delivered
29/6/17

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: A480/2016

In the matter between:

FIRSTRAND BANK LIMITED Appellant

and

HEINRICH JOHANN BRAND N.O First Respondent

(in his capacity as Trustee of the Brand Familie Trust)

ALETTA ELIZABETH DU PLESSIS N.O Second Respondent

(in her capacity as Trustee of the Brand Familie Trust)

JUDGMENT

MAKHUBELE AJ

Introduction

[1] This is an appeal against the judgment of Magistrate Gouws Botha in the Magistrate's Court for the district of Tshwane Central (the Magistrate) dismissing the appellant's application for condonation for the late filing of its application of rescission of a default judgment and

orders granted in favour of the Brandt Family Trust ("the Trust") on 15 September 2011.

[2] The default judgment emanated from an application, in terms of Section 86(8) *(b)* of the National Credit Act, Act No. 34 of 2005 ("the NCA") ("the Debt Review Application") that was brought by the debt counselor of the Trust, Mr. John Claasen Lubbe.

[3] In addition to costs, the debt counselor sought the following orders in the notice of motion (Debt Review Application):

> *"1. That the First Respondent be declared over-indebted as set out in Section 79 of the National Credit Act 34 of 2005;*
>
> *2. that the draft Debt Re-arrangement Order attached to the Applicant's Founding Affidavit as Annexure "X" be made an order of court;*
>
> *3. That the debt review proceedings be re-instated in terms of section 86(11) of the NCA, in as far as same was terminated by any respondents; "*

[4] Pursuant to the said application, the Magistrate on 15 September 2011 issued an order which reads as follows:

> *"1. That the First (sic!) Respondents are found to be over indebted and the re-arrangement proposals annexed to the*

Founding Affidavit in the application, marked "E1-E20" is made an Order of Court.

2. The First (sic!) Respondents are ordered to make payments as is proposed in annexure "E".

3. None of the existing rights and obligations as is envisaged in the original credit agreements or loan agreements is waived or amended unless stated otherwise in the re-arrangement of that specific agreement.

4. The rights and obligations if amended as referred to in paragraph 3 above will be revived and be fully enforceable should the First and Second Respondents default in terms of this order.

5. That the payments in terms of paragraph 2 hereof be distributed as per the arrangement set out in annexure "E1-E20".

6. That the Debt Review resume, in as far as same may be terminated by any Respondent.

7. Further and/or alternative relief."

The factual matrix

[5] The only contentious issue, in the rescission application, was whether the appellant was aware that the Trust had applied for debt review and that there was a subsequent application for the relief indicated in paragraph [2] of this judgment. It is common cause that

the condonation and rescission applications were only filed during March 2015, four years later.

[6] The facts giving rise to this appeal are the following. During 2006 a Mortgage Bond was registered in favour of the appellant as security for payment of monies lent and advanced to the Brand Family Trust (the Trust) under a home loan agreement.

[7] The Trust applied for debt review during July 2010.

[8] The appellant terminated debt review proceedings in terms of Section 86(10) of the NCA on 03 August 2011.

[9] The debt counselor made a payment proposal in terms of which the Trust was to repay its indebtedness to the appellant by way of 256 cascading monthly installments commencing at R1 344.35 with interest at a rate of 11.50%. This was not accepted. The reason given[1] was that its account was *"excluded from the debt review process as summons was served prior to the application. Therefore the proposal was not assessed"*.

[10] The debt counselor approached the Magistrate Court as stated above. The appellant made no appearance at the hearing of the

[1] Email dated 11 August 2011, Annexure HB 3

Debt Review application and default judgment was granted against it as per the order in paragraph [4] of this judgment; hence, the condonation and rescission application.

[11] The appellant's reasons for its failure to oppose the application lodged by the debt counselor and the delay in bringing the rescission application is attributed to what it refers to as a regrettable oversight and unfortunate error in which it mistook the debt review application of the Trust for that of the first respondent in his personal capacity.

