IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 11766/2010

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED — **Plaintiff**

and

CLEMENT RICHARD ALLARD — **First Defendant**

VERONICA CECILIA ALLARD — **Second Defendant**

Court:	CLOETE, AJ
Heard:	3 March 2011
Delivered:	March 2011

JUDGMENT

CLOETE AJ:

INTRODUCTION

[1] This is an opposed application for summary judgment.

[2] On 28 June 2010 the plaintiff instituted action against the defendants (who are married to each other in community of property) jointly and severally for (a) payment of the sum of R530 033.03; (b) interest thereon at the rate of 8.8% per annum as from 21 June 2010 to date of payment; (c) an order declaring the immovable property registered in the names of the defendants (being remainder Erf 15347 Parow) executable for the aforesaid amounts; and (d) costs of suit on the scale as between attorney and client.

[3] The defendants delivered a notice of intention to defend and the plaintiff then applied for summary judgment which was set down for hearing on 13 August 2010. The defendants delivered an affidavit in opposition to the summary judgment application and after a postponement on that date the matter was further postponed for hearing on the semi-urgent roll, when it came before me.

[4] It should be mentioned that applications by the defendants for condonation for late filing of their affidavit and late filing of their heads of argument were granted by agreement between the parties.

[5] The relevant paragraph of plaintiff's summons reads as follows (the reference to the "NCA" is to the National Credit Act no 34 of 2005):

'1. Payment of the sum of R530 033.03 being the balance of the principal debt together with finance charges thereon (both as defined in the NCA) in respect of monies lent and advanced by the Plaintiff to the Defendants under a mortgage agreement (as defined in the NCA) pursuant to Mortgage Bond No. B33786/2006 (a copy of which is annexed hereto and marked "A") for R562 500.00 passed by the Defendants in favour of the Plaintiff, registered in the Deeds Registry at Cape Town on 7 April 2006 and hypothecating as a First Mortgage Remainder Erf 15437 Parow, in the City of Cape Town, Cape Division, Province of the Western Cape, the sum

claimed now being due and payable in terms of clause 9.1 of the bond by reason of the Defendants' failure to pay on demand the instalments due under the bond, the Plaintiff having complied with the provisions of the NCA and in particular the provisions of Sections 86(10), 129 1(b)(i) and 130 thereof, the Plaintiff having terminated the debt review process ...' (My emphasis.)

[6] The defences raised by the defendants are the following:

(a) The plaintiff failed to inform the court of whether "termination notices" as contemplated by the NCA were sent to the defendants, the debt counsellor and the National Creditor Regulator; the plaintiff *"does not allege that such a notice was sent to the National Creditor Regulator by registered mail, and makes no reference that the notices were also sent to myself and my Debt Counsellor, as is prescribed in section 86(10) of the Act"*. (The references to *"myself"* and *"my"* are accepted to be references to both defendants.)

(b) The plaintiff failed to inform the court of the circumstances under which the debt review process was terminated, and it is on the basis of these circumstances that the defendants contend that the plaintiff was not entitled to terminate the debt review process and to institute proceedings against them.

(c) Even if I find that the debt review process was validly terminated, this court should exercise its discretion in favour of the defendants and order that the debt review must resume (again, in light of the circumstances alleged by the defendants).

[7] The circumstances alleged are the following: (a) when the defendants began experiencing difficulty in maintaining their mortgage bond payments, they approached a debt counsellor who, after considering their position, placed the defendants under debt review as contemplated in s 86 of the NCA; (b) they were informed by their debt counsellor that their creditors (including the plaintiff) had been notified; (c) they were assessed to be over-

indebted and all creditors were informed of this *"using Form 17.2 as prescribed by the Act, in and during January 2008"* from which date the defendants have been under debt review; (d) they indeed defaulted on one payment *"in terms of the Debt review process"*, but state that their debt counsellor, Mr Mouwers informed them that they could do so and at the time they believed this information to be correct in law; and (e) it is on the strength of this one single default that the plaintiff has sought to *"terminate"* the debt review process.

ISSUES TO BE DETERMINED

[8] What must be determined is if any of the following constitute bona fide defences as envisaged in Rule 32(3)(b) of the Rules of Court:

(a) Whether the allegations by the plaintiff in its summons that it had complied with the provisions of the NCA and in particular the provisions of s86(10), 129(1)(b)(i) and 130 thereof, constitute compliance with the notice requirements of the NCA to terminate the debt review process.

