REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 17347/2011
DATE: 29/11/2012

In the matter between:

FIRST NATIONAL BANK, A DIVISION OF
FIRST RAND BANK LIMITED Plaintiff

and

FRANSCH, ADRIAN ERNEST Defendant

JUDGMENT

Dodson AJ:

Introduction

[1] This matter concerns the right of a bank to foreclose on a mortgage bond in circumstances where the loan has been subject to a debt rearrangement ordered by a magistrate's court in terms of section 87(1)(b)(ii) of the National Credit Act No. 34 of 2004 ("the NCA")[1] and the consumer has defaulted on his obligations in terms of the rearrangement.

[1] Section 87(1)(b)(ii) reads –

Factual background

[2] The facts in this matter are essentially common cause. In 2002, 2004 and 2005, mortgage bonds were passed over the immovable property of the defendant, being sectional title unit No. 69, Elspark, Klippoortje, Ekurhuleni. The amounts advanced were R192 000, R120 000 and R204 000 respectively.

[3] The defendant ran into financial difficulty and defaulted on his bond repayments for the first time on 25 February 2008. At around the same time, the defendant approached the National Credit Regulator established in terms of section 12 of the NCA. The National Credit Regulator referred the defendant to a debt counsellor registered in terms of section 44 of the NCA, being Ms Octavia Hlatshwayo of Mzansi Debt Counselling. The defendant then applied in terms of section 86(1) to the debt counsellor to be declared over-indebted.[2]

[4] The debt counsellor determined that the defendant appeared to be over-indebted as contemplated in section 86(6)(a)[3] of the NCA and accordingly

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(1)If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86(8)(b), or a consumer applies to the Magistrate's Court in terms of section 86(9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, may-

a) ...

b) make-

i) ...

ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii)."

[2] Section 86(1) reads-

"A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted."

[3] Section 86(6)(a)

"A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time-

a) whether the consumer appears to be over-indebted."

issued a proposal that the magistrate's court make an order rearranging the defendant's obligations in respect of his creditors in terms of section 86(7)(c)(ii)[4] of the NCA.

[5] From February 2008 until April 2008, the defendant made no repayments. From 5 June 2008 the defendant recommenced payments, but in a substantially reduced amount. Details in this regard are provided below.

[6] The debt counsellor's proposal seemingly did not find favour with the credit providers concerned. Accordingly, on 14 April 2009 the debt counsellor launched an application referring her recommendation to the magistrate's court, Germiston.

[7] On 16 March 2010, the magistrate's court made an order rearranging the defendant's obligations in terms of section 87(1)(b)(ii) of the NCA. As far as the

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[4] Section 86(7)(c)(ii) reads -

> *"(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably conclused that –*
>
> *(a) …*
>
> *(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-*
>
> *(i)…*
>
> *(ii) that one or more of the consumer's obligations be re-arranged by-*
>
> *(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;*
>
> *(bb) postponing during a specified period the dates on which payments are due under the agreement;*
>
> *(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or*
>
> *(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6."*

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plaintiff's debt is concerned, that order requires the defendant to pay instalments of R2 051.16 per month until June 2017. After that, a substantial additional contribution of R4 302.49 per month over and above the R2 051.16 per month is to be paid until October 2025.

[8] On 6 May 2010, and apparently unaware of the order in the magistrate's court, the plaintiff purported to address a notice to the defendant, the National Credit Regulator and the debt counsellor terminating the debt relief process under section 86. Consequent upon that notice, the plaintiff issued summons on 9 July 2010 claiming the full amount due under the three mortgage bonds, along with an order declaring the property executable. The action was defended.

[9] The plaintiff then brought an application for summary judgment which was set down for hearing on 21 September 2010. At this point the defendant resisted summary judgment on the grounds that the magistrate's court had made a rearrangement order. Upon being confronted with opposition to the summary judgment application on this basis, the plaintiff agreed to remove the matter from the roll.

[10] According to the defendant (and this was not placed in dispute by the plaintiff), as a consequence of his having to secure legal representation in defending the plaintiff's action he became liable to pay his legal representatives their fees. The debt counsellor accordingly diverted the greater portion of the amounts which were hitherto being paid to the plaintiff, towards the settlement of the defendant's legal expenses. The day after the first reduced payment of

R220,97 was made to the plaintiff on 7 October 2010, the debt counsellor addressed a letter to the plaintiff which read as follows:

> *"We refer to … the on-going litigation in regard to the 3000005103147 account. We have defended the matter and the matter is subject to litigation which is costing our client a fortune in legal fees, which our client cannot afford.*
>
> *The bank is well aware of our client's financial position, however intent on litigating in this matter (sic), notwithstanding the fact that you are receiving payments in respect of the outstanding amount each and every month as per the repayment proposal.*
>
> *Having regard to the above, and having regard to the fact that our client has been forced to incur unnecessary legal expenses … and you are unwilling or unable to deal with the debt review process, we have instructed our client to cease all payments in regard to the debt due to you until such time as the legal costs have been settled in full and accordingly we will instruct our client not to pay for the next few months and thereafter to resume payment to your account as per the repayment proposals.*
>
> *Unfortunately we have no other alternative as our client is not in possession of additional funds in which (sic) to fund the litigation and we believe that you are taking advantage of the situation by unnecessarily litigating. Please note that this letter will be brought to the attention of the necessary courts and we reserve our client's rights."*

