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

CASE NO.: 2306/2012

In the matter between:

ABSA BANK LIMITED **Applicant**

And

MANYANO NOQAYI **First Respondent**

THANDEKA MARIA NOQAYI **Second Respondent**

JUDGMENT

BESHE, J:

[1] Applicant issued summonses against the respondents for payment of the sum of R322 975.32 being the balance of the principal debt together with finance charges therein, in respect of monies loaned and advanced by applicant to the respondents in terms of a Mortgage Loan Agreement. Applicant also sought an order declaring executable the specially hypothecated property in respect of the loan agreement, which is [……].

[2] The respondents defended the action, whereupon applicant applied for summary judgment.

[3] The respondents do not dispute that they defaulted on their obligations under the loan agreement and mortgage bond and that they fell into arrears. That the arrears on their obligations have increased to R61 030.37 as at date of issue of summons. They do not deny that they received a notice in terms of *Section 129 of the National Credit Act 34 of 2005*. In terms of the said section, the respondents were advised or it was proposed that they refer their account which is the subject of these proceedings, to the Debt Counsellor, Alternative Dispute Resolution Agent, Consumer Court or Ombud with jurisdiction, with the intent to resolve any dispute under the account, or to develop or agree on a plan to bring payments on the account up to date.

[4] According to the first respondent, (who is the only respondent to depose to an opposing affidavit) upon receipt of the *Section 129* notice, he attended upon the offices of the applicant's attorneys and made an offer to settle the debt in instalments. The offer was not accepted. The respondents resist the application for summary judgment on the basis that they are over indebted and request that the matter be referred to a debt counsellor who will evaluate their circumstances and make a recommendation in terms of *Section 86 (7) of the National Credit Act*.

[5] In the terms of *Section 85 of the National Credit Act*, a court may declare and relieve over-indebtedness. The section reads:

"Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may –

(a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or

(b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness."

[6] The reason cited by the respondents why they did not approach the debt counsellor upon receiving the *Section 129* notice is that the thought the negotiations they had with the applicants sufficed. As a result of the said negotiations they entered into a "Help-U-Stay" agreement with the applicant. By first respondent's own admission, they did not comply with the restructured payments in terms of the "Help U Stay" agreement (see paragraph 8.3.8 and 8.3.9 of first respondent's opposing affidavit).

[7] There is however no explanation forthcoming from the respondents why, if they could not keep up with the terms of the "Help-U-Stay" agreement, they did not approach the debt counsellor as proposed in the *Section 129* notice. Especially in view of the fact that the said agreement was concluded on the 11 November 2010. After the agreement was reached they made two payments for November and December. No payment was made in January, and they have been making payments erratically. The *Section 129* notice was only issued in June 2012.

[8] It was submitted on behalf of the applicant that the request for the matter to be referred to a debt counsellor is a delaying tactic. The circumstances upon which I am required to decide whether the matter should be referred to the debt counsellor only relate to the first respondent and his current wife. The respondents were divorced in 2000. They had both entered into the mortgage loan agreement with the applicant. There are no details regarding second respondent's financial circumstances or her ability to contribute to the reduction of their indebtedness to the applicant. *Section 85 of the*

National Credit Act gives a court a discretion whether or not to refer the matter to a debt counsellor. I have alluded to the reason proffered by the first respondent as to why they did not avail themselves of the opportunity to approach the debt counsellor prior to the debt enforcement of the agreement by the applicant. Which is that they were under the impression that the "Help-U-Stay" agreement was sufficient to protect their interest in the property. (as indicated earlier only first respondent deposed to an opposing affidavit). But clearly even after the said agreement, respondents could not make payments in the terms agreed upon. This must have prompted the issuing of the *Section 129* notice.

[9] In ***Standard Bank of South Africa Ltd v Panayiotts 2009 (3) SA 363*** *Masipa J* pointed out that the explanation why the debt counsellor was not approached is important for a number of reasons. Those reasons being, according to her:

"The explanation is important for a number of reasons: the NCA provides a simple, inexpensive and effective procedure for debt restructuring in s 86. These provisions were obviously designed to expedite and to simplify the procedure relating to debt restructuring. The aim is further to avoid the necessity of the parties having to resort to the far more costly procedure of applying to the High Court for relief.

It is also undesirable that the High Court should deal with frequent applications for debt restructuring very much along the lines of a court sitting in terms of s 65 of the Magistrates' Court Act 32 or 1944.