[12] The appellant stated further that it could only assume that the Trust's application may have been lost between the scores of debt review applications received by it during the tough economical period experienced by many people in the country. In short, it slipped through unnoticed. The fact that it was served by e-mail and not by the Sheriff also added to the confusion. It was only realized during 2014 whilst updating its records that a debt review order was also granted in favour of the Trust.

[13] At the hearing of the rescission application the appellant acknowledged that this explanation may not be sufficient, but submitted that it is the truth. It urged the court to condone the late filing of the rescission application for the following reasons:

[13.1] it is in the interest of justice;

[13.2] the issues between the parties must be canvassed;

[13.3] it had great prospects of success on the merits of the main application;

[13.4] it has shown good cause for rescission of the order.

[14] On the merits, the main ground for the rescission application was that the order is ultra vires the NCA because the restructured payments will not lead to the ultimate satisfaction of the debt of the appellant. In particular, the restructured payments are allegedly not sufficient to even cover the contractual interest accruing to the Trust's account.

[15] Counsel for the Trust before the Magistrate conceded this point during argument and the only issue that they argued was about the late filing of the application for condonation.

[16] The debt counselor did not oppose the application. The Trustees opposed the application and highlighted certain inconsistencies with regard to the appellant's contentions that it was not aware, in the first place, about the Trust's debt review application and, secondly, the date on which it gained knowledge of the order.

[17] Furthermore, it was argued that the appellant should have been aware that since 2011 the Trust was making payment of substantially

reduced installments. In this regard, the argument made was that it has acquiesced in the judgment.

[18] The other argument was that the Trust would suffer prejudice with regard to the interest that has accrued since 2011 if the debt review order were to be rescinded.

The judgment

[19] When refusing to grant the rescission, the Magistrate was of the view that there is no provision in the NCA or Magistrate's Court Act that provides for the rescission or part of the order.

[20] In paragraph 6.5 he concluded by stating the following;

> *"The Magistrate's Court being a creature of statute and restricted to act within the confines of legislation is not in any way empowered to hear either rescission or variation applications of the debt restructuring order. The aforesaid was confirmed by Du Plessis J in the declaratory order with the citation:* ***National Credit Regulator v Nedbank Ltd and Others*** *2009 (6) SA 295 (GNP) at 307H-308B."*

[21] Condonation for late filing of the rescission of the debt review order was refused on the basis that granting it was not in the interest of

justice. The rationale for this conclusion appears from paragraph 6.4 of the judgment that reads as follows:

> *"If consideration is had to the consumer as well as the other respondents and the prejudice that they shall suffer should the application of the applicant succeed. It is obvious that the applicant will initial civil proceedings against the respondent once the application is granted. The respondent will have no right of recourse against such application. It is also clear that the respondent will not be able to make payments to the Applicant as per initial agreement, and any attempt by the consumer to make the required payments will in turn prejudice the other respondents in that their payment agreements shall not be met due to the consumer's reduced available funds."*

The grounds of appeal

[22] The main grounds of appeal are actually a repetition of the grounds in the condonation and rescission applications. I do not wish to restate them here.

[23] It is further contended that the Magistrate erred by not taking into account the merits of the rescission application when he dismissed the condonation application.

[24] The further grounds relate to the prejudice that the appellant stands to suffer if the Trust is allowed to remain in possession of the property under circumstances where the value of the property was less than the amount owing because the restructured installment did not even cover the interests accruing in the account.

Issues for decision

[25] The only dispute before us was whether in refusing the application for condonation; the Magistrate erred by failing to consider the merits of the rescission application. It is common cause that the debt review order is invalid for reasons stated above. The question is whether the court should allow invalid court orders to stand on the basis that a rescission application was filed out of time.

Submissions

[26] We are grateful for the written submissions that were submitted on behalf of both parties. I will not be able to refer to all the case law raised in the submissions, but where necessary, and on novel issues, I will endeavor to highlight the cases referred to.

[27] As I have already stated above, the parties were in agreement during the proceedings before the Magistrate and before us that the debt review order was invalid and unlawful because the restructured

payments were far less than the interests accruing on a monthly basis, and as such they will not lead to the eventual satisfaction of the debt.