[11] On 25 March 2011, the plaintiff purported to address a "*notice of default in terms of debt re-arrangement in terms of a court order in accordance with section 86(10) and/or read with section 88(3) of the National Credit Act*" to the defendant, the debt counsellor and the National Credit Regulator. The letter pointed out that the defendant had failed to make payments in accordance with the order of the magistrate's court. It referred to section 88(3) of the NCA and gave notice of the plaintiff's intention to proceed with legal action. The letter also purported, once again, to "*terminate the debt review with immediate effect*" in terms of section 88(1) of the NCA. It demanded repayment of the then outstanding balance of R114 125,96 within 10 business days, failing which legal proceedings were to be commenced.

[12] Following upon this, on 6 May 2011, and without withdrawing the earlier summons, a second summons was issued for the same relief.

[13] On 9 November 2011, the defendant's indebtedness in respect of legal expenses having been settled, payments to the plaintiff at the amount required in terms of the debt rearrangement order resumed at the required monthly amount.

[14] From 9 November 2011 until the present time, the defendant has maintained his monthly payments to the plaintiff at the level required by the rearrangement order.

[15] The trial was heard before me on 3 and 4 October 2012. Reference was made during cross-examination of the plaintiff's witness on the first day to the earlier proceedings based on the first summons. This resulted in the relevant file being located overnight and on the morning of the second day of the trial, the plaintiff filed a notice of withdrawal of that action, excluding any tender of costs, in order to pre-empt a threatened plea of *lis pendens*.

The issues

[16] The plaintiff relies on section 88(3) of the NCA. It provides -

> *"Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until-*
>
> *(a) the consumer is in default under the credit agreement; and*
>
> *(b) one of the following has occurred:*

(i) an event contemplated in subsection (1)(a) through (c); or

(ii) the consumer defaults on any obligation in terms of a rearrangement agreed between the consumer and credit providers, or ordered by a court or Tribunal."

[17] An event as referred to in section 88(3)(b)(i) means, in essence, the entering into by a consumer of a further credit agreement after filing an application for debt review in terms of section 86(1), which triggers the forfeiture by the consumer of the protections afforded by part D of Chapter 4 of the NCA against over-indebtedness and reckless credit. It is not relevant in these proceedings.

[18] Instead, the plaintiff relies on –

[18.1] the defendant's being in default under the credit agreement as contemplated in section 88(3)(a); and

[18.2] the defendant's default in paying the amounts due in terms of the rearrangement order as contemplated in section 88(3)(b)(ii).

[19] The consequence of these defaults, argues the plaintiff, is that the prohibition on commencement of legal proceedings to enforce a credit agreement in section 88(3) falls away and the plaintiff may commence legal proceedings without further notice to the defendant.

[20] The defendant raised a number of defences:

[20.1] The defendant adopted the stance that there is an order of the magistrate's court in place. The grant of the relief sought by the plaintiff would be in conflict with that order. The rearrangement order would

therefore have to be rescinded or varied before the plaintiff could bring legal proceedings against the defendant.

[20.2] The defendant contends that notice is required before commencement of legal proceedings in these circumstances. In this regard, the defendant contends that the registered mail receipts and internet tracking printouts pertaining to the notice dated 25 March 2011 do not reflect successful delivery to the defendant's post office. Moreover, the defendant testified that he never received this notice.

[20.3] The defendant contends that this court has the discretion in terms of section 85 of the NCA to afford further debt relief to the defendant, either itself or through a referral of a matter to a debt counsellor.

[20.4] The defendant contests the plaintiff's reliance on the certificate of balance on which it relies for proof of the amount payable.

[20.5] The defendant relies on his right to adequate housing in terms of section 26 of the Constitution and contends that upon the exercise of this court's discretion required thereby before a property is declared executable, it should be found that it would be inappropriate to declare his property as such.

Rescission first?

[21] The defendant argues that it is self-evident that before proceedings can be commenced where a rearrangement order in terms of section 87 is in place, it

has to be rescinded. The plaintiff contests this and argues that all it need do is ensure that it complies with section 88(3) of the NCA.

[22] The primary function of section 88(3) is to place a prohibition on litigation in order to allow a debt-review or debt restructuring[5] process to take place free of the pressure of pending litigation.

