In the KwaZulu-Natal High Court, Pietermaritzburg

Republic of South Africa

Case No 7008/11

In the matter between :

R G Subramanian Applicant

and

Standard Bank Limited Respondent

Judgment

Lopes J

[1] On the 3rd August 2007 the applicant concluded an instalment sale agreement with the respondent bank to enable her to purchase a motor vehicle. It is common cause that she and her husband, to whom she was married in community of property, got into financial difficulties as a result of which she defaulted on her repayments to the respondent. Pursuant to their financial difficulties the applicant and her husband applied to Fidelity Debt Counselling Services (Pty) Ltd for debt review. Their application for debt review was successful, and their creditors were notified accordingly. On the 9th February

2011 the respondent addressed a letter by registered post to the applicant's chosen domicilium citandi et executandi in terms of the instalment sale agreement, terminating the debt review in terms of s 86(10) of the National Credit Act, 2005 ('the Act'). On the 5th August 2011 the respondent applied to the Registrar of this court for default judgment in terms of the instalment sale agreement, which was granted on the 12th August 2011.

[2] The respondent first became aware of the default judgment taken against her on the 5th September 2011 when a tracing agent arrived at her home with a warrant of delivery. On the 28th September 2011 the applicant instituted this application for rescission of that judgment. Mr *Blomkamp*, who appeared for the applicant, submitted that the applicant had satisfied the requirements for a rescission in that she had demonstrated :-

a) a reasonable explanation for her default, which was neither willful nor due to gross negligence;

b) a bona fide application demonstrating a bona fide defence to the respondent's claim;

c) 'good cause' for the rescission as required by Rule 31(2)(b) of the Uniform Rules of this Court.

[3] I deal firstly with the bona fide defence. Mr *Blomkamp* has submitted that the papers demonstrate :-

(a) that the applicant was married in community of property to her husband

Yegan Subramanian; and

(b) that it was a condition subject to which the instalment sale agreement was concluded, that the applicant's husband consented to her concluding the agreement.

[4] There can be no doubt that the respondent was well aware of the above facts. I say this because it is evident from the copy of the instalment sale agreement put up by the respondent that it was a suspensive condition of the instalment sale agreement that the applicant's husband's consent was necessary. There would have been no reason to request that consent had the applicant been married out of community of property.

[5] In the notification of the acceptance of the application for debt review sent to the respondent by Fidelity Debt Counselling Services (Pty) Ltd, it recorded that the applicants for debt review in that application were both the applicant and her husband. Their identification numbers were provided as were their physical and postal addresses.

[6] As the applicant and her husband were married in community of property, her husband was jointly and severally liable for the repayment of her debts. 'Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of their financial contributions, hold equal shares' – H R Hahlo *The*

South African Law of Husband and Wife , H R Hahlo, 5th ed, pages 157 – 158. This is so despite the fact that the respondent was entitled to bring its action against the applicant only – see subsec 17(5) of the Matrimonial Property Act, 1984 which provides :-

'Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, …'

[7] It is correct, as pointed out by Mr *Ramdhani* for the respondent, that the applicant was the only party to the instalment sale agreement, and it is only the debt review process in respect of that instalment sale agreement which the respondent sought to terminate. (see : *Collett v Firstrand Bank* 2011 (4) SA 508 (SCA) at 517, paragraph 14.)

[8] But the corollary of community assets is community of debts. 'Die de man ofte wjif touwt, die trouwt oock de schulden.' 'Just as the assets of the spouses become common property, so their debts become joint liabilities' – Hahlo op cit, at 169 – 170.

[9] Subsec 86(10) of the Act provides that if a consumer is in default under a credit agreement that is being reviewed in terms of s 86, the credit provider in respect of that credit agreement may give notice to terminate the review after the lapse of a period of at least 60 days after the date upon which the consumer applied for the debt review.

[10] Whilst the respondent may have been entitled to terminate the debt review process, in order validly to do so it was required to give notice to the applicant. But what of the applicant's spouse? He is liable for the debts of the applicant and his rights are directly affected by the decision to terminate the debt review process. In those circumstances it would accord with justice were he to be given the same notice of the termination of the process as was afforded by the respondent to the applicant. That the respondent did not attempt to do so cannot be ascribed to ignorance. It was clear from the documentation sent to it that both the applicant and her husband had applied for debt review.

[11] In those circumstances the interests of the applicant's husband were prejudiced by the failure of the bank to notify him of the cancellation of the debt review process. Having not properly cancelled the debt review process the respondent was not entitled to have issued summons against the applicant (see : subsec 88(3) of the Act). Although somewhat distinguishable on the facts, the decision in *M V Zammit and another v The Standard Bank of SA Limited* (Case No 7593/10) (an as yet unreported decision of Rall AJ in this division) would appear to support this reasoning. Accordingly the judgment against her was one which should not have been granted, and it falls to be set aside. Having reached this conclusion it is unnecessary for me to consider the other defences on the merits raised by Mr *Blomkamp*.

[12] The judgment falls within the ambit of Rule 31(2)(b) of the Uniform Rules of this Court. The default of the applicant was neither willful nor negligent. The circumstances were such that the respondent was aware from the notification sent to it by the debt review counsellor, that the physical and postal address of the applicant was not the same as it was in the original agreement in terms of which the applicant chose the address used as her domilicium citandi et executandi. Although strictly speaking this is not a notification of a change of domilicium address in terms of the instalment sale agreement, it would be unfortunate to suggest in those circumstances that the respondent had no notice of the change of the applicant's address.

[13] The applicant has accordingly shown the necessary 'good cause' required by the rule.

[14] In all the circumstances I grant the following order :-

1. The default judgment granted on the 12th August 2011 against the applicant under the above case number is rescinded.
2. The applicant is granted leave to defend the action brought against her by the respondent.
3. The warrant of delivery issued on the 17th August 2011 directing the sheriff of this court to seize the 2005 Tata Indica 1.4LX is set aside.
4. The respondent is directed to return the motor vehicle forthwith to the applicant.

5. The respondent is directed to pay the costs of this application.

Date of hearing : 6th March 2012

Date of judgment : 13th March 2012

Counsel for the Applicant : P C Blomkamp (instructed by W H A Compton)

Counsel for the Respondent : D Ramdhani (instructed by Strauss Daly

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