THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between

Appeal Case No: A315/2013

Trial Case No: 18463/2012

REGINALD HARDENBERG **FIRST APPELLANT**

LISA ANN HARDENBERG **SECOND APPELLANT**

And

NEDBANK LIMITED **RESPONDENT**

Coram: ERASMUS, ROGERS & MANTAME JJ

Heard: **30 JANUARY 2015**

Delivered: **12 FEBRUARY 2015**

JUDGMENT

ROGERS J (ERASMUS AND MANTAME JJ concurring) :

Introduction

[1] The appellants were the defendants and the respondent the plaintiff in the court quo. I shall refer to them as such.

[2] The parties concluded a mortgage loan agreement during November 2007 in terms whereof the plaintiff was to lend the defendants, who are married in community of property, an amount of R673 431 to be secured by a mortgage bond over property situated in Ottery. The money was advanced and the mortgage bond registered during January 2008.

[3] In mid-2009 the defendants applied to a debt counsellor in terms of s 86(1) of the National Credit Act 34 2005 ('the Act') to be declared over-indebted. On 19 June 2009 the counsellor gave the defendants' credit providers, including the plaintiff, the notice contemplated in s 86(4) of the Act.

[4] The counsellor, having circulated several proposals to the credit providers, brought an application in the Wynberg Magistrate's Court in terms of s 86(7)(c) for a re-arrangement of the defendants' obligations, including their obligations to the plaintiff.

[5] By letter dated 2 May 2012, at a time when the re-arrangement application was pending, the plaintiff gave notice that it was terminating the debt review in terms of s 86(10). Summons was issued in September 2012. The defendants defended the action. The plaintiff applied for summary judgment. The defendants filed papers in opposition.

[6] The summary judgment application was granted by the court a quo (Henney J) on 10 December 2012. The judge refused a request to postpone the application to afford the defendants opportunity to ascertain the status of the re-arrangement application. He considered that the defendants did not have a bona fide defence.

[7] In April 2013 the defendants delivered an application for leave to appeal. The only point raised was that the defendants had not been in arrears at the time they applied for debt review in mid-2009 and that for this reason, and by virtue of the decision in *Collett v FirstRand Bank* 2011 (4) SA 508 (SCA), the plaintiff had not been entitled to terminate the debt review. Henney J granted leave to appeal to a full bench.

[8] In the appeal the defendants were represented by Mr Tredoux and the plaintiff by Mr Jonker.

The *Collett* point

[9] The defendants alleged, in their affidavits opposing summary judgment, that they were not in arrears to the plaintiff when they applied to the debt counsellor for debt review or when the debt counsellor issued the prescribed notice to the credit providers. They say they only fell into arrears when the plaintiff, upon notification of the debt review, reversed their last debit order. This is at odds with the statement of balance which the plaintiff provided to the debt counsellor on the latter's request and which reflected an arrears of R5 597 as at the certificate date, namely 23 June 2009. If the debit order of 27 May 2009 was not dishonoured for lack of funds, it is surprising that the plaintiff would have reversed a good payment (which was to its benefit) merely because the defendants had applied for debt review. I shall assume, however, that for purposes of summary judgment, and thus the appeal, the defendants' version must be accepted as correct. Indeed, I understood Mr Jonker to invite us to decide the appeal on this basis.

[10] Mr Tredoux argued that the effect of *Collett* was that, because the defendants were not in default of their agreement with the plaintiff at the time they applied for debt review, the plaintiff was not entitled to terminate the debt review in terms of s 86(10), even though by the date of termination the defendants were in default.

[11] In *Collett* the consumer was in default when he applied for debt review. The question in the case was whether the right to terminate in terms of s 86(10) could be exercised while an application for a re-arrangement order was pending in the

magistrate's court. This was a question on which there had been conflicting decisions in the provincial divisions. The Supreme Court of Appeal held in *Collett* that a pending re-arrangement application did not bar termination in terms of s 86(10).

[12] In the course of delivering the court's judgment, Malan JA said that a consumer who was over-indebted or in strained circumstances could apply for debt review in terms of s 86(1) whether or not he was in arrears under any particular credit agreement. The learned judge of appeal proceeded:

'[9] … Where the consumer is not in default of any of his obligations, the credit provider is unable to terminate the process, because s 86(10) gives the right to terminate the debt review only where the consumer is in default. In such a case the creditor must await the hearing in terms of s 87. Nor can the credit provider proceed to enforce the credit agreement, because the consumer is not in default. Where the consumer, however, is in default the credit provider is entitled to enforce that credit agreement, provided the consumer has not made application for debt review pursuant to s 86(1) and the credit provider has complied with the requirements of ss 129 and 130. In terms of s 86(2), an application for debt review concerning a particular credit agreement may not be made if the credit provider has "proceeded to take the steps contemplated in section 129 to enforce that agreement".'

