Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 4985/2010

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

FIRSTRAND BANK LTD formerly known as FIRST NATIONAL BANK OF SOUTHERN AFRICA **Plaintiff**

and

GEORGE G PROVAN **Defendant**

JUDGMENT DELIVERED: 17 JUNE 2011

BINNS-WARD J:

[1] The plaintiff claims payment of the sum of R1 245 343,58 together with interest thereon from 30 January 2010. The claim arises out of monies lent and

advanced by the plaintiff to the defendant against the security of a mortgage bond over the defendant's fixed property. It is common cause that the underlying transaction is a credit agreement within the meaning of the National Credit Act 34 of 2005 ('the NCA'). An order declaring that property to be specially executable is also sought. The claim is being prosecuted by way of action. The defendant gave notice of his intention to defend the action and the plaintiff thereupon applied for summary judgment.

[2] An affidavit opposing the summary judgment application was made by a debt counsellor registered as such in terms of the NCA. It took the point that because the defendant had an application for debt restructuring pending before the magistrates' court in terms of s 87 of the NCA, the plaintiff's purported termination, in terms of s 86(10) of the NCA, of the debt review to which the defendant was subject was incompetent and ineffectual. That defence has been disposed of adversely to the defendant by the Supreme Court of Appeal's recent judgment in *Collett v Firstrand Bank Ltd and Another* [2011] ZASCA 78 (27 May 2011); and therefore, no more needs to be said about it. The debt re-arrangement application in the magistrates' court was in any event refused.

[3] In a further affidavit opposing summary judgment delivered on 31 May 2011 the defendant avers that 'the loan agreement which forms the basis of the plaintiff's claim contains a provision that renders the whole agreement unlawful in terms of the [National Credit] Act'. He invoked the provisions of s 90(2)(a)(ii), read with s 90(3), 90(4) and 89(5) of the NCA in this connection.

[4] Section 90(2)(a)(ii) of the NCA provides:

> (2) A provision of a credit agreement is unlawful if-

(a) its general purpose or effect is to-

(i) ...;

(ii) deceive the consumer; or

(iii) ...;

Sub-sections 90(3) and 90(4) of the NCA provide:

(3) In any credit agreement, a provision that is unlawful in terms of this section is void as from the date that the provision purported to take effect.

(4) In any matter before it respecting a credit agreement that contains a provision contemplated in subsection (2), the court must-

(a) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or

(b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect,

and make any further order that is just and reasonable in the circumstances to give effect to the principles of section 89 (5) with respect to that unlawful provision, or entire agreement, as the case may be.

and s 89(5) of the Act reads as follows:

(5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that-

(a) the credit agreement is void as from the date the agreement was entered into;

(b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated-

(i) at the rate set out in that agreement; and

(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and

(c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either-

(i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or

(ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.

[5] The provision in the loan agreement relied upon by the defendant for the purposes of invoking s 90(2)(a)(ii) of the NCA is clause 3.10 of the loan agreement, under the heading 'Special Terms and Conditions' which provides 'The bond and the property to be registered in the joint names of the Customers'. The clause does not read sensibly in the context of the contract document. The contract document purports on its face to evidence an agreement between the plaintiff, referred to therein as 'the Bank', and the defendant, referred to therein, in the singular, as 'the Customer'. The copy of the agreement attached to the further opposing affidavit is not a signed copy, but it provides only for the defendant's signature. No provision is made for the signature of the document by his wife.

[6] The defendant set out the factual context of his contention that the clause in question had the general purpose or effect of unlawfully deceiving him by explaining that the loan in question had been incurred in the context of a consolidation of his pre-existing debts. He averred that he had been introduced to the plaintiff by a so-called 'mortgage broker', who had advised him to 'consolidate' his existing debt - 'including an existing home loan that was secured by a mortgage bond over [his] property in favour of an entity named SA Home Loans' - 'with a loan from the Plaintiff, in the form of an overdraft facility, that could be secured by a replacement mortgage loan in favour of the Plaintiff'. Read literally, the defendant's averments in this regard are rather garbled. Their gist, however, is clear enough in the context of the papers read as a whole, including the provisions of the mortgage bond registered in favour of the plaintiff and the reference therein to the authority executed by the defendant for the registration of the said bond. The position was that the mortgaged

property was and at all material times had been registered in the sole name of the defendant. His wife, to whom he was married out of community of property, was not the co-owner of the property. The so-called consolidation of debt occurred by means of the payment by the plaintiff of the amounts owing to the defendant's pre-existing debtors, including the entity known as SA Home Loans, thus rendering the plaintiff as the defendant's sole creditor in place of the multiple creditors whose claims against the defendant had been settled. The amount of money applied by the plaintiff to pay the defendant's pre-existing debtors was debited to a current account operated on the plaintiff's books in the defendant's name, thereby creating the contemplated overdraft. As security for the repayment of any amount owed by the defendant to the plaintiff on overdraft on the said account, the defendant mortgaged the immovable property in favour of the plaintiff.