[28] It appears from the record, and was confirmed during the hearing before us, that on the morning of the hearing of the application, Counsel for the appellant, Mr. Denato, alerted counsel appearing on behalf of the Trust, Mr. McTurk, to a judgment of Goosen J in the matter of **Nedbank v Norris and Others 2016 (3) SA 568 (ECP).**

[29] After reading this judgment, the latter informed the Magistrate that it would seem as if the order granted by him in the debt review application was ultra vires the Act. He advised the Magistrate that he was in agreement with the judgment in question and that the Trust would only argue the issue of condonation.

[30] The parties are agreed that if condonation is granted, then the rescission application should follow and vice versa.

[31] I have considered this judgment, and I wish to quote the relevant paragraphs;

> *"41. The difficulty with the order, however, does not end there. As indicated hereinabove the magistrate re-arranged the first*

respondent's affairs in such manner as to require payment of a monthly amount of R289.15 over a 260 month period and ordered that interest would be reduced to 0%.

42. It is obvious from these figures that the re-arranged payments will not satisfy the amount outstanding to the applicant as at the date of restructuring. The clear effect of the re-arrangement order is that the first respondent, as consumer, will not meet all of his obligations to the applicant in terms of the credit agreement. Not only will the first respondent not be obliged to make payment of the full outstanding loan, the monthly payments do not even meet the requirement to reimburse the applicant for the monthly payment it is obliged to make on behalf of the first respondent in respect of credit insurance cover. The order plainly does not meet the essential purposes of the NCA as set out in s 3 (g) and (i) (cf. BMW Financial Services SA (Pty) Ltd v Mudaly2010 (5) SA618 (KZD); FirstRand Bank Ltd v Adams and Another ***2012 (4) SA 14*** *(WCC)).*

43. Apart from this, the magistrate also ordered that the first respondent's contractual obligations to pay interest on the outstanding balance of the loan be reduced from the fixed 17.5% to 0%.

44. Section 86(7) (c) (ii) confers no such power upon the Magistrates Court. A debt re-arrangement order has as its

purpose the rescheduling or re-arrangement of the obligations of the consumer in such a manner as to enable the consumer to meet his/her/its obligations to the credit provider. It serves to mitigate the effect of over-indebtedness by making provision for payments within the existing means of the consumer and over an extended period. A re-arrangement order, does not, and cannot, extinguish the underlying contractual obligations. This much is plain from the wording of section 86 (7). The order reducing the first respondent's contractual obligation to pay interest on the outstanding balance of the loan is therefore ultra vires the NCA (FirstRand Bank v Adams (supra) at par 28; SA Taxi Securitisation (Pty) Ltd v Lennard ***2012 (2) SA 456*** *(ECG) at paragraph 10).*

45. A magistrate's court is a creature of statute. It only has the jurisdiction that is conferred upon it by statute. It exercises no inherent jurisdiction and can accordingly not adjudicate matters which fall outside of its expressly conferred jurisdiction and cannot grant orders, other than those it is expressly authorised to grant (Ndamase v Functions 4 All ***2004 (5) SA 602*** *(SCA)).*

46. In purporting to make the order the magistrate acted without jurisdiction. At common law such an order is null and void (Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others 2012 (3) 3 to 5 (SCA) at paragraph

12). Although the applicant seeks an order to the effect that orders made without jurisdiction are void ab initio and may be ignored, I do not consider that such an order is necessary in the present matter or that it is appropriate given the reach off the declaratory relief sought.

[32] It is common cause that the Trust's re-structured payment proposal that was made an order of court as indicated above falls foul of all the issues raised in the judgment of Goosen J.

[33] Counsel for the Trust, Mr. McTurk surprisingly, and contrary to the concessions he made during the hearing before the Magistrate, argued that the appellant is relying on an invalidity that came about after the judgment was granted.

[34] Counsel for the appellant countered this argument by referring to the founding affidavit where these issues were raised. This was before the judgment of Goosen J which was only issued on 01 March 2016. Therefore, the Magistrate should have taken note of the contentions with regard to the validity of the court order before the matter was argued.