[13] Malan JA continued by observing that the purpose of debt review is not to relieve the consumer of his obligations but to achieve either a voluntary debt re-arrangement or a debt re-arrangement by the magistrates' court (para 10). Under ss 86 and 87 there is 'only one unified process, the purpose of which is the restructuring of the consumer's debts by amending the terms of the credit transaction between the parties'.

[14] He then dealt with the decision of this court in *Wesbank, A Division of FirstRand Ltd v Papier* 2011 (2) SA 395 (WCC), which held that a credit provider's right to terminate the debt review was forfeited once the counsellor delivered an application to the magistrates' court for a re-arrangement order. In *Papier* the court concluded that the lawmaker had selected a 60-day period in s 86(10) to allow the debt counsellor 30 days, and thereafter the consumer 20 days, to approach the

magistrates' court for a re-arrangement order. Only if this was not done could the credit provider (effectively after a further 10 days – 60 days in all) terminate the process. Malan JA rejected this interpretation of the section (the underlining is mine):

'[12] … I do not think that s 86 requires the consumer or his debt counsellor to "approach the court" within the period of 60 days. Indeed no time period is specified within which the debt counsellor must make application to the magistrates' court. Nor does the NCA require the process of debt-restructuring to be complete within the period of 60 days after the application was made. To do so would obviously be unrealistic… A sounder approach is to recognise the express words of s 86(10), which gives the credit provider a right to terminate the debt review in respect of the particular credit transaction under which the consumer is in default, and only when he is in default, at least 60 business days after the application for debt review was made. It must be emphasised that it is only when the consumer is in default that the credit provider has this right. If he is not, the debt review continues without the credit provider being entitled to terminate it. It is not that the credit provider is "derailing" the process when he terminates the debt review: it is the consumer that is in breach of the contract, not the credit provider. <u>If the consumer applies for debt review before he is in default the credit provider may not terminate the process</u>. But if the consumer is in default the consumer is entitled to a 60 business days' moratorium, during which time the parties may attempt to resolve their dispute.'

[15] The underlined words formed the foundation of Mr Tredoux's argument.

[16] The same point was considered and rejected by Meer J in *Gelderbloem & Another v Changing Tides No 17 (Pty) Ltd* [2011] ZAWCHC 396. The learned judge, after quoting the paragraphs above, said the following (para 13):

'Whilst in the above extracts it is stated that if a consumer applies for debt review before he is in default, the credit provider may not terminate the process, it is neither stated nor implied that a termination under s 86(10) cannot validly occur once such a consumer comes to be in default. The interpretation relied upon by the applicants which seeks to protect such a defaulting consumer is thus misplaced. It is now settled law that when a consumer is in default a credit provider may terminate debt review proceedings in terms of s 86(10) of the Act after the lapse of 60 days from date of application for debt review, even when such an application is pending before a Magistrate's Court. The fact that the consumer might not have been in default when the application for debt review was made, does not render the

termination invalid. The right of the credit provider to terminate the review is balanced by s 86(11), as is pointed out in *Collet* at paragraph 15. The section provides that if the credit provider has given notice to terminate and proceeds to enforce the agreement, the Magistrate's Court may order that the debt review resume on any conditions that the court considers to be just in the circumstances.'

[17] I agree.[1] One must guard against reading a judgment as if it were a statute. A judgment must be read in the context of what the court was asked to decide. As I have said, in *Collett* the consumer was in default when he applied for debt review and that is the more usual case. The court was not called upon to decide the question whether termination was precluded if the default did not exist at the time the consumer applied for debt review.

[18] The question in the present case turns on the proper interpretation of s 86(10). That section starts thus (my emphasis): '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…'. There is nothing in this formulation to suggest that the default must exist at the time the consumer applied to be declared over-indebted. The present tense is used in relation to the default, indicating that the requirement is that the default should exist when the credit provider terminates the debt review.

