NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN GAUTENG HIGH COURT, PRETORIA)

Case No: 7133/2009

DATE:03/06/2009

In the matter between:

CHANGING TIDES 17 (PROPIETARY)

LIMITED N.O. APPLICANT

And

JOHN ADENDORFF 1st RESPONDENT

(I.D.:)

WILHELMINA ELIZABETH ADENDORFF 2nd RESPONDENT

(Identity Number:)

(Married to each other in community of property)

JUDGMENT

Mavundla, J.:

[1] This is an opposed application for summary judgment against the defendants, jointly and severally, the one paying the other to be absolved, for (a) payment in the amount of R416 211. 26

together with monthly capitalized interest on the aforesaid amount calculated at the rate of 14.10% per annum from the 1st January 2009 to date of payment; an order declaring executable certain sectional title immovable property registered in the names of both the defendants, as well as cost between attorney and client. For purposes of convenience, I shall refer to the applicant as the plaintiff and the respondents as the defendants, respectively,

[2] The plaintiff's claim arises from a written credit agreement between the parties, namely a bond payment in respect of which an amount of R416 211 26 is alleged to be outstanding .

[3] In paragraph 26 of its particulars of claim the plaintiff alleges that:

''26.1. In terms of the provisions of the National Credit Act No. 34

of 2005 (The NCA"):

26.1.1 Defendant(s) applied for debt review.:

26.2. A period of more than 60 (SIXTY) business days lapsed since the defendant(s) applied for debt review and is/are in default:

26.3. Therefore the plaintiff gave notice in terms of Section 86(10) of the NCA and terminated the debt review process, a copy attached marked Annexure “L1".

26.4. A period of at least ten business days have lapsed since the Trust delivered the notice in terms of Section 86(10) of the

---

[1]' This is is a letter dated 7 January 2009 addressed on behalf of the applicant to Maita Projects, the defendants stating that-
"We confirm that the payment restructuring has nit been completed. We have forwarded the proposal to you on the 20th of October and have not received any further feedback. Furthermore we confirm that no payments have been allocated to us either via PDA nor has client been maintaining their installment. Notice is hereby given in terms of section 86 (10) of the National Credit Act No 34 of 2005, that we terminated the debt review in respect of the consumer."

NCA to the Defendant(s) and the Defendant(s) have not responded to the aforesaid:

26.5. The Defendant(s)are and has been in default of their obligations under the loan for a period of at least 20 (TWENTY) business days;

26.6. There is no matter arising under the loan, as contemplated in Section 130(3)(b) of NCA, pending before the National Consumer Tribunal established in terms of Section 26 of the NCA that could result in an order affecting the issue to be determined by" this Court.

26.7. None of the circumstances contemplated in Section 130 (3) (c) of the NCA exist in respect of the loan."

[4] In opposing the summary judgment application the defendants deny that they do not have a bona fide defence and that they entered the appearance to defend sofely for purposes of delay. They have raised points in limine in their defence. The first point in limine is that the applicant has in the summons not prayed for canceflation of the agreement. They further contend that although a credit provider, in the event of alleged breach of the agreement by a consumer, is entitled to approach a court for enforcement of its remedies by means of cancellation and repossession and enforcement of the outstanding balance under credit agreement, in the absence of a prayer for cancellation of the agreement the other prayers cannot be granted.

[5] Secondly they contend that they have applied for debt review to the debt counsellor in terms of section 86 of the National Agreement Credit Act 34 of 2005 on the 18 June 2008, and that

the applicant was notified in terms of section 86(4) (b) (i) (ii) of the aforesaid Act 34 of 2005. They further aver that on 18 June 20082 they requested the applicant to provide the credit agreements and statements in respect of themselves. On 15 October 2008 they notified the plaintiff that their application for debt review was successful3. On the same date the respondents sent to the applicant the debt restructuring proposal4.

[6] The respondents commenced to effect payment to, inter alia,

---

[2] They have attached annexure "B" which is a letter from Maita Projects CC dated 1 June 2008 stating as follows:

"We therefore request that you supply our office within five (5) days of receipt of this letter in terms of the National Credit Regulations 24 (3) of 2006, with credit agreements and statement in respect of the above mentioned and/or account held with yourself."

[3] They have attached annexure "D" which is a letter dated 15/10/2008 by the Debt Counselor stating that:

(b) the above mentioned consumer's application for debt review as successful the debt obligations are in the process of being restructured.

.....

