

PARTIES: **FIRSTRAND BANK LIMITED v SAMUEL JACOBUS VAN DEN BERG** NOT REPORTABLE

- DATE HEARD: **18 AUGUST 2009**
- DATE DELIVERED: **1 SEPTEMBER 2009**

- [1] *Nature of proceedings:*
[2] *Key Words:*
[3] *Summary:*

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 1662/09

Date delivered: 1 September 2009

In the matter between:

FIRSTRAND BANK LIMITED

Plaintiff

and

SAMUEL JACOBUS VAN DEN BERG

Defendant

JUDGMENT

EKSTEEN AJ:

[2] This is an application for summary judgment. The plaintiff alleges that the defendant is indebted to it in the amount of R697 577,59, being the principle debt together with finance charges thereon due and owing by the defendant to the plaintiff in respect of monies lent and advanced. The loan is secured by a bond passed by the defendant in favour of the plaintiff and registered over Erf 2446, Lorraine, Nelson Mandela Bay Metropolitan Municipality.

[3] The plaintiff avers in its summons that it has complied with the provisions of the National Credit Act, 34 of 2005, (herein "the Act) and in particular with sections 129 and 130 thereof. The plaintiff accordingly claims payment of the aforestated amount and an order declaring the property especially hypothecated to be executable. The defendant opposes the application for summary judgment and has filed an affidavit in support of

his opposition. In paragraph 3 of his opposing affidavit the defendant states as follows:

“When I received summons on 25 June 2009 I sought assistance. I had heard about debt counselling and although I did not receive a section 129(1) notices averred in the paragraph 1 of the particulars of claim I sought debt counselling.”

[4] No other reference is made to section 129(1) of the Act or to the notice envisaged in the Act in the opposing affidavit. The defendant does not deny that the plaintiff has complied with the provisions of section 129(1) and it was not argued before me that I should consider that section 129(1) has not been complied with. In any event, it has been held that a notice in terms of the Act can be validly delivered even where it does not come to the notice of the defendant (see **Marimuthi Munien v BMW Financial Services (SA) (Pty) Ltd**, as yet an unreported judgment, delivered in KwaZulu National Local Division in case no. 16103/08 on 3 April 2009). In the circumstances I do not consider that the defendant has raised any facts which, if proved at the trial, would establish that the plaintiff has not complied with the provisions of section 129(1).

[5] The defendant does not raise a defence to the plaintiff's action or its application to summary judgment, but meets the application with an application in terms of section 85 of the Act. In support hereof the defendant states as follows:

“3. I have been self-employed since January 2009 in the building industry. However, due to the current economic circumstances there was not enough work available for me to earn sufficient income to pay my obligations to credit providers. When I received this summons on 25 June 2009 I sought assistance. I had heard of debt counselling and although I did not receive a section 129(1) notice as averred in paragraph 1 of the particulars of claim I sought debt counselling.

4. On 26 June 2009 I attended upon the DebtSenseGroup debt counsellors and all my creditors including the plaintiff were duly informed of my application for debt review in terms of section 86 of the NCA. I am informed that once a summons is served the provisions of section 130(3)(c) and section 88(3) of the NCA is no longer applicable.

5. The debt counsellor made a thorough investigation and verified my financial affairs the particulars of which was noted in Form 16 by the debt counsellor as provided in Regulation 24(1)(a) and 9(b) of the NCA. I attach a copy of the relevant pages of the Form 16 marked "SJB1" as required by Regulation 24(3) of the NCA. I submit that it is clear from the document which contains my full financial position, that I am over indebted. My

debt counsellor found me to be over indebted and duly informed the credit providers of that fact by way of form 17(1) which I attach hereto marked "SJB2".

6. At this point in time I am unable to pay my monthly obligations and the debt counsellor is in the process of rearranging my obligations. My attorney informs me that, if I had sought the debt counsellors assistance prior to the summons being issued then the plaintiff would not have had any choice but to be included in the debt review process and that the only way to include the plaintiff now is if the Honourable Court refers this matter to the debt counsellor in terms of section 85 of the NCA."