(b) Whether termination of the debt review process in the circumstances alleged by the defendants constitutes valid termination entitling the plaintiff to have instituted legal proceedings.

(c) If the plaintiff is found to have validly terminated the debt review process, whether I should exercise my discretion in favour of the defendants and order the resumption of the debt review process.

WHETHER THERE WAS COMPLIANCE WITH THE NOTICE REQUIREMENTS OF THE NCA TO TERMINATE THE DEBT REVIEW PROCESS

[9] The defendants relied heavily on *Rossouw and Another v FirstRand Bank Limited t/a FNB Homeloans (formerly FirstRand Bank of South Africa*

Limited) (Case No 640/2009) [2010] ZASCA (130), a judgment of the Supreme Court of Appeal handed down on 30 September 2010.

[10] The defendants do not deny delivery of the notices in terms of s129 and 130 of the NCA but deny delivery as required by s86(10) thereof. As set out above, the defendants aver that the plaintiff also failed to allege in its summons that it delivered such notices of termination to all relevant parties as contemplated by the NCA.

[11] The defendants submit that the decision in the *Rossouw* case illustrates the approach to be adopted when considering the *"delivery"* of notices in terms of the NCA albeit that the case concerned the delivery of notices in terms of s129 and 130 thereof. The defendants argue that it is noteworthy that the Supreme Court of Appeal considered that the failure to allege delivery of such notices in the plaintiff's summons, coupled with the denial of such delivery by a defendant, constituted a defence to an application for summary judgment.

[12] It is accordingly necessary to consider the provisions of s86(10) of the NCA in light of the *Rossouw* case.

[13] Section 86(10) provides that:

'(10) 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 give notice to terminate the review in the prescribed manner to –
(a) the consumer;
(b) the debt counsellor; and
(c) the National Credit Regulator,
at any time at least 60 business days after the date on which the consumer applied for the debt review.' (My emphasis.)

[14] The credit provider accordingly has a discretion to terminate the debt review process but in the event that it does so, it is obliged to give notice in

the prescribed manner to (a) the consumer; (b) the debt counsellor; and (c) the National Credit Regulator. If it was intended that the credit provider could elect to give notice to only one or more of these in its discretion, one would not find the word *"and"* in s86(10)(b). Accordingly, in order to follow the correct procedure to terminate the debt review process, all three of the aforementioned must be given notice.

[15] In the *Rossouw* case, the court found that the legislature was satisfied that sending a document by registered mail is proper delivery; that *"send"* does not include *"receipt"* of the sent item; and the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders: see paragraphs 30 and 31 of the judgment.

[16] The court however found that the credit provider had not complied with the provisions of s129(1) – which in turn refer to the provisions of s86(10) as set out above – in that no allegation was made either in the summons or the summary judgment affidavit regarding the method employed in delivering the notice. The credit provider had merely stated cryptically in its summons that the plaintiff had complied with s129(1) and 130 of the NCA, annexing notices titled *"NOTICE IN TERMS OF **SECTION 129(1)** OF THE **NATIONAL CREDIT ACT**"* and *"CERTIFICATE OF COMPLIANCE IN TERMS OF **SECTION 129(1)** OF THE **NATIONAL CREDIT ACT**"* respectively: see paragraph 33 of the judgment. The court found that these allegations were inadequate for purposes of establishing whether the notice was delivered in terms of the relevant provisions.

[17] The credit provider in that case sought to overcome this difficulty in its papers by handing in a transcript of the argument in the court *a quo* during which proof of postage by registered mail had been handed in on behalf of the credit provider. However the Supreme Court of Appeal found that, since the provisions of rule 32(4) of the Rules of Court limit a plaintiff's evidence in summary judgment proceedings to the affidavit supporting the notice of

application, the document which the credit provider handed in at the hearing of the court *a quo* was simply inadmissible: see paragraphs 34 and 35 of the judgment. It was in these circumstances that the court found that the credit provider did not prove that it had delivered the notice in terms of s129(1).

[18] In my view, there is merit in the defendants' contention that the principles set out in the *Rossouw* case should apply equally to s86(10). Firstly, the provisions of s86(10) are specifically incorporated by reference into the provisions of s129(1)(b). Secondly, there is nothing in s86(10) to indicate that the provisions of s168 of the NCA are not applicable to that specific section (s168 being the *"catch-all"* section of the NCA dealing with service of documents which, as stated in the *Rossouw* case is in the legal context synonymous to *delivery of documents*: see paragraph 30 of the judgment).

