IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

REPORTABLE

CASE NO. 14597/2011

In the matter between:

FIRSTRAND BANK LIMITED formerly known as FIRST NATIONAL BANK OF SOUTHERN AFRICA LIMITED	**APPLICANT**

And

SHAUN ERROL FESTER	**FIRST RESPONDENT**
MARCHELLE ODETTE FESTER	**SECOND RESPONDENT**

Coram	:	**DLODLO, J**
Judgment by	:	**DLODLO, J**
For the Applicant	:	**ADV. W. JONKER**
Instructed by	:	Minde Schapiro & smith Inc. Tyger Valley Office Park II Cnr. Old Oak & Willie van Schoor Roads BELLVILLE (REF. HJ CROUS) TEL. NO. (021) 918 9006
For the Respondents	:	**ATTOR. K. ARMFIELD**
Instructed	:	Kim Armfield & Associates 7 Voortrekker Road BELLVILLE (REF. Kim Armfield) TEL. NO. (021) 949 2211
Date(s) of Hearing	:	**9 SEPTEMBER 2011**
Judgment delivered on	:	**15 SEPTEMBER 2011**

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JUDGMENT DELIVERED ON THURSDAY, 15 SEPTEMBER 2011

DLODLO, J

[1] This is an opposed application for summary judgment against the Defendants for payment of the sum of R806 264.88, together with interest, being the amount due in terms of a loan advanced to the Defendants against the security of a mortgage bond over Erf 6594 Kraaifontein. The Plaintiff is also seeking an order declaring the immovable property executable. The immovable property is the Defendants' primary residence and accordingly Rule 46 finds application. The loan agreement and mortgage bond qualifies as credit agreements

within the meaning of the National Credit Act 34 of 2005 (the "NCA"). The Defendants do not dispute the conclusion of the loan agreement that monies were advanced, their failure to pay and the amount claimed. The Defendants rely on defences in terms of the NCA and contend that an order declaring the property executable will infringe on their rights in terms of section 26(1) of the Constitution.

NCA DEFENCES:

[2] It is common cause that the First Defendant applied to be placed under debt review in terms of section 86(7) of the NCA, pursuant to which an order was made by the Kuilsriver Magistrate's Court on 22 March 2011 in terms of which the debts of the First Defendant was restructured in terms of section 87 (1) (b) (ii) of the NCA. A copy of the debt restructuring order is annexed as annexure "C" to the summons. It is common cause that the instalment payable by the first defendant in terms of the restructuring order was the sum of R5 472.65 per month, commencing on April 2011. It is furthermore common cause that the First Defendant defaulted with his payments in terms of the restructuring order. The First Defendant admits defaulting for the month of May 2011, and, furthermore, the First Defendant admits being in arrears with his payment obligations in terms of the debt restructuring order as at the end of July in the sum of R4 648.53 as stated in paragraph 5 of the Practice Note Affidavit. The Plaintiff alleges in its summons that by virtue of the First Defendant's breach of the restructuring order, the statutory bar to proceed to enforce by litigation its rights under the agreements is uplifted in terms of section 88 (3) (b) (ii) of the NCA. The First Defendant contends that it remedied its breach and paid up the arrears during the month of August 2011 and as such, the debt review has not terminated.

DID DEBT REVIEW TERMINATE?

[3] The crisp issue before this court is whether the debt review terminated automatically by virtue of the First Defendant defaulting on its obligations in terms of the restructuring order in terms of section 88 (3), or whether the debt review are automatically reinstated by virtue of the consumer remedying its default of the re-arrangement order. Mr Jonker submitted that the answer to the aforesaid question may be found in the provisions of section 88 (3). It is appropriate to set out the provisions of section 88 (3) of the NCA and it reads as follows:

"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 re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal."

[4] I am in agreement with the submission made by Mr Jonker, namely that section 88 (3) does not provide for such an automatic reinstatement

(contended for on behalf of the Defendants) upon the consumer remedying its default. It must be borne in mind that the provisions of section 88 (3) (a) are hardly ambiguous. These provisions are clear. Once one of the jurisdictional requirements set out in section 88 (3) (a) co-exist with any of the jurisdictional requirements set out in section 88 (3) (b), the re-arrangement order automatically falls away and the credit provider is at liberty to proceed to exercise and enforce, by litigation or other judicial process, any right or security under the credit agreement, without further notice. Indeed ***Firstrand Bank v Fillis and Another*** 2010 (6) SA 565 (ECP) per Eksteen J dealt with this aspect rather exhaustively at 569 G-570C. I set out the formulation by Eksteen J:

> *"The second argument raised is, in my view, equally lacking in merit. The Act provides very extensive protection to a consumer who has become overindebted, 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] Thus, once the credit review process has commenced, s 88 (3) of the Act prevents a credit provider from exercising or enforcing, by litigation or other judicial process, any right or security under any 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 the Tribunal.'

[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 to exercise and enforce, by litigation or other judicial process, any right or security under his credit agreement, without further notice."