[23] Once the debt-review process has been completed, it may culminate in an order under section 87,[6] or a voluntary rearrangement under sections 86(7)(b) or 86(8)(a). If it does, the outcome is an amended credit transaction between parties.[7] That amended credit transaction also requires protection from litigation because even if the consumer complies with its terms, under the original credit transaction the consumer is still in default. Hence section 88(3) extends the prohibition on litigation until *"the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal"*. That, however, is as far as the protection from litigation extends. On the clear wording of section 88(3), that protection ends at the point of default under the rearrangement order.

[24] It cannot, in my view, be said that the need for a rescission of the rearrangement order before commencing legal proceedings is *"self-evident"*. A rearrangement order only amends the repayment terms of the credit transaction. The order itself does not prohibit legal proceedings against the

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5 Whether in terms of sections 83, 85 or 86 of the NCA.

6 Read, where appropriate with section 83(3)(b)(ii) or 85(b).

7 See *Collett v FirstRand Bank Ltd (National Credit Regulator as amicus curiae*) [2011] 3 All SA 585 (SCA) at p593 para 11.

consumer. Thus legal proceedings consequent upon a default under a rearrangement order do not conflict with or seek to amend the rearrangement order. On the contrary, they deal with the consequences of its breach. It is the consumer that breaches the rearrangement order when he or she defaults, not the credit provider when it brings proceedings consequent upon the consumer's default.

[25] A similar argument to that raised by the defendant was rejected in *FirstRand Bank Ltd v Fillis and Another*.[8] The court held as follows:

> *"[17]On behalf of the defendants, it is argued that because the application for a rearrangement order in terms of section 86(7)(c) is an application governed by the Rules of the Magistrates' Courts, a credit provider cannot proceed to enforce its rights until it has first moved to rescind the rearrangement order, in accordance with the provisions of s 36 of the Magistrates' Courts Act 32 of 1944. The provision of s 88(3), so it is argued, simply give the plaintiff the right to now apply for a rescission of the rearrangement order. This, it is contended, is so, because orders of court do not automatically fall away, unless specifically authorised by an Act.*
>
> *[18] In my view, the restraint placed upon a credit provider, in consequence of a credit review process and a rearrangement order, does, in this instance, fall away on the express authority of s 88(3). This interpretation accords too with the provisions of s 129(2) of the Act."*[9]

[26] The defendant referred to two unreported judgments which he argued had come to a different conclusion from that arrived at in the *Fillis* case. The first was *FirstRand Bank Ltd v Britz and another.*[10] That case dealt with a summary judgment application. There, the defendants had defaulted on the

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8 2010 (6) SA 565 (ECP)

9 S 129(2) is dealt with below.

10 (5243/2011) [2012] ZAFSHC 13 (9 February 2012).

rearrangement order in that there was a short payment in one month which the defendant had later attempted to remedy. In addition, payments had not always been timeous. In refusing summary judgment, the court had regard to the fact that it did not appear on the facts that the defendants were still in arrears. The court also took into account that the defendants had demonstrated their willingness and ability to comply with the restructured debt commitment. The court had regard to the purposes of the Act as being to promote a fair and transparent credit market and to protect consumers. Because the matter fell within the purview of the NCA, the court considered that the matter ought to be decided on the basis of the purpose of the legislation.[11]

[27] This reasoning is at odds with that in the *Fillis* case. The decision does not however refer to the provisions of section 88(3) of the NCA. It is therefore of relatively little assistance for present purposes. The case is also distinguishable from the present one on the grounds that it was a summary judgment application and further that in this case it is common cause that the defendant is in default under the rearrangement order. The decision is also not binding on me.

[28] The other decision relied on by the defendant was *The Standard Bank of SA v Daya NO and others*.[12] That case also concerned an application for summary judgment in circumstances where the third defendant was alleged to have failed to make the payments due under a debt rearrangement order of the Port Elizabeth Magistrates Court.

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[11] At paras 24 – 25.

[12] (540/2012) [2012] ZAECPEHC 33 (24 May 2012).

[29] The court accepted the decision in *FirstRand Bank v Fillis* as being correct.[13] It referred to section 88(3) of the NCA and recognised that enforcement proceedings could be commenced if the consumer was in default under the credit agreement and in addition had defaulted on a rearrangement order or agreement.[14] Summary judgment was however refused because it was not clear that the defendant had defaulted under the rearrangement order. Nowhere is it suggested in the judgment that a rescission of the rearrangement order was required before legal proceedings could be commenced.

[30] I am thus of the view that it was not incumbent upon the plaintiff to seek the rescission of the rearrangement order before commencing the present proceedings.

Was prior notice required?

[31] The defendant argues that the plaintiff was obliged to give notice in writing to the defendant before commencing the current proceedings. He relies for his contention on sections 86(10), 123 and 129 of the NCA.

[32] The notice requirements of section 129 are contained in section 129(1).[15] However section 129(2) provides as follows:

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[13] At para 7 and fn 3.

[14] At para 7.

