburol"(Pty) Ltd and Another* 1949 (4) SA 873 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 88). There is no such defence disclosed in the present matter.

[11] I am quite aware of the 'drastic' nature of the remedy of summary judgment as it allows judgment to be entered against a defendant without evidence. On the other hand, the court would be remiss in its duties if unmeritorious defences, clearly devoid of any *bona fides*, stand in the way of a plaintiff who is clearly entitled to relief. The ever-increasing perception that any defence, whatever its merits, is sufficient to stave off summary judgment, is misplaced and not supported by the trite general principles developed over many decades. See for example the well-known decision

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[1] *Ferris and another v FirstRand Ltd* 2014 (3) SA 39 (CC).
[2] Para 14.
[3] Para 18.

of *Maharaj v Barclays National Bank Ltd* (supra). See also generally, *Herb Dyers (Pty) Ltd v Mohamed and Another* 1965 (1) 31 (T) at 31H-32A-B; *Caltex Oil (SA) Ltd v Webb and Another* 1965 (2) SA 914 (N) AT 916D-H; *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA (C) at 303F-H; *Shepstone v Shepstone* 1974 (2) 462 (N) at 467A-H and *Breytenbach v Fiat SA (Edms) Bpk* 1976 (2) 226 (T).

[12] Recently the Supreme Court of Appeal (the SCA) restated the purpose of summary judgment procedure in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA). At paras 31 and 33 the following is stated:

'[31] [I]t was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

[33] Having regard to its purpose and its proper application, summary judgment proceedings do not hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G-426E.'

[13] In the result the applicant is entitled to summary judgment. However, given the fact that the respondents had, as at the launching of the application, made up for the arrears, I am not inclined to grant the order declaring the properties executable at this stage.

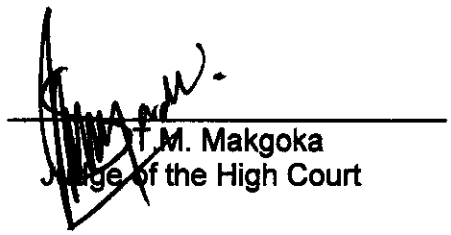
[14] Accordingly, summary judgment is granted against the respondents, jointly and severally, the one paying the other to be absolved, for:

A. 1. Payment in the amount of R2 429 659.15;

2. Interest on the above amount at the rate of 8.50% plus 1.00% per annum compounded monthly and calculated from 5 February 2015 to date of payment;

3. Costs of the application on an attorney and client scale.

B. The prayer for declaration of the respondents' properties to be specially executable is postponed *sine die*.



T.M. Makgoka
Judge of the High Court

Date of hearing: 23 February 2016

Date of judgment: 31 March 2016

For the applicant: Adv. M Riley

Instructed by: Rorich Wolmarans & Luderitz Inc.

For the respondent: Adv. M Joubert

Instructed by: Muthray and Associates Inc.