IN THE CONSTITUTIONAL COURT

(REPUBLIC OF SOUTH AFRICA)

Case Number : 2013/____

In the matter between:

DESTRI JOSEPH MALCOLM FERRIS	First Applicant
SORAYA LACHPORIA FERRIS	Second Applicant

and

FIRSTRAND BANK LIMITED	First Respondent
D. LEE	Second Respondent

FOUNDING AFFIDAVIT

I, the undersigned:

DESTRI JOSEPH MALCOLM FERRIS

do herby make oath and state that:

THE DEPONENT

1. I am the First Applicant herein. I am a major male and reside at 2 Essenhout Drive, Randpark Ridge, Randburg, Gauteng..

2. The contents hereof are, save where otherwise indicated, within my personal knowledge and belief and are to the best of my knowledge and belief both

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true and correct. Where I advance submissions on the law, I do so on the advice of the Applicants' legal representatives.

3. I depose to this affidavit in my personal capacity and on behalf of **Soray Lachporia Ferris**, my wife, who is the Second Applicant in this application. We are married in community of property. Her confirmatory affidavit accompanies this affidavit.

THE PARTIES

4. As stated, my wife and I are the Applicants.

5. The First Respondent is **FirstRand Bank Ltd** (*"the Bank"*), a public company duly registered and incorporated in terms of the laws of the Republic of South Africa, with its principal business place at, amongst others, 6th Floor, FNB Tower, 27 Diagonal Street, Johannesburg. It was represented in other Courts by attorneys Bezuidenhout Van Zyl & Associates in Johannesburg. A copy of this application will be served on those attorneys.

6. The Second Respondent is Ms **D. Lee**, a major female of _____. She has an interest in the matter in that she is the purchaser of the property which forms the subject matter of the main proceedings, our family home, at a sale in execution. No relief is sought against her. The property has not yet been transferred into her name.

THE ISSUES

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11. It is common cause that we fell into arrears with our obligations under the loan agreement. We consulted a debt counsellor and, before an application for debt review was brought, he made an instalment offer to the Bank on 13 March 2009. The Bank ignored that offer.

12. On 24 February 2009, we applied for debt review in terms of Section 86 of the NCA. On 22 September 2009, our debt counsellor brought an application in the Magistrate's Court for the district of Randburg under case number 39757/2009 that we be declared over-indebted and our debt obligations be re-arranged. This debt review application preceded the summons in the matter, which was issued subsequent to the order being granted. Attached, marked "**FA1**", is a copy of the order that was granted by the Randburg Magistrate's Court on 30 April 2010 (*"the order"*).

13. The Bank contends that it had addressed correspondence to us in terms of Section 86(10) of the NCA, purporting to terminate the debt review. These notices did not come to our attention.

14. In an answering affidavit in the application for leave to appeal to the Supreme Court of Appeal, the Bank attached to its answering affidavit a list of registered letters, together with what is termed *"parcel tracking results"*. I attach, marked "**FA2.1**" to "**FA2.3**", copies of those documents. I also attach, marked "**FA3**", a copy of a letter purportedly sent to us. From "**FA3**" it is apparent that the Bank purported to act under Section 86(10) of the NCA and purported to terminate the debt review because of the lapse of 60 business days after the date on which application was made for debt review. I deal

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later in more detail with these allegations. I also point out that "**FA2.1**" and "**FA2.2**" are difficult to comprehend. Assuming that the branch referred to on each of the documents is the relevant post office, I have not idea what the *"WELOBIE"* post office is to which the notice was apparently dispatched on the first occasion and returned to sender on 24 May 2010. The notices are also defective in that there is no indication on them of any action taken after 25 May 2010.

15. I later deal with the legal efficacy of the purported termination of the debt review.

16. We raised the defence based on the non-compliance with the provisions of the NCA in an application for summary judgment in which we were granted leave to defend.

17. Pleadings closed. On account of negligent conduct on the part of our erstwhile attorneys, which were fully dealt with by the Court and which was not really disputed by the Bank, judgment was entered against us by default for non-compliance with notices in terms of Rule 35 of the Uniform Rules of Court. Attached, marked "**FA4**", is a copy of the judgment of the Court below. The relevant facts are fully set out on pages 2 to 4 thereof. I therefore do not repeat them.

18. We only became aware of the judgment which had been entered against us when we received the warrant of execution during April 2012. I then briefed

our present attorney, Mr Larry Marks, on 2 May 2012, to investigate the matter.

19. An application was brought in the South Gauteng High Court, Johannesburg, on 23 May 2012, under case number 22156/2010 (the same case number under which the Bank's action was brought). We also attempted to have the sale in execution to the Second Respondent set aside, but were not successful therein

20. On 5 October 2012, Kgomo J dismissed the rescission application. I deal later with the findings of the Court.

21. An application for leave to appeal was made against the judgment on 7 August 2012. Leave to appeal was refused on 5 October 2012. Attached, marked "**FA5**", is a copy of the order.

22. We thereafter applied to the Supreme Court of Appeal for leave to appeal, but on 22 February 2012, the Honourable Justices of Appeal Shongwe JA and Pillay JA dismissed our application for leave to appeal with costs. Attached, marked "**FA6**", is a copy of the order.

