

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 6446/2010

In the matter between:-

FIRSTRAND BANK LTD

Applicant (Plaintiff)

and

PIETER GROBLER

Respondent (Defendant)

HEARD ON: 24 FEBRUARY 2011

DELIVERED ON: 17 MARCH 2011

JUDGMENT

H.M. MUSI, JP

[1] This is an application for summary judgment. The applicant's cause of action is based on a credit agreement entered into by and between the parties and it is common cause that such agreement is subject to the provisions of the National Credit Act, 34 of 2005 (the NCA).

[2] In opposing the application, the respondent filed a notice in terms of Rule 30 alleging several irregularities in the application. It is unnecessary to go into the alleged

irregularities, because all were shown to be without merit and Mr. Buys, who appeared for the respondent, conceded this much at the hearing. Mr. Buys was constrained to fall back on a point *in limine* he raised in his heads of argument to the effect that the provisions of the Act had not been complied with. In this regard he cited the provisions of section 86(4)(b)(i) and section 86(10).

[3] Now section 86(4)(b) was cited in relation to section 88(3) which provides as follows:

“(3) 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.”

The provisions of sections 83 and 85 are not applicable to this matter. Section 86(4)(b) is also not applicable, because the respondent’s application for debt review in terms of that section ran its full course, culminating in an order of re-arrangement in terms of section 87(1)(b)(ii). Section 86(9) is also not applicable by virtue of the fact that the debt counsellor submitted the application for debt review to the magistrates’ court which duly granted an order of re-arrangement. The only possible impediment may be section 86(10), with which I proceed to deal *infra*.

- [4] It is not disputed that the order of re-arrangement was made by the magistrates’ court at Parys on 3 November 2009. In terms thereof the respondent was required to pay monthly instalments of R4 000,00. In its summons the applicant alleges that the respondent has defaulted on the order of re-arrangement and has given details of such default. The respondent has not challenged these averments, because he

chose not to file any answering affidavit and in the absence thereof, the applicant's averment as contained in the summons and verified by affidavit, must be accepted.

- [5] It is against this factual background that the only issue that remains to be determined should be considered. That issue is the respondent's contention that the applicant is debarred from proceeding with its action by virtue of the fact that it had not issued a notice in terms of section 86(10) terminating the debt review. My initial view expressed during the hearing was that the applicant should have issued such notice before issuing summons. In this regard, Mr. Tsangarakis, for the applicant, handed up a copy of a judgment of the full bench of the Western Cape High Court in the matter of **WESBANK, a division of FIRSTRAND BANK LIMITED v DEON WINSTON PAPIER AND THE NATIONAL CREDIT REGULATOR AS AMICUS CURIAE**, case number 14256/2010 delivered on 1 February 2011.

- [6] The ratio of this judgment is that where a consumer has applied for debt review in terms of section 86(1) and the debt counsellor has referred the application to the magistrates'

court in terms of section 86(7) for an order or re-arrangement, notice in terms of section 86(10) is incompetent. See also **STANDARD BANK OF SOUTH AFRICA LTD v KRUGER: STANDARD BANK OF SOUTH AFRICA LTD v PRETORIUS** 2010 (4) SA 635 (GSJ) where a similar conclusion was reached for different reasons. This is in contrast to other judgments that had ruled that a credit provider can terminate a debt review process by issuing a section 86(10) notice, even when the review application has been submitted to court, but before a debt re-arrangement order had been granted. Compare **FIRSTRAND BANK LTD T/A FIRST NATIONAL BANK v SEYFFERT AND ANOTHER AND THREE SIMILAR CASES** 2010 (6) SA 429 (GSJ) at 436 A – B.¹

- [7] I respectfully agree with the reasoning and conclusion reached in **PAPIER**. However this judgment does not deal with the question of what should a credit provider do in a situation such as the present where the consumer has defaulted on his/her obligations under the re-arrangement order. Must the credit provider still issue a notice in terms of

section 86(10)? Mr. Tsangarakis contended that in such a case a credit provider can simply summons whereas Mr. Buys contended that it would be necessary to still issue a notice in terms of section 86(10).

- [8] Mr. Tsangarakis pointed out that section 86(10) applies to a credit agreement that is being reviewed and that in the instant case the debt review process had run its full course, culminating in an order of re-arrangement. He referred to subsection 2 of section 129 which provides that section 129(1) does not apply *inter alia* to a credit agreement that is subject to a debt restructuring order. Now section 129(1) provides that, subject to section 130(2), a credit provider

“may not commence any legal proceedings to enforce the agreement before –

- (i) first providing notice to the consumer, as contemplated in paragraph (a) or in section 86(10) as the case may be; and
- (ii) meeting any further requirements set out in section 130.”

