IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 718/2013

Date Heard: 16 April 2013

Date Delivered: 25 April 2013

In the matter between:

FIRSTRAND BANK LIMITED Plaintiff

and

DAVID ANDREW GOVENDER Defendant

JUDGMENT

EKSTEEN J:

[1] This is an application for summary judgment. The plaintiff, a registered commercial bank and credit provider in terms of the National Credit Act, 34 of 2005 (herein referred to as "the NCA") entered into an agreement of loan with the defendant in 2005 in order for the defendant to purchase an immovable property (the property). A bond was duly registered over the property in favour of the defendant.

[2] The plaintiff issued summons against the defendant on 11 March 2013 in which it alleged that the defendant had breached the agreement and by virtue of the express terms of the loan agreement the entire outstanding amount due on the loan became due and payable together with interest. It accordingly sought judgment in the sum of R563 355,80 together with interest thereon. In addition the plaintiff

sought an order declaring the property which is situated in Amsterdamhoek, Nelson Mandela Bay, to be executable.

[3] Following upon the alleged breach of the agreement the plaintiff duly issued a notice in terms of the provisions of section 129(1)(a) of the NCA. The said notice was dispatched by registered post to the defendant and attached to the papers is proof thereof and a track and trace record which reveals that the letter was delivered to the defendant on 19 February 2013 at Bluewater Bay. The delivery is not in dispute. In due course the summons was served on the defendant and he entered an appearance to defend. The notice of opposition prompted the application for summary judgment.

Defences to claim

[4] The defendant filed a brief affidavit to resist the summary judgment. He purports to raise three defences therein:

(i) That the plaintiff had failed to prove that a loan agreement exists and what the terms of the agreement are;

(ii) That the plaintiff had failed to prove that the amount claimed is in fact correct; and

(iii) That the defendant was under the protection of the NCA in that he had applied for debt review pursuant to the provisions of section 86 of the NCA.

[5] The affidavit filed in opposition to the summary judgment application was filed out of time and accordingly Mr ***Scott***, on behalf of the plaintiff, argued that in the absence of any explanation for the failure to comply with the time provisions set out in Rule 32 of the Uniform Rules of Court, I should rule that the affidavit constitutes an irregular step in terms of Rule 30 and that it should be struck out. Upon engaging Mr ***Scott*** in argument on this aspect he, correctly in my view, did not persist in this argument. I shall accordingly deal with the three defences raised in the sequence in which they are set above.

[6] In commencing the affidavit in opposition to the summary judgment application the defendant alleges that the "agreed instalment on our home loan agreement … as per the letter of grant" was R5 788,53. He then proceeds to state that the "Letter of Grant was signed by me on the 12 April 2005". Having made these express admissions he proceeds to allege, remarkably, that the applicant has attached a letter of grant to the summons as proof of the loan agreement which was allegedly concluded between the parties and that the applicant has based his cause of action for this entire application on this. He states that the "Letter of Grant describes itself as a letter and as an 'advice'." On this basis it is argued that the applicant has failed to prove that a loan agreement exists and what the terms of the agreement are.

[7] The argument is clearly spurious. The application is for summary judgment. The applicant has alleged an agreement. He has annexed the letter of grant and the bond document to the particulars of claim. The letter of grant commences by a

confirmation that the bank "has agreed to lend" to the defendant R621 000,00 against security of a first mortgage bond to be registered over the property. It then proceeds to set out the terms of the agreement which extends for several pages. At the conclusion of these terms a representative of the plaintiff has, *ex facie* the document, signed the agreement on behalf of the plaintiff. Immediately thereafter the final page of the "letter of grant" follows. It commences to record:

> "I agree to the aforegoing terms and conditions and declare …"

At the conclusion of the final page the defendant's admitted signature appears.