CONDONATION

23. The order of the Supreme Court of Appeal, although dated 22 February 2013, only came to our attention on 3 April 2013, when the Second

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Respondent (Ms Lee) gave us a copy thereof. Up until that stage both my wife and I (as well as our attorney) were unaware of the Court order.

24. Our attorney had appointed correspondents in Bloemfontein, namely Symington De Kok Attorneys, who had not notified our attorney of the Court order.

25. On 9 April 2013, an associate of our attorney, Mr Luzuko Mbunye, communicated with a Symington De Kok Attorneys, who confirmed that the application for leave to appeal had been dismissed.

26. Our attorney thereupon briefed counsel to draft these papers. They will be served and filed timeously, namely fifteen days permitted by Rule 19(2) of the Rules of this Court, from the date upon which we obtained knowledge of the dismissal of the application by the Supreme Court of Appeal.

27. I submit that, through no fault of us or our attorney, the Court order had not come to our attention earlier. As soon as the Court order came to our attention, papers were drawn up expeditiously and this application served and filed. As appears later, the prospects of success are good. Neither we, nor our attorney, can be blamed for the lateness of this application.

28. It is in the interests of justice that condonation be granted.

THE DECISION AGAINST WHICH THE APPEAL IS BROUGHT AND THE GROUNDS UPON WHICH SUCH DECISION IS DISPUTED (RULE 19(3)(a))

29. I have already referred to the judgment of Kgomo J (attached as "**FA4**").

30. The first issue which the Court decided was that a termination of debt review can take place even after enquiry at the Magistrate's Court had been finalised (p. 5, ls 6-10). The Court then refers to the judgment of the Supreme Court of Appeal in **Collett v FirstRand Bank Ltd** 2011(4) SA 508 (SCA).

31. The Court then went on and held that because the applicants were, as at May 2012, in arrears of some R25 000, the Bank was entitled to proceed to legal action.

32. **Collett** is not comparable to the facts of this case. In **Collett**, contrary to the present matter, the hearing in terms of Section 87 of the NCA was still pending. In the present case, a re-arrangement in terms of Section 87 had taken place. In addition, in the present case the re-arrangements, together with the effects of the debt review set out in Section 88 of the NCA took effect.

33. Another ground of appeal in respect of which it is submitted that the Court below erred, was that it ignored the order when it did not take into account that the order prevented legal proceedings taking place while it was still in effect. This will be elaborated on later.

34. The Court below accordingly erred in not setting aside the judgment which was obtained by default, whether in terms of Rule 42, the common law or

Rule 31 of the Uniform Rules. The application in the Court below was based on all these three grounds in the alternative (FA: para 2).

CONSTITUTIONAL MATTER AND RELATED ISSUES (RULE 19(3)(b))

35. I submit that it is in the interest of justice that leave to appeal be granted to this Court.

36. This Court held in **Sebola & Another v Standard Bank of South Africa Ltd & Another** 2012(5) SA 142 (CC) (at para [36]) that matters such as the present raise constitutional issues. My wife and I are previously disadvantaged South Africans. One of the aims of the NCA is to enable all persons to have access to credit.

37. In addition, there are other constitutional values which are implicated in this matter. The are the right to access to Court (enshrined by Section 34 of the Constitution), the right to access to housing (Section 26(1)) and the principle of legality which is inherent in our constitutional democracy.

38. The order in terms of the NCA to pay the instalments provided for in that order protected our primary residential property from execution. That order was never set aside. As is apparent from "**FA2.1**", the Bank purported to act under Section 86(10) of the NCA and terminated the review forthwith. It will be argued later that it acted in terms of the wrong section.

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39. The property was purchased for a purchase price of R450 000 and is currently worth some R1 195 000. We reside on the property with, amongst others, our minor grandchildren. As we are currently under debt review, our credit rating is compromised and we will not be able to purchase another dwelling which is the principal and core asset in our estate.

40. Our defence to the Bank's claim was the existence of the order. We considered that we were under debt review and that there was a valid order to the effect. We furthermore considered that the debt review had not been terminated and the order was still valid.

41. The incorrect finding by the Court below that the order was no longer in existence because the debt review had been terminated, effectively destroyed our constitutional right of access to housing and also interfered with our right of access to Court.

42. We had a constitutional right to place our defence before the South Gauteng High Court at a trial (which is imminent) and to put the Bank to the test as to whether or not the debt review had been terminated and whether the order remained valid. Had the High Court come to the conclusion that the debt review had not been terminated and the order was valid, the action would have been dismissed. The further constitutional issue, the doctrine of legality, plays a principle part in this matter. We are advised that this principle in this case is based on the fact that an order validly made by one Court cannot simply be ignored by another without such order having been set aside, either on appeal or by review. In this regard reference will be

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made to the Master of the High Court (**North Gauteng High Court, Pretoria v Motala NO & Others** 2012(3) SA 325 (SCA) and **Van Rensburg & Another NNO v Naidoo & Others NNO / Naidoo & Others NNO v Van Rensburg NO & Others** 2011(4) SA 149 (SCA), para [47]). It stands to reason that total anarchy will be created if one Court can simply ignore a valid and lawful order of another Court.