The High Court generally would not entertain a matter where there is another, simple and effective procedure available. (See ***Troskie v Troskie 1968 (3) SA 369 (W).***)"

[10] I am not persuaded that the reason why the respondents did not approach the debt counsellor is such as to influence me to exercise my

discretion in their favour. They clearly do not have a valid reason why they did not do so.

[11] As far as the defence of over-indebtedness is concerned, it is trite that the court will have regard to a number of factors before it can exercise a discretion in terms of *Section 8*5 *of the National Credit Act*, *inter alia*, whether the respondent is in fact over-indebted; has he fully disclosed his indebtedness, etc.

[12] Both the first respondent and his current wife are pensioners. They have a combined income of approximately R36 000.00. The property in question is valued at between R1 250 000.00 and R1 400 000.00. The amount owing on the bond is ± R300 000.00. The arrears being over R60 000.00. Their monthly expenses are ± R41 500.00. Included therein are R15 000.00 tuition fees in respect of their two daughters who are studying at Universities of […..]. R5 000.00 in respect of a debt to a builder. No details are provided about this debt; such as what it is for, what the total debt owing is, when it was incurred, over what period it is to be paid. These also include R5000.00 bond on the immovable property. It is clear though that the first respondent pays far less than R5000.00 per month towards the bond.

[13] The words of *A R Erasmus J* in ***Firstrand Bank Ltd v Olivier 2009 (3) SA 353*** seem to apply to the present case. He had this to say:

"It would seem that the defendant's alleged over-indebtedness is due largely to his maintenance of the credit agreement with the plaintiff. ... ... The defendant would therefore be relieved of a monthly burden of about R2400 were he rid of the property. ... ... The sale thereof would largely reduce or completely liquidate his obligation to the plaintiff. Should he retain the property the defendant, on his own figures, will be hard pressed to pay the monthly instalments, let alone the R500 per month which he tenders on the arrears."

Similarly, in ***Standard Bank of South Africa Ltd v Panayiotts*** *supra – Masipa J* has this to say:

"In any event, my view is that the NCA does not envisage that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods which form the subject-matter of the agreement. Such goods should be sold to reduce the defendant's indebtedness."

The property in question is worth far more than what is due to the applicant. Hence I say the remarks by the two learned judges apply with equal force in this matter.

[14] The next question to consider is whether the grant of an order declaring the property executable will infringe the respondent's right to adequate housing as afforded them by *Section 26 of the Constitution*. It would appear that the property in question is used by the first respondent and his current wife as their primary residence. Their two daughters who are studying at […..] Universities stay with them during vacations. They also stay with first respondent's […] year old granddaughter. Both first respondent and his current wife are pensioners. It is trite that the Constitution protects the right to adequate housing and not the right to housing per se. *Mogoro J* dealt with the use of property as security for a debt in ***Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others 2005 (2) SA 140 CC paragraph 58*** and had this to say:

"Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge."

[15] Based on the reasons stated above, I am not satisfied that this is an appropriate case where I should exercise my discretion in favour of the respondents (i) by referring the matter to the debt counsellor and (ii) by not declaring the property in question executable. I am not persuaded that ordering the property executable will result in an infringement of first respondent and his current wife's right to adequate housing. This in view of the amount owing to the applicant which is approximately R300 000.00 and the value of the property which is in excess of R1 000 000.00.

[16] In the result, summary judgment is granted in favour of the applicant against the respondents jointly and severally, the one paying the other to be absolved, for:

1. Payment of the sum of R322 975.32.

2. Payment of interest on the said sum of R322 975.32 at the rate of 8.25% per annum from 19 June 2012 to date of payment.

3. An order declaring executable, […..], Municipality and Divisions of Port Elizabeth, the Province of Eastern Cape, specially hypothecated.

4. Costs of suit.

_____

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Adv: J G Richards
Instructed by	:	McWILLIAMS ELLIOT INC 83 Parliament Street Central PORT ELIZABETH Tel.: 041 – 582 1250 Ref.: E D Murray/Lulene/W56387
For the Respondent/s	:	Adv: L Voultsos
Instructed by	:	LAWRENCE MASIZA VORSTER INC 214 Cape Road Mill Park PORT ELIZABETH Tel.: 041 – 373 0030 Ref.: D Vorster/ng/NOQAYI
Date Heard	:	11 September 2012
Date Reserved	:	11 September 2012
Date Delivered	:	27 February 2014