

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE – PORT ELIZABETH)**

**Case No: 2578/2012**

In the matter between

**NEDBANK LIMITED**

Plaintiff

and

**NDUMISO MALCOLM BUSAKWE**

First Defendant

**NOMVUYO GLADYS BUSAKWE**

Second Defendant

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**JUDGMENT**

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**REVELAS J**

[1] The plaintiff instituted an action against the two defendants who are married in community of property, based on a credit agreement (home loan) entered into in 2007. A mortgaged bond was registered over the defendant's immovable property, which is also their primary residence, during April 2007, to secure the aforesaid loan.

[2] In terms of the loan agreement, the plaintiff advanced the sum of R150 000.00 to the defendants and their monthly repayment instalments together with finance charges amounted to R1600.00 per month

[3] The defendants fell in arrears with their monthly instalments and as at 1 August 2012, they were in arrears with four monthly instalments.

[4] A notice in terms of section 129(1) of the National Credit Act No 34 of 2005 (the Act) was delivered to the second defendant on 18 June 2012. Summons was issued on 8 August 2008. On 12 September 2012 the defendants noted an appearance to defend and the applicants brought the present application for summary judgment for payment of the amount claimed, being R136 789.20, plus interest thereon at the rate of 8.5 percent per annum, and an order declaring the property hypothecated under the mortgage bond, executable.

[5] The original loan agreement was misplaced by the plaintiff's attorneys and an explanatory affidavit to that effect was deposed by Mr Vienings of the plaintiff's attorneys of record.

[6] In the summons commencing the enforcement proceedings, the plaintiff alleged that the loan agreement was not subject to any debt-restructuring order or process in a court. On 25 May 2012 the plaintiff had issued a notice to the first defendant terminating "*Credit Agreement(s) for Debt Review in terms of section 86(10) of the [Act]*". The first defendant had obtained a debt-arrangement order in the Magistrate's Court on 10 December 2008. According, to the first

defendant, Ms Govender, his new debt counsellor, applied for a variation of the debt arrangement order in April 2012.

[7] The first defendant alleged that the plaintiff's attempt to terminate the debt arrangement in terms of section 86(10) of the Act (dated 25 May 2012) was only served on the first defendant, and therefore "defective". The defendants also allege that despite an order of Beshe J, the section 86(10) notice in question was never served on the second defendant as ordered, and that the plaintiff is therefore in contempt of the order. On 30 October 2012, the relevant documents were however served on the defendant's new debt counsellor.

[8] It appeared that the plaintiff was never cited in the debt-arrangement order of the Magistrate's Court, referred to above. During August 2012 a candidate attorney of the plaintiff's attorney of record, deposed to an affidavit in the Magistrates Court, and drew the Magistrate's attention to the fact that the plaintiff was excluded from the debt review proceedings, by virtue of it not being cited in those proceedings.

[9] In my view, the service of the section 86(10) notice on only one of the defendants was not fatal, since they were parties to the debt

arrangement application in the Magistrate's Court and there was no indication that they lived separately.

[10] In any event, even if there was a debt arrangement agreement or order in place, the defendants were nonetheless in breach thereof because they did not comply with such an agreement order in that no payments were made in April, May and June 2012. According to the first defendant, Ms Govender applied for a variation of the order only in April 2012 and the matter was heard again in the Magistrate's Court on 24 August 2012.

[11] The plaintiff's section 86(10) notice to the first defendant was dispatched on 25 May 2012 and further payments were only made in July, August and September 2012.

[12] The first defendant alleges there was also no proper service of the notice in terms of section 129 of the National Credit Act. This allegation is not substantiated.

[13] The plaintiff was also by virtue of the provisions of section 88(3) of the National Credit Act, entitled to enforce the agreement.

[14] There is no merit in the defendants' proposition that because the original loan agreement had been mislaid, there is no agreement. The defendants had since the conclusion of the loan agreement in 2007, acted in compliance therewith, until they fell in arrears, which is an indication that they were indeed parties to the agreement. This belated defence is at best opportunistic and has no merit.

[15] Ms Govender, the defendant's debt counsellor, was also the advocate who appeared on their behalf in this court. She was also the applicant for the debt-arrangement of the defendants in the Magistrate's Court. Ms Govender filed an explanation for the late delivery of her heads of arguments and of the defendant's opposing papers. The explanation filed by her was not contained in a proper condonation application. However, I proceeded to deal with the matter on the merits, since the plaintiff was understandably not amenable to a further postponement.

[16] For the above considerations, the defendants were unable to persuade me that they had a *bona fide* defence.

[17] In the result I make the following order:

[18] Summary Judgment is granted in the following terms:

- (1) The defendants are liable to pay the plaintiff the sum of R136 789.20, jointly and severally, the one paying the other to be absolved.
- (2) Interest is to be paid on the aforesaid amount, at the rate of 8.5 percent per annum as from 2 August 2012 to date of payment.
- (3) The following immovable property is declared executable:

Erf 2752 Motherwell, in the Nelson Mandela Metropolitan Municipality, Division of Uitenhage, Province of the Eastern Cape, in extent 162 (One Hundred and Sixty Two) square metres Held by Deed of Transfer No. T2367/1995
- (4) The defendants are jointly and severally liable for the plaintiff's costs of suit as between attorney and client, the one paying the other to be absolved.

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E REVELAS  
Judge of the High Court

Counsel for the Plaintiff:

Adv Zietsmann

Instructed by:

Pagdens Attorneys

Counsel for the Defendant's

Adv Govender

Instructed by:

MSA Attorneys

Date Heard:

4 December 2012

Date Delivered:

5 December 2012