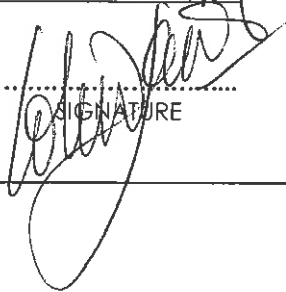


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/10545

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. ✓
<u>4 June 2014</u> DATE	
 SIGNATURE	

In the matter between:

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK

Plaintiff

and

STAND 949 COTTAGE LANE SUNDOWNER (PTY) LTD
MARCO JOHN BUINEBERG

First Defendant
Second Defendant

J U D G M E N T

LAMONT, J:

[1] The plaintiff instituted action against the first and second defendants claiming payment of monies and an order that certain mortgaged property be declared executable.

[2] The claim against the first defendant was based on monies lent and advanced by the plaintiff to the first defendant pursuant to a home loan agreement. The monies in terms of the agreement were payable in instalments. The first defendant had not paid the instalments and was in arrears. In accordance with an acceleration clause contained within the agreement the plaintiff had elected to claim the full amount due, owing and payable by the first defendant as being immediately due and payable.

[3] The debt of the first defendant was secured by a mortgage bond passed over property. The property was at all relevant times used as residential property. The second defendant undertook liability to the plaintiff as surety and co-principal debtor for the debt of the first defendant.

[4] The claim of the plaintiff was for:

4.1 judgment against first and second defendants jointly and severally for:

- (a) payment of the sum of R1 246 083,31;
- (b) interest on the aforesaid sum at the rate of 8,5% per annum from 24th February 2014 to date of payment;
- (c) costs of suit on the attorney and client scale

4.2 as against the first defendant only for:

- (d) an order declaring the mortgaged property held by the first defendant executable for the said sum.

[5] The summons properly set forth the causes of action against first and second defendants. All formalities and requirements were complied with. The first and second defendants failed to enter an appearance to defend. The plaintiff accordingly became entitled to relief against first and second defendants.

[6] When the plaintiff framed its causes of action against the first and second defendants, the plaintiff claimed both for payment of monies and for executability of the asset pledged. A creditor claiming payment of money in respect of which goods have been pledged is entitled as a first source of recovery to look to the pledged goods. This right and procedure is recognised in our law and has long been exercised. It is a long standing practice for the creditor to claim judgment for the money debt and for executability of the pledged goods in one action. See for example *Wille's Mortgage and Pledge* 3rd edition by Scott & Scott at pages 128 and 232. See also *Barclays Nasionale Bank Beperk v Registrateur van Aktes, Transvaal en 'n Ander* [1975] 4 All SA 655 (T) in which it was held that it is open to the creditor to raise the personal and hypothetical action together and to lump both of them in a single statement of claim.

[7] In the normal course the question of execution arises only after judgment has been granted. It is a special exception to allow a creditor to

simultaneously seek to exercise his rights to obtain a judgment for payment as well as rights to execute in a single action. This procedure is generally speaking not controversial as the allegations founding both claims are the same. The procedure becomes controversial once there are special rules which apply to the right of execution of the creditor as currently is the position in respect of mortgaged residential property. There is no longer in respect of such property an automatic right of execution if the creditor establishes the allegations necessary to found the money claim.

[8] The issue which needs to be decided in the present matter is whether or not as a matter of procedure a plaintiff is entitled to seek default judgment for the money payment and execution of residential property otherwise than by approaching the Registrar and using the procedures set out in Rule 31(5).

[9] Rule 31(5) provides:

"(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend ... the plaintiff, if he ... wishes to obtain judgment by default, shall where ... the claim is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant ...

(b) The registrar may –

- (i) grant judgment as requested;*
- (ii) grant judgment for part of the claim only or on amended terms;*
- (iii) refuse judgment wholly or in part;*
- (iv) postpone the application for judgment on such terms as he may consider just;*

- (v) *request or receive oral or written submissions;*
- (vi) *require that the matter be set down for hearing in open court*

Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court."

[10] The Rule reflects the state of the law since *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) which provided that it was unconstitutional for a registrar of the High Court to declare immovable residential property specially executable when ordering default judgment under Rule 31(5) to the extent that this permits the sale in execution of the home of a natural person.

[11] It is immediately apparent that if the property to be declared specially executable is not residential property occupied by a natural person then the registrar has the powers referred to in Rule 31(5).

[12] In the present matter the property is residential property occupied by a natural person and accordingly the registrar does not have the power to declare the property specially executable.

[13] The issue then becomes whether the registrar by reason of not having the power of ordering the property to be specially executable no longer has the power to grant the judgment for the money payment.

[14] In the present matter the second defendant is a surety and the question of the executability of the property has no bearing on the claim of the plaintiff against him.

[15] As far as the first defendant is concerned the fact that the registrar has no power to declare immovable property executable in no way impacts on the rights of the plaintiff to judgment for the money claim. The plaintiff is in the same position as any commercial creditor.

See *Mkhize v Umvoti Municipality and Others* 2012 (1) SA 1 (SCA) para [16].

See also *Ferris and Another v Firstrand Bank Limited* 2014 (3) SA 39 (CC). (Although the issue is not expressly dealt with it is apparent from the fact that the Constitutional Court found that there was no just cause (hence no *bona fide* defence) that the creditor was entitled to recovery of monies due to it).

[16] A creditor who lends money and does not obtain security (in the form of a bond passed over residential property occupied by a natural person) is in a better position than a creditor who gets security if the rules concerning the security impact on the rules concerning the right to the money judgment. The result is untenable and could never have been intended by the rule maker.

[17] There is accordingly no question of judicial oversight of the right of a plaintiff to payment of the money due to it.

[18] Rule 31(5) entitles the registrar to grant the whole judgment or part of the judgment or part of the judgment on amended terms. It is apparent from the rights contained within the Rule that the registrar is obliged to consider the entitlement of the plaintiff to a judgment in respect of each individual prayer. This being so upon a proper reading of Rule 31(5), the word "application" in the proviso is a reference to the application for that relief only (executability) and not a reference to the application for default judgment.

[19] The registrar is in terms of Rule 31(5) empowered to grant relief for the payment of the capital, the interest and the costs notwithstanding that he has no power to grant the prayer for executability of the immovable residential property.

[20] I am accordingly of the view that the plaintiff in an action who seeks judgment by default for payment of money, interest, costs and the executability of property is required to approach the registrar in terms of Rule 31(5) for judgment against the defendant for the payment of money, interest and costs.

[21] It appears to me that it is logical that the approach for payment of the capital interest and costs should be dealt with prior to consideration being given to the issue of executability and the judicial oversight of any application in respect thereof.

[22] I accordingly propose to rule that this matter be referred to the registrar to be dealt with and to put in place a mechanism by which the executability issue can be resolved.

[23] I accordingly make the following order:

1. The default judgment application is referred to the registrar.
2. If the plaintiff seeks an order declaring the property specially executable such application shall be made to court on notice to the first defendant.



C G LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Attorneys for Plaintiff: Charl Cilliers Inc Attorneys

Counsel for Plaintiff: Adv. Gradidge

Date of Hearing: 04 May 2014

Date of Judgment: 04 May 2014