[6] The financial affairs of the defendant are set out in the Form 16 to which reference is made in the affidavit and which is annexed to the affidavit. It is apparent from the said form that the defendant has a total monthly income, after salary deductions, in the amount of R18 603. The Form 16 further contains a budget of necessary monthly living expenses which amount to R12 045. The defendant accordingly has an amount of R6 557 per month available for payment to credit providers.

[7] The defendant's total liabilities amount to R908 288,49 and his current monthly instalment payments on his debts amount to R18 151,36. The debt forming the subject matter of the summary judgment proceedings

constitutes by far the greatness debt amongst the defendant's liabilities. The monthly instalment payable at the time of the issue of summons on the bond forming the subject matter of the summary judgment proceedings amounted to R7 000 per month. In these circumstances the defendant is plainly over indebted as envisaged in section 79 of the Act.

[8] Section 85 of the Act provides as follows:

“Despite any provision 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 made a recommendation to the court in terms of section 86(7);
- or
- (b) declare that the consumer is over indebted as determined in accordance with this part, and make any order contemplated in terms of section 87 to relieve the consumer's over indebtedness.”

[9] The Court is not obliged to act simply on the defendant's allegation of over indebtedness. In ***Firststrand Bank Limited v Olivier*** 2009 (3) SA 353 Erasmus J, considering a similar application in summary judgment proceedings stated as follows at page 361A-B:

“The question is therefore whether the court should exercise its discretion in favour of granting that application. Certainly, the application must be *bona fide* and not merely a delaying tactic, and the defendant must set out sufficient information to support his allegation of over indebtedness.”

[10]In the present instance the defendant has indeed approached a debt counsellor who has found the defendant to be over indebted. The defendant in his opposing papers, however, makes no proposal as to how his debt could conceivably be rearranged and no proposal by the debt counsellor is annexed.

[11]It is one of the express purposes of the Act as set out in section 3(g) thereof to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by addressing and preventing over indebtedness of consumers and providing mechanisms for resolving over indebtedness based upon the principle of satisfaction by the consumer of all responsible financial obligations. Any rearrangement of debt must accordingly provide for the satisfaction by the consumer of all responsible financial debt. In the present matter reckless credit is not an issue and all the defendants debt must be considered to be “responsible financial obligations”.

[12]On the financial assessment contained in Form 16 annexed to the opposing affidavit it appears that the defendant has liabilities totalling R908 288,49. Even at a modest interest rate of 10% per annum the interest on the outstanding debt far exceeds the amount of R6 557 per month which the defendant has available for payment of credit providers. Any extension of the period of repayment would therefore increase the defendant's debt with each passing month. In the circumstances it would appear, *prima facie*, that the defendant's cash flow is simply insufficient to develop a viable and responsible debt restructuring payment plan. The defendant has placed no information before me as to how he intends to restructure his financial obligations in such a manner that he would ultimately satisfy all his responsible financial obligations.

[13]I have already stated above that the defendant's major commitment is the repayment of the bond. His position would be greatly improved if he was relieved of the bond instalment and his prospects of a successful debt restructuring would be considerably enhanced.

[14]The defendant, in his opposing affidavit, states that he owes almost R700 000 to the bank and if the house were to be sold on an auction it would not realise an amount of more than R350 000 and he would remain indebted to the bank for the balance. Again no basis is laid in the opposing affidavit for this suggestion. The defendant does not state what the original purchase price of the house was nor is any current valuation annexed.

[15] In all the circumstances I consider that the defendant's case for a section 85 order is not persuasive and he has failed to show good and sufficient reason for granting the orders which he seeks.

In the result, there will be judgment in favour of the plaintiff as follows:

1. Payment in the amount of R697 577,59.
2. Payment of interest on the said amount calculated at 13,3% per annum and compounded monthly as provided for in the bond number B120064/2006 with effect from 1 January 2009 to the date of payment, both dates inclusive.
3. An order declaring executable the property specially hypothecated and
4. Costs of the suit as between attorney and client, as provided for in terms of the said bond.

J W EKSTEEN

ACTING JUDGE OF THE HIGH COURT