[8] It is plainly an offer to extend to the defendant a loan of R621 000,00 on the conditions set out in the letter and it is signed on behalf of the plaintiff. It was thereafter expressly and in writing accepted by the defendant. On any interpretation it constitutes an agreement of loan. The defendant has not alleged any basis upon which it could conceivably be contended that the document does not constitute a binding contract. On the contrary, he admits expressly that there was an agreed instalment on the home loan agreement and that he signed the letter of grant. The affidavit accordingly reveals no defence based on the allegation that no loan agreement exists. The first defence must accordingly fail.

[9] In the second defence raised the defendant contends that the plaintiff is prohibited by legislation from charging "administration fees in excess of R5,00 (excluding VAT) on pre-existing homeloans in excess of the maximum fee in the Usury Act until that fee is amended under the powers conferred by Section 105(1) of

the NCA". He contends that the Minister of Trade and Industry has not changed the maximum fee and thus it remains at R5,00 (excluding VAT).

[10] Against this background the defendant alleges that the plaintiff has not provided the court with a comprehensive bank statement and accordingly the court cannot be certain that the liquid amount claimed in, and substantiated by the plaintiff's certificate of balance, is correct.

[11] These averments are equally misguided in my view. In terms of the bond agreement a certificate purporting to be signed on behalf of the bank shall be proof until the contrary is proved of the balance owing and the fact that it is due and payable. A certificate of balance is annexed to the particulars of claim which shows the outstanding amount to be R563 355,80. The defendant, whilst speculating on what might have been included in the calculation, makes no averment that the plaintiff has charged administration fees in excess of that which is permitted. That being so, it follows that the defendant has not made out a defence as envisaged in Rule 32 of the Uniform Rules of Court. In fact, I do not think that any facts which he has alleged could justify any doubt as to the correctness of the certificate. The second defence must therefore also fail.

[12] I turn then to consider the third defence raised. It is not in dispute that the defendant breached the terms of the loan agreement nor is it disputed that he in fact received the notice in terms of section 129(1) of the NCA on 19 February 2013. The relevant portion of the letter in terms of section 129(1) reads as follows:

"Home Loan Account Number: 3 000 009 500 957
Outstanding Account Balance: R559643.72
Default Amount: R24403.86

1. We act on behalf of **Firstrand Bank Limited** … and advise that you are in default under Home Loan agreement/s ("credit agreement/s") in respect of the above Home Loan Account.

2. …

3. In order to rectify this situation, we propose that you either:-

   3.1 pay the default amount within 10 business days of delivery hereof;

   3.2 contact our client directly on 011 352 5544 to discuss the possibility of making a firm arrangement to bring the default in terms of the credit agreement/s up to date; or

   3.3 refer the credit agreement/s to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that any dispute may be resolved under the credit agreement/s or (to) develop and agree on a plan to bring the payments under the credit agreement/s up to date.

4. If you fail to respond to this notice or reject our client's proposals contained in paragraph 3, within 10 business days from delivery of this notice, our client may exercise its rights, amongst any other remedies available to our client, to have summons issued against you which, should judgment be granted against you, may result in the sale of your home in execution, potentially leading to the loss thereof and your eviction therefrom.

5. Your attention is also drawn to the following terms and conditions contained in the credit agreement/s and/or bond/s in respect of the above Home Loan Account:

   5.1 When you are in default thereof our client is entitled to claim immediate repayment of the full outstanding balance; or

   5.2 Terminate the credit agreement/s, upon which all amounts whatsoever owing to our client by you will be payable in full.

   If you fail to respond to this notice or reject our client's proposals contained in paragraph 3, within 10 business days from delivery of this notice, our client may proceed to exercise the abovementioned rights.

6. …"

[13] The defendant alleges in his affidavit that the plaintiff served a notice in terms of section 129 of the NCA on him advising him "to seek help from amongst others a debt counsellor, within 10 days of receipt of the letter", which letter was received by him on 19 February. He then proceeds to allege that on 5 March 2013, the 10th business day after receipt of the section 129(1)(a) notice, he approached a debt counsellor and "applied to be placed under Debt Review". Within five days of the date thereof, the debt counsellor, he says, registered him to their system and a Form 17.1 was sent to the applicant. It emerged later, from his supplementary affidavit, to which I refer below, that the debt counsellor so informed the plaintiff on 12 March 2013.

