REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

JUDGMENT

Case No.: 72118/13

DATE: 24 MARCH 2016

In the matter between:

ABSA BANK LIMITED	**Plaintiff**
And	
SERVAAS DANIEL DE KOCK	**1st Defendant**
ELSOFIA DE KOCK	**2nd Defendant**

MNGQIBISA-THUSI J

[I] This matter came before this court as a stated case in terms of Rule 33(1) of the Rules of Court as agreed upon at a pre-trial meeting. The agreed upon issues to be determined are the following:

1.1 whether in the main trial the defendant has the duty to begin; and

1.2 whether the plaintiff should have used either section 86(10) or 88(3) of the National Credit Act[1] ("the NCA") in order to enforce its rights under a mortgage loan agreement.

[2] The following facts are common cause.

[3] The plaintiff and the defendants concluded three mortgage loan agreements on 14 October 2005; 18 August 2006 and 2 February 2007. The loans were for the amounts of R520 000.00 plus an additional amount of R104 000.00; R100 000.00 plus an additional amount of R20 000.00 and another for R100 000.00 plus an additional amount of R20 000.00, respectively. The loan agreements were secured by a mortgage bond over an immovable property known as Portion 1 of Erf [4……..], [P……] Township, Registration Division

I. Q, Province of North West; measuring 952 (Nine Five Two) square metres; held by Deed of Transfer [T…….], subject to the conditions therein contained ("the property").

[4] The plaintiff advanced to the defendants the loan amounts.

[5] The defendants applied to be placed under debt review in terms of section 86(1)[2] of the NCA. The debt counsellor, Mr Jean-Pierre Jordaan, was of the opinion that the defendants were over-indebted and referred the matter, in terms of section 86(7)(cc)(ii)[3] of the NCA to the Potchefstroom magistrates' court.

[6] On 20 April 2010, the magistrates' court declared the defendants to be over indebted and ordered the restructuring of their debt to the various service providers, including the plaintiff. The defendants' monthly instalment to the plaintiff was set at R3 263.13, payable over a period of 109 months. The debt restructuring order further provided that payment in respect of the plaintiff, amongst other service providers, be made to Consumer Protection Excellence ("CPE").

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[1] Act 3 of 2005.

[2] In terms of section 86(1) of the NCA, a consumer can, if finds himself/ herself in financial difficulties and unable to meet his or her obligations in terms of a credit agreement, apply to a debt counsellor to be placed under debt review on the grounds that s(he) is over- indebted or that reckless credit has been granted to him or her.

[3] Section 86(7)(cc)(ii) provides that "If, as a result of an assessment conducted in terms of subsection [6] , a debt counsellor reasonably concludes that- (c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-... (ii) that one or more of the consumer's obligations be re-arranged by-(aa) extending the period of the agreement and reducing the amount of each payment due accordingly; (bb) postponing during a specified period the dates on which payments are due under the agreement; extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or (dd) recalculating the consumer's obligations because of

[7] On 1 August 2013, the plaintiff sought to terminate the defendants' debt review by issuing and delivering to the defendants, the debt counsellor and the National Credit Regulator, a notice in terms of section 86(10) of the NCA.

[8] On 5 December 2013, the plaintiff served summons on the defendants at the defendants' *domicilium* address. The defendants entered appearance to defend and the plaintiff applied for summary judgment against the defendant. The defendants were granted leave to defend and filed a plea.

[9] The plaintiff is claiming payment of the total capital amount owing in the sum R755 535.46, together with interest thereon at the rate of 8.50% per annum. Furthermore, the plaintiff seeks an order declaring the property especially executable in favour of the plaintiff and costs on an attorney and client scale. The plaintiffs claim for the total capital amount owed is based on an acceleration clause contained in the loan agreements.

[10] In its particulars of claim the plaintiff alleges, *inter alia*, the following:

"11.2 The Plaintiff duly performed in terms of the mortgage loan agreements between the parties and more in particular paid the loan amounts to the Defendants and informed the Defendants of the dates on which the instalments were due and payable.

11.2 The Defendants failed to comply with their obligations in terms of the agreements between the parties and more in particular failed to pay punctually the instalment due and payable to the plaintiff.

17.1 The Defendant was placed under Debt Review in terms of the provisions of the National Credit Act, Act 34 of 2005.

17.2 The Plaintiff lawfully terminated the Debt Review in terms of the provisions of the aforementioned act. ...The Defendant failed to respond to the aforementioned notice.

18.1 The total arrears due by Defendants to Plaintiff on date of issuing of summons amounted to 314 535.78.

18.2 The current monthly instalment amounts to R7 277.84.

18.3 Defendants are accordingly 43.22 months in arrears with payment of the mortgage bond instalments."

[11] In their plea, the defendants deny that they owe the plaintiff the amount of R755 535.46 and that the full capital amount as claimed by the plaintiff is due. The defendants deny that they are arrears and allege that they have been complying with the restructuring order and duly paying the instalments as per the order. Further, the defendants deny that the plaintiff validly terminated the debt review.