[15] The relevant provision reads as follows:

> "***129. Required procedures before debt enforcement***
>
> *(1) If the consumer is in default under a credit agreement, the credit provider-*
>
> *(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the*

> *"Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order."*

[33] Given that we are concerned in this instance with a credit agreement that is indeed subject to a debt rearrangement order, there cannot be a notice requirement based on section 129(1).

[34] Section 86(10) is a provision which allows a credit provider to terminate the debt review process under section 86 once 60 days have run since the date when the consumer applied for debt-review in terms of section 86(1). It provides as follows:

> *"If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to -*
>
> *(a) the consumer;*
>
> *(b) the debt counsellor; and*
>
> *(c) the National Credit Regulator,*
>
> *at any time at least 60 business days after the date on which the consumer applied for the debt review."*

[35] That provision has been the subject matter of a number of reported cases in the context of whether or not such notice terminating the debt review process may be sent after either the debt counsellor or the consumer has applied to the magistrate's court for a debt rearrangement order, but before such an order is made. The conflicting views of the various high courts on that matter were

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agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to s 130(2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be, and

(ii) meeting the further requirements set out in section 130."

addressed by the Supreme Court of Appeal in the matter of *Collett v FirstRand Bank Ltd (National Credit Regulator as amicus curiae).*[16] Although the decision dealt with the situation before and not after the rearrangement order of the magistrate's court, it is helpful in identifying precisely when the debt review process is complete. This aspect is relevant to the present matter because it could not be expected of a credit provider to give notice of termination of the debt review process if that process was already complete.

[36] The Supreme Court of Appeal described the debt review process as follows:

> *"[11]The debt counsellor is charged to determine whether the consumer 'appears' to be over-indebted, and must issue a proposal recommending any or all of the orders set out in section 86(7)(c). The debt counsellor's involvement in the debt review is no end in itself but part of an on-going process culminating in the order of the Magistrate's Court under section 87 (or a voluntary rearrangement under sections 86(7)(b) and 86(8)(a). Only then can the debt review be said to be complete."* (emphasis added)

[37] Applying this judgment, the debt review process in the present matter was completed on 16 March 2010 when the magistrate's court made its rearrangement order. The debt review process having been completed, there could not have been any need, or obligation cast upon the plaintiff, to terminate the debt review process by way of a notice in terms of section 86(10) of the NCA.

[38] The other provision relied on by the defendant was section 123. Section 123 deals with "*termination of agreement by credit provider*". The only express provision requiring notice in section 123 is in section 123(3)(b), which requires

[16] [2011] 3 All SA 585 (SCA).

10 days' written notice before a *"credit facility"* is closed. A *"credit facility"* is described in section 8(3) and does not cover the agreement we are concerned with here.

[39] Section 123(2) provides –

> *"If a consumer is in default under a credit agreement, the credit provider may take the steps set out in part C of chapter 6 to enforce and terminate that agreement."*

[40] The notice provisions of part C of chapter 6 are those contained in section 129(1) which, as pointed out above, does not apply in the present instance because of the provisions of section 129(2). Accordingly I do not consider section 123 to impose any obligation to give notice on the defendant.

[41] In *FirstRand Bank v Fillis*,[17] the court held as follows:

> *"[14]… The Act provides very extensive protection to a consumer who has become over-indebted, whether it be of his or her own making or through circumstances beyond his or her control. Not only does a rearrangement afford him or her alleviation from the onerous monthly obligations that he or she has in all seriousness undertaken to his or her credit providers, but he or she also enjoys the protection of s 103(5) against the ravaging effect of escalating interest whilst he or she remains in default under the credit arrangement. If, however, he or she fails to embrace this opportunity, or he or she is, notwithstanding this very considerable assistance, unable to comply with his or her restructured debt commitment, the Act permits the common law to run its course."*
>
> *[15] …*
>
> *[16] It follows, in my view, as a matter of interpretation, that once the jurisdictional requirement set out in s 88(3)(a) co-exists with any one of the jurisdictional requirements set out in s 88(3)(b), the credit provider is at liberty to proceed and exercise and enforce,*

[17] See footnote 8 above.

> *by litigation or other judicial process, any right or security under his credit agreement, without further notice."* (emphasis added)

[42] This decision was followed by Musi JP in *FirstRand Bank Ltd v Grobler*[18] where the court dealt with the question of whether or not prior notice was required to be given in terms of either section 129(1) or section 86(10) of the NCA after default under a rearrangement order. The court held that it was not.[19]

[43] In the circumstances, I am satisfied that it was not incumbent upon the plaintiff in this matter to give notice to the defendant before commencing proceedings. It is therefore unnecessary to deal with the consequences of the fact that, as was shown in the evidence, the plaintiff's notice dated 25 March 2011 failed to reach the defendant. The failure to give effective notice has no bearing on the matter.[20]

Can the defendant rely on s 85?

