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

REPORTABLE
CASE NO: 11945/2011

In the matter between:

FIRSTRAND BANK LTD	**Plaintiff**
and	
BURTON ADAMS	**First Defendant**
CHARLENE MICHELLE ADAMS	**Second Defendant**

CORAM	**:**	**D M DAVIS J**
JUDGMENT BY	**:**	**DAVIS J**
FOR THE PLAINTIFF	**:**	**ADV L LIEBENBERG**
INSTRUCTED BY	**:**	**KG DRUKER & ASSOCIATES**
FOR THE RESPONDENTS	**:**	**MR H L H JOUBERT**
INSTRUCTED BY	**:**	**JOUBERT ATTORNEYS**
DATE OF HEARINGS	**:**	**15 AUGUST 2011**
DATE OF JUDGMENT	**:**	**23 SEPTEMBER 2011**

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CASE NUMBER: 11945/2011

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In the matter between:

FIRST NATIONAL BANK Plaintiff

and

B ADAMS 1st Defendant

C M ADAMS 2nd Defendant

J U D G M E N T

DAVIS, J:

Introduction:

This matter initially came before this court as an application for summary judgement. When it was heard on 15 August 2011, it was opposed, essentially, on the basis that negotiations between the parties, as are envisaged, broadly expressed in terms of the National Credit Act 34 of 2005 ("the Act") were contemplated. The case for summary judgment would, in essence, have meant that the mortgaged property,

being a domestic home, would have been executable and accordingly the defendants would have lost their abode without any further negotiations.

Given the present economic climate, which is likely to endure for the foreseeable future, courts are increasingly confronted with the difficult decision of ordering people who have few resources to give up their homes. The issue is compounded by the provisions of the Act which, as has been often noted, is not an exemplar of drafting which would make litigation both certain and relatively easy.

Be that as it may, the Act has a clear purpose as expressed in section 3 thereof:

> "To promote and advance a social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market in the industry and to protect consumer..."

The consumer is protected in particular by way of a mechanism:

> "... for resolving over indebtedness based on the

principles of satisfaction by the consumer of all responsible financial obligations."

In addition section 3(i) of the Act provides for:

> "a consistent and harmonised system of debt restructuring, enforcement and judgment which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

In short, the Act seeks to ensure that obligations which have been incurred by consumers, are discharged to the satisfaction of the credit provider, but, in circumstances where the interests of the consumer are considered; hence, instead of the consumer, such as in the present case losing their key asset, a restructuring mechanism is established and can be utilised to achieve a necessary balance between competing interests of consumer credit provider.

So much for the problem and the legislative framework within which the problem must be solved.

Factual background

I turn briefly to turn with the applicable facts. On 10 May

2010, the defendants attended the offices of the plaintiff, in terms of a section 86(11) application. The relevant debt counsellor declared the defendants be over-indebted. On 6 July 2010, the debt counsellor compiled a proposal which was then sent to plaintiff. On 7 July 2010, the plaintiff responded to the debt counsellor's proposal, confirming that it was not acceptable and indeed making a counterproposal. It is necessary to refer to this letter, where plaintiff sets out its reasons for rejecting the rearrangement of the proposal and suggests the following:

> "We suggest a repayment proposal of 240 months that will be accepted on total balance outstanding of R450 476,47 at an interest rate of 8.85% and an instalment of R3 441,13 for the first 24 months. Thereafter, R4 753,15 is to be paid over the remaining 216 months (including insurance of R514,11). Should the counterproposal be amenable, you are informed that none of the existing respective rights and obligations of the original credit agreement/loan agreement are waived or amended. All rights and obligations remain fully enforceable in the event that the consumer is in default of an agreed rearrangement proposal."

