Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 26346/2010

In the matter between:

FIRST RAND BANK LIMITED **Plaintiff**

and

MELICIA MUNSAMY **Respondent**

JUDGMENT DELIVERED: 7 MARCH 2011

BINNS-WARD, J:

[1] The plaintiff has applied for summary judgment in respect of an amount allegedly due to it by the defendant in respect of a loan advanced against the security of a

mortgage bond. In opposing the application the defendant has not made any allegations suggesting that the claimed amount is not due. She has opposed the granting of summary judgment solely on the grounds that the debt is the subject of debt review proceedings in terms of the National Credit Act 34 of 2005 ('the Act').

[2] In the particulars of claim it was alleged on behalf of the plaintiff that notice had been given to the defendant in terms of s 129 of the Act on 5 November 2010. Copies of the registered slips pertaining to the postage of the notices sent by the plaintiff to the defendant's respective *domicilia citandi et executandi* nominated in the loan and mortgage agreements were annexed to the particulars of claim. It was alleged that to the plaintiff's knowledge the matter was not 'pending before a debt counsellor, alternative dispute resolution agent, consumer court or ombud'. The action was instituted on 6 December 2010.

[3] The defendant avers, however, that an application for a debt rearrangement order was enlisted for hearing in terms of s 87 of the Act in the magistrates' court for the District of the Cape on 8 September 2010. She has annexed to her opposing affidavits a copy of the founding papers in that application. She does not, however, aver what transpired at the proceedings set down on that date. All she does state, in an affidavit deposed to on 22 February 2011, is that she will ensure that her 'new Debt Counsellor' is instructed to ensure that 'the application is processed without delay'.

[4] The defendant submits that because proceedings for a debt restructuring order had been instituted in the magistrates' court before the summons had been issued, the plaintiff was thereby excluded from obtaining judgment against her. In this respect she purported to rely on the authority of the recent Full Bench judgment of this court in

Wesbank, division of FirstRand Bank Ltd v Papier [2011] ZAWCHC 2 (1 February 2011).

[5] The issue centrally in issue in *Papier* was the proper construction of s 86(10) of the Act.[1] Section 86(10) of the Act provides that a credit provider may give notice to terminate debt review proceedings at any time after 60 business days of the commencement of a debt review process. The Full Court held that it was not competent for a credit provider to purport to terminate a debt review at a stage when, in the context of a debt review process, an application was pending in a magistrates' court for an order in terms of s 87 read with s 86(7)(c)(ii) of the Act. The Full Court's judgment has no application on the facts of the current matter because there is no suggestion that the plaintiff purported to terminate the debt review process by notice in terms of s 86(10).

[6] In terms of s 130(3)(c)(i) of the Act, this court may determine the matter only if the court is satisfied that the credit provider has not approached the court while the matter is before a debt counsellor. In the current matter I am not so satisfied. It is clear that a debt counsellor representing the defendant applied for a debt re-arrangement order in terms of s 87 of the Act. It is not clear what has become of that application. There is a statement in the written heads of argument submitted by the plaintiff's counsel that the application was removed from the magistrates' court roll on 8 September 2010, but, with no disrespect to counsel, that does not constitute evidence. Even assuming in favour of the plaintiff that the matter was indeed removed from the roll it is not apparent in what circumstances such removal occurred. There is no indication in the papers before this court that the debt review process was terminated by the removal of the matter from the roll.

---

[1] See para 12 of the judgment in *Papier*.

[7] I do not understand the judgment in *Papier* to afford any warrant to a credit receiver to keep a credit provider from enforcing its rights under a credit agreement in circumstances in which a 'consumer' or his or her debt counsellor does not reasonably efficiently and conscientiously prosecute proceedings pending before a magistrate for an order in terms of s 87 of the Act. The facts in the *Papier* matter did not call for a consideration of what the credit provider's rights might be in such a situation. In my view it would be open to a credit provider to give notice of termination in terms of s 86(10) of the Act if the proceedings before the magistrates' court are not being diligently proceeded with. A failure by a consumer of the debt counsellor to diligently prosecute the proceedings before the magistrate would in my view amount, in substance, to an abandonment of the proceedings; with the result that the impediment presented by their existence to resort to s 86(10) by the credit provider would be removed; cf. *Papier* at para 34.

[8] The difficulty is that the plaintiff has proceeded as if the debt review proceedings never occurred. That much is apparent from its allegations in the particulars of claim mentioned earlier and also by its having purported to give the defendant notice in terms of s 129(1)(a) of the Act in November 2010. In my view, and as far as I can judge the facts on the papers, it behoved the plaintiff to terminate what it seems to have considered to be the actually or constructively abandoned debt review process before instituting this action. The manner of doing so should have been by an appropriately worded notice in terms of s 86(10). (It should not be overlooked in this regard that the evident purpose of the ten business days notice period in terms of s 86(10) is to afford

the consumer, if so advised, to apply in terms of s 86(11) for a resumption of the debt review.)

[9] In the circumstances it seems to me *prima facie* that the action may have been prematurely instituted. Accordingly, it would be inappropriate to grant the application for summary judgment.

[10] The following orders will issue:

1. The application for summary judgment is refused.
2. The defendant is granted leave to defend the action.
3. The costs of the summary judgment proceedings are reserved for determination by the court which determines the action.

A.G. BINNS-WARD
Judge of the High Court