[44] The defendant asks that I exercise my discretion in terms of section 85 of the NCA to provide further debt relief to the defendant and on that basis dismiss the claim brought by the plaintiff. Section 85 provides as follows:

> ***"85. Court may declare and relieve over-indebtedness***
>
> *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*

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[18] (6446/2010) [2011] ZAFSCHC 58 (17 March 2011).

[19] See paras 7 – 10.

[20] Contrast *Sebola v Standard Bank of SA Ltd* 2012 (5) SA 142 (CC).

> *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."*

[45] I will assume in favour of the defendant that that remedy is potentially available to him, notwithstanding that he has already been through a debt-review process in terms of section 86 of the NCA.

[46] In *Standard Bank of SA Ltd v Panayiotts*[21] Masipa J held as follows in the context of a defence of over-indebtedness based on section 85:

> *"[8] A party (the consumer) who raises a defence of over-indebtedness must plead and prove the defence, which includes proving that he is over-indebted as envisaged in s 79 of the NCA.*
>
> *[9] Having regard to the wording of s 79, such proof must inevitably involve details of, inter alia, the consumer's financial means, prospects and obligations. financial means would include not only income and expenses but also assets and liabilities. Prospects would include prospects of improving the consumer's financial position, such as increases, and, even, liquidating assets."*[22] (emphasis added)

[47] In the pleadings in the present matter, there is no reference whatsoever to section 85. On that basis alone, the defence must fail. Moreover, there has been no attempt in these proceedings to present any detailed evidence regarding the defendant's financial means, prospects and obligations. It is so that the magistrate's court made an order in terms of section 87 on the basis that the defendant was over-indebted, but that is not a sufficient evidentiary basis for a similar order in these proceedings at this time.

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[21] 2009 (3) SA 363 (W).

[22] See also *FirstRand Bank Ltd v Olivier* 2009 (3) SA 353 (SECLD) and *Andrews v Nedbank* 2012 (3) SA 82 (ECG) at paras 13 – 24 where a similar approach was adopted.

[48] In the circumstances, there is no basis for me to make an order as contemplated in section 85(a) or (b) of the NCA.

Does the defendant's right to housing preclude relief?

[49] In *Jaftha v Schoeman and others; Van Rooyen v Stoltz and others*[23] the Constitutional Court provided the following guidance regarding the exercise by a court of the requisite discretion before allowing execution to proceed against immovable property as follows:

> *"[56]…If there are other reasonable ways in which the debt can be paid an order permitting a sale in execution would ordinarily be undesirable. If the requirements of the Rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless.*
>
> *[57] It is for this reason that the size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor. However this will depend on the circumstances of the case. … In this regard, it is important too to bear in mind that there is widely recognised legal and social value that must be acknowledged in debtors meeting the debts that they incur.*
>
> *[58] 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 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.*

[23] 2005 (2) SA 140 (CC) at paras 56 – 59.

> *[59] A final consideration will be the availability of alternatives which might allow for the recovery of debt but do not require the sale in execution of the debtor's home. … The balancing should not be seen as an all or nothing process. It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort.*
>
> *[60] In summing up, factors that a court might consider, but to which a court is not limited, are: The circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court."*

[50] In *Gundwana v Steko Development and others*[24] the Constitutional Court dealt with the application of the discretion required to be exercised by the *Jaftha* decision in the context of foreclosure on a mortgage bond and declaring of the property to be specially executable. The court held as follows :

> *"[48] An agreement to put one's property at risk as security in a mortgage bond does not equate to a licence for the mortgagee to enforce execution in bad faith.*
>
> *[49] I conclude that the willingness of mortgagors to put their homes forward as security for the loans they acquire is not by itself sufficient to put those cases beyond the reach of Jaftha. An evaluation of the facts of each case is necessary in order to determine whether a declaration, that hypothecated property constituting a person's home is specially executable, may be made. …*
>
> *[50] …*
>
> *[53] Some further cautionary remarks are called for. [C]onstitutional considerations … do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. What it does is to caution courts that, in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, that alternative course should be judicially considered before granting execution orders.*

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[24] 2011 (3) SA 608 (CC).

> *[54] … It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."*

[51] Applying these decisions to the present matter, one is dealing here with neither a trifling debt nor an indigent defendant. On three separate occasions, the defendant elected to put up his house for security for his debt against the risk of forfeiture of the family home in the event of non-payment of his debt. Both the defendant and his wife are employed although the latter at an airline which is in some financial difficulty. They have a young child. The home is indeed their primary residence. It is in a middle class but not an affluent part of the city. The effect of execution against the property is unlikely to be homelessness. The defendant testified that he would have an amount of R3 000 per month available for purposes of rental.

[52] The circumstances relevant to the exercise of my discretion are however intimately bound up with the circumstances preceding, during and following the debt review. As pointed out above, it is common cause that the defendant's reduction of his repayments to the plaintiff in terms of the rearrangement order, was the consequence of the plaintiff's having had to defend the earlier proceedings. The defendant's contention is that those proceedings were brought in breach of the prohibition on legal proceedings in section 88(3) of the NCA and that the plaintiff should not be able to benefit from its own wrong in this regard.