[5] In the present matter it is common cause that the First Defendant is in default under the credit agreement (being the mortgage loan and bond) and that he defaulted on his payment obligation in terms of the restructuring order. Accordingly, it is common cause that both the jurisdictional requirements set out in section 88 (3) (a) and (b) are complied with. Mr Jonker is correct in submitting that the NCA does not afford me a discretion as to whether the statutory bar is uplifted or not. It remains indeed a purely factual enquiry whether the jurisdictional requirements set out in section 88 (3) (a) (b) are complied with. The true position is that once the Court establishes that both the jurisdictional requirements set out in the aforesaid subsection (a) and (b) have been complied with, I must conclude that the statutory bar was uplifted and the credit provider was fully entitled to proceed by way of litigation to enforce its rights in terms of the credit agreement. It is not in dispute in

these papers that the debt review process has been terminated. Mr Jonker's submission that the debt review has automatically terminated and that the Plaintiff was at liberty to proceed and to exercise and enforce, by litigation, its rights and security under the credit agreement without further notice to the First Defendant, is correct and cannot thus be faulted.

[6] The First Defendant requests this Court to order the resumption of the debt review under section 86 (11) or for leave to make such a substantive application. One must of necessity set out the provisions of section 86 (11) of the NCA:

> *"86 (11) If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances."*

Importantly, in the instant matter, the Plaintiff did not terminate the debt review as contemplated in section 86 (10). Rather, the debt review automatically terminated by virtue of section 88 (3) by virtue of the First Defendant's default of the restructuring order. Clearly the Defendants' reliance on section 86 (11) is misplaced in the present matter? Section 86 (11) cannot find any application in the present matter. Relying on ***Collett v Firstrand Bank Limited*** 2011 (4) SA 508 (SCA), Mr Jonker submitted that the Defendants have failed to properly make such an application and have failed to provide the Court with a full breakdown of its financial position and reasons why the debt review should be reinstated. At 519 A of the ***Collett*** case *supra*, the Supreme Court of Appeal concluded that

sufficient information must be placed before the Court when the consumer requests a resumption of the debt review in terms of section 86 (11).

[7] The Defendants contend that an order declaring the immovable property executable will result in an infringement of their right to adequate housing in terms of section 26 of the Constitution. This contention is put to rest in the following dictum in the matter of ***Standard Bank of South Africa Limited v Saunderson and Others*** 2006 (2) SA 264 (SCA) at 274 G- 275A:

"But even accepting for present purposes that execution against mortgaged property could conflict with s 26 (1) such cases are likely to be rare. It is particularly hard to conceive of instances where a mortgagee's right to reclaim the debt from the property will be denied altogether; and it is therefore not surprising that the Constitutional Court noted in Jaftha that in the absence of abuse of court procedure – and none is alleged here – a sale in execution should ordinarily be permitted against even a home bonded for the debt sought to be reclaimed. Nor can the approach differ depending on the reasons the property owner might have had for bonding the property, or the objects on which the loan was expended."

And then further at page 275E:

"Until the defendants in the cases before us could show that orders for execution would infringe s 26(1) the bank was not called on to justify the grant of the orders. The sole fact that the property is residential in character is not enough to found the conclusion that an infringement of s 26(1) will necessarily occur."

My understanding of the Defendants' defence is based on section 26 (1) of the Constitution is that its high watermark is that the property is residential in character and that their family resides with them. As demonstrated above this falls short of making out a case based on section 26 (1). There is no allegation that there was an abuse of the Court procedure by the Plaintiff. Accordingly the sale in execution should be permitted in the ordinary course. We gather from the record that suitable replacement accommodation will costs at least between R4 000.00 and R5 000.00. The Defendants can afford (it would appear) the reduced monthly instalment (in terms of the restructuring order that terminated) of R5 472.66. It would thus appear that the Defendants are in the financial position to acquire alternative housing. Section 26 (1) only provides that a person has the right to "adequate" housing and not housing of the same luxury. It remains for the Defendants to show that orders for execution would infringe on section 26 (1) and the Plaintiff is not called upon to justify the grounds for such an order. In my view the Defendants failed dismally to raise a defence in terms of section 26 (1) of the constitution. There is therefore no *bona fide* defence envisaged in Rule 32 (3) and there are no triable issues raised.

ORDER

[8] In the circumstances I make the following order:

(a) Summary judgment is hereby granted against the two Respondents/Defendants for:

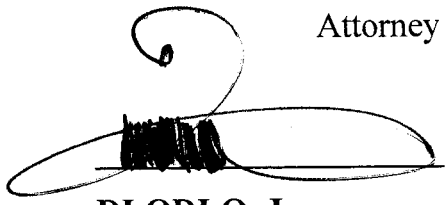
(i) Payment in the amount of eight hundred and six thousand two hundred and sixty four rand and eighty eight cents (R806 264.88);

(ii) Payment of interest on the above sum of money at the rate of 7.6% per annum, calculated daily and

compounded monthly from 10 July 2011 to date of payment, both days inclusive;

(b) An order is hereby made in terms whereof Erf 6594 Kraaifontein situated in the city of Cape Town, Paarl Division, Province of the Western Cape in extent of 496m², held by virtue of Deed of Transfer T80812/2001 is declared executable.

(c) An order is hereby granted in terms of which the Defendants are ordered to pay costs hereof on the scale as between Attorney and client.



DLODLO, J