FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5243/2011

In the matter between:-

FIRSTRAND BANK LIMITED Plaintiff

and

GERHARDUS PETRUS BRITZ 1st Defendant

STEPHANIE DANELIA BRITZ 2nd Defendant

HEARD ON: 2 FEBRUARY 2012

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 9 FEBRUARY 2012

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[1] This is an application for summary judgment. The plaintiff's cause of action is based on a Home Loan Agreement entered into between the parties on 11 July 2007.

[2] The plaintiff avers in the particulars of claim that the defendants failed and/or neglected to maintain the instalments and, consequently, the full outstanding amount has become due and payable, in terms of the agreement.

[3] On 3 May 2010, Adri Kleinhans, debt counsellor, sent the notification to all the defendants' credit providers in terms of Section 86(4)(b) of the National Credit Act, 34 of 2005, advising them that the defendants have applied for debt review.

[4] On 5 August 2010, the plaintiff sent a notice in terms of Section 86(10) of Act 34 of 2005, terminating the review with immediate effect.

[5] The defendants, however, proceeded with the application and a rearrangement order was granted by the Hennenman magistrate's court on 12 August 2010.

[6] In terms of the said order, the defendants were ordered to pay the monthly instalments of R11 453-20, for distribution to the defendants' credit providers.

[7] The plaintiff avers that the defendants defaulted on the rearrangement order and the plaintiff is therefore entitled to proceed to enforce the credit agreement without further notice to the defendants, in terms of Section 88(3) of the

National Credit Act.

[8] The defendants filed the opposing affidavit, detailing the reasons for their financial problems which prompted them to apply for debt counselling.

[9] They further state that they are now both employed and they collectively earn an amount of about R32 000-00 per month, which enables them to comply with the rearrangement order.

[10] They, however, concede that during August 2011, they made a payment of R8 000-00, instead of R11 000-00 as set out in the rearrangement order and asked African bank, the agent, to distribute that amount *pro rata,* among the creditors.

[11] They later tried to enquire from the plaintiff as to what amount was in arrears, to no avail.

[12] In an attempt to rectify the situation, over and above the monthly payments made in terms of the rearrangement order, they made two extra payments directly to the plaintiff,

totalling R1 700-00.

[13] The plaintiff does not provide any details in the particulars of claim as to when did the defendants default and what the amount of the arrears is, but only avers that the whole outstanding amount has become due and payable because of the default.

[14] In the absence of such details, I am bound to accept the averments of the defendants in this regard.

[15] Mr. Groenewald, who appeared for the plaintiff, argued that since the defendants have conceded that they defaulted by short payment in August 2011, the fact that they later paid in an extra amount to try and remedy the default is of no consequence, and that summary judgment should therefore be granted against the defendants.

[16] He further argued that the defendants, on their own version, conceded that the payments were not always done on or before the end of the month, as it should be done in terms of the rearrangement order.

[17] He also referred me to the unreported case of **<u>FIRST BANK LIMITED v GROBLER</u>** (Case Number 6446/2010 SA (O), where Musi JP held that, where a consumer has defaulted on his obligation under an order of rearrangement, neither a Section 129(1) notice nor a Section 86(10) notice is required before a credit provider can issue summons.

[18] He further referred to the case of **<u>FIRSTRAND BANK v FILLIS</u>** 2010 (6) SA 565 (ECP) 569, where it was held that if a consumer is unable to comply with his or her restructured debt commitment, the Act permits the common law to run its course.

[19] Mr. Heymans, who appeared on behalf of the defendants, contended that the Section 86 (10) notice, which was sent by the plaintiff to the defendants, was premature, in that the words "being reviewed", in the subsection, refers to a review which was granted by a court, in terms of Section 86. I do not agree with this contention, as the subsection clearly states that the notice may be sent "at any time at least 60 days after the date on which the consumer ***applied*** for debt

review. (my own emphasis). This was also confirmed in the as yet unreported case of **<u>COLLETT v FIRSTRAND BANK</u>** (766/2010) [2011] ZASCA 78 (27 May 2011).

[20] Mr. Groenewald also argued, correctly in my view, that the Section 86(10) notice which was sent to the defendants is of no force and effect in that the rearrangement order, which included the plaintiff, was finally granted by the court. I will therefore not refer to this notice any further.

[21] The only issue that remains to be considered is whether, on the facts as set out above, summary judgment should be granted against the defendants.

[22] The problem that I have with this matter is three fold:

22.1 firstly, whether the default relied upon by the plaintiff, as explained by the defendants, is of such a nature that the defendants should not be given an opportunity to continue with the fulfilment of their obligations, as they are still doing;

22.2 secondly, whether the defendants are still in arrears, given the scarcity of the details provided by the plaintiff on this aspect, and the payments made by the defendants to rectify those arrears that may have arisen out of the short payment made in August 2011;

22.3 thirdly, whether the defendants are ***unable*** to comply with their restructured debt commitment, as held in the **FILLIS**-case, *supra.* (my own emphasis).

[23] Mr. Groenewald argued that although it might be unfair to the defendants to grant summary judgment against them under these circumstances, the law entitles the plaintiff to summary judgment.

[24] The preamble to the National Credit Act states that the Act is there

> "to promote a fair marketplace for access to consumer credit…"

and Section 3 of the Act states some of the purposes of the Act as to promote a fair and transparent credit market and industry, and to protect consumers.

[25] It is common cause that this matter falls within the purview of this Act and should be decided pursuant to the purpose and import thereof.

[26] In the light of the above, I come to the following conclusions:

26.1 that on the facts before me, I cannot find that the defendants are still in arrears;

26.2 that the defendants have demonstrated both their willingness and ability to comply with their restructured debt commitment; and

26.3 that, in the circumstances, summary judgment cannot be granted against them.

[27] In the light of my conclusions, the further matter which was argued, being whether the property should be declared specially executable, falls away.

[28] I accordingly dismiss the application for summary judgment,

grant leave to defendants to defend the matter and that costs will be costs in the main case.

N.W. PHALATSI, AJ

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On behalf of defendants: Adv. P.J. Heymans
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