Onus and the duty to begin

[12] On behalf of the plaintiff, Mr Kolides submitted that since the defendants allege that

they have been duly paying the instalments, and in view of the fact that they have not discovered proof of those payments since it has not received any payment from either the debt counsellor, CPE or Consumer Friend, the other agency mentioned in the restricting order. It is the plaintiff's contention that the defendants bear the duty to begin and the onus to prove that the payments have been made.

[13] Mr Roux, representing the defendants, submitted that in view of the fact that, in their plea, the defendants are disputing the amount claimed by the plaintiff and that they were in arrears in terms of the restructuring order, the quantum of the plaintiffs claim is in dispute and therefore the plaintiff bears the onus of proving the amount and has the duty to begin. The defendants further allege that they have duly been paying instalments in excess of the instalment set by the court order and are as a result ahead in terms of the repayment plan ordered by the magistrates' court and are not in arrears. Furthermore, it was argued that the plaintiff has failed to plead that the defendants are in breach of the restructuring order and on that basis, alone its claim should be dismissed.

[14] It is common cause that the defendants' obligations to the plaintiff in terms of the amounts loaned are now determined by the debt restructuring order made on 20 April 2010 by the Potchefstroom magistrates' court. The defendants are denying that they owe the plaintiff the amount claimed. The plaintiff, as the party seeking a remedy, bears the overall burden of proving its claim. The plaintiff has to show that the defendants have failed to pay the due instalment amount of R3 263.13. The fact that the defendants allege that they have duly paid the instalments and are therefore not in arrears, does not shift the onus onto the defendants. All what the defendants have is an evidentiary burden of adducing evidence showing that they have been paying the instalments in terms of the restructuring order. I am therefore of the view that, in the face of the dispute about the capital amount owed, the plaintiff bears the onus of proving its claim. Therefore, the plaintiff also has the duty to begin.

Procedure to be followed

[15] The issue to be determined is whether the plaintiff was entitled to deliver a section 86(10) notice terminating the defendants' debt review and to thereafter enforce the terms of the original agreement, after a debt-restructuring order has been granted.

[16] it is the plaintiffs contention that it is within its rights to terminate the defendants'

debt review by issuing the section 86(10)[4] notice and enforcing the original credit agreement once the defendants fell into arrears, I read the plaintiffs argument to mean that, the debt review process continues even after a restructuring order is made; and therefore that the section 86(10) procedure is available even after a debt rearrangement order is made. However, Counsel did not address me on the defendants' assertion that the plaintiff should have used section 88(3) under the circumstances. In fact, the plaintiff did not allude to the existence of the debt rearrangement order in its particulars of claim.

[17] It is the defendants' contention that as long as they have fully complied with their obligations in terms of the debt- restructuring order by paying the instalments as and when they become due, the plaintiff was not entitled to issue the section 86(10) notice, terminating the debt review or enforcing the loan agreement. It was submitted on behalf of the defendants that the procedure in section 86(10) is available to creditor providers throughout the debt review process up to the stage where a court makes a debt restructuring order. In this regard, the defendants rely on *Collett v FirstRand Bank Ltd*[5], a matter involving the determination whether the section 86(10) procedure is available to a credit provider even when a debt review application is pending before a magistrates' court.

[18] The Supreme Court of Appeal ("SCA") held that a debt counsellor's role in the debt review is part of an on-going process, which culminates in the order of the magistrate's court under section 87. The court further held that "only then can the debt review be said to be complete" The SCA confirmed the conclusion reached by the court a *quo* in that matter where the court stated that:

"[18] I am unable to find anything in the structure of s 86, or of the Act in its entirety, which is indicative of an intention on the part of the legislature to limit the right of a credit provider under s 86(10) to the process prior to the reference to the magistrate's court. On the contrary ... I consider that the credit provider's rights to give notice in terms of s 86(10) and to legitimately terminate the debt

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Secti on 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 T r i b u n a l * ~ ~

5 2011 (4) SA 508 (SCA) at para [11].

review process continue until the magistrates' court has made an order as envisaged in s87.'[n]

[19] Furthermore, it is the defendants' contention that, if the plaintiff wanted to enforce the amount allegedly owed under the loan agreements, the proper procedure would have been to lodge a section 88(3)(b)(ii) of the NCA application.

[20] In terms of section 86(1) of the NCA, a consumer can, if he finds himself in financial difficulties and unable to meet his obligations in terms of a credit agreement, apply to a debt counsellor to be placed under debt review on the ground that he is over- indebted or that reckless credit has been granted to him.

