REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 11978/2010

In the matter between:

FIRSTRAND BANK LIMITED t/a WESBANK PLAINTIFF

and

GEAN KUNDASAMI PILLAY DEFENDANT

In the matter between:

GEAN KUNDASAMI PILLAY APPLICANT

and

FIRSTRAND BANK LIMITED t/a WESBANK RESPONDENT

JUDGMENT Delivered on 08 December 2011

SWAIN J

[1] Two applications serve before me. In the first application Firstrand Bank Limited t/a Wesbank (the plaintiff) seeks summary judgment against one Gean Kundasami Pillay (the defendant) for an order authorising the Sheriff of the Court to take possession of and deliver to the plaintiff a certain motor vehicle, which it is common cause is the subject of an instalment sale agreement (the Agreement) concluded between the plaintiff and the defendant. Ancillary relief sought by the plaintiff, is that the plaintiff's claim for damages, allegedly suffered as a consequence of the defendant's breach of the Agreement, be adjourned *sine die*, pending the return

of the vehicle to the plaintiff, the subsequent valuation and sale thereof and the calculation of the amount to which the applicant is entitled in terms of the Agreement. I will refer to the parties in the manner in which they are cited in the summary judgment proceedings, when dealing with the application brought by the defendant, in due course.

[2] The sole basis upon which the defendant initially resisted the claim of the plaintiff for summary judgment, was that the defendant had applied for debt review in terms of Section 86 of the National Credit Act No. 34 of 2005 (the Act) which application was pending in the Pinetown Magistrates' Court, at the time the plaintiff purported to terminate the debt review process on 14 July 2010, in terms of Section 86 (10) of the Act. The defence advanced, based as it was upon the decision in

Wesbank, a division of Firstrand Bank Limited

v

Papier (National Credit Regulator as amicus curiae)

2011 (2) SA 395 (WCC)

was that the plaintiff was not entitled to terminate the debt review process, at a time when the defendant's application for a debt rearrangement order, was pending before the Pinetown Magistrates' Court.

[3] In the light of the subsequent decision by the Supreme Court of Appeal in the case of

in which it was held that a credit provider may terminate a debt review in terms of Section 86 (10) of the Act, even after the matter has been referred to the Magistrates' Court for a rearrangement order in terms of Section 87 of the Act, this defence raised by the defendant was no longer valid.

[4] As a consequence, the defendant launched the further application, which serves before me, in which the following relief is sought by the defendant.

[4.1] That the defendant's application for debt review under Section 86 of the Act, in so far as it relates to the plaintiff, be resumed in terms of Section 86 (11) of the Act, on such conditions as this Court deems just and

[4.2] The plaintiff's application for summary judgment be removed from the Roll before this Court, and the Registrar be directed not to re-enrol such application, until such time as the defendant's application, in terms of Section 87 of the Act, has been finalised and the Magistrates' Court has excluded the plaintiff from any order made by it, or the defendant defaults on any order made by the Magistrates' Court.

[5] The allegation made by the plaintiff in its particulars of claim,

that by reason of the defendant's breach of the Agreement, in failing to pay the requisite instalments in terms of the Agreement, the plaintiff had elected to cancel the Agreement and notified the defendant of its election to do so, was not disputed by the defendant in her affidavit opposing summary judgment. In addition, the plaintiff alleged in its affidavit opposing the relief sought by the defendant in the application, that "service of the summons constituted a clear indication to the applicant that the respondent considers the Agreement cancelled". No replying affidavit was filed by the defendant in which this assertion was disputed. Indeed, it is common cause on the papers that the defendant was and remains in breach of her obligations, in terms of the agreement to make payment of the requisite instalments. It is therefore clear that as at the date of issue of summons, being 12 October 2010, the plaintiff was entitled to exercise its election to cancel the agreement, the debt review process having been terminated by the requisite notices in terms of Section 86 (10) of the Act, being delivered on or about 14 July 2010.

