THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: 00/0000

In the matter between: Reportable

FIRSTRAND BANK LTD **PLAINTIFF**

And

MELICIA MUNSAMY **DEFENDANT**

Coram: ROGERS J

Heard: **11 FEBRUARY 2013**

Delivered: **14 FEBRUARY 2013**

JUDGMENT

ROGERS AJ:

Introduction

[1] The plaintiff ('FRB') has applied for summary judgment for the amount allegedly owing by the defendant ('Munsamy') on her home loan together with an order declaring the mortgaged property ('the Parklands property') executable. Munsamy has opposed summary judgment and filed an application in terms of s 86(11) of the National Credit Act 34 of 2005 ('the Act') for resumption of a terminated debt review.

[2] The relatively straightforward circumstances of the case have given rise to a procedural history which suggests a collective failure by the parties and the legal system to attain the objects of the Act. FRB instituted a previous action for the same debt in late 2010. Those responsible for preparing FRB's summons disregarded a debt review which Munsamy had sought and instead alleged that FRB was entitled to institute proceedings because it had delivered a notice in terms of s 129(1) of the Act. Munsamy defended the action whereupon FNB applied for summary judgment. In her affidavit opposing summary judgment Munsamy referred to the debt review. On 7 March 2011 Binns-Ward J refused summary judgment on the basis that FRB's summons did not make allegations to show that the review had been terminated.

[3] In November 2011 FNB issued summons in the present action. FRB alleged that the debt review had been terminated by notices given in May 2010 and October 2011. FRB presumably issued a new summons to preserve its right to seek summary judgment. It did so without withdrawing the first action (the first action was only withdrawn some months later, without a tender of Munsamy's costs).

[4] Munsamy entered appearance to defend whereupon FRB again applied for summary judgment. At its first hearing on 25 January 2012 the summary judgment application was postponed to 8 February 2011 (presumably to afford Munsamy an opportunity to file her opposing affidavit, which she did on 8 February 2012). At the second hearing on 8 February 2012 the summary judgment application was postponed to 23 February 2012 (presumably to afford FRB an opportunity to

consider the opposing affidavit). The matter served again before the court on 23 February 2012, 17 May 2012 and 31 July 2012, only to be postponed on each occasion. On 31July 2012 the order (taken by agreement) postponed the matter to 13 August 2012 with a direction that Munsamy file her s 86(11) application by 6 August 2012. This she did, whereupon the summary judgment application and the s 86(11) application were again postponed on 13 August 2012, 24 October 2012 and 5 December 2012, finally coming before me on 11 February 2013. The hearing before me was thus the tenth occasion on which the matter has served before court in one form or another.

[5] In addition to the depressing story of delay summarised above, the following further facts should be mentioned. The home loan on which FRB sues was granted in September 2007 and the mortgage bond registered in November 2007. The mortgaged property, the Parklands property, is Munsamy's primary residence. According to her affidavit of 6 August 2012 she has a 14 month old daughter. Munsamy also owns two other properties, both of which she describes as investments, the one in Summers Green in the Cape Peninsula, the other in Glenside, KZN. FRB is also the funder and mortgagee of the Glenside property.

[6] In August 2010 Munsamy, who is employed as an administrator, applied for debt review in terms of s 86(1) of the Act. Her first debt counsellor was a Mr Richard Elliot ('Elliot'). He found her to be over-indebted. After communicating with and making proposals to credit providers (including FRB), Elliot on 8 September 2010 filed an application in the Cape Town Magistrate's Court ('CT MC') in terms of s 86(8)(b) in which a rearrangement of Munsamy's obligations was recommended. Munsamy signed an affidavit in support of that application.