Mr. Tsangarakis submitted that the effect of these provisions is that neither a section 129(1) notice nor a section 86(10)

notice is required before a credit provider can issue summons where a consumer has defaulted on his/her obligations under an order of re-arrangement. However, both counsel were unable to cite any authority in support of their respective submissions. I considered it necessary to ponder the issue further and accordingly reserved judgment.

- [9] As I was working on my judgment, I stumbled upon the matter of **FIRSTRAND BANK LTD v FILLIS AND ANOTHER** 2010 (6) SA 565 (ECP) in which the same issue as in the instant case arose. The consumer had applied for debt review in terms of section 86(1) which culminated in the magistrates' court making an order of debt re-arrangement. The consumer subsequently defaulted with payments in terms of the order. Eksteen J held that under those circumstances the credit provider was entitled to institute action to enforce the terms of the credit agreement without further notice to the consumer. The learned judge put the matter as follows at 569 par. [14]:

“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 re-arrangement 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.”

[10] I fully agree with the above statement. See also

FIRSTRAND BANK LTD t/a WESBANK v MOODLEY

[2010] JOL 265272 (KZD) where the consumer had defaulted on the debt restructuring order whereupon the credit provider purportedly² cancelled the debt review and proceeded to sue for the return of the motor vehicle that formed the subject of the credit agreement. The consumer’s contention that the credit provider should first have issued a notice either in terms of section 129(1)(a) or section 86(10) was rejected.³

2 I use the word “purportedly” because it was incompetent of the credit provider to cancel an agreement that was subject to a debt re-arrangement order.

3 It seems to follow from the above that a notice in terms of section 86(10) can only be issued in respect of a pending debt review that has not been referred to a magistrates’ court in terms of section 87(1).

[11] The respondent herein has not raised any defence on the merits, let alone a *bona fide* defence. Nonetheless, I have to consider two further issues. The first relates to the provisions of 130 of the NCA. I have perused these provisions and they do not preclude the grant of judgment in the circumstances of this case. The second issue relates to the provision of section 26(1) of the Constitution relating to the right of access to adequate housing. Linked to this is the amended Rule 46 of the Uniform Rules. In **JAFTHA v SCHOEMAN AND OTHERS; VAN ROOYEN v STOLTZ AND OTHERS** 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 the Constitutional Court emphasised the need for courts to oversee execution against immovable property in order to protect the right of access to adequate housing and to do so without prompting by the debtor. Compare **FIRSTRAND BANK LTD v MALEKE AND THREE SIMILAR CASES** 2010 (1) SA 143 (GSJ).

[12] The court in **JAFTHA v SCHOEMAN AND OTHERS; VAN ROOYEN v STOLTZ AND OTHERS**, *supra*, listed the factors that a court must take into account when considering whether to authorise execution of immovable property, but

made it clear that the list is not exhaustive and that each case must be decided on its facts. The difficulty I have in this matter is that there is no indication in the papers whether or not the property in question is the primary residence of the respondent, whether or not he will have nowhere to go if ejected and whether or not he would be able to acquire alternative accommodation. The summons makes it clear that an order will be sought to declare executable his immovable property and the respondent has been legally represented throughout. Surely his attorneys would have known what the consequences of such order would be and they would have advised him of the options available to him if there was a risk that he may be rendered homeless. As Masipa, J stated in **STANDARD BANK OF SOUTH AFRICA LTD v PANAYIOTTS** 2009 (3) SA 363 (WLD) at 375, considerations of fairness require that the circumstances of both the consumer and the credit provider be given equal treatment. The balance owing *in casu* is substantial and it is clear that the respondent is unable to pay it. It will not be fair that the respondent be allowed to retain the property that he cannot pay for, especially considering that he has had the full benefit of the ameliorating provisions of the NCA.

In the circumstances sale of the property will be justifiable.

[13] Accordingly I grant an order in terms of prayers 1, 2 and 3 of the notice of motion together with costs, to be taxed on the scale as between attorney and client.

H.M. MUSI, JP

On behalf of applicant:

Adv. S. Tsangarakis
Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of respondent:

Adv. J.J. Buys
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

/sp