[53] Having regard to the emphasis placed on examining whether there was an abuse of court process in the *Jaftha* case and the relevance of bad faith on the part of the party seeking execution in *Gundwana*[25] I am inclined to agree with this argument, provided that it has been shown by the defendant that the earlier proceedings were indeed brought in breach of section 88(3) of the NCA.

[54] This requires an examination of the circumstances preceding the issuing of the first summons. In this regard, included in the plaintiff's trial bundle was a complete set of statements of account reflecting all of the debits and credits on the defendant's mortgage loan account for the period of its duration ("the statement of account"). The statement of account was not contested and was indeed relied upon by the defendant in relation to his challenge to the certificate of balance, to which I will refer below.

[55] What the statement of account shows is that the defendant first defaulted on his monthly instalments, then in an amount of R5 186.86, on 25 February 2008. Similar defaults followed immediately thereafter. These were attributed in evidence to the over-indebtedness of the defendant, the need to pay the debt counsellor's initial statutory fee and other expenses related to the debt review process.

[56] The restructured debt repayment plan proposed by the debt counsellor envisaged adjusted monthly instalments of R2 051,16 commencing from June 2008. Apparently in response to this, and notwithstanding that the debt counsellor's proposal had yet to be agreed upon or made an order of the

[25] At para [44](c), for example.

magistrate's court, the defendant recommenced payments from 5 June 2008. These were monthly payments of just over R2 000, which were just short of the amount of R2 051.16 provided for in the debt counsellor's repayment plan.

[57] After the launch of the application to the magistrate's court in terms of section 86(8)(b) of the NCA on 14 April 2009, the payments remained at this level.[26] However, on 12 October 2009, the payment dropped to an amount of R1 835.83, on 6 November 2009 to an amount of R1 694.06, on 23 December 2009 to an amount of R1 884.18, on 4 February 2010 to an amount of R1 725.42 and on 11 March 2010 to an amount of R1 712.85. Accordingly, by the time of the rearrangement order on 16 March 2010, the payments had dropped to some R300 less than the repayments required by what was now an order of the magistrate's court.

[58] On 6 April 2010, being the first payment due under the amended terms of the credit agreement determined by the magistrate's court, a repayment of only R1 536.90 was made, being more than R500 less than the amount required in terms of the court order just made. On 6 May 2010, an amount of R1 694 was paid, again falling significantly short of the amount required in terms of the court order. On 2 June 2010, an amount of R1 890.80 was paid, again short of the amount due in terms of the court order. This was the position when the plaintiff issued the first summons on 9 July 2010.

[26] More precisely, the payments in the months immediately after 14 April 2009 were R2026.47 per month (ie R24,69 short of the payments under the debt counsellor's plan).

[59] For the following three months, payments were made in the amount of R2 121 per month, in excess of the amount of R2 051.16 required by the rearrangement order. However, as explained above, from 7 October 2010 the repayments were drastically reduced on account of the need to pay legal fees. From 9 November 2011, payments at or slightly above the level required by the rearrangement order were resumed and have apparently persisted.

[60] The upshot of this is that when the plaintiff issued the first summons the defendant was in fact in default of his obligations in terms of the rearrangement order. Thus the commencement of those proceedings was not in breach of section 88(3) of the NCA. In these circumstances it is not possible, in my view, to hold that the commencement of those proceedings amounted to an abuse of the court process as envisaged in *Jaftha* or to an act of bad faith on the part of the plaintiff.

[61] One would have expected that the defendant, having received the second chance afforded him by the rearrangement order, to seize the opportunity with both hands and to ensure scrupulous compliance with its terms. Yet, after the making of that order and before any legal proceedings, the payments were in fact reduced from those which he had hitherto been making. This suggests that the defendant in incurring the legal costs associated with defending the first summons must to a significant degree be considered to have been the author of his own misfortune. In those circumstances, one would have expected the adoption of a less confrontational attitude than that reflected in the letter addressed by the debt counsellor to the plaintiff on 8 October 2010, announcing the unilateral reduction in repayments in breach of the

rearrangement order. A proper approach, in my view, required an application to the magistrate's court to vary the rearrangement order before the unilateral reduction in payments. At the very least one would have expected the letter to the plaintiff to have sought the plaintiff's consent to the reduction before its unilateral implementation.

[62] I also take into account that, whilst the defendant is currently meeting the amount required in respect of his monthly repayments, there was no evidence on his part as to how he intended to make up the arrears which have accumulated under the restructured debt. The defendant's patchy record in relation to repayment does not bode well for future compliance with the rearrangement order, particularly once he becomes obliged to make the "additional contribution" of R4 302.49 per month.

[63] In all the circumstances, I am not satisfied that refusal of the relief sought by the plaintiff is justified on the grounds of any breach of the defendant's right to adequate housing in terms of section 26(1) of the Constitution and his right not to be subjected to eviction in contravention of section 26(3) of the Constitution.