[7] On 7 December 2010 the summons in the first action was served on Munsamy. She says that she had not up to that time received any notice from FRB of the termination of the debt review. Upon receipt of the summons she tried to find out from Elliot what was going on, only to discover that he was no longer in business and that he had never been registered as a debt counsellor – he had been using the name and number of another registered counsellor. Munsamy thus sought help from a new registered counsel, Deborah Solomon ('Solomon'). In February 2011

Solomon made proposals to the credit providers, including FRB. The latter rejected the proposal, claiming that it had already exercised its right in terms of s 86(10) to terminate the debt review (more of this later).

[8] It will be recalled that at this stage (February 2011) the first action was still pending (it was only on 7 March 2011 that Binns-Ward J refused FRB's application for summary judgment). On 16 March 2011 Solomon filed a further application with the CTMC in terms of s 86(8)(b). The proposed rearrangement included Munsamy's obligations to FRB in respect of the Parklands property, the Glenside property, a credit card debt and a further loan indebtedness. On 7 July 2011 FRB filed an affidavit in the CTMC opposing the rearrangement order insofar as it concerned the Parklands loan, contending that FRB had duly terminated the debt review. FRB also asserted that the rearrangement was not reasonable.

[9] While the rearrangement proceedings were pending in the CTMC, FRB on 7 November 2011 issued its summons in the current action. Later that month (on 29 November 2011) the CTMC made a rearrangement order from which FRB's Parklands loan was excluded. The other three FNB debts formed part of the rearrangement order.

[10] As noted, FRB's application for summary judgment in the second action was postponed on a number of occasions. Over the period August-November 2012 founding, answering and replying papers were filed in Munsamy's related s 86(11) application.

Termination of the debt review

[11] The facts relating to the termination of the debt review in relation to the Parklands loan are somewhat confused. In the first action FRB ignored the debt review and thus made no allegations regarding its termination. In the current action FRB alleges in its summons that it terminated the debt review in relation to the Parklands loan in May 2010 and October 2011, and the relevant letters are annexed.

[12] The first of these letters (which would, on FRB's version, have pre-dated the institution of the first action) does not actually bear a date though there is a computer file reference which may indicate that the document was generated in May 2010. In its answering affidavit in the s 86(11) application FRB departed from the allegation that this notice was given in May 2010, instead asserting (without apparently noticing the discrepancy) that the first termination notice was given on 27 July 2010. No proof of that fact was offered. However, Munsamy attached to her affidavit opposing summary judgment the affidavit filed by FRB in the CTMC in opposition to the debt rearrangement, from which one might deduce that the first termination notice (which in the summons was said to have been given in May 2010) was in fact only dispatched by registered post to Munsamy in the latter part of July 2010.

[13] However that may be, the so-called first termination letter is in my view irrelevant. I say so because it bears an account number which is not the account number for the Parklands loan but, as far as I can tell, for the Glenside loan, which is consistent with the fact that this particular letter was sent to Munsamy at an address in Glenside. That notice could thus not have served to remove the Parklands loan from the scope of the debt review.

[14] The second notice, dated 14 October 2011, indeed related to the Parklands loan. It was sent shortly before the second summons was issued and shortly before the CTMC made the debt rearrangement order but many months after FRB in February 2011 had declined to entertain Solomon's proposals on the purported basis that the debt review had already been terminated.

[15] One further matter regarding the termination of the debt review must be mentioned. In the affidavit filed by FRB in the CTMC in opposition to the debt rearrangement order FRB's deponent said that a termination notice was given on 21 October 2010. The letter annexed in support of that allegation is indeed dated 21 October 2010 and bears the Parklands loan account reference. There is also annexed to the affidavit a proof of posting suggesting that the letter was dispatched on 22 October 2010 (though the annexure is barely legible). The difficulty is that this is not the allegation made by FRB in its summons nor has FRB, in opposing the

s 86(11) application, claimed that a termination notice was given in October 2010. I thus consider that I should disregard this alleged termination.