[19] In the instant matter:

(a) The plaintiff instituted proceedings against the defendants on 28 June 2010.

(b) In its summons the plaintiff alleged that it had complied with the provisions of the NCA *'and in particular the provisions of Section 86(10), 129 1(b)(i) and 130 thereof'*.

(c) At the date when plaintiff instituted action against the defendants, practice note 33 of the Consolidated Practice Notes of this division provided that:

'(1) In any action instituted in terms of the National Credit Act 34 of 2005 (the Act), the summons or particulars of claim must allege that there has been compliance with the relevant provisions of sections 127, 129 and 131 (as the case may be), read with section 130 of the Act.

(2) In order to satisfy the court of the matters referred to in section 130(3) of the Act, an affidavit by the credit provider must be filed when judgment is applied for.'

(d) Prior to the hearing of this matter the plaintiff filed an affidavit of compliance as envisaged in terms of practice note 33(2) from which it is clear that it had indeed fully complied with the provisions of s86(10).

[20] The plaintiff would not have been aware of the requirements regarding pleading in NCA matters laid down in the *Rossouw* case at the time of institution of the action, as the decision in that case was only handed down on 30 September 2010 which was more than a month after the summary judgment application was ripe for hearing. Further, practice note 33(1) was only amended on 1 February 2011 to provide that founding papers in NCA matters must contain *"sufficient allegations or averments to enable the court to be satisfied that the procedures required by those sections, read with s130(1) and (2) of the Act, as may be applicable to the claim had been complied with before the institution of the proceedings."*

[21] In my view, it could not reasonably have been expected of the plaintiff to have to withdraw and reinstitute proceedings in order to ensure compliance with the requirements laid down in the *Rossouw* case and the amended provisions of practice note 33(1). To my mind, the plaintiff complied fully with what was required of it at the time the proceedings were instituted; and it took all of the steps which it could reasonably take to ensure compliance with the *Rossouw* case prior to the matter being heard before me.

[22] I accordingly find that the first defence raised by the defendants must fail.

WHETHER THE PLAINTIFF WAS ENTITLED TO TERMINATE THE DEBT REVIEW PROCESS

[23] The plaintiff submitted that the defendants' affidavit does not reflect that any application has been made to a magistrate's court for debt review and that, on the defendants' own version, the plaintiff was entitled to terminate the debt review process. The plaintiff further submitted that the recent full bench decision of this division in *Wesbank, a Division of FirstRand Bank Limited v Papier* (case no 1245/2010) is thus not applicable to the present matter.

[24] It is correct that in that case the full bench granted an order staying an application for summary judgment pending the resumption of a hearing before a magistrate in terms of s86(11) as read with s87 of the NCA.

[25] In the instant matter the defendants allege that they were placed under debt review by a debt counsellor. To my mind, a consumer cannot be placed *"under debt review"* by a debt counsellor in terms of s86(8)(b) of the NCA. A consumer can only be placed under debt review by a court since the debt counsellor's powers only extend to (a) making a recommendation to the consumer's creditors to accept debt restructuring; and (b) failing their acceptance, referring the matter to the court with the recommendation which the creditors have rejected so that the presiding officer can decide whether to place the consumer under debt review with the attendant restructuring of his or her debts: see s86(7)(c)(ii) as read with s86(8)(b) of the NCA. (Specific reference is made to a magistrate's court in s86; but see *Mercedes Benz Financial Services South Africa (Pty) Limited v Papana Gideon Dunga* (case no. 9222/2010) a decision of this division on 20 September 2010, where the court found that s86(11) should be interpreted to include a reference to the high court and not to the magistrate's court only).

[26] It should also be noted that even in those instances where the creditors accept the debt counsellor's proposal for restructuring, their formal consent must be filed by the debt counsellor as a consent order in terms of s138: see s86(8)(a) of the NCA. Section 138 makes it clear that the consent order must be confirmed by either the National Consumer Tribunal or a court, as the case may be. The acceptance by the creditors of the debt counsellor's

proposal for restructuring will thus only constitute being *"under debt review"* once the consent order is made.

[27] Defendants allege that their creditors were informed of their over-indebtedness (which clearly implies that a debt review process had commenced in terms of s86(7)(c) of the NCA) by *"using Form 17.2"*. The defendants did not however annex a copy of the duly completed form 17.2, nor did they refer to or annex a copy of any s138 consent order.

