A409/11

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A409/11

DATE: 2 December 2011

In the matter between:

BMW FINANCIAL SERVICES S A (PTY) LTD Applicant

and

CHARLES FRANCOIS GELL 1st Respondent

ANNA ELIZABETH SCHMALTZ-WEEDA 2nd Respondent

JUDGMENT

DOLAMO, AJ

This is an appeal by a credit provider, BMW Financial Services, against an order by the Magistrate Strand declaring the second respondent over indebted and rearranging her debt repayment obligations.

The first respondent, her debt councillor, applied in terms of Section 86(7)(c) of the National Credit Act, 34 of 2005, (hereinafter referred to as "the Act") for an order declaring the respondent to be over indebted and recommending a proposed extension of her agreement to be made an order of Court.

The respondent is currently 57 years old, and receiving as her main source of income a disability pension from the Netherlands. She is alleged to have suffered serious injuries to her neck, spine and knees and is said to be unable to do her household chores. The amount of her pension is dependant on the Rand/Euro exchange rate. At the time when the application was launched in the magistrate's court she was receiving R11-00 to a Euro, resulting in a net amount of R21 164 per month. She was also receiving a maintenance amount of R3 000 from her husband from whom she was in the process of divorcing.

It was alleged that she incurred her debts while she was still living with her husband and while his income was still available to supplement her payment of these debts. With his departure her own income became insufficient to meet all her financial obligations. She has no executable, moveable or immoveable, assets which did not form part of or associated with any credit agreement in the debt review process.

As a result of these factors the first respondent determined that she was over indebted because after providing for her family's essential monthly living expenses she was left with insufficient funds to meet her monthly commitment to the ten

credit providers to whom she owed various amounts.

The application in terms of Section 86 (7)(c) was accordingly launched to declare her to be over-indebted and proposing a re-arrangement of her obligations to her creditors. The appellant opposed the application basically on the grounds that insufficient evidence was placed before the Court *a quo* to enable it to reach an informed decision and that the proposed plan was impractical. In terms of the papers filed in the application the proposed restructuring payment of the debt which was due and payable to the appellant the monthly instalments were to be reduced from R2 650,51 at 20% interest rate per annum to R504,18 per month over a period of 47 months. There was however an amendment to the founding affidavit which was by way of a supplementary affidavit filed by the first respondent, aimed at reflecting her current financial position which had since deteriorated due to various circumstances. The debt to the appellant was in the process also going to be affected.

At the hearing of the matter and after the appellant had already filed its opposing papers a document was handed up to Court containing a new summary of the first respondent's alleged expenses as against her income. This document also included a new proposal for the restructuring of her debts

based on the newly disclosed income and expenditure outlined therein. In terms of this proposal the debt owed to the appellant was to be paid over a period of approximately eight months at R1 867,59 per month. The document was not supported by any affidavit. The court *a quo* however granted the order in question in line with the proposed rearrangements. The present appeal is against both the procedural and substantive decisions of the court *a quo*.

The appellant's contention is that the order of the court was based on a document handed up to court which was not properly part of the record, and that the order granted has the effect that even if the second respondent were to pay all the amounts due in terms of the order, the creditor will not be paid in full during the period of the order.

I deem it apposite to outline grounds upon which the appellant opposed the application in the court *a quo* as they are, in my view, applicable to the determination of this appeal. These grounds were; that the first respondent had failed to attach any documentation used to reach a determination that the second respondent was over-indebted; that he failed to attach any proof of the second respondent's alleged expenses; that the second respondent was not truthful with her income and expenditure when she applied for financing with the appellant,

that the second respondent could have proceeded with legal action against her estranged husband to alleviate her alleged dire financial circumstances; that it would not be in the best interest of the appellant for the debt to be repaid over the extended period as suggested; and that the second respondent had not explored the possibility of voluntarily surrendering the vehicle to the appellant as provided for in Section 127 of the Act.

I, with respect to the learned magistrate, agree with the submission by the appellant that a paucity of information was placed before the court *a quo* which and such will not have enabled the learned magistrate to properly determine the income and expenditure of the second respondent, her current circumstances and the circumstances that led to her current financial crises. By way of example, and certainly not exhaustive, no invoices, receipts or accounts were attached to the founding papers, only the bare allegations of income and expenditure were made that the applicant has to make out her case in her founding affidavit. He or she must set out facts necessary to establish a *prima facie* case in as complete a way as the circumstances demand.

Regrettably this was not the case in the present matter. Secondly, in my view, the admission into evidence of the

document handed up to Court, and without any supporting affidavit and on which the court *a quo* based its decision was improper. In this respect I can only endorse the dictum of Van Reenen, J in Die Dros (Pty) Ltd and Another v Telephone Beverages CC and Others 2003(4) SA 207 at para 28 which counsel for the applicant Mr Wessels had referred to in his heads of argument and the appropriate quotation is as follows:

> "It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties but also to place essential evidence before the Court. See Diamond Mines Pty Ltd and Others v Government of the Department of South Africa and Others 1999(2) SA 279 (W) at 323 for the benefit of not only the Court but also the parties."

Lastly the order was attacked by the appellant on the basis that the restructured payment to the appellant will not lead to a full recovery of the debt due to it. To substantiate the point the appellant attached to its heads of argument a document setting out how the payments or the proposed payment will leave a balance of the sum or R23 956,24, as unrecovered. The effect of permitting the second respondent to evade the payment in full of her obligation is counter to the spirit of the Act and cannot be countenanced.

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I find no fault with the calculations of the appellant on this aspect and accept the document as proof that in terms of the restructuring proposal the second respondent will evade paying the debt in full.

Finally the appellant indicated that the second respondent did not look at the possibility of voluntarily surrendering the vehicle. If one couples the fact that the second respondent intends to retain the vehicle and not pay for it in full, one is left in no doubt that the order as it is couched, is fundamentally flawed.

On a conspectus of all the circumstances of the case I am of the view that the order granted by the magistrate in this matter was flawed and ought to be set aside. The order I propose is therefore the following:

That the debt rearrangement order granted by the Strand magistrate court on 7 February 2011 in case number 5420/2010 is set aside and the following is substituted therefore. The APPLICANT'S APPLICATION FOR THE REARRANGEMENT OF THE FIRST RESPONDENT'S OBLIGATION AS CONTEMPLATED IN SECTION 86(7)(C)(II) OF ACT 34 OF 2005 IS REFUSED. No order as to costs is

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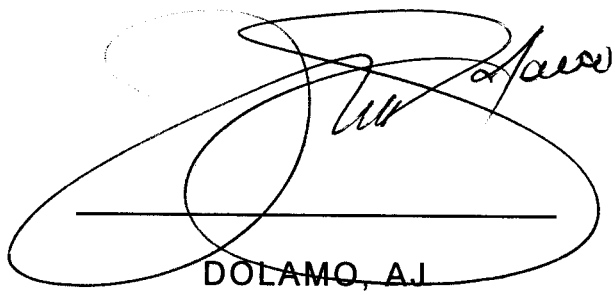
made.



DOLAMO, AJ

I agree, the APPEAL IS ACCORDINGLY UPHELD AND THE ORDER PROPOSED BY MY LEARNED BROTHER IS THEREFORE MADE.

FOURIE, J

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