[14] On this basis the defendant contends that the plaintiff acted prematurely in issuing summons as he (the defendant) had complied with plaintiff's request to see a debt counsellor within ten days of receipt of the section 129(1)(a) notice.

[15] Clearly, the defendant has misconstrued the letter written to him. He was not invited to "seek help from amongst others a debt counsellor". What the defendant was invited to do is to refer the credit agreement to a debt counsellor, alternatively a dispute resolution agent, consumer court or ombud with the intention either to resolve a dispute which may exist under the credit agreement in issue, or to develop and agree on a plan to bring the payments under the credit agreement up to date. This is not what the defendant attempted to do. On the contrary, the express averments set out in the affidavit indicate that the defendant sought to include the home loan agreement in a debt review process pursuant to the provisions of section 86 of the NCA. This he cannot do. Once a section 129(1)(a) notice has been

delivered it is not competent for the debt in issue, being the home loan account, to form part of any debt review pursuant to the provisions of section 86 of the NCA. (See ***Nedbank Limited and Others v National Credit Regulator and Another*** 2011 (3) SA 581 (SCA) at para [14] p. 590.) His reference to the debt counsellor, at least in respect is the agreement in issue, is accordingly a nullity and can have no impact on these proceedings (compare ***Standard Bank of South Africa Limited v Hales a-nd Another*** 2009 (3) SA 315 (D&CLD) at 323I-J).

[16] It is accordingly clear that the defendant has not made out any defence as envisaged in Rule 32. During argument before me Ms ***Govender***, who appears on behalf of the defendant, recognised this difficulty and conceded that no defence had been made out in respect of the claim. She, however, requested that the matter be postponed to enable the defendant to file a supplementary affidavit by the defendant in order to lay a foundation upon which I might exercise my discretion in terms of the provisions of section 85 of the NCA. Mr ***Scott*** resisted this application. I granted the application as I considered it to be in the interests of justice and the matter was accordingly postponed in order to enable the defendant to supplement his papers.

[17] A supplementary affidavit was duly filed. Notwithstanding the basis upon which the application for the postponement was granted the defendant nevertheless again attempted to make out a defence under the provisions of section 129 of the NCA. Again it was confirmed that the notice in terms of section 129 was received by the defendant on 19 February 2013. An application, as recorded above, was made to a debt counsellor on 5 March 2013 for debt review. The debt counsellor advised the plaintiff thereof on 12 March 2013. On this basis the defendant then proceeds

to allege that "[s]ummons was in any event served upon me, before any dispute resolution or repayment plan could be developed or suggested by my Debt Counsellor to the [a]pplicant" (*sic)*. It is argued for this reason that the plaintiff did not act "*bona fide*" and acted prematurely in issuing summons.

[18] Again I think that the defence is ill-considered. Firstly, on his own version, the defendant says that the debt counsellor was not approached to resolve a dispute or to develop a repayment plan in respect of this debt. The undisputed facts before me show that defendant had been in default for more than 20 business days, the section 129(1)(a) notice was indeed received on 19 February 2013, no response was received by the plaintiff within ten business days thereof and accordingly the plaintiff proceeded to issue summons on 11 March 2013, as he was entitled to do. (See section 130(1) of the NCA.) The return of service of the combined summons, particulars of claim and annexures thereto, shows that the sheriff served the summons upon the defendant of 11 March 2013. I am unable to comprehend how any communication given on 12 March 2013, after the service of the summons upon the defendant, could possibly cast doubt upon the *bona fides* of the plaintiff.

Section 85 of the NCA

[19] I turn to consider section 85 of the NCA. Section 85 provides as follows:

> **"85 Court may declare and relieve over-indebtedness**
> 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 make 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 section 87 to relieve the consumer's over-indebtedness."

[20] Ms ***Govender*** has urged me to make an order in terms of the provisions of section 85(a) in the exercise of my discretion. Mr ***Scott*** argues to the contrary.