From the papers, I was not able to ascertain any further exchange of correspondence between the plaintiff and the debt counsellor. The debt counsellor generated an application in terms of section 87 of the Act on 23 July 2010 and the matter was set down for hearing on 25 January 2011. Plaintiff opposed this application and filed a notice of opposition on 11 January 2011. This application was postponed on two occasions; initially, to 21 March 2011 and later to 24 August 2011. I do not have any information as to the outcome of the application which should have been heard on 24 August 2011; suffice to say that the plaintiff terminated the debt review process on 6 June 2011 and issued summons on 14 June 2011.

What interrupted the hearing for summary judgment, was an application, which was brought in terms of section 86(11) of the Act, to the effect that, irrespective of the validity of the termination as I have set it out, plaintiff should be ordered to resume the debt review process on conditions stipulated by the court. In order to determine the validity of this application, it is necessary, albeit briefly, to refer again to the Act.

The Act

Section 86 of the Act provides that a consumer may apply to a debt counsellor to have that consumer declared to be over-indebted. The debt counsellor then conducts a debt review and an assessment, at the end of which process she may conclude that the consumer is or is not over-indebted. In a situation where there is over-indebtedness, she may recommend that the obligations be rearranged.

It is important to take account of the menu for rearrangement as set out in section 86(7)(c) of the Act. This section provides that when the consumer is over-indebted, the debt counsellor may generate a proposal, recommending that the Magistrate's Court may make either or both of the following orders:

> "(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless, and;
>
> (ii) that one or more of the consumer's obligations be rearranged 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."

A recommendation is then made to the Magistrate's Court, which may, in terms of section 87, order the rearrangement of these obligations in terms of the alternatives set out in section 86(7). Where a debt counsellor decides that the consumer is not over-indebted, the consumer is entitled to make application himself or herself to the Magistrate's Court for a rearrangement order.

In terms of section 130(4)(c) of the Act, if a court determines that a credit agreement is subject to a pending debt review, it must adjourn proceedings to enforce the agreement in the final determination of the debt review. If the agreement is subject to a debt review rearrangement order and the consumer is in compliance with the order, then in terms of section 130(4)(e), the court must dismiss any action or application to enforce the agreement.

The question which arose in this case, was that, as I have already indicated, plaintiff terminated the debt review process. It followed the provisions of the legislation and, applied for summary judgment. Nothing was raised on the papers before me to suggest that the debt review was still being considered at the time or that it had not been terminated.

The defendants' case

The submission put before me by Mr Joubert, who appeared on behalf of the defendants, was to the effect that the court had a discretion to grant a further application in terms of section 86(11). In this connection, he referred to a judgment of Murphy, J in Changing Tides 17 (Pty) Limited v Grobler and Grobler (unreported judgment of the North Gauteng High Court, 2 June 2011). The judgment provides a luminous exposition of the relevant provisions and is extremely useful in determining the powers which a court, placed in the situation of this court, has to deal with such an application.

In his judgment, Murphy, J referred to the Supreme Court of Appeal judgment in Collett v Firstrand Bank (2011) ZA (SCA) 78, in which the court, per Malan, JA, distinguished between a situation where a consumer is in default in terms of the credit

agreement and where the consumer is not so in default. When a consumer is not in default, he or she may apply for review and the credit provider may not terminate the review in terms of section 86(10), because that section gives the right to terminate the debt review only where the consumer is in default. Where a consumer is in default, the credit provider may enforce the agreement once the debt review (as occurred in this case) is terminated in terms of the section. Malan, JA, at para 12, says:

> "A sounder approach is to recognise the express words of section 86(10), which gives the credit provider a right to terminate the debt review in respect of the particular credit transaction under which the consumer is in default and only when the consumer is in default, at least 60 business days after the application for a debt review was made. It must be emphasised that it is only when the consumer is in default that the credit provider has this right... If the consumer applies for debt review before he is in default, the credit provider may not terminate the process, but if the consumer is in default, the consumer is entitled to a 60 business days' moratorium, during which time the parties may attempt to resolve their dispute."