All credit Bereau are advised to list the abovementioned consumer within 5 days of receipt of this notice as having applied for debt review.

[4] Annexure "E"

the applicant in accordance with the debt restructuring5. The respondents further aver that on 01/ 03/ 2009 the clerk of the civil court in Pretoria issued their application with number 27444/09. The application was launched in terms of section 86 and 87 of the Credit National Credit Act for the rearrangement order6. They further say that the application has been served upon ail their creditors, including the applicant, and that it would be heard on 10 June 2009.

[7] It is submitted on behalf of the defendants that, before the applicant is entitled to issue summons against them, it must first comply with section 129 and 130 of the National Credit Agreement Act No 34 of 2005. It is further averred that the applicant has not attached any proof that it has complied with the aforesaid sections, nor attached any proof that the respondent

---

[5]The respondents have attached annexure "F" as proof of payments

has not effected any payment in accordance with the restructured debt payment.

[8] It is further contended by the defendants that the applicant has deprived them of their rights flowing from section 129 which they are entitled to rely on. Section 129, inter alia, bars the applicant from, commencing with legal proceedings until it has satisfied the court that it has complied with the procedural requirements of the Act; vide 120(1)(b).

[9] In order to successfully resist summary judgment, the defendants must show that they have a bona fide defence disclose fully the facts upon which they rely for their defence; Maharaj v Barclays National Bank Ltd7. In Arend and Another v

---

[6] Annexure "G" has been attached in this regard. The current installment is R5489, 57 and the restructured installment is R2104, 74

[7] 1976 (1) SA418 where at 426 A-C Corbett JA said that: "Accordingly, one of the ways in which a defendant may successfully

Astra Furnishers (Ptv) Ltd 1974 (1) SA 298 (CPD) at 303H

Corbett J, as he then was, said:

"In the first place, it is clear that all that a defendant need do in order to defeat a claim for summary judgment is to satisfy the court that he has a bona fide defence to the action. Me would

---

oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona vide defence to claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summon or combined summons are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these or to determine whether or not there is a balance of probabilities in favour of the one or the other party. All the Court enquires into is: (a) whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded. (b) whether on the facts so disclosed the defendant appears to have as to either the hole or part of the claim, a defence which id bona fide and good in law. If satisfies on the these matters the Court must refuse summary judgment either wholly or in part as the case may be....while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularly and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence. (See generally, Her Dryers (Pty(ltd v Mahommed and Another 1965 (1) SA 31(1); Caltex Oil (SA) Ltd v Webb and nother 1695 (2) (N); Arend and Another v Astra Furnishers (Pty) Ltd (1974 (1) SA 298 (C)at 303.4; Shepstone v Shepstone 1974 (2) SA 462 (N) at 467 F-H. At the same time defendant is not required to formulate his opposition to the claim with the precision that he would be required of a plea nor does the Court examine is by the standard of pleading (See Estate Potgieter v Elliot 1918 (1) SA 1084 at 1088-9; Herb Dryers case supra at 323

normally do so by deposing to the facts which, if true, would establish such a defence. At this stage he is not required to persuade the Court of the correctness of the defence of probability in his favour. The Court, in turn, does not endeavour to weigh or decide disputed factual issues; it merely considers whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to tie bona fide. In order to do so the Court must be apprised of the facts upon which defendant relies with such completeness as to be able to hold that if these statements of fact are found at trial lo be correct, judgment should be for defendant; ant that the defence appears to be bona fide one.., "

...an important factor to be taken into account by the Court in determining how to exercise its discretion is the extraordinary and very stringent remedy; it permits a final judgment to be given

against a defendant without a trial. It is designed to prevent a plaintiff having lo suffer the delay and additional expenses of the trial procedure where the defendant’s case is a bogus one or is bad in law and is raised merely for purposes of delay, hut in achieving this il makes drastic inroads upon normal right of the defendant to present his case Lo the Court." At page 305C-1-' Corbett J proceeds, with approval, with the following citation:

'In Wise & Co. (Africa) Ltd v Gin, 1946 C.P.D. 524, Fagan, J., after referring to Maisel's case, supra, and Roscoe 's case, supra, stated (at p. 526) that in those decisions the principle was accepted-

"That the Court can only grant summary judgment if on the papers before it, it has no reasonable doubt that the plaintiff is entitled to judgment and fee is able to say that the defendant has not got a defence which may possibly succeed, even though the

Court may not think he is likely to succeed".