[21] Section 85 confers a discretion on the court. In ***Firstrand Bank Limited v Olivier*** 2009 (3) SA 353 (SE) at para [14] on p. 359 Erasmus J considered the nature of the discretion. He held as follows:

> "[14] A court is not obliged to act simply on the defendant's allegation of over-indebtedness, but 'may' make an appropriate order in terms of para *(a)* or *(b)*. The court will exercise this discretion judicially with due regard to the objectives of the NCA which, in the present regard, is to assist the over-burdened consumer to rehabilitate his affairs. In doing so, the Act makes significant inroads into the credit provider's common-law rights, as well as its constitutional right of access to the courts (s 34 of the Constitution of the Republic of South Africa Act 108 of 1996). The court will restrict the statutory limitation of the credit provider's rights to the extent that it is reasonable and justifiable to do so in our democratic order while promoting the objects of the NCA."

I agree with this approach.

[22] This accords with the sentiment expressed by Cameron J in ***Sebola and Another v Standard Bank of South Africa Limited and Another*** 2012 (5) SA 142 (CC) at para [40] p. 154 where he confirmed the dictum of the SCA in ***Nedbank Limited v National Credit Regulator*** *supra* at 585 para [3] stating:

> "The interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider."

(See also ***Standard Bank of South Africa Limited v Hales and Another*** *supra* at 322B-C.)

[23] The discretion which section 85 confers upon a court arises when a credit agreement is considered in proceedings before it and it is further alleged by the defendant (the consumer under the credit agreement) that he is over-indebted. Once these two jurisdictional facts co-exist the discretion arises. The discretion is conferred upon the court despite "any provision of law or agreement to the contrary". It follows that notwithstanding the fact that the plaintiff has commenced proceedings to enforce the credit agreement by the issue of a notice in terms of section 129(1)(a) of the NCA a general debt review, which includes the credit agreement in issue, may still follow in the event that the court exercises its discretion in terms of the provisions of section 85 (see ***Nedbank Limited v National Credit Regulator*** *supra* at para [14] on p. 590D).

[24] In the proceedings before me the loan agreement (credit agreement) is being considered and the defendant has alleged that he is over-indebted. The parties are accordingly in agreement, and correctly so, that I am empowered to exercise a discretion in terms of the provisions of section 85.

[25] It is argued on behalf of the defendant that in the event of a referral in terms of section 85(a) the court does not have to make a determination of over-indebtedness, but only needs to refer the matter to a debt counsellor, requesting the debt counsellor to report back to the court with a determination and recommendation for

the restructuring of the consumer's debt. It is only upon receipt of such determination and recommendation, so the argument proceeds, that the court will be able to exercise its discretion informatively. In the circumstances, so the argument runs, the defendant is not required to make allegations of fact relating to his alleged over-indebtedness. I think that this argument fails to appreciate the nature of these proceedings.

[26] It is of course correct that the court need not at this stage make a determination of over-indebtedness. What is required of the court at this stage is to exercise a discretion and to do so judicially along the lines set out above. The court has always, even before the advent of the NCA, retained a residual discretion to refuse summary judgment even where the requirements of Rule 32(2) have not been met. In ***Breitenbach v Fiat (Edms) Beperk*** 1976 (2) SA 226 (T) Colman J considered the approach of the court to the exercise of such a discretion. At p. 229C-F he stated:

> "The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief …
>
> The discretion … should not be exercised against a plaintiff on the basis of mere conjecture or speculation. It should be exercised on the basis of material before the Court."

[27] These comments find equal application where a defendant asks of a court to exercise its discretion under section 85 of the NCA in its favour. This is borne out by a number of instances where the courts have considered the provisions of section 85. In ***Firstrand Bank Limited v Olivier*** *supra* at 361B Erasmus J said:

> "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."

(See also ***Standard Bank of South Africa Limited v Panayiotts*** 2009 (3) SA 363 (WLD) at para [55] p. 372; and compare ***Standard Bank v Hales*** *supra* at p. 324 at 325 para [22].)