Certificate of balance

[64] Each of the mortgage bonds contains a clause 16 which provides as follows:

> *"16 <u>CERTIFICATE OF AMOUNT OWING</u>*
>
> *A certificate purporting to be signed on behalf of the Bank shall be proof until the contrary is proved of the balance owing and the fact that it is due and payable, and the authority of the signatory and the validity of the signature need not to be proved. The certificate shall be valid as a liquid document for the purposes of obtaining provisional sentence, summary judgment or default judgment."*

[65] The plaintiff sought to rely on a certificate of balance purportedly signed by one Amelia Du Buisson, the Manager: Collections, which read as follows:

> *"CERTIFICATE OF BALANCE*
>
> *ATTORNEY: STRAUSS DALY ATTORNEYS*
>
> *ACCOUNT NO:3000-005-103-147*
>
> *I hereby certify that the Home Loans account balance standing to the Debit of **FRANSH A** in the books of this Branch on the evening of **15 APRIL 2011** amounted to R541,623,36 (five hundred and forty one thousand, six hundred and twenty-three rand thirty-six cents). Interest is accrued at a rate of **7.50**% calculated daily and compounded monthly from **25 MARCH 2011**."*

[66] In support of this certificate, the plaintiff led the evidence of its attorney who on a weekly basis witnesses the signing by Ms Du Buisson of the said certificates of balance. Under cross-examination, it became apparent that he was not, however, able specifically to recall the occasion of the signing of the particular certificate in question. Nonetheless his evidence that the signature was indeed that of Amelia Du Buisson was not challenged.

[67] The certificate was challenged by the defendant on three separate bases. The first was that the second sentence in clause 16, quoted above, confines the use of the certificate to the particular forms of legal proceeding there mentioned, namely provisional sentence, summary judgment or default judgment.

[68] A similar argument was rejected by the Supreme Court of Appeal in the matter of *Senekal v Trust Bank of Africa Ltd*[27] where the court held as follows:

> *"[Counsel] sought to attach a limiting or exclusionary meaning and purpose to the words 'to such an extent that the bank may obtain provisional sentence …'. It appears to me, however, that the purpose of adding the words at the end of the certificate clause was*

[27] 1978 (3) SA 375 (A) at 381F – 382F.

> *to extend rather than to limit the scope of applicability of the fundamental provision that such a certificate was to constitute prima facie evidence of the amount of the debt owed to the bank by the principal debtor. Whenever a bank claims payment of money said to be owing to it by a customer who enjoys overdraft facilities on a current account which fluctuates, possibly from day to day, it must needs rely on its books of account and other records of transactions in order to establish the amount due to it. To prove every one of the many entries in the books, which may have been made from time to time by a large number of different employees, might for obvious reasons sometimes be extremely difficult. … The main purpose of the certificate clause was clearly to facilitate proof of the amount of the principal debtor's indebtedness to the bank at any given time. … We are not now concerned, however, with the questions whether the certificate itself, read with the deed of suretyship, would have rendered the claim sufficiently liquid to entitle the respondent to provisional sentence, but with the question whether such a certificate can have value in the sense of constituting prima facie evidence of the amount of the indebtedness in proceedings such as were instituted by respondent, and to that question the answer appears to me, on construction of the agreement, to be 'Yes'."*

[69] For the same reasons I am of the view in this matter that the effect of the second sentence of the clause is to extend rather than to narrow the range of proceedings in which such a certificate would be admissible as *prima facie* proof of the balance owing and the fact that it is due and payable.

[70] The second challenge to the certificate was that the witness who testified as to its authenticity was not able to recall the specific occasion on which the certificate of balance was signed in front of him. In my view this argument is met by the wording of the clause itself where it is provided that *"the authority of the signatory and the validity of the signature need not be proved."* The evidence of the attorney was accordingly superfluous in this regard. In any event the testimony that the signature was indeed that of Ms Du Buisson was not challenged.

[71] The third challenge to the certificate pertains to items debited to the defendant's statement of account in respect of "*legal fees"* between the period 9 July 2010 and 13 August 2012. It was put to the plaintiff's witness in cross-examination that these must pertain to legal fees in respect of the first summons issued on 9 July 2010 and subsequent proceedings as well as the current pending proceedings. It was further put to him in cross-examination that these amounts were wrongly debited in the absence of any costs order having been granted against the defendant in favour of the plaintiff. Because the plaintiff's sole witness had no personal knowledge of the entries on the bank statement he was not able to shed any light on these items.

[72] It was argued on behalf of the plaintiff that the effect of the certificate of balance was such as to place the evidentiary burden on the defendant to prove that these amounts were in fact amounts wrongly debited in respect of legal costs for these proceedings and the earlier proceedings.

