IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: 962/2016

DATE: 1 JUNE 2016
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES

In the matter between:

NEDBANK LIMITED **APPLICANT/PLAINTIFF**

and

THABO ELIAS MOLOI **FIRST RESPONDENT/DEFENDANT NELISIWE OCTAVIA MOLOI**

SECOND RESPONDENT/DEFENDANT

JUDGMENT

RANCHOD J:

[1] This is an application for summary judgment which is opposed by the respondents who are the defendants in the action.

[2] It is necessary to set out the chronology of events.

[3] The first mortgage bond registered on 21 June 2006 in favour of the applicant over the respondents property was for an amount of R130 000.00. A second mortgage bond was registered on 21 November 2006 for R60 000.00 and a third one was registered on 22 April 2008 for R171 721.00.

[4] On 18 October 2014 the respondents entered into a 'Distressed Restructure Agreement.' It appears that the three bonds were consolidated into one.

[5] On 28 January 2015 a debt counsellor, Mr Hein du Plessis (Du Plessis) informed the respondents' creditors that they have applied for debt review in terms of s86 of the National Credit Act 34 of 2005 (the NCA). On 10 March 2015 Du Plessis informed creditors that the application was successful. Thereafter Du Plessis issued a proposal

dated 14 July 2015 for re-structuring the debts.

[6] On the same day, i.e. 14 July 2015 the applicant declined the re-structure proposal.

[7] About three and a half months later, on 30 November 2015 Du Plessis made a finding in terms of s79(1) of the National Credit Act that the respondents are over-indebted and made a so-called 'Instalment Offer' to the applicant.

[8] On 11 December 2015 the applicant despatched a letter by registered post to the respondents informing them that in terms of s86(10) of the National Credit Act the debt review process has been terminated in respect of the respondents' account No. 8138 4353 41801 which relates to the several mortgage bonds referred to above over the respondents' one of two residential properties. There is a mortgage bond over the other property registered in favour of the applicant. The re-structuring of the debt in respect of that property was apparently accepted by the applicant. A similar letter but dated 4 January 2015 (it was accepted that this was a typing error and the year should in fact be 2016) was again despatched to the respondents.

[9] The debt counsellor and the National Credit Regulator were also informed of the termination of the debt review.

[10] On 8 January 2016 the applicant issued summons and, after the respondents entered appearance to defend, applied for summary judgment.

[11] The crisp issue to be determined is whether the applicant validly terminated the debt review proceedings in relation to the debt under account No. 81...

[12] The respondents' primary contention is that the applicant did not participate in the debt review proceedings in good faith. Section 86(5) of the National Credit Act provides:

> 'A consumer who applies to a debt counsellor and each credit provider contemplated in subsection (4)(b) must
>
> (a) ...
>
> (b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.' "

[13] The respondents contend that the applicant was unreasonable in terminating the debt review after Du Plessis had made the proposal dated 30 November 2015. It is contended that the applicant should have participated in the proposal or at least have made a counter-proposal. In *Firstrand Bank vs Adams and Another 2012(4) SA 14* it was held [I quote from the headnote]:

> 'A court may, during summary judgment proceedings initiated by a credit provider, on application by the consumer in terms of s 86(11) of the NCA, order an adjournment to allow the consumer an opportunity to argue that the debt-review process should be resumed so as to provide an opportunity for further negotiations between the parties. In order to decide whether there would be any benefit in so postponing the summary judgment application, the court must strike a balance between the interests of the parties, taking into consideration the nature of the dispute, whether the parties acted in good faith during their negotiations, and the prospect of a rearrangement that, within the parameters of the Act, will ensure the discharge of the consumer's obligations. Any proposal in this regard by the consumer has to fall within the parameters of the NCA, so that it may not be based on a reduction of the contracted interest rate. (Paragraphs [20], F [22], [26] – [28] and [30] at 18G – I, 198 – C, 191 – 20E.).'

[14] In *Firstrand Bank tla FNB v Seyffert 2010(6) SA 429 GSJ* at 435 para [12] Willis J (as he then was) said:

> 'A plain reading of s 86(10), especially when read together with s 86(11), makes it clear that the giving of notice by a credit provider to a consumer to terminate a process of debt review does not necessarily terminate that process of debt review, but may have this consequence. In plain English, a 'notice' denotes an intention, a preliminary step towards a consequence, rather than the consequence itself. In the particular context with which one is now concerned, it all depends on the extent to which the parties show good faith to one another, have sensible, fair and reasonable proposals and actively engage with one another to

> find realistic solutions to a particular consumer's problems. Providing incentives for good sense and fairness on all sides will go a long way to achieving the objectives of the Act.'

