REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

1) **REPORTABLE: YES/~~NO~~**
2) **OF INTEREST TO OTHER JUDGES: YES/~~NO~~**
3) **REVISED.**

CASE NUMBER: 76369/2014

26/7/2019

In the matter between:

FULUFHELO DAVID MABUDUGA	Applicant
and	
NEDBANK LIMITED	Respondent
In re:	
NEDBANK LIMITED	Plaintiff
and	
FULUFHELO DAVID MABUDUGA	Defendant

JUDGMENT

LE GRANGE AJ:

[1] This is an application for rescission (not specified whether under rule 42, Rule

31 or the common law, but to be considered regardless[1]) of an order granted by Madlba AJ in this court on 13 May 2013. The order granted in favour of the respondent/plaintiff ("Nedbank") against the applicant/defendant ("applicant") was for:

1. Payment of the amount of R 551013.19. Interest on the amount of R 551013.19 at the rate of 9.25°/o per annum calculated and capitalised monthly in advance from 1 September 2014 to date of payment;

2. Cost of suit as between attorney and client scale;

3. Prayers 2 and 4 are postponed *sine die.*

[2] At the start of the hearing, the parties (through counsel, in a sincere attempt to dispose of the matter amicably) approached the court with a draft order, containing certain terms, and insisted that it be granted, as it was by consent.

Judicial overview

[3] The court has the duty to review the terms consented to, and to ensure that any order it makes, is legally sound. That is: within the boundaries of the applicable law and not against public policy or *contra bones mores.*

[4] The court should not slavishly adhere to settlement- or consented terms proposed by parties and only act as rubber stamp. To do so would be disastrous to our law and our constitution. The order, if not legally sound, may be set aside on the basis that no such order could have been made in law.

[5] To this end, it was important to consider the draft order, while having regard to the facts and the applicable legislation.

Background facts

[6] The background facts in this matter is very similar to that in *Rougier v Nedbank 2013 JDR 1167 (GSJ),* wherein action was Instituted for the enforcement of a credit agreement (as envisaged by the National Credit Act 34 of 2005 ("Act")) and judgement granted after the applicant had applied for debt

[1] *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd 2017 (1) SA 613 (CC) at p 637 par [71*

review (in terms s 86(1) of the Act) and subsequent to Nedbank receiving a Form 17.4 notice of termination from the debt counsellor.

[7] The factual matrix herein differs to the extent that In *Rougier* the debt counsellor "withdrew" the debt review application due to the applicant's uncooperativeness, while in this matter the debt counsellor gave notice to Nedbank, using Form 17.4 which stated that:

> *"This notice serves to advise you that the application for Debt Counselling dated 15 May 2014 has been voluntarily withdrawn by the consumer."*
>
> (Own emphasis added)

[8] This notice of withdrawal of the application for debt counselling, led to action being instituted by Nedbank and default judgement being granted.

[9] In the judicial overview process and In considering the terms of the proposed draft order the question whether a consumer is entitled to exit, withdraw from, or terminate, the debt review process after his/her application in terms of s 86(1) becomes relevant for the following reason: (i) If it is found that the credit agreement is not subject to a pending debt review or before a debt counsellor the parties will be at liberty to settle their dispute amongst themselves, without the intervention and oversight of the debt counsellor or the application of the debt-review-process provisions of the Act, and should the order correspond therewith; (ii) If the credit agreement is however before a debt counsellor or subject to a pending debt review, the aggregate debt-review-process provisions of the Act must be adhered to and should the court order correspond accordingly.

[10] By agreement a second draft order, which accord with the second scenario aforementioned, was handed up for my consideration. I Confirmation was given to me by counsel that the terms thereof was agreed upon by the parties.

The law

[11] After considering the facts and the law in *Rougier,* Nobanda J, came to the

conclusion that:

"[12] In the circumstances, the debt counsellor fulfils a statutory function. As such, the debt counsellor is enjoined to act within the parameters of the empowering provisions.... accordingly, the debt counsellor's powers in dealing with a s 86(1) application are limited as set out above. I could not find any provision in the Act that empowers the debt counsellor to "withdraw" the debt review instituted in terms of s 86(1).

[13] In the premises, I find that in purporting to withdraw the debt review instituted by the applicant in terms of the provisions of s 86(1), the debt counsellor acted ultra vires.

[14] In the light thereof, the debt review application by the applicant was still pending before the debt counsellor at the time of the institution of the action by the Respondent. As such, the provisions of s *88(3) of the Act applied.*

(Own emphasis added)

[12] I agree with the findings in *Rougier.*

[13] The *Rougier* matter did however not address, nor consider the consumer's right to exit the debt review process, but only that of the debt counsellor.

[14] The National Credit Regulator, considered *Rougier* and subsequently implemented its 'Withdrawal Guidelines 002/2015 of the National Credit Regulator' (which guidelines is inferior to the NCA, its Regulations and case law), which provide as follows:

"Consumer can only withdraw or terminate the debt review process prior to the declaration of over-indebtedness as per s *86(7) of the Act and issuance of Form 17.2 subject to payment of the debt counselling fees as per NCR Debt Counselling Fee Guidelines.* "

[15] The National Credit Regulator therefore seems to be of the view that the consumer is entitled to withdraw his/her debt review application, or from the debt review process, up until the time that the debt counsellor has acted in

accordance with s 86(7).

