

**THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG-PRETORIA**

CASE NO 5581 9/2009

CHANGING TIDES 17 (PTY) LTD.

PLAINTIFF

V

DEGE, HENRY CORNELIUS

1ST DEFENDANT

DEGE , LEYZL

2ND DEFENDENT

CORAM SAPIRE AJ

APPLICATION FOR SUMMARY JUDGMENT

JUDGMENT

Plaintiff in a pending action claims payment from the Defendants of an amount of R398 721.41. The defendants have responded to the summons with notice of intention to defend. Plaintiff in turn seeks summary judgment alleging that the Defendants have no *bone fide* defence to the claim and are defending the matter only to delay the ultimate and inevitable outcome. This the defendants deny and resist the granting of summary judgment. To this end Defendants have filed an affidavit in which they disclose the basis of their defence.

At this stage it is for the court to decide whether

a) The summons discloses a cause of action which if unanswered entitles the Plaintiff to judgment as claimed, and if so whether

b) the factual allegations sworn to by the defendants if established at the trial would substantiate a viable defence to Plaintiffs claim.

The Plaintiff is a company and described as the trustee duly appointed as such by the Master of the High Court, of the South African Home Loans Guarantee Trust. By this were to understand that the Plaintiff is the sole trustee. The summons however does not allege that the Plaintiff is suing *nomine officio*, and the indication of its office as trustee could be merely descriptive. No resolution of the Trust authorising plaintiffs representation of it in these proceedings is mentioned in Plaintiffs citation in the particulars of claim. If, as it would appear to be the case Plaintiff is the sole trustee, its authority to institute and prosecute the action is probable. As the Defendant has not attacked the citation of the plaintiff, the application will be adjudicated on the basis that the Trust is the plaintiff properly before the court.

The Trust is a registered credit provider in terms of the National Credit Act (Section 40 of Act 34 of 2005)

The Defendants are major individuals married to each other in community of property. On or about 23rd November 2006, MAIN STREET 65(PTY) LTD, a registered credit provider, lent R379 308 .16 (plus an additional amount of R112 500.00) to the defendants on terms and conditions provided for in a written agreement. The terms of the contract which are recited at some length in the particulars of claim are largely common cause and not presently in issue,

Pursuant to the agreement the lender advanced R381 912,98 to the defendants on 23rd January 2007. Further debits were passed for incidentals which were provided for on the agreement.

The particulars of claim recites that the loan agreement was successively ceded to other credit providers, but ultimately back to MAIN STREET 65(Pty)Ltd which at all material times, and to all effects and purposes the lender in terms of the loan

agreement.

The loan was unsecured, but was granted subject to it being guaranteed by a third party, which, in the event, is the Trust, of which the Plaintiff is the trustee.

The Defendants made payment from time to time, but have defaulted in payment and fallen into arrear. The outstanding amount owing to the lender was, as at 1st August 2009, R398 721.41, due for payment because of the defendants' default, together with such interest as may have accrued after that date.

As contemplated in the loan agreement, South African Home Loans Guarantee Trust, ("the Trust"), of which Plaintiff is presumably, the sole Trustee, guaranteed the Defendants' obligations under the loan agreement. In consideration of which the defendants undertook to indemnify the Trust against any loss, cost, claim, expense or liability of any kind incurred or to be incurred by the trust as a result of the Defendants' failure to duly and punctually perform any of the Defendants' obligations in terms of the loan agreement. As security for the Defendants' obligations to the Trust arising from the indemnity the Defendant mortgaged the immovable property described in the summons and which the Plaintiff seeks to be declared executable.

The Trust it is alleged, paid the amount of R398 721 41. to Main Street pursuant to the guarantee on 1st August 2009, thus discharging the defendants' obligations to Main Street under the loan agreement.

The Plaintiff now claims not only payment from the defendants of the amount of R398 721.41 which it is alleged was paid by the Trust pursuant to the guarantee, which would appear to be covered by the indemnity, but also interest thereon at the rate of 11.80% per annum, said to be the arrear interest rate, from 1st August 2009 to date of payment. The interest so claimed does not appear to arise from the terms of the indemnity and to be claimable as such. With the payment of the full balance of the loan account the defendants' obligations to the lender in respect thereof ceased and terminated. No

further arrear interest could become payable in terms of the loan agreement, claimable from the Trust or the Defendants. Plaintiff, in the event of it being successful, will be entitled to interest *a tempore mora* at the rate claimed, it being less than the 15.5% otherwise applied.