[28] It is accordingly necessary for a defendant who makes an appeal upon the provisions of section 85 to set out sufficient facts on affidavit to enable the court to exercise the discretion which is conferred upon it, and to satisfy itself that the application for referral is *bona fide* and not made as a delaying tactic.

[29] Section 79 of the NCA provides that a consumer is over-indebted if:

> "… the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to the consumer's-
>
> (a) financial means, prospects and obligations; and
> (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment".

[30] In order to enable a court to assess the *bona fides* of the defendant and to determine, *prima facie*, whether or not the appeal on section 85 is a mere delaying tactic, it is required of a defendant to take the court into his confidence and to set out sufficient information to enable the court to assess whether there is a reasonable prospect that he may be found to be over-indebted, including the extent of his financial means and commitments. He should set out sufficient particularity of his

current liabilities and must take the court into his confidence in respect of his financial means, including his current earnings and investments, and his monthly living expenses. He should set out particulars of his financial prospects in the foreseeable future so as to enable the court to determine whether there is a reasonable prospect that he will be able to rehabilitate his affairs within a reasonable period. This may require him to deal with the circumstances which gave rise to his default and the extent of the change which has since occurred, if any, in his financial affairs. (Compare ***Standard Bank v Hales*** *supra* at p. 324I to 325E.) Each case will, however, depend on its own facts.

[31] The defendant has fallen dismally short of this standard. He recognises that it is incumbent upon him to indicate how he came to be in default under the agreement. In this regard he states:

> "The employer experienced financial difficulties and I was not paid timeously or correctly. This in turn resulted in my defaulting under the credit agreement and subsequently becoming over-indebted."

[32] This explanation is extremely coy. He does not tell the court what he was entitled to under his contract of employment nor what the extent of his employer's default was. He does not give any indication of the extent of the delay in payments nor of the obligations which he was required to meet at the time. He does not tell us what assets or investments he had which he could have utilised to meet these obligations nor why, if such assets existed, he did not realise them to settle his debt. In all he had not taken the court into his confidence as to the particulars of the history which gave rise to his default.

[33] He recognises that it is incumbent upon him to provide particularity as to the change which has occurred in his financial circumstances since his default. In this regard he records:

> "I have actively been pursuing new employment opportunities and have managed to acquire a position with a neurological firm as an operations and marketing manager."

[34] This, in my view, is of no assistance. He does not confide in the court as to how his present earnings compare to what he previously earned. He does not give any indication of whether his new employment opportunity affords him greater or lesser remuneration. In the absence of any indication of the change in his earnings nor of the change in his obligations, liabilities and living expenses the statement is of no assistance.

[35] He declares further that he has always been aware of debt counselling and his right to approach a debt counsellor. In this regard, however, he states:

> "I was unaware that you had to approach a Debt Counsellor before you received the S129(1)(a) notice. It has always been my belief that the notice was merely a demand and that once you received it, you could then go to a Debt Counsellor."

[36] What the defendant fails to explain is why he did not approach a debt counsellor at the time of his default and why he chose to sit back and wait for a "demand" before seeking any rearrangement in his affairs. He acknowledges that he

did not, in response to the section 129(1)(a) notice, approach the plaintiff with a proposal to reschedule his debt.

[37] He recognises that he is required to state how the debt would be repaid and to address the potential for success of debt rescheduling. In this regard he states:

> "My Debt Counsellor informs me that the Debt Counselling Rules System (DCRS) implemented by the National Debt Mediation Association (NDMA) requires a repayment of 80% of my original bond repayment as a viable proposal under the debt review. I am prepared to commit to this payment and if possible an annual escalation of 8% thereon, thereby allowing me to recover from my present indebtedness. This will be subject to my Debt Counsellors final proposal, should the Court see fit to exercise its discretion in my favour."