[19] There are no other considerations to suggest that a different interpretation should be given to s 86(10). Where a consumer is in default and the credit provider wishes to take legal action, the latter is ordinarily required to give the notice contemplated in ss 129 and 130 of the Act and to refrain from instituting action until ten business days have elapsed without response from the consumer. As in s 86(10), ss 129(1) and 130(1) use the present tense in relation to the requirement of default ('If the consumer is in default …'), indicating that the default must exist at the time of the giving of the notice. The purpose of the notice is to draw to the consumer's attention his right to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with a view to the

[1] See also *Motor Finance Corporation (a Division of Nedbank) v Petersen* [2014] ZAWCHC 79 para 50, where in an obiter dictum I expressed considerable doubt as to whether the relevant passage in para 12 of *Collett* had the meaning for which Mr Tredoux now contends.

parties' resolving any dispute under the agreement or developing and agreeing a plan to bring the payments up to date. However, the lawmaker evidently considered that if the consumer has already availed himself of the right to refer the agreement to a debt counsellor for debt review it is unnecessary to require the credit provider to comply with ss 129 and 130 – the consumer has already shown knowledge of and exercised his statutory right. It is sufficient, in these circumstances, to require the credit provider to wait at least 60 days before terminating the debt review and taking legal action. As in the case of ss 129 and 130, the credit provider naturally cannot take enforcement action unless the consumer is in default but in the absence of clear language one would not expect it to be a mandatory requirement that the default should not only exist at date of termination and enforcement but also when the consumer applied for debt review.

[20] If Mr Tredoux's argument were sound, it would give rise to unequal treatment of credit providers without a rational basis. At the time a consumer applies for debt review he may be in default of his obligations to some but not all of his credit providers. On Mr Tredoux's argument those credit providers in respect of whose agreements the consumer was in default when he applied for debt review would be entitled to terminate the debt review in respect of their agreements after 60 days while other credit providers, in respect of whom the consumer may have fallen into default very shortly after applying for debt review, would have to await the finalisation of the whole debt review process, something which experience shows can take a very long time (as the present case illustrates).

[21] Mr Tredoux suggested that the distinction between the two classes of credit providers may have been drawn with a view to preventing a 'flood' of litigation following upon the termination of debt reviews. The first point, of course, is that the legislation itself apparently draws no such distinction; Mr Tredoux relies on the passage in *Collett* rather than on the wording of s 86(10). Accordingly, if the lawmaker was intent upon making the distinction it did so in a very obscure way. But in any event, I have some difficulty in following the rationale put forward by Mr Tredoux. I understood him to suggest that there would be a 'flood' of debt review terminations, with resultant enforcement litigation, if s 86(10) were held to apply to credit agreements in relation to which the consumer was not in default at the time of

seeking debt review. I would have thought just the opposite. Experience indicates that more often than not consumers are already in default of their various credit agreements by the time they seek debt review yet admittedly the credit providers in question are permitted by s 86(10) to terminate the debt review in respect of those credit agreements. To extend this right also to credit providers in respect of whose agreements the consumer only fell into default after seeking debt review would not add much to the volume of terminations; it is the former class of terminations, rather than the latter, which constitutes the 'flood' (if this is the correct metaphor).

[22] Mr Tredoux's argument would also allow unscrupulous consumers to apply for debt review without yet being in default, then to apply for debt review, stop paying their credit providers and delay the finalisation of the resultant debt review process for months or even years. It is true, as Mr Tredoux pointed out, that it is the debt counsellor rather than the consumer who in law controls the process of debt review and brings the application for debt re-arrangement. However, debt counsellors are not always as diligent as they should be and depend to some extent upon the cooperation given by the consumer.

[23] I am satisfied that Malan JA in *Collett* did not intend to hold that the default must exist at the time the consumer applies for debt review in order for the credit provider to be entitled to exercise the right of termination conferred by s 86(10). He did not examine the language of s 86(10) with this question in mind. Had he been called upon to decide this particular question, I have no doubt that the second last sentence of para 12 of his judgment would have been amplified to read as follows: 'If the consumer applies for debt review before he is in default the credit provider may not terminate the process unless the consumer thereafter falls into default.'