[6] I therefore raised with Mr. Hoar, who appeared for the defendant, whether in the light of the cancellation of the agreement by the plaintiff and the only substantive relief sought by the plaintiff in the summary judgment application, being the return of the vehicle, as a consequence of such cancellation, there could be any grounds to order that the debt review resume in terms of Section 86 (11) of the Act. In other words, the cancellation of the Agreement had as its inevitable consequence, that there could no longer be any rearrangement of the defendant's obligation, to make payment in terms of the cancelled Agreement. Although I could envisage the

possibility of the defendant, seeking a resumption of the debt review process, when the plaintiff sought payment of any shortfall by the defendant in terms of the Agreement, after re-possession and sale of the vehicle, that had not yet occurred.

[7] Mr. Hoar's response to this was to submit that the case made out by the defendant, was that the plaintiff had failed to participate in good faith, in the debt review process. I comprehend that such a submission finds it genesis in Section 86 (5) (b) of the Act, which provides that the consumer and credit provider must participate in good faith, in the debt review and in any negotiations designed to result in responsible debt rearrangement, as well as the decision of Blignault J in the case of

Mercedes Benz Financial Services S A v Dunga
2011 (1) SA 374 (WCC) at pg 386 para 48 and pg 387 para 52

Mr. Hoar's argument then proceeded, that if I granted an order in terms of Section 86 (11), that the debt review resume, such resumption would have the legal effect that the parties would be placed in the positions they were in at the time the debt review was terminated. In other words, the cancellation of the agreement by the plaintiff would be of no force and effect and the agreement would be re-instated. Whether the defendant has established on the papers, that the plaintiff failed to participate in good faith, in the debt review process, I will consider in due course, but at present the provisions of the Act must be examined, to decide on the validity of Mr. Hoar's submission.

[8] At the hearing of the matter I referred Mr. Hoar to the decision of Wallis J in

B M W Financial Services (S A) (Pty) Ltd. v Donkin
2009 (6) SA 63 (KZD)

where the learned Judge held that a cancelled instalment sale agreement, cannot be re-instated as a result of a debt rearrangement flowing from a court order under Section 85 of the Act. Mr. Hoar's response was that the case was distinguishable, on the grounds that the Court was concerned there with the provisions of Section 85, and not a resumption of the debt review process, in terms of Section 87 (11) of the Act. It is therefore necessary to examine what was decided in Donkin.

[9] In reaching the conclusion he did in Donkin, Wallis J analysed the provisions of Section 86 (7) (c) (ii) of the Act, in the context that the cornerstone of the argument, presented to him in support of the re-instatement of the instalment sale agreement, was that the provisions of this Section all pre-supposed the continued existence of the credit agreement in question (at pg 77 F). The argument proceeded that one can only extend the period of the agreement and reduce the amount of each payment due, if the agreement itself is *extant.* In addition, the provisions of the sub-paragraphs of the Section, which provide for postponing the dates on which payments are due under the agreement, extending the period of the agreement and postponing the dates on which payments are due and re-calculating the consumer's obligations, are only feasible as

possible means of debt rearrangement, if the credit agreement continues to exist (at pg 77 G). The argument accordingly was that where the credit provider has cancelled the agreement, it was necessarily implicit in these provisions that, in the course of a debt rearrangement, the cancelled agreement can be re-instated (at pg 77 H).

[10] Wallis J however held that although these provisions of the Act were "particularly attuned to an agreement such as an instalment sale agreement" the implication contended for could only arise if that were the only situation covered by these provisions (at pg 77 (i) – 78A). On examining the purposes of the Act, Wallis J concluded that the process of debt restructuring was not restricted to circumstances where there were ongoing payment obligations by the consumer, but that "all the debts of an over-indebted consumer can be the subject of a debt review and a debt rearrangement" (at pg 79 A).

[11] I agree with the conclusion of Wallis J in this regard. The act clearly never had as its exclusive objective, debt review and debt rearrangement of agreements "where the consumer commits himself or herself to making regular payments to the credit provider in discharge of his or her obligations" (at pg 78 A).

[12] In my view, whether a debt review takes place in terms of Section 86 of the Act, via an order granted by the Court in terms of Section 85 (a) of the Act, or via an order granted by the Court in terms of Section 86 (11) of the Act, for the debt review to resume,

the provisions of Section 86 (7) (c) of the Act, read in the context of the Act as a whole, do not support any inference being drawn, that such referral has the effect of re-instating a cancelled agreement.