[38] It is immediately apparent from this that it is not a firm proposal. It is qualified by "if possible" and "subject to my Debt Counsellor's final proposal". What is, however, conspicuously absent from this paragraph is any particularity which would enable the court to assess whether there is a prospect that he could afford to pay this or of the potential for success of debt counselling in general. In particular there is an absence of any information relating to his income, investments and other assets or of his financial commitments and living expenses.

[39] Where a defendant chooses to be unduly coy about his financial affairs it should not come as a surprise if the court should hold that it is not satisfied as to his *bona fides* and is not convinced that his allegation of over-indebtedness is not merely a delaying tactic. In the present case, on a careful consideration of the very limited information placed before the court I do not think that I can be satisfied of the *bona fides* of the allegation of over-indebtedness nor can I be satisfied that the plea

for relief under section 85 of the NCA is not merely a delaying tactic. Accordingly, in the exercise of my discretion, I decline to refer the matter to a debt counsellor in terms of section 85. In the circumstances the plaintiff is entitled to judgment.

Declaration of executability

[40] In addition to judgment the plaintiff seeks an order declaring executable the immovable property, being Erf 1633 Amsterdamhoek, in the Nelson Mandela Bay Metropolitan Municipality and Division of Port Elizabeth, Province of the Eastern Cape

In extent: 1065 square metres

Held under Deed of Transfer No. T 46108/2005

[41] In the summons served upon the defendant on 11 March 2013 the following was recorded:

> "(a) your attention is drawn to section 26(1) of the Constitution of the Republic of South Africa, 1996, which accords to everyone the right to have access to adequate housing. Should you claim that the order for execution will infringe that right it is incumbent on you to place information supporting that claim before the court;
>
> (b) in terms of section 26(3) of the Constitution you may not be evicted from your home or your home may not be declared executable and sold in execution without an order of court made after considering all the relevant circumstances;
>
> (c) in terms of rule 46(1)(a)(ii) of the Rules of the High Courts of South Africa, no writ of execution shall issue against your primary residence (ie your home), unless the court, having considered all the relevant circumstances, orders execution against such property;
>
> (d) if you object to your home being declared executable, you are hereby called upon to place facts and submissions before the court to enable the court to consider them in terms of rule 46(1)(a)(ii) of the Rules of Court. Your failure to do so may result in an order declaring your home specially executable being granted, consequent upon which your home may be sold in execution."

[42] This invitation was not taken up by the defendant in his affidavit and no reference at all was made to any circumstances which may impact upon the provisions of section 26 of the Constitution. In the supplementary affidavit, however, the defendant states:

> "If the property is sold in execution it will have an impact on my access to adequate housing. It is virtually impossible in the present financial environment to obtain a mortgage bond and I do not have the resources to place a deposit or offer security. In order for me to rent a house for my family (wife and 2 minor children) and myself, the estate agents would require a credit bureax check and I will not qualify for rental."

These averments constitute the only information placed before me by the defendant.

[43] In the particulars of claim the plaintiff has alleged that the defendant concluded the credit agreement with the plaintiff in order to obtain money to acquire and/or improve the property in issue. It alleged further that the bond was registered in order to provide security to the plaintiff in respect of the principal debt, together with certain other charges. These averments are not contested.

[44] Before me Ms ***Govender*** argued, with reference to the aforestated averments in the supplementary affidavit, that if the property was sold in execution it would have an impact on the respondent's access to adequate housing. Section 26 of the Constitution provides that "everyone has the right to have access to adequate housing". In ***Standard Bank of South Africa Limited v Saunderson and Others*** 2006 (2) SA 264 (SCA) Cameron JA and Nugent JA emphasised at p. 273 para [16] that-

> "It must be borne in mind that s 26(1) does not confer a right of access to housing *per se* but only a right of access to 'adequate' housing; and this concept of necessity is relative …"

[45] They noted that in ***Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*** 2005 (2) SA 140 (CC) the Constitutional Court had held that ownership, as opposed to occupation, of a residence which constituted "adequate housing" was itself invasive of section 26(1). They thereafter proceeded to emphasise at p. 274 para [17]:

> "But *Jaftha* did not decide that the ownership of all residential property is protected by s 26(1); nor could it have done so bearing in mind that what constitutes 'adequate housing' is necessarily a fact-bound enquiry. One need only postulate executing against a luxury home or a holiday home to see that this must be so, for there it cannot be claimed that the process of execution will implicate the right of access to adequate housing at all."