SUPPLEMENTARY INFORMATION AND ARGUMENT (RULE 19(3)(c))

43. I am advised that it is necessary to give a short overview of the application for debt review and the effects thereof.

44. Section 86 of the NCA provides for the application for debt review. Section 86(10) provides that if a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider may give notice to terminate the review at any time at least 60 business days after the date on which the consumer applied for debt review.

45. Section 87 deals with the powers of the Magistrate's Court to re-arrange a consumer's obligations. Section 88 sets out the effect of a debt review or re-arrangement order. In Section 88(3) deals with default under a debt review.

46. In the present case, the Bank's claim is based on Section 86(10) of the NCA (declaration: para 15). It relies squarely on the Applicants having applied for debt review more than 60 business days before the summons was issued. It

never purported to act under Section 88(3) of the NCA. If it had wanted to do so, it should have based its case thereon.

47. Reverting to Section 86(10), this should be read in conjunction with Section 129(1) and Section 130(1)(a) of the NCA. These sections are not entirely clear, but a proper reading thereof renders the interpretation that a period of ten business days must have elapsed from the date of delivery of notice to the consumer before legal steps can be taken.

48. From these observations flow two conclusions. The first is the meaning of the delivering of a notice. The second is whether the Bank could rely on Section 86(10) in the case where a debt review resulted in an order by a magistrate.

49. In the first case, this Court held in **Sebola** (paras [75] to [77]) that mere dispatch by registered post was insufficient. *"This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office"* (para [75]). In paragraph [76] the Court dealt with the *"track and trace"* printout from the website of the SA Post Office. This can be done quickly and easily. The registered items number is entered, the location of the outcome appears and it can be printed.

50. Of importance is the injunction in paragraph [77] that *"the credit provider's summons or particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing*

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the consumer that the registered article was available for collection. Coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed in the absence of contrary indication and the credit provider may credibly aver, that notice of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office".

51. In the declaration and in the affidavits resisting the rescission application, the Bank did not comply with these requirements. The mere fact that **Sebola** was decided after the proceedings in the High Court had been instituted, is irrelevant.

52. Reverting to the second issue, the judgment of the KwaZulu / Natal High Court, Durban, in **FirstRand Bank v Raheman & Another** 2012(3) SA 418 (KZD), is instructive. In that case, a special plea was raised in terms of which consumers were declared to be over-indebted and that, in consequence, the plaintiff was not entitled to rely on Section 86(10). The issue in that matter (judgment: para [4]) was whether the credit provider is entitled to terminate the debt review in terms of Section 86(10) after the debt counsellor had referred the matter to the Magistrate's Court.

53. The crux of the judgment is found in paragraph [9]: *"In casu, not only is the matter pending before the Magistrate, an order has been made in terms of Sections 86 and 87 to re-arrange the debt. The plaintiff has not alleged that the defendants have defaulted the terms of the Court order granted on 10 May 2010. Therefore, the plaintiff is not entitled to exercise and enforce*

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by litigation any right under the credit agreement". This *dictum* is of equal application in the present case. This is not a mere dilatory defence, but an absolute defence, which resulted in the action being dismissed with costs.

54. The Court below should accordingly have come to the conclusion that the Applicants had two valid defences which go to the root of the plaintiff's cause of action. Either one or both unseated the Bank. It should accordingly have set aside the judgment obtained by default.

55. This is not the usual case of an appeal against the exercise of a discretion. Even if it were, the exercise of the discretion was based on wrong principles and on matters which go to the heart of the exercise of a discretion which entitles an appeal court to intervene.

COSTS

56. While we accept that this is a constitutional matter and that in constitutional matters the Courts are at large in awarding costs orders, this does not apply in this case.

57. In **Sebola** costs were granted against the bank (para [90]). The same order is sought in this matter.

58. In addition, **Sebola** was decided by this Court on 7 June 2012. The replying affidavit was filed on 9 July 2012 and the application was set down for argument on 24 July 2012.

59. The Bank strenuously opposed the application for leave to appeal in the face of **Sebola**. It persisted in its stance by opposing the application for leave to appeal to the Supreme Court of Appeal. Once **Sebola** was handed down, the Bank should have withdrawn its opposition and consented to the setting aside of the judgment obtained by default.

60. In these circumstances, the Bank should pay the costs of the Applicants in the Court below, the Supreme Court of Appeal, as well as in this Court.

CONCLUSION

61. I respectfully request this Court to grant the relief set out in the notice of motion to which this affidavit is attached.

DEPONENT

I CERTIFY that the deponent has acknowledged that he/she knows and understands the contents of this affidavit which was signed and sworn to, before me, at RANDBURG on this the 22 day of 04 **APRIL 2013**, the Regulations contained in Government Notice No. R.1258 dated 21 July 1972 (as amended), Government Notice No. R.4648 dated 19 August 1977 (as amended) and Government Notice No. R.774 dated 23 April 1982, having been complied with.

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
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