IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. 9794/2011

In the matter between:

**FIRST RAND BANK LTD** Plaintiff

and

**MOGAMAT NAIAM NOROODIEN** First Defendant

**ASA NOROODIEN** Second Defendant

**IGSHAAN NOROODIEN** Third Defendant

Court: ROGERS AJ

Heard: 10 November 2011

Delivered: 14 November 2011

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| **COUNSEL FOR PLAINTIFF:** | Adv Botha |
| **INSTRUCTED BY:** | Lindsay & Waters (PM Waters) |
| **COUNSEL FOR FIRST DEFENDANT:** | Adv N Sewpersadh |
| **INSTRUCTED BY:** | Cape Town Justice Centre (LJ Goosen) |

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**JUDGMENT**

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**OL ROGERS AJ**

*Introduction*

1. In this application for summary judgment the plaintiff has sued the defendants for the amount of R114 733,12 plus interest from 2 May 2011 on a loan secured by a mortgage bond over property situated at 42 Tulbagh Street, Brooklyn.

2. The defendants filed a notice of intention to defend through a firm of attorneys who subsequently withdrew. Thereafter the first defendant with the assistance of the Cape Town Justice Centre filed an affidavit opposing summary judgment. At the hearing before me the plaintiff was represented by Mr Botha and the first defendant by Ms Sewpersadh of the Justice Centre.

3. The opposing affidavit raises two points, namely [a] whether the plaintiff was precluded by s 88(3) of the National Credit Act 34 of 2005 from instituting the action [b] if not, whether the court – instead of granting summary judgment – should order a resumption of debt review proceedings pursuant to s 86(11) of the Act.

4. In October 2010 the first and second defendants applied to a debt counsellor (Ms Karriem of Consumer Debt Management) for debt review in terms of s 86(1). Their indebtedness to the plaintiff was one of the credit transactions they listed in their debt review application. On 8 November 2010 Ms Karriem issued the notifications required by s 86(4).

5. In April 2011 the plaintiff gave notice in terms of s 86(10) that it was terminating the debt review. It is not in dispute that the defendants were in default under the mortgage loan at this time and have remained in default since then. In May 2011 the plaintiff issued summons, at which stage the defendants were in arrears to the extent of R10 261.

6. The first defendant alleges in his opposing affidavit that the termination of the debt review came as a surprise to him because Ms Karriem had in consultation with him compiled a repayment schedule which he has been honouring since February 2011. The repayment schedule reflects that the first and second defendants' monthly income is R4 220 and that their living expenses are R3 320, leaving R900. After deducting a monthly debt counselling fee of R45, R855 per month was available to be divided between creditors, of which the plaintiff was one. The amount earmarked for the plaintiff was R621,50 per month.

7. It appears that relatively recently, and perhaps prompted by the institution of the plaintiff's action, Ms Karriem issued an application in the magistrate's court of Wynberg in terms of s86(7) for a declaration that all three defendants are over-indebted and for approval of a debt rearrangement. This was set down for hearing on 9 November 2011, the same day that the present application served before me. I was informed from the bar that the application in the magistrate's court had been postponed. The reasons for the postponement are unclear.

*Section 88(3)*

8. Ms Sewpersadh's first point is that by virtue of s 88(3) the plaintiff was not entitled to institute the action. This is so, she submitted, because [a] the plaintiff had in November 2010 received a notice in terms of s 86(4)(1) and [b] that although the first and second defendants were in default, none of the events in s 88(3)(b)(ii) had occurred.

9. In my view this argument is misconceived. Section 88(3) stipulates that its provisions are subject to ss 86(9) and (10). The phrase *"subject to"* indicates that what follows these words is made dominant over other matter in the provision. This means, in the context of s 88(3), that s 86(10) overrides the requirements of s88(3). Put differently, if the credit provider has duly terminated the debt review under s 86(10) he is not precluded by s 88(3) from enforcing his credit transaction. This conclusion is reinforced by the nature of

the conditions specified in s88(3)(b). Those conditions make little sense in the context of a credit provider who has terminated the debt review in terms of s86(10), not least for the reason that if a credit provider has terminated the debt review in respect of his transaction the said transaction cannot thereafter validly be made the subject of a rearrangement order in the magistrate's court. The right of termination under s 86(10) would be illusory if the credit provider were precluded by s 88(3) from enforcing his transaction; his position would then be indistinguishable from a credit provider who had *not* terminated the debt review.

10. Ms Sewpersadh's contention is also inconsistent with s 129(1)(b)(i) read with s 130(1)(a) which envisages that if a consumer has remained in default for ten days following a notice under s 86(10) or s 129(1) as the case may be the credit provider may approach the court to enforce the transaction.[1] By virtue of s 129(2) these requirements do not apply where a debt restructuring order has been made – in the latter case (but only in the latter case) the credit provider's entitlement to enforce will be determined by s 88(3).

*Section 86(11)*

11. Ms Sewpersadh's other submission is that I should order a resumption of the debt review in terms of s 86(11). Because a termination under s 86(11) only excises from the ambit of the debt review the transaction of the creditor who has given notice of termination (see *Collett v First Rand Bank Ltd & Another* 2011 (4) SA 508 (SCA) para 14), a resumption under s 86(11) entails (where there are also other transactions which are the subject of the debt review) that the former transaction will again be brought into the debt review process together with the other transactions that were never excised from the process under s 86(10).

