

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

Case Number: 22041/10

In the matter between:

**FirstRand Bank Ltd formerly known as
First National Bank of South Africa Ltd Applicant**

and

Sarel Gerhardus Yssel Meiring Respondent

JUDGMENT DELIVERED ON 19 APRIL 2011

Baartman, J

- [1] This is an application for summary judgment. The applicant, FirstRand Bank Ltd formerly known as First National Bank of South Africa, issued summons and claimed money due in terms of a loan secured by way of a mortgage bond and that the property situated at 31 Monroe Road, St Helena Bay, Erf 1306, **(the vacant erf)**, the vacant erf over which the bond is registered, be declared executable.
- [2] The respondent admitted that he had fallen into arrears with his bond repayments but alleged that he had a *bona fide* defence to the applicant's claim in the following terms:

- (a) The agreement that formed the subject of this application was subject to debt review which the applicant had not properly terminated and alternatively that if the debt review had been properly terminated, the respondent alleged that he had the right to apply to the magistrate's court in Vredenburg for an order in terms of section 86(11) of the National Credit Act 34 of 2005 (**the NCA**) to revive his debt review application.
- (b) The respondent claimed that the vacant erf was his home and should therefore not be declared executable as such a declaration would violate his right to housing.

BACKGROUND

- [3] On 7 April 2010, the respondent applied for debt review in terms of the provisions of the NCA and in May 2010, the debt counsellor put to the applicant a proposal to restructure the respondent's debt. Although the applicant did not engage the proposal, the respondent made payments in terms of the proposal from June 2010 and continued such payments until the hearing.
- [4] Instead of engaging the proposal, on 5 August 2010, the applicant issued a notice in terms of section 86(10) of the NCA and on 5 October 2010 issued summons. The summons was served on 19 October and it was the applicant's case that it had thereby terminated the debt review in respect of the debt that forms the subject of this application.
- [5] Nevertheless, on 27 October, the respondent launched an application in the Vredenburg Magistrate's Court to have his debt restructured. The respondent alleged that the delay had been occasioned by the debt counsellor's difficulty in interpreting a judgment delivered by Du Plessis, J in the Pretoria High Court in August 2010, which judgment was relevant to the jurisdiction in which

to launch the application for the restructuring of the respondent's debt.

- [6] It was common cause that the applicant had terminated the debt review before the application for debt restructuring was launched in the magistrate's court. However, in addition, the respondent alleged that the Hope Field Magistrate's Court had jurisdiction in respect of his debt restructuring application rather than the Vredenburg Magistrate's Court. It follows that there was no application for the restructuring of the respondent's debts before a competent lower court, neither when the applicant cancelled the debt review nor when this application was heard. During argument, however, counsel could not persuasively argue that the debt review had not been properly terminated. (See **Westbank, a Division of FirstRand Bank Ltd v Papier (National Credit Regulator as Amicus Curiae)** 2011(2) SA 395(WCC)). I accepted that the debt review had been competently cancelled.

- [7] The respondent therefore relied on section 85 of the NCA, which provides that:

"85 Court may declare and relieve over-indebtedness.

Despite any provisions 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 court in terms of section 86(7); or*
- (b) declare that the consumer is over-indebted, as determined in accordance with Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness."*

[8] In his opposing papers, the respondent alleged that he earned R22 500 per month and that his monthly repayments to his various creditors amounted to R18 272. The respondent further alleged that his monthly living expenses amounted to R11 560.

[9] As indicated above, the respondent alleged that should summary judgment be granted against him he would lose his residence. I therefore postponed the matter and directed the debt counsellor to file a report. The following appears from the report:

- (a) The respondent was 68 years old, married out of community of property and his wife had been unemployed for the past 3 years.
- (b) The respondent was retired and received a monthly pension of R2 500; however, the respondent was also employed as a developer for which he received a monthly salary of R20 000. The debt counsellor explained the salary as follows:

"6. The Honourable Court will note from Annexure A that the Respondent is receiving an income of approximately R22 500.00. This income is currently being paid by a colleague of the Respondent, a Mr P van der Gunste."

[10] The debt counsellor said the following in respect of the respondent's age and his means to settle the debt:

"I also note that the respondent will be 87 years of age when the debt will be paid off if one has regard to the terms of his debt review application. I confirm that I have explained same to the Respondent and he also acknowledged same and shares the same view as myself that the time to repay the loan would not be in his best interest nor that of the Applicant in this matter. The Respondent has according to my investigation no other assets or other additional income that one can allocate towards his debt."

- [11] The debt counsellor concluded that "... the Respondent is over-indebted as indicated in his debt review application."
- [12] Unfortunately, it appears that the respondent did not disclose all relevant financial information to the debt counsellor. The applicant filed an affidavit by Robert Freeborough (**Freeborough**), the operations manager of the applicant's Arrears Legal Division, from which the following appears:
- (a) The respondent is the registered owner of an unimproved vacant erf situated at 31 Monroe Road, St Helena Bay, Erf 1306, over which a R600 000 bond has been registered in favour of the applicant. These proceedings relate to the foreclosure in respect of this vacant erf. It was therefore not true that the property that forms the subject of these proceedings is the respondent's residence; rather, the respondent had acquired the vacant erf for investment purposes.
 - (b) The respondent is also the registered owner of the property situated at Erf 4686, 29 Monroe Road, St Helena Bay, the neighbouring property to Erf 1306 (**the 29 Monroe property**). The respondent and his wife reside at the 29 Monroe property. The respondent has registered 3 mortgage bonds in favour of the applicant over this Monroe property. The bond repayments are in arrears and the applicant has commenced foreclosure proceedings. However, these proceedings do not relate to the 29 Monroe property.
 - (c) The respondent was also the registered owner of Erf 305 Jacobsbaai. In 2010, the Jacobsbaai property was sold in execution for R401 000 leaving a shortfall of R734 188.98. The shortfall is not reflected in the debt counsellor's report nor does it form part of the subject of these proceedings.

[13] In addition, Rosalie Smit (**Smit**), the applicant's attorney of record, attested to an affidavit from which it appears that on 22 August 2007, the respondent had acquired the property situated at Erf 3062 St Helena Bay. He purchased the property for R1million and registered a R450 000 bond over it. Smit could not attest to any other details in respect of the bond registered over this property. This property is also not included in the debt counsellor's report.

[14] It must follow that I cannot rely on the debt counsellor's report as a full account of all relevant financial information pertaining to the respondent's indebtedness. The respondent has not explained his apparent lack of frankness with this court and the debt counsellor. In my view, a party seeking relief in terms of section 85 of the NCA must place all relevant financial information before the court for without it an assessment of his/her indebtedness is not possible. In this matter the respondent has not attempted to explain the omissions and half-truths given to the court and the debt counsellor. The respondent has failed to prove that he is over-indebted as envisaged in section 79 of the NCA.

[15] In these circumstances, I am unable to make a finding envisaged in section 85. It follows that the application for summary judgment must succeed.

CONCLUSION

[16] I, for the reasons stated above, make the following order.

- (a) Summary judgment is granted in terms of the order marked "X" annexed hereto.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a small flourish.

Baartman, J