[46] In the present matter we know from the summons that the loan agreement was in the amount of R621 000,00. The defendant has not favoured the court with any information as to the original purchase price nor the current value of the home or the economic standing of the suburb in which it is situated. I have not been told of its size or the facilities which it offers. I am accordingly unable to judge the standard of housing which is in issue.

[47] In any event, in the present case it is not disputed that the loan was advanced and the bond registered in order to acquire the property in issue, alternatively to improve same. This consideration alone weighs heavily in assessing whether or not

to make an order declaring the property executable. Reverting to the judgment in ***Saunderson*** *supra* Cameron JA and Nugent JA addressed this issue at p. 274 para [19] where they stated:

> "But even accepting for present purposes that execution against mortgaged property could conflict with s 26(1) such cases are likely to be rare. It is particularly hard to conceive of instances where a mortgagee's right to reclaim the debt from the property will be denied altogether; and it is therefore not surprising that the Constitutional Court noted in *Jaftha* that in the absence of abuse of court procedure - and none is alleged here - a sale in execution should ordinarily be permitted against even a home bonded for the debt sought to be reclaimed. Nor can the approach differ depending on the reasons the property owner might have had for bonding the property, or the object on which the loan was extended. "

[48] Later, at p. 275 para [20] they proceeded to state:

> "Until the defendants in the cases before us could show that orders for execution would infringe s 26(1) the bank was not called on to justify the grant of the orders. The sole fact that the property is residential in character is not enough to found the conclusion that an infringement of s 26(1) will necessarily occur."

[49] In the present instance the defendant has not shown that an infringement of his right to "adequate housing" would occur.

[50] Ms ***Govender*** further resorts to ***Jaftha's*** case *supra* where Mokgoro J at p. 162I-J said:

> "The balancing should not be seen as an all or nothing process. It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort."

[51] I think these comments are correct and Cameron JA and Nugent JA recognised at p. 275 para [20] that it was more easily possible to contemplate a court delaying execution where there was a real prospect that the debt might yet be paid. I have no doubt that section 85 of the NCA provides such a mechanism, however, by virtue of the paucity of information which was placed before me, I have concluded that I am not able to exercise my discretion in the defendant's favour. In these circumstances the plaintiff is entitled to an order declaring the property to be executable.

Costs

[52] Clause 11.1 of the bond agreement provides that the plaintiff shall be entitled to all costs, including attorney and client costs and collection commission incurred by the bank, inter alia, in demanding or obtaining payment of all or any sums due by the defendant to the bank and in suing for the recovery thereof. On this basis Mr ***Scott*** seeks a costs order on a scale as between attorney and client. Ms ***Govender*** was unable to advance any argument as to why such a costs order should not be granted. I think, by virtue of the agreement between the parties, that the defendant is entitled to such a costs order.

[53] In the result, the following order is made:

1. The defendant is ordered to pay to the plaintiff:

(a) The amount of R563 355,80;

(b) Interest on the amount of R563 355,80, calculated daily and compounded monthly, at the rate of 8,5% nominal per annum with effect from 7 March 2013 to the date of final payment, both dates inclusive;

2. The property being Erf 1633 Amsterdamhoek, in the Nelson Mandela Bay Metropolitan Municipality and Division of Port Elizabeth, Province of the Eastern Cape

In extent: 1065 square metres

Held under Deed of Transfer Number T46108/2005 is declared specially executable.

3. The defendant is ordered to pay the plaintiff's costs of the suit on a scale as between attorney and client.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv P Scott SC instructed by Spilkins, Port Elizabeth

For Defendant: Adv Govender instructed by MSA Attorneys, Port Elizabeth