Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – GRAHAMSTOWN)

Case No: CA 265/10
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Date Heard: 18/03/11
Date Delivered: 28/04/11

In the matter between

SA TAXI SECURITISATION (PTY) LTD Appellant

and

MONGEZI MANI (CA 265/10) Respondent

MAZIZI MICHAEL DYOWU (CA 266/10) Respondent

ELLEN NONTOBEKO HLEKISO (CA 267/10) Respondent

JUDGMENT

REVELAS J

[1] This appeal is against a judgment of a magistrate sitting in the District Court in King William's Town, wherein he dismissed the appellant's three applications for rescission of the three orders made in the appellant's absence on 16 February 2010. Although the magistrate gave one judgment in respect of the three (unopposed) rescission applications, three separate, but virtually identical appeals were enrolled for hearing. They will be simultaneously dealt with in this judgment.

[2] The three orders were made in terms of Section 86 (8) (b) of the National Credit Act, 34 of 2005, ("the NCA"). The orders declared the three consumers or applicants (the respondents) in the

three appeals under consideration) to be over-indebted as contemplated in Section 79 of the NCA and re-arranged their debts by reducing the monthly instalments payable by each of the respondent to the appellant, as well as extending the period for payment and reducing the applicable interest rates.

[3] The appellant is a credit provider within the meaning of Section 4 of the Act. The three respondents each entered into a lease agreement with the appellant which related to the lease of a motor-vehicle. It was a standard term of the agreement that if the consumer party to the agreement falls into arrears with his or her monthly instalments, the full amount owed to the credit provider will immediately become due and payable.

[4] The three respondents indeed fell into arrears with their monthly instalments and approached the same debt counsellor, Ms Derry Burge, a debt counsellor and applied for debt review during July and August 2009. On 7 and 17 August and 1 September 2009 respectively, the appellant received notification in terms of Section 86 (4) (b) (i) of the NCA from the debt counsellor, of the successful applications for debt review (Regulation 24 (2), of the NCA) and notices of the assessments that the respondents were over-indebted and that their debt obligations were being restructured. (Regulation 24 (10) of the NCA). The significance of the notices in this appeal is that the appellant had been made aware that the respondents would eventually refer their debt reviews to the Magistrate's Court.

[5] On 9 November 2009, the appellant terminated the three debt reviews, which the appellant argued it was entitled to do in terms of Section 86 (10) of the NCA, since the respondents were in default under the credit agreements, and 60 business days after the date

on which the consumers applied for debt review had lapsed, and because the respondents were in default at the time they received the notices.

[6] The appellant did not consent to the debt restructuring proposals advanced by Ms Burge. Accordingly, the three respondents supported and assisted by Ms Burge, each successfully launched identical applications in the Magistrates' Court of King William's Town for orders to be declared over-indebted in terms of Section 79 of the NCA, and that their debt obligations to the appellant be re-structured and re-arranged.

[7] In terms of the orders granted, the monthly instalments of the respondents payable to the appellant were substantially reduced and the interest rates stipulated in the lease agreements were decreased from 28.5% 28% 22% respectively to 15%. The applications or referrals were set down for hearing at 09h00 on 16 February 2010. The appellant had filed notices of opposition to the applications but no answering affidavits.

[8] The applications were called at 08h30, 08h55 and 09h05 respectively, and the orders referred to were granted by default. At 09h10 the appellant's correspondent attorneys in King William's Town telephoned the presiding magistrate who advised that he had already granted the orders. Attempts to persuade the magistrate to recall the matter were unsuccessful. Consequently the appellant made three separate applications to rescind the orders granted in terms of Rule 49 of the Magistrate's Court Rules on the grounds that they were obtained in its absence. The appellant also set out the grounds of opposition and the defences it would have raised had it been allowed to oppose the application. These appear below.

[9] The first "ground of defence" referred to by the appellant was

two points *in limine* in which the appellant challenged the court's jurisdiction. The appellant contended that the service of the debt review applications was defective because they were served by fax, and not by the sheriff and further, that the applications should have been brought by the debt counsellor and not by the respondents themselves. This second point on the consumers' *locus standi* can however easily be rectified by an order substituting the applicants, and it was in any event not pursued during argument of this appeal. Therefore, the remaining point regarding the defective service of the referral will be dealt with as the only point *in limine*.

[10] Secondly, insofar as the merits of the applications are concerned, the appellant disputed that the respondents were over-indebted on the grounds that it was never established on a preponderance of the available information at the relevant time, that the respondents were indeed over-indebted, having regard to their financial means, prospects, obligations and "probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment".