The s 86(11) application

[16] It is common ground that in terms of s 86(11) this court (and not only the magistrate's court) has the jurisdiction to order that the debt review in respect of the Parklands loan be resumed. There is no closed list of factors relevant to the exercise of this discretionary power though the considerations which a court would typically need to assess would include whether the credit provider engaged in the debt review process in good faith and whether there are reasonable grounds to believe that the debt review, if it were resumed, might result in an agreement or rearrangement order in terms whereof the credit provider's claim will be satisfied.[1]

(i) FRB's participation in the debt review

[17] If I proceed on the basis (as I think I must) that FRB has not shown that the debt review in respect of the Parklands loan had been terminated by February 2011, FRB was, in terms of s 86(5), under an obligation in February 2011 to participate meaningfully in the debt review and to consider and respond to Solomon's proposal. FRB may have believed that the debt review had been terminated but on the evidence properly before me the bank was mistaken.

[18] FRB's counsel submitted that the bank had indeed considered Solomon's proposal and found it to be unreasonable. Even if that were so, there is no evidence that FRB communicated its difficulties to Solomon and made counter-proposals. FRB simply declined to enter into a discussion on the merits of the proposal, asserting that the bank had terminated the debt review.

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[1] See *FirstRand Bank Ltd v Collett* 2011 (4) SA 508 (SCA) paras 15-18; *Seyffert & Another v FirstRand Bank Ltd* 2012 (6) SA 581 (SCA) paras 7-9. See also *FirstRand Bank Ltd v Adams and Another* 2012 (4) SA 14 (WCC) para 20.

[19] In any event, I do not think the evidence shows that FRB properly considered and assessed Solomon's proposal at the time. In FRB's answering affidavit in the s 86(11) application the deponent annexes two spread sheets to demonstrate that Munsamy's current proposal and a previous proposal were not feasible. After summarising the content of the spread sheets the deponent adds that the annexures show that FRB had considered 'the second proposal' (presumably Solomon's proposal of February 2011 as opposed to Elliot's earlier proposal) but declined it because it was 'unrealistic and unreasonable'. The annexures do not prove what the deponent claims. The first annexure is an analysis of the proposal contained in Munsamy's founding papers in the s86(11) application, ie a proposal made in August 2012. The second annexure is difficult to fathom and counsel could not assist me in understanding it. Be that as it may, the second annexure, like the first one, is an analysis with an opening balance as at 1 September 2012. It thus appears to be an analysis performed at the time FRB was preparing its opposing papers in the s 86(11) application – it does not date back to February 2011.

(ii) Prospects of successful rearrangement

[20] Despite the fact that FRB did not, as it should have done, consider and respond to Solomon's proposal in February 2011, there would be little purpose in ordering a resumption of the debt review if it has no prospect of achieving a successful outcome.

[21] The proposal advanced by Munsamy in her founding papers in the s 86(11) application is based on her current monthly income and her current monthly commitments, including commitments in terms of the existing debt rearrangement order. Munsamy states that she can afford to pay R3 325 per month towards the Parklands loans. This is significantly below the current contractual instalment (which, according to FRB's compliance affidavit filed in January 2012, was at that time R10 268,65). As other obligations forming part of the existing debt rearrangement order are discharged, the monthly payments which Munsamy could afford to pay to FRB will increase. Attached to the founding affidavit is a schedule prepared by Solomon with a monthly analysis. It is on the strength of this schedule

that Munsamy asserts that her proposal will result in a settlement of FRB's Parklands loan over 282 months (23½ years). In the context of a mortgage loan granted in 2007 with a 30-year period, that might not seem unreasonable.