[24] If, however, Malan JA's judgment indeed purports to decide the point which arises in this appeal, I would respectfully regard the decision on that point as *obiter*. On the distinction between *ratio* and *obiter* Mr Tredoux referred us to *Pretoria City Council v Levinson* 1949 (3) SA 305 (A). In that case Schreiner JA referred to conflicting statements as to the status of the 'reasons' which a judge gives for his or her decision, a conflict which he suggested might be due to uncertainties of definition (at 316-317). He concluded:

'As I understand the ordinary usage in this connection, where a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the *ratio decidendi*, originating or following a legal rule, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts … and (c) … that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons.'

This approach to identifying the *ratio* of a judgment was approved and applied more recently in *True Motives 84 (Pty) Ltd v Mahdi & Another* 2009 (4) SA 153 (SCA) paras 37-39 (per Heher JA) and paras 103-106 (per Cameron JA).

[25] I have indicated that I do not regard Malan JA's judgment, on a proper interpretation, as holding that a debt review cannot be terminated in respect of the particular credit agreement if the consumer was not in default at the time he sought debt review. However, if Malan JA did intend to make such a finding, it cannot be regarded as part of the *ratio* of the judgment, having regard to proviso (c) and perhaps also proviso (a) in *Levinson*. It did not matter to the outcome of *Collett* whether in law the default had to exist at the time the consumer applied for debt review or only at the date of the s 86(10) termination because in fact the consumer was in default on both occasions. If in law there had to be default at the time the consumer applied for debt review in order for there to be a valid s 86(10) termination, the consumer in *Collett* was at that time in default, so the termination was not on this account bad; if in law there did not need to be default at the time the consumer applied for debt review, the fact that the consumer happened at that time to be in default would obviously not make the termination bad. The *ratio* was whether it mattered that there was a pending application for a debt re-arrangement order at the date of termination, because in *Collett* there was such a pending application. The binding *ratio* of *Collett* is that a valid s 86(10) termination is not precluded because there is a pending debt-rearrangement application. But for that conclusion of law, the outcome in *Collett* would have been different.

Other points

[26] Mr Tredoux advanced two other arguments, namely (i) that the track-and-trace report in respect of the s 86(10) notice showed that the notice could not have been received by the defendants; (ii) that the plaintiff's termination of the debt review was not in good faith. Neither of these points is open to the defendants on appeal. The notice of appeal, which followed precisely the application for leave to appeal, raised only the *Collett* point. There is no application to amend the notice of appeal (cf *Hugo v Loubser* 1920 CPD 469 at 471). If there had been such an application, the defendants would have been required to explain why their notice of appeal was limited as it was and whether they consciously limited themselves to one point, abandoning the others (cf *Bredenkamp v Du Toit* 1924 GWL 15 at 19).

[27] I wish simply to add that neither of the further points has any self-evident merit. As to the delivery of the notice of termination, the defendants did not state in their affidavits opposing summary judgment that they did not receive the notice. It was sent to the correct address. The track-and-trace report does not convey that the notice only arrived at the relevant post office on the same day it was returned to sender; on my reading of the track-and-trace report the registered item may have been received at the Ottery post office at any time between 7 May 2012 and 13 June 2012, the latter being the date containing the return-to-sender comment.

[28] As to the supposed absence of good faith, and assuming that good faith is a legal requirement for a valid s 86(10) termination (as to which, see *Absa Bank Ltd v Walker* [2014] ZAWCHC 92 paras 10-11), the evidence does not point to an absence of good faith by the plaintiff. The defendants rely on the fact that the plaintiff in September 2010 accepted the debt counsellor's second proposal insofar as it related to the first defendant but rejected it insofar as it related to the second defendant, this despite the fact that the defendants were married in community of property and jointly and severally liable for the debt. However, the question is not whether the acceptance and rejection in September 2010 were in bad faith but whether the termination, which happened about 18 months later in May 2012, was in bad faith. The apparent inconsistency in the acceptance and rejection of the proposal in October 2010 may have been an administrative error – the plaintiff,

given the nature of the proceedings, was not entitled to file an explanatory affidavit. Mr Jonker also directed our attention to the fact that there were differences (unexplained by the defendants) between the proposals forwarded to the plaintiff in respect of the two defendants. Be that as it may, I cannot see how the plaintiff can be criticised for having decided to terminate the debt review in May 2012, given the lengthy delay in the finalisation of the debt review process. Even if the plaintiff had accepted the second proposal in respect of both defendants, it would still have been entitled to terminate the debt review at a later stage if there was no finality on the debt review process as a whole.

Conclusion

[29] The appeal is dismissed with costs.

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ERASMUS J

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ROGERS J

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MANTAME J

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