[11] Thirdly, the appellant relied upon its own termination of the debt review process of which notice was given to the debt counsellor on 9 November 2009. It submitted that it was entitled to end the debt review because 60 days had lapsed and the respondents were in default with their instalments as envisaged in section 86 (10) of the NCA. The legal question of the entitlement to terminate the process as aforesaid is a matter which has caused much debate and has been settled for the time being by a decision of the Full Bench Court of the Western Cape High Court, in *Wesbank, a Division of Firstrand Limited v Papier (the National Credit Regulator as amicus curiae),* an *unreported judgment in the*

High Court of South Africa, Western Cape under Case No 14256/2010. That court concluded that, properly interpreted, Section 86 (10) of the NCA, means that consumers such as the respondents *in casu,* are protected from enforcement proceedings by a credit provider while proceedings for an order in terms of Section 87 (7) (c) (a referral to the Magistrate's Court) are pending. Although the correctness of the judgment in *Wesbank* was not challenged in this appeal, the appellant once again relied on its termination of the debt reviews but on a different basis, namely that the defective service meant there was no application pending.

The Magistrate's Judgment

[12] In his judgment dated 10 June 2010, in respect of all three rescission applications, the magistrate accepted that the matters had been set down erroneously for 09h00 instead of 08h30 by the respondents and that two of the applications had therefore been called prematurely. He appears to have accepted the reasons or good cause for the appellant's default of appearance. However, the magistrate dismissed the appellant's applications for rescission on the grounds that the appellant did not demonstrate that it had a "*bona fide* objection or opposition" to the three debt reviews.

[13] The magistrate rejected the point *in limine*, raised with regard to the service of the applications for debt review, and found that the applications were in fact served by sheriff.

[14] Insofar as the merits were concerned, the magistrate found that the debt counsellor's assessment that the respondents were over-indebted was concluded after she had conducted some form of enquiry into their financial positions and in the absence of any evidence by the appellant to the contrary (the appellant did not file

an answering affidavit, only a notice of opposition to the debt review application), it must be accepted that this assessment had been correctly made. The magistrate took into account that the affidavits in support of the rescission applications were deposed to by parties who were not involved in the debt restructuring process due to the appellant's apathy towards the process, and that consequently it would not be in a position to gainsay the debt counsellor's assessment.

[15] The magistrate rejected the appellant's contention that the debt reviews had been terminated in terms of Section 86 (10) of the NCA because he held that the appellant failed to furnish proof of notification of the termination "and in any event they would have been out of time as more than sixty days had elapsed since the consumer had made application for debt review". This reasoning is based on the misapprehension that the credit provider must end the debt review before the 60 day period ends, instead of having to wait until after that period before terminating the review.

Discussion

[16] Despite there being no opposition to the applications for rescission, the applications were dismissed with costs.

[17] In *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 711 E-G, Jones J set out the proper approach to be adopted by a magistrate deciding an application for rescission thus:

> "An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not

> the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligence or otherwise, gives rise to the probable inference that there is no *bona fide* defence, and that the application for rescission is not *bona fide*".

[18] In *Silber v Ozen Wholesalers (Pty) Ltd* 1964 (2) SA 345 (A) at 352 H the Appellate Division held that "good cause" included, but was not limited to, the existence of a substantial defence.

[19] In the present matter the primary enquiry is whether the magistrate ought to have found that the appellant had demonstrated at least one *bona fide* defence.

[20] The magistrate's finding that the application or referral for debt review in terms of Section 86 (8) (b) of the NCA had been properly served on the appellant by the sheriff is factually incorrect. The appellant alleged in its affidavit in support of its application for rescission, that the referral was served by fax. That allegation was left unchallenged. It also appears from the respondents' notice of motion that the referral was served by fax. It was specifically noted by the attorneys for the respondents on the second page of the notice of motion, that the appellant "[c]onsented to review documents by fax, only". Although the appellant disputed its consent to service by fax, the fact remains that the referrals for debt review were indeed served by fax, and not by the sheriff, as found by the magistrate.

[21] Attached to the rescission applications were copies of a letter by the appellant addressed to the debt counsellor dated 5 October 2009, advising that the notices (Form 17.1 and Form 17.2 as required by Regulations 24 (2) and 24 (10) respectively, in terms of Section 86 (4) of the NCA), may be sent to the appellant by fax. The letter expressly states that the appellant does not consent to

receiving "court processes by way of fax, e-mail or registered post". The service of the applications or referrals for debt review by fax was therefore not by consent between the parties.