[35] For instance, payment in the first ten (10) installments is about R1 344.00 per month. Interest at 11, 5% accrues in the amount of about

R14 900.00 per month. The balance in the account started at R1498 418.56 and by the tenth month it is R1 617 970.85. Installment number 215 on 27 July 2028 is R17 834.39. The interest, at the same rate of 11, 5% is R81 320.42. The balance in the bond account is R8 549 094.84.

[36] Counsel also referred to judgments delivered before the **Norris-**judgment[2] above, which emphasized the objectives of debt review and the approach when the Magistrate is considering such an application. These cases deal with issues such as the unfairness or prejudice that a home loan lender would suffer when a borrower who can no longer afford to repay the loan is allowed to remain in the property.

[37] The other grounds of appeal with regard to whether the court erred by stating that it had no authority to rescind part of an order fell off because counsel for the Trust conceded that there was merit in the appellant's argument.

[38] It also became apparent that the Trust was not going to oppose the other grounds of appeal, except for condonation for late filing of the rescission and condonation applications.

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[2] such as FirstRand Bank Limited & Nedbank Limited v Barnard & Another (A801/2014) [2015] ZAGPPHC 1109 (11 August 2015).
BMW financial Services (SA) (Pty) Ltd v Donkin 2009 SA 63 (KZD).

[39] Mr. Stevens referred to the Constitutional Court Judgment in the matter of **Department of Transport and Others v Tasima (Pty) Limited**[3] to advance his contention that the Magistrate should have considered the merits of the rescission application.

[40] He argued further that the Magistrate only paid lip service to the correct approach of considering the merits by referring to the judgment of Moseneke J as he then was, in the matter of **Harris v ABSA Bank Ltd t/a Volkskas**[4], but did the opposite when he stated that he was going to consider the rescission without looking at the merits.

[41] Mr. McTurk sought to make a distinction between decisions which are illegal and such as what happened in the **Tasima**-case and the circumstances of this case where the issue is about the decision being ultra vires the Act. His argument is that delays can be overlooked where the decision is unlawful.

[42] This argument does not make sense because in the **Tasima**-case the issues about contraventions of the Public Finance Management Act had not yet been subjected to the court's scrutiny, hence the delay in bringing the counter-application was over looked.

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[3] (CCT5/16) [2016] ZACC 39; 2017 (1) BCLR 1 (CC) (9 November 2016).
[4] 2006(4) SA 527 (T).

[43] In this case, there is a judgment and order already, which clearly should not have been given. It is illegal hence the distinction that he sought to draw is, in my view not there.

[44] The question is why the illegality should be allowed to stand. In my view the Magistrate misconstrued the approach when dealing with an application for condonation.

[45] Even where a delay is unreasonable, interest of justice may demand that condonation be granted. The only way to establish the existence of interest of justice is to undertake an enquiry, which involve a consideration of the merits and prejudice to the other party.[5]

[46] The Magistrate clearly misdirected himself by emphasizing the interest of justice and prejudice in as far as it pertains to the Trust. It appears from a reading of the judgment that the Magistrate, even when advised about the **Norris**-judgment, did not consider its effect on the proceedings before him. It is clear that he did not consider the invalidity of the debt review order, not just on the basis of the **Norris**-judgment, but as part of the grounds for rescission as clearly stated in the founding affidavit.

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[5] **South African National Roads Agency Ltd v Cape Town City 2017 (1) SA 468 (SCA)** at paragraphs 84 and 85.

[47] Condonation for late filing of the rescission application should have been granted.

[48] The respondents' heads of argument were filed out of time. Condonation in this regard is granted.

[49] Accordingly, and in view of the above, I propose the following order:

[49.1] The appeal is upheld with costs.

[49.2] The judgment and order of the Magistrate under case number 14779/2011 is set aside and replaced with the following:

"1. Condonation for the late filing of the rescission application is granted.

2. The Debt Review order dated 15 September 2011 is rescinded and set aside.

3. The second and third respondents are ordered to pay costs, jointly and severally, one paying the other to be absolved."

MAKHUBELE AJ

ACTING JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT

I agree and it is so ordered

KUBUSHI J

JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT

APPEARANCES:

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