[28] For ease of reference a blank form 17.2 is reproduced hereunder:

NCR Form 17.2

(On the letterhead of the debt counsellor)

TO: (An individually addressed notification must be sent to credit department of each credit provider listed in application for debt review)

AND TO: (An individually addressed notification must sent to each registered credit bureau)

FROM: Name of Debt Counsellor .....
NCR registration number .....
Address .....
.....
Contact Number .....

DATE: .....
Full name of Consumer .....
Identity number of Consumer .....

This notice serves to advise you that

(a) the abovementioned consumer's application for debt review was rejected in terms of Section 86(7)(a) of the National Credit Act 34 of 2005; or

(b) the abovementioned consumer's application for debt review was successful and the debt obligations are in the process of being restructured; or

(c) the abovementioned consumer's debt obligations have been restructured and a court/Tribunal order has been issued, the details of which are as follows:

(i) Case Number;

(ii) magistrates' Court for the district of ...../Tribunal

All credit bureaus are advised to update the abovementioned consumer's record, within 5 days of receipt of this notice, as set out above.

Signed at *[place]* .....on this *[day]* .....of [month] .....of *[year]* .....

Debt Counsellor .....'

[29] In the instant matter the court is left in the dark as to whether the outcome of the defendants' debt review application falls under (b) or (c) on Form 17.2 above.

[30] The only indication is to be found at the following portion of the defendants' opposing affidavit (the reference to the "respondents" is a reference to the defendants):

'The facts pertaining to our default are as follows: The Respondents indeed did default on one single payment to the Plaintiff in terms of the Debt review process. The Respondents were advised by Mr. Mouwers at the time that the Respondents are allowed by law to default on one payment during the course of being under debt

review. At the time the Respondents believed this information to be correct in law. It is on the strength of this one single default that the Plaintiff has sought to "terminate" the debt review process.'

[31] However, even if the defendants were subject to debt review in terms of s86(8)(a) as read with s138, it seems that this might not assist them.

[32] Section 88 of the NCA deals with the effect of a debt review, re-arrangement order *"or agreement"*. Section 88(3) provides that, subject to s86(9) and (10) a credit provider who receives notice of court proceedings contemplated in s83 or s85, or notice in terms of s86(4)(b)(i) may not exercise or enforce by any judicial process any right under the credit agreement in question 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 re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.' (My emphasis.)

[33] Accordingly, irrespective of whether the defendants had entered into a debt restructuring arrangement with their creditors as provided for in s86(8)(a) as read with s88(1)(c), the plaintiff may well have been entitled to terminate the debt review process and to institute proceedings against the defendants since, on their own version, the defendants had defaulted on their payment arrangement.

[34] However, I do not believe that it would be appropriate to make any specific finding in this regard for the following reasons:

(a) the plaintiff clearly relies on s86(10) and not on s88(3) to terminate the debt review process;

(b) it may be that the trial court after hearing all the evidence finds that, based on the *"good faith"* requirement referred to in s86(5)(b) and the findings of the court in the *Dunga* case (particularly at paragraphs 15 and 24) the plaintiff was not entitled to terminate the debt review process;

(c) Accordingly, the legal point raised by the defendants cannot be considered to be *"really unarguable"* for purposes of those proceedings: see *Shingadia v Shingadia* 1966(3) SA 24 (R) at 26A. The defendants must be given the benefit of the doubt and I am obliged to find that they have disclosed a *bona fide* defence in the sense that their case is not unarguable.

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION IN FAVOUR OF THE DEFENDANTS AND ORDER THE RESUMPTION OF THE DEBT REVIEW PROCESS

[35] In the alternative the defendants requested that I should stay these proceedings in order that the debt review *"may resume"* in the magistrate's court, alternatively that this court should reinstate the debt review process since *"equitable conditions"* so dictate. As to the defence relating to termination of the debt review process is, to my mind, arguable, I believe that it is nonetheless necessary to deal with this "alternative" defence.

[36] As there is no evidence that the defendants were placed under debt review by a magistrate, there is presumably no debt review which can be resumed in the magistrate's court in terms of s86(11) of the NCA.

[37] The defendants must thus rely upon the provisions of s85 of the NCA, which are as follows:

'85 Court may declare and relieve over-indebtedness

Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may –

Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may –

(a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or

(b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.'

[38] Accordingly, in terms of this section the court has a discretion to refer the matter to a debt counsellor, or to declare the consumer to be over-indebted and make any order to relief the consumer's over-indebtedness, if it is alleged that the consumer is over-indebted.