The Supreme Court of Appeal also held that this right to terminate a debt review process, must be viewed within the context of section 86(11) of the Act, which provides:

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

On the basis of this finding and the approach adopted by the Supreme Court of Appeal in the Collett case, Murphy, J, at para 18, held:

> "Once a debt review has been terminated under section 86(10), and the credit provider seeks to enforce the agreement either in the High Court or the Magistrate's Court, such court may order the debt review to resume. This means that a court to whom the debt counsellor or the consumer has applied in terms of section 87(1) to rearrange the consumer's obligations, has no such jurisdiction, it is only the court hearing the matter in the

proceedings to enforce the agreement that may order the results from the debt review."

It is, therefore, on the basis of the reasoning adopted by Murphy, J, that a court, in a position similar to this court, can decide whether there is any benefit to postponing an application for summary judgment in order to determine the advantages of a further debt review. In order to do so, a court would have to take into account the nature of the dispute, the manner of participation of both parties in negotiations, that is that they acted in good faith in an attempt to resolve the outstanding obligations and further, the prospect of a rearrangement that, within the parameters of the Act, can ensure the discharge of the obligation.

It appears that this approach can be followed by a court confronted with a dispute such as arises in the present case. As Murphy, J held:

"As section 130(1)(a) of the Act provides that a credit provider may approach a court for an order to enforce a credit agreement, if at that time the consumer has in default under that agreement for at least 20 business days and at least 10 business days have elapsed since the credit provider

delivered the notice to the consumer in terms of section 86(10) or section 129(1) as the case may be."

In other words, the point highlighted by Murphy, J, is that because of the extraordinary nature of summary judgment (see in particular the description of summary judgment by the Supreme Court of Appeal in Joobjoob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) at paras 10-11) there is a discretion available in terms of the Act, for the court, *mero motu*, to consider whether to adjourn a summary judgment application, afford a consumer an opportunity to provide an argument that the debt review should be resumed. It is precisely this approach that I adopted and which has given rise to the hearing this morning.

Evaluation

Before I proceed any further, I want to pay tribute to both Mr Joubert, and Ms Liebenberg, who appeared equally ably on behalf of the plaintiffs, for their considered arguments which I found extremely helpful in resolving a not uncomplicated matter. As Ms Liebenberg correctly contended, there had been a process of negotiation in this case. It was not as if the plaintiff simply rejected any and all proposals. So much is evident from the letter to which I made reference of 7 June

2010.

There is however a further proposal on the table at present. It is this proposal which aims to provide a justification for the application before this court and which is accompanied by an affidavit by the debt counsellor, Ms Noor.

In her affidavit, Ms Noor submits as follows:

> "I have considered the financial position of the respondents and I have found that taking the present circumstances into consideration, that they area able to increase their payment to the PDA by 15%. For this reason, I have increased the instalment. The property mortgage which is the primary residence of the respondents when the application was launched was opposed by the third respondents. I have until date hereof not received the opposing affidavit... I am prepared to negotiate with the providers to increase the instalment if the consumer can cut on his expenses. At present it would be difficult, but I anticipate that their financial position will improve. If, however, the property is declared executable, I am of the opinion it will be more expensive of the respondent to rent the place

than it would be to keep the existing property. As matters stand, the 15% increase per annum, respondent will be able to keep the property."

In essence the argument is that a proposal has been formulated, which could be the subject matter of further negotiations and as a result of which, Mr Joubert urges me to grant an order postponing the summary judgment application, referring the matter for a resumption of debt review on any conditions that I might so stipulate. Recall that there are parameters in terms of which a court may act in exercising this discretion. In the first place, as I have noted, there must be a balance struck between the interests of the consumer and the interests of the credit provider. Were it to be otherwise, the entire system of credit provision in this country, would either collapse or be subjected to significantly increased costs as credit providers seek to recoup the consequent risks of an unregulated or disproportionate dispensation.