[73] It was argued on behalf of the defendant that, the plaintiff having discovered and included the statement of account in its trial bundle, the debits having been identified in the way which they were in the statement and having corresponded precisely with the period during which the defendant had been subject to legal proceedings at the instance of the plaintiff, no reliance could be placed on the certificate of balance and that the plaintiff's claim should be dismissed.

[74] The first of the legal fees reflected as a debit on the statement of account coincides precisely with the date of issue of the first summons, being 9 July

2010. Amounts have been debited at regular intervals since that time with the final debit reflected as having been made on 13 August 2012.

[75] In my view, the coincidence is too significant to ignore. The plaintiff included the statement of account in its trial bundle. It was conceded by the plaintiff's witness that the statement of account formed the basis upon which the certificate of balance was prepared because the statement reflects the balance between 12 and 19 April 2011 as being R541 623.36 which is the amount reflected in the certificate of balance as being due at 15 April 2011. The plaintiff's sole witness could not refute the assertion put to him that these payments, totalling R7 709.23 as at 15 April 2011, could pertain to the costs associated with the issuing of the two summonses.[28]

[76] This is significant because the plaintiff has withdrawn the first summons and the defendant is *prima facie* entitled to a costs order in his favour consequent upon such withdrawal. Were I to order the defendant to pay the sum reflected in the certificate of balance, absent a proper explanation for those debits, there is a risk of the defendant paying the costs of the earlier proceedings when the plaintiff has withdrawn them and the issue of the costs of those proceedings has yet to be decided.

[77] What is the consequence of this flaw? The defendant argues that the plaintiff has, in the circumstances, failed to prove its case and that its claim therefore

[28] The subsequent debits for legal fees on the statement of account may be ignored because the amount claimed in the declaration is based on the certificate of balance dated 15 April 2011.

stands to be dismissed. The plaintiff relies on *Senekal v Trust Bank*[29] to argue that reliance may be placed on a certificate of balance notwithstanding there being some imperfections in it. There it was held as follows :

> *"Mr du Toit's contention was, in effect, that once such a certificate is shown to be suspect as to its accuracy or reliability in any respect whatever, it has no evidential value and must be entirely disregarded. I have no doubt that that broad contention must be rejected. There might be several items to which such certificate relates, some of which may appear to be unassailable while others may either be shown to be inaccurate or appear to be of dubious reliability, or might require some modification or adjustment. I can find no reason why in such circumstances the certificate is to be entirely disregarded merely because it is found or thought to be inaccurate or unreliable in certain respects."*[30]

[78] Applying this judgment to the circumstances of the present matter, I am satisfied that the certificate of balance does constitute adequate evidence in respect of that part of the balance which is unaffected by the debits in respect of legal fees. The amount debited in respect of legal fees as at the date of the certificate of balance is easily ascertainable and can be deducted from the amount claimed.[31] Accordingly, the amount claimed should simply be subject to modification along the lines suggested in *Senekal v Trust Bank*. It is so that interest will have been charged on the amounts debited in respect of legal fees. In my view, appropriate provision can and will be made in this court's order to ensure that in this respect, too, an appropriate modification is made.[32]

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[29] See para 68 above.

[30] At 382 F-G.

[31] The amount claimed is R541 623.36. This amount is reduced to R533 914.13 after the deduction of the amount of R7 709.23.

[32] The parties were invited at the conclusion of the trial to provide me with this amount. I was belatedly provided with a spreadsheet from which I was not able to discern it.

[79] In the circumstances, I am satisfied that the plaintiff has proven its claim on a balance of probabilities in respect of a lesser amount. In relation to the amount of R7 709.23 charged in respect of legal fees, the plaintiff has failed to prove its claim and absolution from the instance should be granted.

[80] I grant absolution from the instance in respect of the amount of R7 709.23.

[81] I grant judgment in favour of the plaintiff against the defendant for-

(a) Payment of the sum of R533 914.13, less the interest charged on the amounts debited in respect of "legal fees" on the defendant's statement of account between 9 July 2010 and 15 April 2011;

(b) Interest on the net amount referred to in paragraph (a) at the rate of 7,50% per annum calculated and capitalised monthly in arrears from 25 March 2011 to date of payment, both days inclusive;

(c) An order declaring to be executable the immovable property described as –

"A unit consisting of-

(a) Section No. 69 as shown and more fully described on Sectional Plan No. SS33/2001 in the scheme known as Elspark Villas in respect of the land and building or buildings situated at Klippoortje Agricultural Lots Township, local authority: Ekurhuleni Metropolitan Municipality of which section the floor area, according to the said sectional plan, is 70 square metres in extent; and

(b) An undivided share in the common property in the scheme apportioned to the said section in

accordance with the participation quota as endorsed on the said sectional plan.

Held by Deed of Transfer No. ST30734/2002."

(d) Costs of suit on the scale as between attorney and client.

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AC DODSON AJ

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HEARD:	3 AND 4 OCTOBER 2012
JUDGMENT DELIVERED:	29 NOVEMBER 2012