[13] In this respect and to this extent, the reasoning in Donkin is not distinguishable on the facts of the present case. Where however a distinction may arise, is in respect of the following dictum of Wallis J at pg 80 A – B

"All of this makes it clear that the process of debt review and debt rearrangement involves looking at the global picture of the consumers' obligations at the time of such debt review and debt rearrangement. What follows from this is that, if a particular agreement has been cancelled prior to the debt review or debt rearrangement process, the obligation that falls for consideration in that process is the obligation as it existed after such cancellation, not the obligation while the agreement was still *extant*".

[14] In the present case the cancellation took place after the debt review process had commenced and been terminated in terms of Section 86 (10) of the Act, but before any resumption in terms of Section 87 (11) of the Act.

[15] In Dunga, Blignault J regarded the effect of a resumption order in terms of Section 86 (11) of the Act as

"The debt review will then continue in terms of Section 86 (10) from the point where it was terminated, until an order is made in terms of Section 86 (7)" (at pg 385 D).

[16] Blignault J also referred to the ordinary meaning of the word "resume" in Section 86 (11) of the Act in context and by reference to the Concise Oxford Dictionary to mean "to continue after an interruption" (at pg 385 A).

[17] That the debt review is to continue from the point where it was terminated, does not in my view lead to the necessary inference that it was the Legislature's intention, that any lawful steps taken by the credit provider, during the interruption, to cancel the agreement, must have as its consequence, re-instatement of the agreement.

[18] In this regard it is instructive that in terms of Section 129 (3) (a) of the Act, a consumer may "re-instate" a credit agreement that is in default, by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges, and reasonable costs of enforcing the agreement up to the time of re-instatement, "at any time before the credit provider has cancelled the agreement", subject to the provisions of sub-section 4. Consequently, before cancellation the consumer may deprive the credit provider of an accrued right to cancel the agreement, by making payment of the specified amounts (Donkin at pg 76 A – B). Section 129 (4) (c) provides that a consumer may not re-instate a credit agreement after "the termination thereof in accordance with Section 123". Section 123 of the Act provides that a credit provider may terminate a credit agreement before the time provided in that agreement "only in accordance with this Section". Section 123 (2) provides that if a consumer is in default under a credit agreement,

the credit provider may take the steps set out in part C of Chapter 6, to enforce and terminate that agreement.

[19] The Act consequently only expressly recognises a single mode of "re-instating" an agreement, namely by making payment of the amounts specified in terms of Section 129 (3) (a) and precludes such re-instatement, where the agreement has been cancelled in terms of the Act. In my view, the following dictum of Wallis J (at pg 80 G – H) is of equal application where the debt rearrangement flows from an order in terms of Section 86 (11), to resume the debt review process.

"It follows that the defendant's contention, that a cancelled instalment sale agreement, such as her agreement with the plaintiff, can be reinstated as a result of a debt rearrangement flowing from a court's order under Section 85 of the N C A, cannot be sustained. The N C A does not itself expressly provide for such re-instatement and all the textual and contextual indications point in the opposite direction".

In the absence of an express provision in the Act, providing for the re-instatement of an agreement, which has been lawfully cancelled, on the grant of an order to resume the debt review process in terms of Section 86 (11), there can be no basis for the implication of such a consequence in terms of the Act. Interference in the contractual relationship between the parties, to such an extent, would have to be expressly provided for in the Act.

[20] Consequently, the defendant's right to retain possession of

the vehicle was terminated by the cancellation of the instalment sale agreement by the plaintiff having complied with the provisions of Section 123, read with Section 129 of the Act, and having furnished the defendant with the notices required in terms of Section 129 (1) (a) and Section 86 (10) of the Act. This right cannot be restored to the defendant by an order directing that the debt review process be resumed (Donkin pg 80 H). Any claim in terms of Section 86 (11) of the Act for the resumption of the debt review, can only arise in respect of any claim the plaintiff may advance in the future, for the payment of any shortfall in the amount owed by the defendant in terms of the cancelled agreement, after determination of the value of the re-possessed vehicle. The danger that a credit provider may accordingly elect to cancel the agreement, after termination of the debt review process in terms of Section 86 (10), in order to prevent being involved in the process of debt restructuring, in the event of a resumption of the debt review process being ordered in terms of Section 86 (11), may be more apparent than real, because as pointed out by Wallis J in Donkin at pg 80 D – E

"In many instances of debt rearrangement one would anticipate that the underlying credit agreement would be terminated and the goods restored to the credit provider against an agreement to pay a diminished surrender value over a specified period of time".