(See also Lombard v Van Der Westhuizen. 1953 (4) SA (C) at p. 89; Fischercigeseli.schafi F. Basse & Co Kommanditgeselkchaft v African Frozen Products (Pty) Ltd., 1967 (4) SA 105 (C) at p. 1 1). In Mowschenson v Mercantile Acceptance Corporation, 1959 (3) S.A. 362 (W), Marais, J., stated, with reference to the Transvaal Rule of Court 42 bis (at p. 366)—

''The proper approach appears to me to tic the one which keeps the important fact in view that the remedy for summary judgment is an extraordinary remedy, and a very stringent one. in tbal il permits judgment rr> he given without trial. It closes the doors of the Court lo the defendant. (See the case of Symon & Co., supra). That tan only be done if there is no doubt but that the plaintiff has an unanswerable ease. If it is reasonably possible that the plaintiffs application is defective or that the defendant has a good defiance. The issue must, in my view, be decided in

favour of the defendants"

[10] The respondents have attached proof of the fact that on 01st t 03/ 2009 the clerk of the civil court in Pretoria issued their application with number 27444/09. The application was launched in terms of section 86 and 87 of the Credit National Credit Act for the rearrangement order8. That application is scheduled for hearing on 10 June 2009.

[11] Although the aforementioned application is at the magistrate court and was issued on 01st / 03/ 2009, the summons in casu were issued on 11 February 2009. The spirit and purpose of the NCA is inter alia, to provide for debt re-organisation in case of over indebtedness,9 to promote equity in the credit market and protect the consumers and to balance the rights of the

---

8 Annexure "G" has been attached in this regards. The current installment is

consumers and credit provider10.

[12] In my view, the ethos envisaged by the NCA, flowing from the preamble and section 3, taken together with the provisions of section 130(3) and (4) of NCA and the draconian effect of summary judgment proceedings, make it an imperative that the courts, in deciding the exercise of their discretion, must have regard to these ethos and be slow to shut the door in the face of a litigant.

[13] Section 130 provides inter alia:

(1) ...

(2) .....

(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court and in respect of credit

---

R5489.57 and the restructured installment is R2104.74

[9]Vide Preamble of Act No 34 of 2005

agreement to which this Act applies, the court may determine the matter only if the court is satisfied that—

(a) in the case of proceedings to which section 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(b) there is no matter arising under that credit agreement, pending before Tribunal, that could result in an order affecting the issues to be determined by the court; and

(c) that the credit provider has not approached the court—

(i) during the time that the matter was before the counsellor, alternative dispute resolution agent, consumer court or the

---

10 Vide section 3 of the Act.

ombud with jurisdiction; or

(ii) despite the consumer having—

(aa)

(bb) agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in section 129 (1) (a); or

(dd) brought the payments under credit agreement up to date, as contemplated in section 129(1) (a).

(4) In any proceedings contemplated in this section, if the court determines that—

(a) ....

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (a), or has approached the court in circumstances contemplated in subsection (3) (c) the court must—

(i) adjourn the matter before it; and

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;

(c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4. the court

(i) adjourn the matter, pending a finat determination of the debt review proceedings;

(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85 (b);

(iii) if the credit agreement is the only credit agreement to which

the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85 (b);

(d) there is a matter pending before the Tribunal, as contemplated in subsection (3) (b), the court may—

(i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or

(ii) order the Tribunal to adjourn the proceedings before it and refer the matter to the court for determination; or

(e) the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with the order or agreement, the court must dismiss the matter.

[14] The defendants, over and above showing that there is a

matter relating to the agreement between the parties pending at the magistrate court and coming on 10 June 2009, and that the applicant has not prayed for the cancellation of the contract, and that they also deny that they were in default with regard to the restructured payment, have, in my view, established a prima facie case. I need not decide the factual issues that are placed in dispute11.

[15] I am therefore of the view that, in the circumstances of this case, in the exercise of my discretion, I must not grant the summary judgment. In the result I make the following order:

1. That the summary judgment application is dismissed;
2. That the costs of this application, including the reserved costs of 8 May 2009 will be costs in the cause.

---

11 Vide the Arend and Another v Astra Furnishers (Pty) case supra

3. That leave to defendant is granted to the defendants.

N. M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE	:29 MAY 2009
DATE OF JUDGEMENT	:3 JUNE 2009
PLAINTIFF'S ATT	:VELILE TINTO &
ASSOCIATES	
PLAINTIFF'S ADV	:MR. WROOS.
DEFENDANTS'ATT	:MABULE & MOLELE
INCORPORATED.	