A proposal has to take place within the parameters of the Act and, in particular, in terms of section 86(7)(c). An examination of the proposal, which is attached to the papers, indicates that certain instalments will be paid over a period of 279 months. The reason that the proposal can achieve completion within the 279 months, is because an interest rate,

which initially in terms of this proposal has set at 8.85%, is to be reduced throughout the period to 2%. Without this reduction, the proposal cannot succeed in ensuring the discharge of the obligation and, therefore, would make no significant impact, save for an inevitable further application at some later date when the debt has not been discharged.

But the 2% interest charge, so crucial to this proposal, falls outside of the Act for the reasons I have indicated, namely that there is no legislative basis to reduce the interest rate pursuant to such a proposal. A proposal can extend the time period for payment or the proposal can have a window in terms of which payments are not made, in order to give the consumer an opportunity to generate liquidity which will allow payments to resume. However the proposal cannot be based on a reduction of the contracted interest rate. When this factor is taken into account, there is no proposal on the table which would alter the position from that which was rejected after an exchange of correspondence and, by implication, negotiations in terms of an offer and counter offer which took place in 2010 in terms of the letters to which I have already made reference.

Mr Joubert contends that, if I were to postpone the matter in order to allow debt review to resume, further negotiations could be placed upon the table, new ideas may be generated,

a further payment schedule could be structured by the defendants and accordingly the debt review may bear fruit. Some measure of flexibility, he argued, should be adopted in dealing with the protection of domestic property. Most certainly, I must take account of the all considerations which are set out in a decision of a Full Bench of this Division in Standard Bank of South Africa Limited v Bekker & Others (case number 6628, 6635, 6644, 7032 and 7047/2011 judgment 25 August 2011), but this judgment, in my respective view, does no more than provide a very carefully considered set of factors which had been approved in a number of decisions of the highest courts of this country and which must be followed before granting an order which would have the effect of denying a consumer immovable property, being a domestic home. There is nothing in this judgment which provides further assistance to defendants.

At the same time as I indicated, a court can only exercise its discretion to permit debt relief negotiations to continue by way of a consideration of that which is available on the evidence, namely whether negotiations took place in good faith, what is the nature of the dispute and, to what extent is there an outstanding debt. Obviously the larger the debt, the bigger the problem and the more difficult it is to resolve it by way of negotiations. Furthermore, the financial viability of the

proposal which is put on to the table in order to justify the application must be examined.

I had postponed this matter to give the defendants an opportunity to come forward, together with a debt counsellor if necessary, and indicate some basis by which negotiations could continue. What has in effect happened, is that the proposal which was rejected a year ago, has been recycled. Nothing new is placed before this court. Nothing effectively has been put up, notwithstanding the opportunities given to defendant, which would indicate to this court as to how negotiations could now be successful. Further, there is no valid proposal because all that has occurred is that the period of payment has been extended by way of a reduction of the interest rate.

After anxious consideration, it appears to me that the application in terms of section 86(11) of the Act must be dismissed. Accordingly I dismiss that application.

It follows that I am faced with an application for summary judgment. Whilst I am not going to order any costs incurred in opposing the application in respect of section 86(11) of the Act and the various hearings that have flowed therefrom, I am obliged, on the basis of the evidence available to me, to grant

the application for summary judgment in the terms that have been set out.

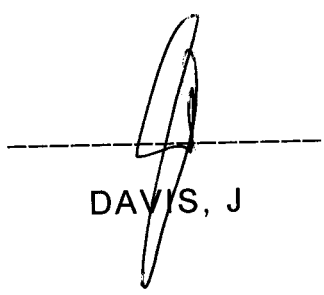
For this reason, summary judgment is granted against the first and second defendants, jointly and severely, the one paying, the other to be absolved as follows:

1. Payment of the sum of R484 889,85.

2. Interest on the said sum of R484 889,85 at the rate of 7.85% per annum, calculated daily and compounded monthly arrears as from 16 May 2011 to date of payment.

3. An order declaring the mortgage property, namely erf 11133, Grassy Park in the City of Cape Town, Cape Division, Western Cape Province, especially executable.

4. Costs on a scale as between attorney and client, including collection commission.



DAVIS, J

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