[22] However, on closer analysis the proposal is in my view entirely unreasonable. The proposal is premised on the operation of the statutory version of the *in duplum* rule contained in s 103(5) of the Act.[2] The reason why FRB's claim would supposedly be settled by month 282 is that this is the month by which (according to Solomon's calculation) Munsamy would have made payments in the aggregate (R3 486 950,90) equal to the opening balance in month 0 of the calculation (R1 743 475,45). The schedule reflects, however, that as at month 282, and disregarding the effect of s 103(5), the unpaid balance of the Parklands loan would be R8 795 313,24. This means that if Solomon has done the *in duplum* calculations correctly, FRB will be required to forego contractual interest of R8 795 313,24 if the Parklands loan is to be rearranged as Munsamy and Solomon propose. Expressed differently, the schedule shows that the Parklands loan will become interest-free after a few years. On my rough calculation this position will be reached in about month 90 (ie after about 7½ years), meaning that for months 91-282 (16 years) the loan would be interest-free.[3]

[23] Whether s 103(5) would in fact apply, as Munsamy's proposal assumes, may be open to question. If the Parklands loan obligation were rearranged pursuant to a resumed debt review, and if Munsamy complied with the rearranged obligation, would she remain 'in default' for purposes of s 103(5)?[4] If not, Munsamy's proposal errs materially in failing to account for a very large amount of interest. If, on the other hand (as her proposal assumes), s 103(5) would continue to operate despite the

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[2] For the correct interpretation of s 103(5) *see Nedbank Ltd & Others v National Credit Regulator & Another* 2011(3) 581 SCA para 33-49.

[3] If one assumes that month 0 of the calculation corresponds with the commencement of Munsamy's default under the Parklands loan (in fact the default would be earlier, since Munsamy has been in default for several years), the interest paid by Munsamy as from month 1 together with accrued but unpaid interest could not exceed the opening balance of R1 743 475,45. By month 90 Munsamy would (according to Solomon's schedule) have paid interest of R444 170 while the unpaid accrued interest would be R1 291 118,84. This means that accrued interest (both paid and unpaid) during the period of default would total R1 735 288,84.

[4] The language of s 88(3)(a) and (b)(ii) might support the view that there could be default under a credit agreement despite compliance with a rearrangement agreement or order.

rearrangement, its effect would be grossly unfair to FRB.[5] The purpose of debt review is not to relieve the consumer of her obligations but to achieve a rearrangement in accordance with the principle of satisfaction of all responsible consumer obligations.[6] It is possible that other debt counsellors are, like Solomon, preparing rearrangement proposals which deal with long-term obligations on the footing that s 103(5) will relieve the consumer of a substantial amount of interest. If so, the rearrangement proposal should, in my view, clearly state and quantify the effect of applying s 103(5) (the proposal in the present case did not do so). Whether a proposal which depends on s 103(5) for its efficacy could ever be regarded as acceptable is not something I need decide; but credit providers, the magistrate's court and (where the matter serves before it under s 86(11)) the high court are at least entitled to be informed in clear terms of the impact of s 103(5), since it is clearly relevant to assessing the reasonableness of the proposal.

[24] Despite my negative view on the proposal made in the founding affidavit, there are other circumstances which suggest that a different and more realistic rearrangement of the Parklands loan might be possible if the debt review resumes. Munsamy owns two other properties. Munsamy is trying to sell the Glenside property. That property is bonded to FRB. The Glenside mortgage loan is part of the existing debt rearrangement order. The bond balance at the time of the rearrangement order was R207 767,65. Munsamy states that there is a signed offer to purchase at R1,4 million, conditional on the purchaser obtaining bond approval. The purchaser has not yet obtained such approval. There is a letter from the transferring attorneys dated 19 October 2012 stating that the purchaser has paid an amount of R200 000 towards the deposit.

[25] If the Glenside property is sold to the current purchaser or to another purchaser, it seems that Munsamy should be able to clear her smaller debts, eliminate the arrears on her Parklands loan and make a capital reduction, leaving

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[5] This may well have been the fundamental flaw in the proposal which Malan JA found to be unacceptable in the *Seyffert* case *supra* para 10.
[6] *Collett supra* para 10.

her with a reduced contractual instalment which she might well be able to afford in full.

[26] There is also the property in Summers Green. According to Munsamy this property currently generates rental income of R6 000 per month. Munsamy states that the tenant is interested in making an offer for the property. This is another source from which (if it were necessary) Munsamy might be able to settle her arrears and make a capital reduction on the Parklands loan.