12. Although s 86(11) in its express terms refers to the making of a resumption order only by the magistrate's court, it was held in *Collett supra* that if the credit

[1] Section 130(1)(a) refers to s 86(9) but that is clearly erroneous and the reference was plainly intended to be to s 86(10) – see *Changing Tides 17 (Pty) Ltd v Grobler & Another* [2011] ZAGPPHC 84 para 25.

provider seeks to enforce the credit transaction in the high court the latter may also make a resumption order (para 17). In principle, therefore, I have the jurisdiction to order a resumption in respect of the transaction which the plaintiff seeks to enforce.

13. The first defendant states in his opposing affidavit that his financial difficulties began in 2010 when he lost his job. He says that he referred his financial difficulties to a debt counsellor and has abided by the proposed rescheduling of his obligations.

14. Mr Botha submitted, however, that from the material contained in the first defendant's own papers (to which, naturally, the plaintiff has not been entitled to respond, given the restriction imposed by rule 32(4)) a resumption order under s 86(11) would not be just or reasonable. According to the first defendant the monthly bond instalment was initially R2 786 but was later reduced to R1 885 (this was by not later than December 2006). He does not state the reasons for this reduction. It appears that despite his financial difficulties in 2010 he was able until about October 2010 to pay the required instalments. He does not say how he was able to do so in the light of his financial difficulties (for example by realising other assets or obtaining assistance from friends).

15. Be that as it may, he and the second defendant (who are husband and wife) were in sufficient financial difficulty by October 2010 that they referred their financial affairs to a debt counsellor in terms of s 86(1). I have already referred to the results of Ms Karriem's investigations. Her debt rescheduling proposal (which included a proposed monthly payment to the plaintiff of R621,50) stated that the credit providers should take into consideration that the total amount available for distribution to them (R900) was the maximum that could be determined after thorough assessment and that it would not be possible to increase the offer to individual creditors without compromising the concerns of other creditors. The first defendant's affidavit does not state that his position has improved since the assessment was undertaken.

16. The first defendant has annexed a record of the bond account from October 2010 to November 2011 from which it appears that the monthly debit for interest is about R850 (sometime slightly less, sometimes more). The amount determined under the proposed debt rescheduling (R621,50) falls well short of covering even the interest. This means that the capital will not be reduced and the outstanding interest will steadily grow. The opposing affidavit does not provide a basis for believing that this will change in the near future or at all. The plaintiff's unwillingness to accede to the reduced instalment proposed by Ms Carriem is, in the light of what I have said, understandable. In all the circumstances, a resumption order under s86(10) would not in my view be justified.

17. Initially only the first and second defendants referred their affairs to a debt counsellor. I infer from the application recently issued by Ms Karriem in the magistrate's court that the third defendant has subsequently also referred his financial affairs for debt review under s86(1). I assume that this occurred some time after the plaintiff issued summons in the present matter in May 2011. Although Ms Karriem's debt rescheduling proposal as attached to the opposing affidavit appears to relate only to the financial affairs of the first and second defendants, the opposing affidavit does not state that the third defendant can or is willing to make any payments towards the bond indebtedness. If the first defendant had considered that the third defendant (who I assume is their child or a relative) could supplement the repayments to the plaintiff, I sure he would have said so.

18. In the circumstances, I do not think it would be appropriate to order a resumption of the debt review. There simply does not appear to be a realistic prospect that the defendants will be able to make payments which will over time reduce their indebtedness under the bond.

*Conclusion*

19. Regarding executability, Ms Sewpersadh did not argue, with reference to s 26 of the Constitution read with rule 46(1)(a), that such an order should not be made. Although the defendants appear not to be able to afford to remain in their current home (I assume it is their primary residence), they have not alleged facts to indicate that following the sale of the property in execution they will not be able to secure accommodation elsewhere from their income and/or from the surplus of the mortgaged property following its disposal. Since the mortgage loan in 1998 was R180 000 and the loan application required the property to be insured for R262 000, the prospect of a surplus must be good, given that the total accelerated indebtedness of the defendants to the plaintiff in May 2011 was only R114 737.

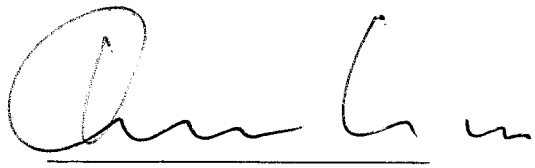
20. The application for summary judgment thus succeeds and the following order is made:

    (a) The defendants are ordered, jointly and severally the one paying the other to be absolved, to pay the plaintiff:

        (i) R114 733,12 together with interest at the rate of 9% per annum, calculated daily and compounded monthly, from 2 May 2011 to date of final payment, both days inclusive;

        (ii) costs of suit on an attorney and client scale;

    (b) The following immovable property is declared executable, namely Erf 19858, Cape Town at Brooklyn situate in the municipality of Blaawberg, Cape Division, Western Cape Province, in extent 439 $m^2$ and held by Deed of Transfer No T113547/98 subject to the terms and conditions contained therein.



**ROGERS AJ**

**14 NOVEMBER 2011**