In any event, even if the restoration of the goods is not accompanied by an agreement to pay a diminished surrender value, the consumer would be able to seek debt review in respect of any claim advanced by the credit provider, for any shortfall, after realisation of the value of the goods.

[21] I am in addition not satisfied that the defendant has established that the plaintiff failed to participate in good faith in the debt review process.

[22] The gravamen of the defendant's complaint is that:

[22.1] The plaintiff had at no stage attempted to negotiate a suitable debt restructuring arrangement with the defendant and had caused unnecessary delays in the Section 87 application, and then sought to rely partially upon such delay, to terminate the debt review process.

[22.2] The plaintiff's contention that the proposed restructuring order would reduce its security under the instalment sale agreement, as the vehicle will depreciate over the proposed restructuring period, was without validity because if the vehicle was re-possessed and sold at a forced sale it would realise substantially less than what it was worth. The plaintiff would then be left with a substantial shortfall on the vehicle which it would have to recover from the defendant, without any security for that amount. The defendant would however be deprived of the use of the vehicle and without a vehicle to commute to and from work the defendant may lose her job, further prejudicing all her creditors.

[23] The response of the plaintiff was as follows:

[23.1] Following the defendant's application for debt review,

payments by the defendant ceased. The defendant's arrears consequently escalated from R3,884.31 to R39,746.87.

[23.2] At the hearing for debt restructuring the proposal for payment by the defendant would mean that the debt would take over one hundred and eighty months, that is fifteen years, to be paid in full.

[23.3] The counter-proposal by the plaintiff was that the debt be settled by instalments of R3,818.03 over eighty four months and that the interest be fixed at 11.01 per cent. This counter proposal was however rejected by the debt counsellor. The plaintiff asserts that the counter proposal was reasonable, in that it would have permitted the defendant to pay a lower instalment, thereby making her financial affairs more manageable, but still entitle the plaintiff to retain some security in the goods as it diminished in value.

[23.4] It was for this reason that the plaintiff decided to terminate the debt review proceedings.

[24] As pointed out above the defendant filed no replying affidavit and there is no evidence to gainsay the plaintiff's assertion that the defendant's proposal would have taken fifteen years to excuss the debt. The security of the plaintiff flowing from its ownership of the vehicle would obviously have been drastically diminished long before settlement of the debt. The plaintiff's counter proposal that the debt be repaid over a further period of seven years, was not in my view unreasonable and its rejection without any further proposal

from the defendant, refutes any suggestion by the defendant, that the plaintiff failed to participate in good faith, in the debt review. It may be said that the plaintiff as

"the credit provider on good grounds concludes that the proposed restructuring will not lead to the 'satisfaction by the consumer of all responsible financial obligations' (Section 3 (g) and (i)) or a rearrangement as contemplated by Section 86 (7) (C)"

and as a consequence

"the court considering the resumption of the debt review may well refuse to sanction its resumption".

Collett at pg 517 G

[25] A further issue raised by the plaintiff is that the defendant, in seeking a resumption of the debt review process, has failed to disclose "sufficient information on which the request for a resumption of the debt review" may be considered.

Collett at pg 519 A

[26] In this regard the plaintiff alleges that the defendant has failed to disclose her total liabilities, her current monthly commitments in respect of liabilities, her income required, living expenses and dependants, if any. It should however be borne in mind, that only the debt review in respect of the plaintiff's claim was terminated,

and the debt review of other creditors' claims would remain unaffected. Be that as it may, in my view, the information that should have been placed before this Court were details of any proposal by the defendant, to repay the debt owed to the plaintiff, together with sufficient supporting information of the defendant's financial affairs, in order to enable this Court to assess the reasonableness of the proposal made by the defendant. In the absence of this information, this Court is unable to assess the reasonableness of the defendant's request for a resumption of the debt review process, in respect of the debt owed to the plaintiff. On this ground also the defendant's application for a resumption of the debt review process must fail.