[7] Obviously, the only manner in which the property could come to be mortgaged jointly by the defendant and his wife in favour of the plaintiff would be by the defendant first transferring ownership of an undivided half share to his wife. The mortgage bond which he caused to be registered in favour of the plaintiff makes it clear that he never did this.

[8] The defendant avers that he would not have agreed to the loan agreement had he known that he 'would be assuming sole liability as a mortgagor under the envisaged mortgage bond'.

[9] The defendant's allegations do not bear scrutiny. There is no denial by the defendant that he is indebted to the plaintiff in the amount claimed. He offers no cogent explanation as to why he failed to transfer a proprietary interest in the fixed property to his wife if that was regarded by him as critical. He does not suggest that

the intended effect of the contemplated involvement of his wife would be to reduce his liability or diminish the security afforded for its repayment by the mortgage of the fixed property. His liability to the plaintiff arises primarily in his overdraft debt. The mortgage bond does not create a liability; it constitutes the furnishing of security for the redemption of the liability. That the property is subject to execution in satisfaction of a judgment on the overdraft debt is a situation that would not be ameliorated in any manner had the defendant's wife been a co-owner of the property and joined the defendant in offering it as security for the defendant's liability, as the defendant says was in contemplation.

[10] The clause on which the defendant relies to invoke the provisions of the NCA, quoted above, reads nonsensically in the context of the deed of contract read as a whole, but that does not mean that its general purpose or effect was to deceive the defendant. The incongruity of the clause was patent and the actions of the defendant do not support the conclusion that he was deceived thereby.

[11] The NCA is badly drafted in several respects, as has by now been observed in a large and ever-growing number of judgments. I do not think that the legislature can be held by the enactment of s 90(2) of the NCA to visit vitiating illegality on an agreement which contains a provision which is palpably the result of a mistake. Read properly the evident legislative intention is to penalise provisions in credit agreements which have or are calculated to have a generally deceptive effect. The word 'deceptive', read in context, is plainly not intended to apply in a situation of mistake with no prejudicial consequences. The provisions of s 90 are directed at vitiating contractual provisions that thwart the objects of the statute, are contrary to public policy, or dishonestly prejudice the consumer. As I have already pointed out,

in the current matter the mistake inherent in clause 3.10 is patent and the defendant is unable to cogently explain that he has suffered any prejudice as a consequence of it. Instead he relies on the mechanical application of s 90(3) and (4) and s 89(5) premised on a misreading of the effect of s 90(2)(a)(ii) of the NCA. The loan agreement does not fall to be declared unlawful and the provisions of s 89(5) do not find ground for application.

[12] In the result the defendant has failed to set out a bona fide defence to the plaintiff's claim in his opposing affidavit. The plaintiff is therefore entitled to summary judgment in its favour. The plaintiff's counsel informed me that he had not been able to find a contractual provision entitling the plaintiff to attorney-client costs, as claimed. The fixed property in question was freely given as security by the defendant and no circumstances justifying an amelioration of the consequences of its sale in execution were placed before the court.

[13] The following order is made:

1. Summary judgment is granted in favour of the plaintiff against the defendant for payment of the sum of R1 245 343, 58, together with interest thereon, as provided in terms of clause 2.5 of the FNB One Account Transaction and Facility Agreement signed by the defendant on 20 June 2007, *a tempore morae* from 30 January 2010 to date of payment.

2. Erf 9720 Strand, situated in the City of Cape Town, Stellenbosch Division, Western Cape Province, held by the defendant under deed of transfer no. T79594/93 and hypothecated in favour of the plaintiff in terms of covering mortgage bond no. B075330/07, is declared specially executable.

3. Defendant is ordered to pay the plaintiff's costs of suit.

A.G. BINNS-WARD
Judge of the High Court