[39] In *ABSA Bank Limited v Kritzinger and Another* (case no 6474/2009), *Standard Bank of South Africa Limited v Pienaar and Another* (case no 7355/2009), a full bench of this division had occasion to consider s85 of the NCA. A reading of that judgment makes it clear that detailed financial information was placed before the court by the defendant consumers which enabled it to exercise its discretion in terms of the aforesaid section.

[40] In the instant matter, not a single piece of financial information has been placed before me by the defendants. All that this court has is the allegation that the defendants were assessed to be over-indebted in January 2008, more than three years ago.

[41] In *Standard Bank of South Africa Ltd v Panayiotts* 2009(3) SA 363 (WLD) 365 the court dealt with the provisions of s85 within the context of summary judgment proceedings. The court first summarised what is required of a defendant in proceedings of this nature at 370F-I:

'[38] To avoid summary judgment a defendant wishing to satisfy the court by affidavit that he has a bona fide defence to the action, shall 'disclose' fully the nature and grounds of the defence and the material facts relied upon therefore (rule 32(3)(b)).

[39] Not only must such a defendant allege facts which, if proved at the trial, will disclose a defence to the plaintiff's claim, but he also has to demonstrate that the defence is bona fide. (Van Niekerk et al *Summary Judgment: A Practical Guide* in para 9.5.4.)

[40] The test of bona fide means that the defendant's allegations ought not to be inherently and seriously unconvincing. (*Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228B.)

[41] Counsel for the plaintiff submitted that the defendant had fallen short of what was required of him.

[42] It was submitted that, inter alia, the defendant had set out insufficient facts to show that he is over-indebted as envisaged in s79 and that he is entitled to the relief set out in s85. In addition, he failed to show that his defence is bona fide, it was argued. In the alternative, counsel for the plaintiff submitted that the defence is set out with such vagueness and baldness that the facts do not amount to a bona fide defence.'

[42] The court then considered whether a case had been made out for relief in terms of s85, and found that it had not. The court set out the position as follows at 372E-373B:

'[51] The section vests the court hearing the matter with a discretion whether to proceed in terms of *(a)* or *(b)* or whether to grant the relief at all. It is clear, therefore, that the court is not obliged to act simply on the defendant's allegation of over-indebtedness, but has to act judiciously. Counsel for the defendant submitted that, in exercising its discretion, the court has to bear in mind the purpose of the NCA, which was to protect not only the poor, but also the rich, against their financial folly.

[52] It is so that the NCA is for the benefit of every consumer who can prove that he is over-indebted as contemplated in s 79 of the NCA. More importantly, however, is whether the consumer wanting to take advantage of the NCA provisions has made proper disclosure to enable a court to exercise its discretion properly.

[53] In exercising its discretion the court ought to bear in mind that, although the relief sought in terms of the NCA is *sui generis*, in a summary judgment application one cannot ignore the requirements of rule 32 of the Uniform Rules of Court completely.

[54] I therefore am unable to agree with AR Erasmus J in *FirstRand Bank Ltd v Olivier* [2009 (3) SA 353 (SE)] where he states that it is inappropriate to superimpose the requirements of rule 32(3) on an application in terms of s 85 of the NCA. In my view, to ignore the rule 32 requirements completely would be grossly unfair to the plaintiff. After all, it is within the context of a summary judgment application that the defence in terms of the NCA provisions has been raised.

[55] The application in terms of s 85 must still be bona fide and not raised solely as a delaying tactic. The debtor must provide sufficient information to support his allegation of over-indebtedness. This means a consumer who raises a defence of over-indebtedness must plead and prove, on a balance of probabilities, that he is over-indebted as envisaged in s 79 of the NCA.

[56] *In casu* the defendant's allegations regarding his over-indebtedness are inherently and seriously unconvincing. I say this for the following reasons: the defendant has set out insufficient facts to show that he is over-indebted as envisaged in s 79. In addition such facts are so vague and bald that they do not amount to a bona fide defence. '

[43] The approach adopted in the *Panayiotts* case was cited with approval in this division in the matter of *FirstRand Bank Limited v Swarts and Another* (case no 25699/2009).

CONCLUSION:

[45] The defences raised in respect of (a) notice; and (b) resumption of the debt review process must fail for the reasons set out above. However the defence raised as to termination of the debt review process constitutes a *bona fide* defence in the sense that it raises an arguable point of law in these summary judgment proceedings.

[49] **In the result, I make the following order:**

(1) The application for summary judgment is refused.

(2) The defendants are given leave to defend.

(3) Costs shall stand over for later determination.

J I CLOETE