[16] Similar to *Rougier,* I can find no provision in the Act that empowers the consumer to "withdraw" his/her application or from the debt review process after the consumer's s 86(1) application.

[17] To this end, the law is clarified by Binns-Ward J, in his judgement in *Phaladi v Lamara 2018 (3) SA 265 (WCC):*

> *[8] The High Court does indeed have an inherent jurisdiction, and in appropriate circumstances even a duty, to develop the common law taking into account the interests of justice. It also has an inherent jurisdiction to regulate its own procedures and processes - it was only of that aspect of its powers that Corbett JA was speaking in Universal City Studios supra foe cit. In the area of law regulated or determined by statute, it is under a duty to interpret and apply legislative enactments in a manner that promotes the spirit, purport and objects of the Bill of Rights, but in striving to do so it cannot by Procrustean construction do violence to the language used by the legislature. Its powers do not extend to improving legislation by providing measures or remedies that the statutory enactments do not afford, merely because the court considers it would be just or equitable that they should be afforded...*
>
> *[9] The concepts of 'over-indebtedness' (including that of financial difficulty falling short of 'over-indebtedness' contemplated by s 86(7)(b)) and the attendant remedy of 'debt review' within the meaning of the NCA, have no foundation in the common law. They are statutory creations. How they work is governed entirely by the NCA and, in the absence of a challenge to their constitutionality , the courts' powers in respect of them are delineated by the provisions of the enactment.*
>
> *[29] ... The courts are not empowered to craft a remedy that the statute does not allow for...*
>
> (Own emphasis added)

[18] A debt review process starts when an application in terms of s 86(1) comes before a debt councillor. From the date of filing of the application (or an

allegation of over-indebtedness to a court), the consumer becomes restricted in his/her dealings (see s 88(1)) until such time as the debt counsellor or the court has determined theconsumer's fate. Upon acceptance of the application the debt counsellor attracts a statutory duty (see s 86(4) to s 86(8)); and after receipt of the s 86(4)(b)(i) and (ii) notice(s) the creditor(s) becomes barred from enforcing by way of litigation the/their credit agreement(s) (see s 88(3)). If the consumer is found to be over- indebted or financially distressed, all parties must then participate in good faith, in an attempt to attain a responsible debt re- arrangement (see s 88(5) to s 88 (7)).

[19] The unambiguous effect of the aforementioned provisions of the NCA is that:

(a) When the applicant filed his application in terms of s 86(1), it was out of the applicant's hands to withdraw his/her application, or from the debt review process. The withdrawal was therefore *ultra vires* and of no force and effect; and

(b) From date of receiving notice in terms of s 86(4)(b)(i), Nedbank was barred from instituting action, which makes its summons premature.

[20] It is incumbent that the debt review process must then resume from where it derailed. That is, in the application process, and while the matter was ln the statutory hands of the debt counsellor. This also seems to be in line with, and the purpose of, an order in terms of s 130(4). In the alternative, the court should consider an order in terms of s 85.

[21] The parties in their settlement agreement, chose to rescind the judgement; withdraw the main action; and resume the debt review process by placing the matter back in the hands of the debt counsellor and by agreeing to participate in good faith in an attempt to retain a responsible debt re-arrangement.

[22] I am satisfied that the terms of the second draft order, as agreed upon and consented to by the parties, accord with the above and Is sound in law.

[23] In the result, the draft order annexed hereto (marked "X") is madean order of court.

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AJ LE GRANGE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicant:	Adv . M Coetzee on the instruction of Johann Scheepers Attorney
For the Respondent:	Adv. WJ Roos on the instruction of Van Heerden's Incorporated

IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

Before the Honourable Justice Le Grange AJ on 6 August 2019

CASE NUMBER: 76369/14

In the matter between:

FULUFHELO DAVID MABUDUGA Applicant

and

NEDBANK LIMITED Respondent

DRAFT ORDER

After considering the papers filed, hearing counsel for the parties and subsequent to an agreement between the parties, the following order is made:

1. That the default judgment granted against the Applicant on 13 May 2016 under case number 76369/14 is hereby rescinded and that the Respondent (the Plaintiff in the main action) herewith withdraws the action against the Applicant (the Defendant in the main action).

2. That the Applicant and the Respondent will forthwith take all necessary steps to facilitate the restructuring of the home loan agreement.
3. That the Applicant and the Respondent undertake to act in good faith and fully co-operate with each other for the purpose of restructuring the aforesaid home loan agreement.
4. That the fact that the Applicant is currently under debt counselling will not

negatively affect the restructuring process between the parties.

5. That the Applicant may approach the appropriate court to apply to have the loan agreement reinstated and/or confirmed under the debt review process, if necessary.

6. That the Respondent is directed to forthwith refund to the Applicant all legal fees debited to bond account number [….].
7. That the debt counsellor must be notified of this order, in writing, within 5 days hereof, in order to act in terms of his statutory duties, if any.
8. Each party will pay their own costs.

By Order of the Court

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The Registrar