[22] Section 87 (7) provides that if as a result of an assessment by the debt counsellor conducted to determine whether the consumer is either over-indebted (or the credit agreements are reckless, or both), the debt counsellor has concluded that the consumer is over-indebted, the debt counsellor "may issue a proposal recommending" that the Magistrates' Court make an order that the credit agreement is also reckless, or that *inter alia,* the consumer's obligations be re-arranged by, either extending the period of the agreement and reducing the amounts of due payments, or postponing certain due dates for payments.

[23] If the credit provider does not accept the proposal, Section 86 (8) (b) of the NCA provides that the debt counsellor "must refer the matter to the Magistrate's Court with the recommendation". In the matter of *National Credit Regulation v Nedbank Limited and Others* 2009 (6) SA 295 (GNP), at 309 B – 310 D, du Plessis J held the abovementioned provisions to mean that the debt counsellor must *refer* the matter to the Magistrate's Court and that referral is an ordinary application in terms of Rule 55 of the Magistrates' Courts Rules.

[24] Rule 8 of the Magistrates' Court Rules provides that any court process (which would include an application) "*shall be served or executed, as the case may be, through the Sheriff*". Since the appellant expressly did not consent to receiving court processes (which would include referrals to the Magistrates' Court for debt review) by fax, there was no proper service of the respondents' applications. For the appellant, the impugned service of the

applications had a further consequence, other than it being a ground to rescind the orders made. It argued with reference to the decision in *Wesbank* (*supra*) that the defective service meant that its termination of the three debt reviews had disposed of them conclusively.

[25] The "crisp question" raised by the defendants in the *Wesbank* matter was formulated by the Full Bench in paragraph [12] of the judgment, as being "*whether it is competent for a credit provider to terminate a debt review process in terms of Section 86 (10), after an application has been lodged with a Magistrates' Court for an order restructuring a consumer's debts as envisaged in Section 86 (7) (c) of the Act, but before an order has been made in terms of Section 87 (1)*" (emphasis added).

[26] "Lodge" in the passage quoted above must also mean "refer" as envisaged in Section 86 (8) (b) of the NCA because "refer" was held to mean the issue or service of an application in the Magistrates' Court by Kathree-Siloane AJ (as she then was) in *SA Taxi Securitisation (Pty) Ltd v Matlala* [2010] ZA GPJHC 70 dated 29 July 2010. Relying on the aforesaid judgment, and in particular paragraph [16] thereof, the appellant submitted that it is only the issue and service of a debt review application that would have the effect of precluding the invocation by the appellant of its rights in terms of Section 86 (10).

[27] If "refer" did not also mean service, it was further argued by the appellant, it might have the result for example, that a credit provider who legitimately endeavours to terminate a debt review in terms of Section 86 (10), seeking to enforce its rights as contemplated in Chapter 6 of the NCA, may be met with the objection that unbeknown to him, an application had been issued in

the Magistrate's Court without service, prior to the credit provider instituting its action. It was submitted that such a situation was not only prejudicial and costly to the credit provider, but one which could not reasonably have been contemplated by the drafter of the legislation.

[28] The Full Bench in the *Wesbank* case (*supra*), at paragraph [34] of their judgment, added to their interpretation of Section 86 (10) of the NCA referred to above, that "*the corollary is that delivery of a notice of termination by a credit provider in terms of Section 86 (10) is not competent once any of the steps referred to in Sections 86 (7) (c), 86 (8) or 86 (9) have been taken. Obviously this impediment will cease to exist, once a Magistrate's Court dismissed the application for re-arrangement or the application has been withdrawn or abandoned*".

[29] The appellant's argument is that the defective service of the referral to the Magistrate's Court had the result that there was no impediment, such as a pending debt review application, which would otherwise have protected the respondents from enforcement proceedings by the appellant, and meant that the debt review was terminated by the notice given on 9 November 2010.

[30] That the concept "refer" also includes service, is with respect, correct. However, the consequences of the defective service of a debt review application means little more than that the credit provider's right to be heard in accordance with the *audi alteram partem* principle has been infringed. The credit provider would be entitled to rescind any order made in its absence, on showing good cause.

[31] In the *Wesbank* matter (paragraph [22] of the judgment), it

was pointed out that Section 86 of the NCA, with its heading "*Application for debt review*" is an "*elaborate process*". The process does not commence with the actual referral to the Magistrate's Court. The process commences with an application to a debt counsellor who must determine whether the consumer is over-indebted within 30 days, and if he or she is found to be over-indebted, only then is the matter referred to the Magistrate's Court. Since there was proper service of the other notices which preceded the referral, the appellant at least had knowledge that the process had begun. Moreover, this was not a case where there was no service at all of the actual referral.