The Plaintiff has in its Particulars of Claim alleged compliance with the provisions of the National Credit Act No 34 of 2005 ("the NCA"). In support of this assertion it is alleged that a written notice in terms of the provisions of section 129(1)(a) of the NCA had been sent, by registered mail by the lender to the Defendants at the address nominated by the defendants as their chosen *domicillium citandi et executandi in the loan agreement*. This overlooks the fact that the loan agreement to which the Trust was not a party had been discharged and affords the Plaintiff no rights whatsoever. The plaintiff is now seeking to enforce a claim arising from the indemnity agreement. Any obligations the Defendants may have is to the Trust in terms of the indemnity and not to the "lender". Notice, if required, was incorrectly given by the wrong person in respect of the wrong cause of action. The confusion is made greater by the allegation that the Defendants are and have been in default of their obligations under the loan agreement for a period of at least twenty business days. As their obligations in terms of the loan agreement were discharged by payment on their behalf by the trust on **1st August 2009**, as alleged by the Plaintiff, any allegation of continued indebtedness under the loan agreement after that date is palpably incorrect. It also follows that notices given by the lender are irrelevant to these proceedings.

Plaintiffs claim, I repeat, arises from the indemnity given by the Defendants and the mortgage bond passed to secure their obligations in terms of the indemnity. In terms of Section 1 of the National Credit Act 34 of 2005

"agreement" includes an arrangement or understanding between or among two or more parties which purports to establish a relationship in law between those parties.

The scheme as disclosed in the particulars of claim, by which credit was extended comprising the loan agreement, the guarantee and the indemnity is an agreement as

defined. Moreover the bond is a “credit agreement” as described in Section 8 of the Act and the Plaintiff Trust is a credit provider.

In terms of Section 129 of the Act, which describes the “Required procedures before debt enforcement”, if the consumer, in this case the Defendants, is in default under a credit agreement the credit provider may not commence any legal proceedings to enforce the Agreement before first providing notice to the consumer as contemplated in paragraph (a), or if such be the case in Section 86(10). The plaintiff relies on notice given in terms of Section 86(10)

In this connection Plaintiff has alleged that the Defendants had approached a debt counsellor and applied for debt review in terms of section 86 of the Act. No recommendation was submitted to the Plaintiff within the prescribed period of time.

Section 86(10) reads

(10) 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 to

- a) the consumer
- b) the debt counsellor and
- c) The national Credit Regulator.

at any time at least 60 business days after the date on which the consumer applied for the debt review

The Defendants are in default of their obligations arising from the indemnity given by them. In this being so the Plaintiff elected to terminate the debt review in terms of section 86(10) and gave written notice to this effect to the Defendants the debt counsellor and

the National Credit Regulator. There appears to have been no response to this notice. It would appear therefore that the condition precedent in terms of the act to the commencement of this action has been fulfilled.

In response to, and opposing Plaintiffs application for summary judgement both Defendants rely on an affidavit attested to by the first Defendant w'ho has in such affidavit deposed to facts which the Defendants submit disclose a defence to the Plaintiffs claim.

The Defendants purport at this stage, in paragraph 6 of the affidavit to afford the Plaintiff an opportunity of accepting their offer or rejecting it. In the event of rejection the matter, they suggest could be referred to the Magistrates' court to make a fair award. The Plaintiff is quite within its rights to ignore this offer.

d) The Defendants proceed to admit that the Plaintiff gave notice in terms of section 86 (10) in order to terminate the debt review but submit that the Plaintiff has not complied with the provisions of Section 86(11) of NCA.

This Section provides

11) If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.

It is difficult to see what the Defendants' have in mind in alleging that the Plaintiff has not taken the provisions of 86(11) into account. The Plaintiff appears to have acted within its rights to give notice terminating the review of the Defendants' debt. There is no evidence of any Magistrates' court being seized of the matter, less so of such a court ordering that the debt review should be

I appraise the affidavit by examining the allegations therein made in the light of observations regarding the relevant assertions.

a) The defendants were placed under debt counselling on 27th March 2009. This is common cause.

b) A form 17(2) was sent to the Plaintiff on the 27th April 2009. A facsimile of the form is attached to the affidavit but no proof of the posting or delivery thereof to the Plaintiff is tendered. Plaintiff has alleged that no recommendation was submitted to it "within the prescribed period of time" This is not dealt with pertinently by the defendants. In the absence of proof of or at least an allegation of the Plaintiff having received the recommendation the Plaintiffs allegation of non receipt is uncontested.

c) The defendants claim to have made their payments faithfully in terms of a scheme of deferred payments over extended time, devised by the debt counsellor. The rescheduling of Defendants' debts is contained in a document headed "Installment (*sic*) Offer for Henry Cornelius Dege There is no allegation that this scheme was approved by the plaintiff or that the steps prescribed in section 86(8) were taken

It is common cause moreover that no payments whatsoever were made to the plaintiff. This is not explained. resumed. The Debt review therefor at the date action was commenced had been terminated, and has remained so until now.

The Defendants' affidavit does not therefor disclose a defence to Plaintiff's claim.

There will be judgment for the plaintiff.

The order made is in terms of prayers 1,2,3, and4 of the draft appearing at page 80 of the papers.