[27] Finally, Munsamy has stated in her replying affidavit in the s 86(11) application that as from 2013 she will be earning additional rent from interns placed with her for accommodation by an organisation called Europe4Africa.

[28] It thus appears that Munsamy's current inability to meet her monthly commitments represents a relatively short-term cash flow difficulty. The court considering the debt review (if the parties cannot resolve the matter extra-judicially) might consider, after being supplied with further up to date information about the sale of the Glenside and/or Summers Green properties and the Europe4Africa rent, that Munsamy should be granted a relatively short period (months, rather than years) during which reduced monthly payments would be allowed, followed either by a clearing of the arrears and resumption of the full contractual instalment or by a capital reduction and thus a reduced contractual instalment.

[29] I thus propose to order the resumption of the debt review in relation to the Parklands loan. As a corollary, the application for summary judgment will need to be postponed *sine die*. If the resumed debt review terminates without a rearrangement order, FRB will be entitled to re-enrol the summary judgment application for hearing.

[30] In *Standard Bank of South Africa Ltd v Kallides* [2012] ZAWCHC 38 Binns-Ward J, in ordering the resumption of a debt review, included an order that the credit provider could again terminate the review in accordance with s 86(10), the 60-day

period to run from the date of the order. Section 86(11) empowers the court to impose conditions when ordering resumption. It may be that by necessary implication s86(10) applies in any event when a debt review is resumed under s 86(11), with the 60 days running not from the date of the original application for debt review but from the date of the resumption order. If it were otherwise, there would be no way for a credit provider to bring the resumed review to an end if the consumer and counsellor dragged their heels. However, and if this is not a necessary implication, I think the court may bring about the same result by imposing an appropriate condition under s 86(11). I propose *ex abundanti cautela* to include such a condition in the present case. This is not, of course, an invitation to FRB to exercise the right of termination as soon as the 60 days expires. Experience has shown that it is often not possible to finalise the debt review process within 60 days. FRB might well be unwise to terminate if the resumed review is proceeding expeditiously. Conversely, though, Munsamy and her counsellor need to understand that they must deal with the matter with energy and speed, since a court is likely to be distinctly less sympathetic to them in a second resumption application.

Costs

[31] Although Munsamy has succeeded in her s 86(11) application, I do not think she should be awarded the costs of the application. The proposal on which she based her application was not reasonable. I have come to her assistance by a different route. Munsamy may also be criticised for not having been more vigorous in disposing of one or both of her other properties, given that she herself sought a debt review nearly three years ago.

Order

[32] I thus make the following order:

(a) In terms of s 86(11) of the National Credit Act 34 of 2005 ('the Act') the debt review for which the defendant applied in March 2010 and in respect of which her current debt counsellor is Deborah Solomon is to resume in relation to the

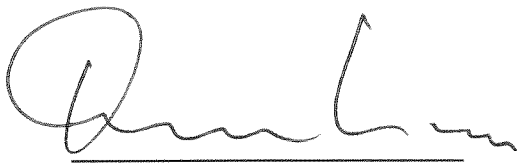
credit agreement which is the subject of the plaintiff's action, namely the home loan agreement with account number 3000 011783 693 ('the agreement').

(b) The resumption of the debt review in terms of para (a) shall be subject to termination by the plaintiff by notice *mutatis mutandis* in accordance with s 86(10) of the Act at any time after the elapse of 60 business days from the date of this order, if, by the date upon which any such notice is given, the defendant is in default in terms of the agreement and a plan of debt rearrangement has not been voluntarily agreed upon or an order in terms of s 87(1) of the Act has not been made.

(c) The plaintiff's application for summary judgment is postponed *sine die*.

(d) The parties shall bear their own costs in relation to the s 86(11) application.

(e) All other questions of costs stand over for later determination.



ROGERS AJ

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