



**Republic of South Africa**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case no: 3006/2013**

In the matter between:

**CHANGING TIDES 17 (PTY) LTD**

**Plaintiff**

**v**

**ROY BRIAN PARISH**

**First Defendant**

**NOLENE LOUISE PARISH**

**Second Defendant**

**Court:** Judge J Cloete

**Heard:** 18 November 2013

**Delivered:** 18 November 2013

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**JUDGMENT**

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**CLOETE J:**

- [1] This is an opposed application for summary judgment. The plaintiff seeks orders against the defendants for payment of the sums of R301 038.12; interest thereon at the rate of 9.2% per annum compounded monthly in arrears from 11 February 2013 to date of payment; that the immovable property purchased by the first defendant in 1999, being remainder Erf 160882 Cape Town at Epping be declared specially executable; and costs on the scale as between attorney and own client.
- [2] The plaintiff's claims arise from a series of loans to the defendants. Payment of these loans was secured by a system of indemnities and guarantees underpinned by two indemnity mortgage bonds registered over the aforementioned immovable property in favour of the plaintiff as security for the defendants' obligations in amounts not exceeding R200 000 and R150 000 respectively.
- [3] It is common cause that the defendants fell into arrears with their repayments. They applied to a debt counsellor, Octogen, for debt review on 13 July 2012. The plaintiff was notified of this application on 17 July 2012. The plaintiff was also notified on 1 August 2012 that the application to the debt counsellor had been successful.
- [4] On the same date the debt counsellor sent a debt restructuring proposal to the plaintiff. It was proposed that the variable interest rate be fixed at 7.7% per annum; that the total monthly instalment of approximately R4 009 (which includes

service fees and premiums totalling R939) be reduced to R2 319 escalating at roughly 5% per annum; and that the term of repayment be extended from the remaining period of 138 months to 141 months. The revised monthly payments proposed, net of the service fees and premiums, would be R1 389 as opposed to the stipulated instalment, again net of service fees and premiums, of R3 079, or roughly 45% of the stipulated amount excluding the proposed annual 5% increase.

- [5] This proposal was rejected by the plaintiff who made a counter-proposal on 29 August 2012 of R3 078 per month at a fixed interest rate of 7.2% per annum. The interest rate aforesaid was less than that proposed by the defendants. After deduction of the service fees and premiums of R939 per month, the revised instalment would thus be R2 139 per month, being about 69% of the stipulated monthly instalment at the time.
- [6] On 13 December 2012 the defendants, who were unable to afford the plaintiff's counter-proposal, informed their debt counsellor that they could increase their offer by R600 per month. This would thus be an instalment of R2 919 per month, and after deduction of the service fees and premiums, an amount of R1 980 per month, just R159 per month short of the plaintiff's counter-proposal. It would appear that, due to no fault on the part of the defendants, the debt counsellor may have failed to communicate their revised proposal to the plaintiff at that stage; however the papers reflect that by 14 January 2013 the plaintiff was well aware thereof.

- [7] Despite the paltry difference between the plaintiff's counter-proposal and the defendants' revised offer the plaintiff, having terminated the debt review on 3 January 2013, proceeded with summons which was served on the defendants on 5 March 2013, two days before their application for debt review was issued in the Goodwood Magistrate's Court under case no. 1625/13 on 7 March 2013. The plaintiff alleged in its summons that as at 22 February 2013 the defendants were in arrears with their payments in the sum of R34 852.29. The certificate of balance annexed to the plaintiff's summons does not bear the signature of the plaintiff's duly authorised representative.
- [8] The plaintiff opposed the defendants' application in the magistrate's court and on 6 June 2013 it furnished the defendants with a revised proposal, namely that: (a) the arrears of R33 179 at that stage be settled within three months; and (b) the defendants pay R4 560.98 per month with effect from 1 July 2013. The defendants are unable to afford this. The first defendant is unemployed. The second defendant earns a monthly salary of R10 932 gross and R5 508 net. After deduction of absolutely basic expenses totalling R3 500, she is left with R2 008 per month. This notwithstanding, the defendants have managed to make payments of R2 425 per month excluding additional ad hoc payments totalling R10 000 which is effectively more than what they initially offered in August 2012.
- [9] Since service of the summons this matter has been postponed on no less than six occasions, culminating in the parties appearing before me today. As I understand it, on certain of these occasions, the reason was to determine the outcome of the application in the magistrate's court. It will be self-evident that

substantial costs have been incurred as a result, all of which the plaintiff seeks to recover from the defendants on the punitive scale of attorney and own client in accordance with the terms of the loans.

[10] On 23 August 2013 the presiding magistrate, Mr De Beer, postponed the debt review application *sine die* and directed that it could be re-enrolled for hearing if this court ordered that it be referred back to that court for a determination in terms of s 86 (11) of the National Credit Act 34 of 2005 (*'the NCA'*).

[11] In *Standard Bank Ltd v Munsamy* [2013] ZAWCHC 13 (14 February 2013) the court said the following at para [16]:

*'It is common ground that in terms of s 86(11) this court (and not only the magistrate's court) has the jurisdiction to order that the debt review... be resumed. There is no closed list of factors relevant to the exercise of this discretionary power though the considerations which a court would typically need to assess would include whether the credit provider engaged in the debt review process in good faith and whether there are reasonable grounds to believe that the debt review, if it were resumed, might result in an agreement or rearrangement order in terms whereof the credit provider's claim will be satisfied.'*

[12] It is my view that the history of this matter shows that the plaintiff has failed to engage in the debt review process with the defendants in good faith. It has adopted a high handed and unreasonable approach. Indeed, thousands of rands of legal costs could have been avoided if the plaintiff's representatives (and I emphasise that here I am not referring to their legal representatives) had simply

applied their minds to the fact that, as at January 2013, the parties were apart on their respective proposals in an amount of only R159 per month.

[13] There can also be no suggestion that the defendants have shown disregard for the financial predicament in which they find themselves. When they initially applied for debt review in July 2012 they had only two creditors, one of which, according to the defendants, has now been paid in full. This leaves only the plaintiff and indeed the defendants have tendered an additional R105 per month on account of the sum due to the plaintiff.

[14] **I thus make the following order:**

- 1. The debt review pending in the Goodwood Magistrate's Court under case no. 1625/13 shall be re-enrolled on a date convenient to Magistrate De Beer for purposes of determining the defendants' application in terms of s 86(11) of the National Credit Act 34 of 2005 in respect of their indebtedness to the plaintiff.**
- 2. The plaintiff's application for summary judgment is postponed *sine die* pending the outcome of the application in the Goodwood Magistrate's Court. The plaintiff is granted leave to file a supplementary affidavit to inform this court in due course of the outcome of the debt review application.**
- 3. Costs shall stand over for later determination.**

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**J I CLOETE**