I respectfully align myself with this view.

[15] In Collett v Firstrand Bank 2011(4) SA 508 SCA it was held – I quote the headnote:

> 'A credit provider may terminate a debt review in terms of s 86(10) of the National Credit Act 34 of 2005 even after the matter has been referred to the magistrates' court for a rearrangement order in terms of s 87 of the NCA. (Paragraphs [6] and [14] at 511E – F and 5178 – D.) This right is, however, counterbalanced by the obligation of both the credit provider and consumer to participate in the debt-review process in good faith so as to achieve a responsible debt rearrangement. A failure to do so by the credit provider may lead to a resumption of the debt review under s 86(11). (Paragraph [15] at 517E – G.) There is a lacuna in s 86(11), and the words 'or High Court' must be read in after the words 'Magistrate's Court': this will ensure that the magistrates' court and the High Court hearing proceedings to enforce a credit agreement may grant an order for the resumption of the debt review. (Paragraph [17] at 518C/D – E.).'

[16] The applicant's primary submission is that the respondents did not take any further steps for more than a year since applying for debt review in January 2015. It is so that no further steps were taken by respondents within 60 days but then neither did the applicant give notice in terms of s86(10) of the NCA immediately after the 60 days expired.

[17] Du Plessis re-structured the debt on 14 July 2015. The applicant declined it and said:

> 'We refer to the application for debt review in terms of section 86 of the [NCA] and to the debt arrangement proposal dated 14 July 2015. The debt re-arrangement proposal has not been accepted due to the following reason/s. The re-arrangement proposal does not solve and/or does not lead to the eventual satisfaction (sic). No proposal received. Kindly send us a proposal. Please take note the following: Non primary residence (refer our previous notes).'

[18] The applicant's response does not make sense as it refers to the 'debt re-arrangement proposal' dated 14 July 2015 but further down the line says 'No proposal received. Kindly send us a proposal.' It is also stated that the proposal 'does not lead to the eventual satisfaction' and is then left hanging in the air, as it were.

[19] Reference is also made to the property not being the primary residence of the respondents. However, in the particulars of claim it is stated that the property is the primary residence of the respondents.

[20] In any event, Du Plessis did make a proposal dated 30 November 2015 but on 11 December 2015 and again on 4 January 2016 the applicant sent letters in terms of s86(10) terminating the debt review and issued summons on 8 January 2016.

[21] In these circumstances it cannot be said that the applicant participated in the debt review process in good faith. No counter-proposal was made by the applicant.

[22] One further aspect must be mentioned. The applicant had accepted a debt re-structure proposal in respect of the respondents' debt due in terms of a mortgage bond registered over another residential property of the applicants. It appears from the declination of the proposal dated 14 July 2015 where it is stated that the property in question is a 'non primary residence' and applicant's counsel's submission during the summary judgment hearing to that effect, that it was rejected for that reason.

[23] As I understand it, there is no distinction made in the NCA between the primary and non-primary residence of a debtor. The NCA simply speaks of the debts of a debtor without even limiting it to a residential property – let alone the primary residence of a debtor. The issue of whether a residence is the primary residence of a debtor has been stated in case law as a part of the criteria to be applied in the judicial oversight of the applications for the issuing of warrants of execution for the sale of a debtor's residential property.

[24] In my view, given the fact that, *inter alia,* the respondents have been paying off the mortgage bonds for some 10 years now, and that the applicant has accepted a restructuring of the debt in respect of the other property of the respondents, it would be appropriate to order a resumption of the debt review.

[25] I make the following order:

1. The application for summary judgment is postponed sine die.
2. The debt review which was terminated by the applicant is to be resumed.
3. Costs are costs in the cause.

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RANCHOR J
JUDGE OF THE HIGH COURT

Appearances	
Counsel on behalf of Applicant	: Adv J Minnaar
Instructed by	: Hammond Pole Attorneys
Counsel on behalf of Respondents	: Adv E.J.J Nel
Instructed by	: Van Der Hoven Attorneys
Date heard	: 2 April 2016 .
Date delivered	: 1 June 2016