[32] One of the aims of the NCA was to "protect consumers by addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations" (Section 3 (g) of the NCA). With reference to the aforesaid, the court in *Wesbank* emphasized in paragraph [13] of the judgment, that in order to achieve the aims of the NCA, the legislator had limited a credit provider's right to enforce a credit agreement where the consumer is in default. The court observed that the NCA "has drastically changed the traditional legal debt collection procedures". Bearing the aforesaid in mind, it is almost inconceivable that the entire debt review process could be circumvented by the defective service of the referral itself, particularly in circumstances where the other notices required by Section 86 of the NCA, and which are also part and parcel of the debt review process, were properly served. If the application for debt review proceeds in the absence of a credit provider who has a *bona fide* defence, but was not notified of the application, the remedy available to him is rescission of the order made in his absence, not the termination of the whole process. Such an overly

technical approach would be in conflict with the aims of the NCA set out above. In my view, the defective service of the referral in this matter did not constitute a substantial defence.

[33] The appellant was however entitled to rescission of the orders and to its day in court for other reasons. The first is that it was impermissible for the magistrate to reduce the interest rates applicable in terms of the lease agreements in question, thereby amending a material term of those agreements.

[34] In the case of *SA Taxi Securitisation (Pty) Ltd v Dick Lennard*, an unreported judgment Van Zyl J in the High Court, Eastern Cape, Grahamstown, under Case No: CA 166/2010, a magistrate had reduced the applicable interest rates in a credit agreement. It was not in dispute in that matter that the Magistrates' Court did not have the power to make any order re-arranging the consumer's obligations other than those listed in Section 86 (7) (c) (ii) of the NCA. It includes "*(aa) extending the period of the agreement and reducing the amount of each payment due accordingly*". The debt counsellor wanted to achieve the result envisaged in Section 86 (7) (c) (ii) (aa) in his proposal. However, instead of reducing the amount of each payment due each month, by spreading the payment in respect thereof over an extended period, the debt counsellor achieved the reduction in the payments by reducing the interest rates. The magistrate then incorporated the proposed reduction of the interest rates in his order.

[35] Van Zyl J, in paragraph [10] of his judgment, emphasized that paragraph (aa) of Section 86 (7) (c) (ii) authorises the court to extend the period of payment stipulated in the credit agreement and to reduce the amounts of each payment due "*accordingly*" in terms of the agreement. The aforesaid section, it was pointed out,

makes no reference to any other terms of a credit agreement which may be re-arranged by a magistrate. It provides for debt relief to an over-indebted consumer by way of reducing the actual payments over an extended period, but without reducing the actual amount owing, which would be the result of a reduction of the interest stipulated in the credit agreement. Accordingly, the learned judge held that the magistrate had acted *ultra vires* and set aside his order.

[36] The magistrate *in casu,* was similarly not empowered to reduce the interest rates stipulated in the lease agreements, and on this ground alone the appeal should succeed. This aspect was not raised as a defence in the application for rescission, but because it pertains to a point of law, it can be determined on the papers as they stand and it was raised as a ground of appeal.

[37] The appeal should also succeed on a further aspect. The magistrate held that the appellant's failure to file an answering affidavit and to consent to the debt-arrangement proposals (in terms of Section 87 (7) (b)) indicated its apathy and therefore it was precluded from disputing that the respondents are over-indebted. The flaw in this reasoning is that apart from the fact that the appellant was not obliged to file an answering affidavit in terms of the Magistrate's Court Rules, it intended to oppose the application mainly on the technical ground that it had terminated the debt review. At the time, the legal position on that aspect was not certain and the *Wesbank* judgment had not been delivered. The appellant was also in any event entitled to dispute and test the respondents' over-indebtedness and the substantial reductions of their instalments if it had its day in court.

[38] The respondents did not oppose the rescission application or

this appeal. Accordingly, it would not be appropriate to make any costs orders against them.

[39] In the result it is ordered as follows:

The appeal succeeds and the magistrate's judgment dated 10 June 2010 is set aside and substituted with the following:

> "The orders of this Court dated 16 February 2010 under Case Numbers 3450/09, 3451/09 and 3455/09 are hereby rescinded in terms of Rule 49 of the Rules of the Magistrates' Courts".

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E REVELAS
Judge of the High Court

Goosen AJ: I agree.

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G GOOSEN
Acting Judge of the High Court

Counsel for Appellant:	Adv ARG Mundell SC
Instructed by:	Marie-Lou Bester Inc Johannesburg c/o Neville Borman & Botha Grahamstown

No appearance for Respondents

Date Heard:	18 March 2011
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