[27] A further defence raised by the defendant to fend off the grant of summary judgment, albeit not raised in the affidavit opposing summary judgment, but in the heads of argument filed by Mr. Hoar, was what was referred to by him as "a Shackleton defence" by reference to the decision in the case of

Shackleton Credit Management v Microzone Trading 88 2010 (5) 112 (KZP)

[28] Albeit that the defendant in her founding affidavit in the application had the following to say

"I accept that should the Court find against me on the Section 86 (11) application and refuse to order that the plaintiff's debt review resume, I have no further defence to the plaintiff's claim for return of the vehicle, and that I will

have to then return the vehicle to the plaintiff"

Mr. Hoar submitted in his heads of argument, as a precursor to the raising of this defence the following:

"In the event that the defendant's application for an adjournment is refused, the defendant intends and is left with no alternative, by virtue of the plaintiff's conduct in this litigation to date, but to raise a Shackleton defence".

[29] The complaint raised, was directed at a lack of personal knowledge of the facts verifying the plaintiff's cause of action and the amount claimed, on the part of the deponent to the affidavit, filed by the plaintiff, in support of the application for summary judgment.

[30] The passage complained of reads as follows

"The facts herein contained are within my own personal knowledge and to the best of my belief true and correct. I say this because, in my capacity as manager, I have been involved with the applicant's claims in this matter and have in my possession or under my control all the applicant's files, documents, statements of account and the like relating to the action".

[31] In Shackleton, Wallis J drew attention to the need in terms of Rule 32 (2) for the deponent to an affidavit filed in support of an application for summary judgment, to have personal knowledge of the facts, which she or he verifies, in support of the plaintiff's cause of action and the amount claimed. If such information on the part of the deponent was due purely to hearsay, as would be the case

where the deponent obtained the information from another person or documentation, this requirement would not be satisfied.

Shackleton at 115 G – H

[32] However, if it is clear that the deponent to the affidavit, by virtue of the position he occupies with the plaintiff, is able during the course of his duties to have acquired personal knowledge of the defendant's financial standing with the plaintiff, this may be sufficient.

Shackleton at pg 118 B – C

[33] The deponent in the present case says that in his capacity as manager "I have been involved with the applicant's claims in this matter" and that the relevant documents are in his possession, or under his control. In my view, the allegation is sufficient to warrant the assertion that the personal knowledge he possesses, was not acquired exclusively from the documentation under his control. There is accordingly no basis to this defence.

The order I make is the following:

(a) The application brought by the defendant for a resumption of the debt review enquiry in terms of Section 86 (11) of the National Credit Act No.

34 of 2005 and for the removal from the Roll of the application for summary judgment by the plaintiff against the defendant, is dismissed.

(b) Summary judgment is granted in favour of the plaintiff against the defendant for:

(i) An order authorising the Sheriff of the Court to take possession of and to deliver to the applicant, the goods being

2008 Chevrolet Captiva 2.4 LT:
Chassis No. KL1DC23F38B176987
Engine No. Z24SED026129

ii) That judgment for the amount of damages that the plaintiff may have suffered, together with interest thereon, be postponed *sine die*, pending the return of the vehicle to the plaintiff, the subsequent valuation and sale thereof and the calculation of the amount to which the plaintiff is entitled.

c) The defendant is ordered to pay the plaintiff's

costs incurred in respect of the application and

the action, to date hereof.

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SWAIN J

Appearances: /

Appearances:

For the Plaintiff /Respondent	**:**	Mr. K. Gounden
Instructed by	**:**	Legator, McKenna Inc Durban
For Defendant/Applicant	**:**	Mr. S. Hoar
Instructed by	**:**	McKenzie Dixon C/o Maxprop Durban
Date of Hearing	**:**	25 November 2011
Date of Filing of Judgment	**:**	08 December 2011