[21] If the debt counsellor is of the opinion that the consumer is over- indebted or that reckless credit has been granted to the consumer, he may make proposals to the consumer's credit providers for his repayment to be restructured. If such proposal is not accepted by the credit providers, the debt counsellor may refer the matter to a magistrates' court in terms of section 86(8)(b)[6] of the NCA for an order declaring the consumer over-indebted and an order rearranging the repayment of the consumer's debts. As correctly pointed out by Counsel for the defendants and in line with the *Collett* judgment, if a consumer's application is still being assessed by the debt counsellor or is pending before the magistrates' court, a credit provider is entitled, in terms of section 86(10) of the NCA, to terminate such debt review and to enforce the original credit agreement, provided that 60 days have expired from the date application for debt review was made.

[22] In the event of the magistrates' court granting a debt rearrangement order, the consumer is obliged to pay its credit providers as per the instalments as set- out in such order. It is not the aim of the debt review regime to relieve a consumer of his or her obligations towards his or her service providers.

[23] Section 88(3) of the NCA provides that:

"Subject to section 86(9) and (10), a credit provider who receives notice of proceedings contemplated in sections 83 or 85, or notice 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 rearrangement agreed between the consumer and credit- providers, or ordered by a court or Tribunal."

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[6] Section 86(8)<b) of the NCA provides that: If a debt counsellor makes a recommendation in terms of subsection (7)(b) and- - -"

[24] With regard to section 88(3) the Constitutional Court in *Ferris and Another v FirstRand Bank Ltd and Another*[7], held that:

"[14] Once the restructuring order had been breached, FirstRand was entitled to enforce the loan without further notice. This is clear from the wording of the relevant sections of the Act. Sections 88(3)(b)(ii) does not require further notice- it merely precludes a credit provider from enforcing a debt under debt review unless, amongst other things, the debtor defaults on a debt-restructuring order."

[25] The Constitutional Court in the *Ferris* matter approved of the decision in *FirstRand Bank Ltd V Fillis and Another*[8] where the court stated that:

"[15] Thus once the credit review process has commenced section 88(3) of the Act prevents a credit provider from exercising or enforcing, by litigation or other judicial process, any right or security under any 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 rearrangement agreed between the consumer and credit- providers, or ordered by a court or Tribunal.'

[16] It follows, in my view, as a matter of interpretation, that once the jurisdictional requirement set out in section 88(3) coexists with any one of the jurisdictional requirements set out in section 88(3)(b), the credit provider is at liberty to proceed and to exercise and enforce,, by litigation or other judicial process, any right or security under his credit agreement without further notice."

[26]

[27] Nm

[28] Bearing in mind the exposition given by the courts with regard to a credit provider's right to terminate debt review and enforce the original credit agreement, the converse is true. If a consumer complies with its obligations in terms of a debt restructuring order, the credit provider is precluded from terminating the debt review process under those circumstances. Should the credit provider be allowed to terminate debt review in circumstances where there is compliance with a debt restructuring order that would render nugatory one of the purposes of the NCA. In the *Fillis* matter *(supra)* the court in this regard said the following:

"[14] The Act provides very extensive protection to a consumer who has become over-indebted, whether it be his or her own making or through circumstances beyond his or her control. Not only does a rearrangement afford him or her alleviation from

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[7] 2014 (3) SA 39 (CC).

[8] 2010 (6) SA 565 (ECP) at para [15]. The *Ferris* decision was followed by the Supreme Court of Appeal *n Jili v FirstRand Bank Ltd t/a Wesbank* **2015 (3) SA 586(SCA) at para [12] and [25].

onerous monthly
obligations that he or she has in all seriousness undertaken to his or her
credit providers but he or she also enjoys the protection of section 103(5) against the ravaging effect of escalating interest whilst he or she remains in default under the credit arrangement. If, however, he or she fails to embrace this opportunity, or him or her, notwithstanding this very considerable assistance, unable to comply with his or her restructured debt commitment, the Act permits the common law to run its course."

[29]

[29] 1 am of the view that the legislature contemplated providing for the termination of debt review in circumstances where a restructuring order is in place and a remedy has been provided in the form of section 88(3) in the event of the consumer being in default of the debt rearrangement order.

[30] I am of the view, in the light of the jurisdictional pre-requisites set out in section 88(3) for the enforcement of the original credit agreement in cases where a debt rearrangement order has been granted, that the plaintiff was not entitled during the subsistence of the debt-restructuring order granted by the magistrates' court, to issue a section 86(10) notice and issue summons enforcing the original credit agreement. The issue of whether or not the defendants have complied with the re-arrangement order is still in dispute.

[31] The plaintiff's section 86(10) notice is of no effect in the face of the debt rearrangement order and its failure to show that the defendants are in default of the rearrangement order.

[32] Accordingly, the following order is made:
The plaintiffs claim is dismissed with costs.'

NP MNGQIBISA-THUSI

Judge of the High Court

Appearances:

For the plaintiff: Adv Kolides

Instructed by: Snyman De Jager Inc

For the defendants: Adv Roux

Instructed by: Messrs, Jordaan Attorneys