REPUBLIC OF SOUTH AFRICA



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

CASE NO: 25248/2017

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

30 January 2020

JUDGE L.T. MODIBA J

In the matter between:

ABSA BANK LIMITED

Plaintiff

And

GLADYS KUNENE

Defendant

JUDGMENT

MODIBA J

INTRODUCTION

[1] This is an application for summary judgment for the payment of R 441 523.01 and other ancillary relief. The applicant relies on a mortgage loan, the terms of which it contends that the defendant breached.

- [2] The mortgage loan is secured by way of mortgage bond.
- [3] The defendant opposes the application and has filed an affidavit, setting out her basis for opposition. To succeed in her opposition, she is required to set out a bona fide defence which, if proved at the trial will result in the dismissal of the applicant's action. Regrettably, she has failed to do so. Therefore summary judgment stands to be granted as claimed by the applicant.

THE AFFIDAVIT RESISTING SUMMARY JUDGMENT

- [4] In her affidavit resisting summary judgment, she contends for the dismissal of the application of the basis that she:
 - [4.1] approached a debt counselling service provider in order to have herself declared over indebted. However, her matter was not attended to.
 - [4.2] she was of the view that she was under debt review, hence, she has been making monthly payments of R 2000.00 towards the mortgage loan, initially to a debt counselling entity but subsequently directly to the applicant, when she realised that the entity was not remitting her payments to the applicant.
- [5] The respondent is obliged to repay the loan in monthly instalments of approximately R4 224.23. The amount of R2 000.00 that she is currently paying to the applicant is less than 50% of her monthly obligations.

- [6] It is not surprising that according to the certificate of balance filed she is currently in arrears in the amount of R86 198.66 or 19.40 months in arrears.

 Notwithstanding the respondent's version that she approached a debt counsellor during 2015, there was never a debt review application made to court. The applicant never accepted the terms of any debt review proposal, presented on behalf of the respondent. The applicant terminated the debt review process by delivering, to all interested parties, a notice in terms of Section 86 (10) dated 13 ,October 2016, which marked the end of any debt review procedures initiated by the defendant.
 - [7] The applicant has complied with all the applicable statutory and contractual requirements including a notice in terms of Section 129 of the National Credit Act 34 of 2005. It is under these circumstances, contractually entitled to enforce the agreement. The respondent has not set out a bona fide defence. She has not placed any facts before this court to urge the court to exercise its discretion in her favour, not to declare the immovable property over with the mortgage bond securing the loan specially executable. 1 Rather, on the facts before the court, it is unlikely that the defendant will have means to liquidate the arrears within a reasonable time or at all. The interest rate applicable on the loan is 10.5%. Therefore, the respondent's payments of R 2000.00 per month do not reduce the loan. Rather, the balance will continue to grow. The jeopardy to the applicant hardly requires deep thought to contemplate. It is apparent. The outstanding balance is R 441 526.01. The amount owing to the municipality in respect of rates and taxes in August 2019 was R5 333.51. The market value of the property is R350 000.00, while the municipal value is R348 000.00. The

applicant will therefore never be able to recover the full amount owed, instead, it the amount owed will continue to escalate. In the circumstances, a reserve price of R350 00.00 is appropriate.

[8] Therefore, summary judgment is granted in terms of the draft order handed up by counsel for the applicant, incorporating the said reserve price.

MADAM JUSTICE L T MODIBA JUDGE OF THE HIGH COURT, GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARENCES

Counsel for plaintiff:

Advocate S McTurk

Attorney for plaintiff:

Tim Du Toit & Co. Inc

Counsel for defendant:

Advocate T Loabile-Rantao

Attorney for defendant:

Temlett Attorneys

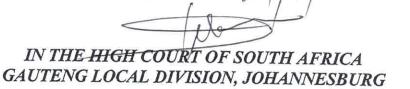
Date of hearing:

22 October 2019

Date of judgment:

30 January 2020

¹See Rule 46A, Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others 2005 (2) SA 140 (CC), Absa Bank Limited v Mokebe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another (2018/00612; 2017/48091; 2018/1459; 2017/35579) [2018] ZAGPJHC 487 (12 September 2018).



CASE NUMBER: 25248/2017

ON 13 AUGUST 2019	
BEFORE THE HONOURABLE JUDGE	

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

GLADYS KUNENE

(Identity Number: 650307 0546 08 7)

Defendant

HAVING READ the documents filed of record, having heard counsel and having considered the matter: -

SUMMARY JUDGMENT is granted against the Defendant, for:

- 1. Payment of the amount of R441,526.01 together with interest at the rate of 10.05% per annum, capitalized monthly, from 02 JUNE 2017 to date of payment;
- 2. An order declaring the following immovable property especially executable:

A Unit consisting of -

(a) Section Number 7 as shown and more fully described on Sectional Plan No. SS19/1983, in the scheme known as WITPOORT GARDENS in respect of the land and building or buildings situate at WITPOORTJIE TOWSHIP: LOCAL AUTHORITY; CITY OF JOHANNESBURG of which section the floor area, according to the said sectional plan, is 71 (SEVENTY ONE) SQUARE METRES in extent; and

(b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

Held by DEED OF TRANSFER NUMBER ST10828/2011

3.	The reserve	price	is set R	350	000	

- 4. In the event that the reserve price is not reached at the first sale in execution, the property in prayer 2 above be sold without reserve to the highest bidder at the second or any subsequent sale in execution.
- 5. That the Defendant is advised that, the provisions of Section 129(3)(a) and (4) of the National Credit Act of 2004 ("the NCA") may apply to the judgment granted in favour of the Plaintiff.
- 6. The Defendant may prevent the sale of the property referred to in paragraph 2 above if the Defendant pay to the Plaintiffs all of the arrear amounts owing to the Plaintiff, together with the Plaintiff's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement, prior to the property being sold in execution.
- 7. The arrear amounts, enforcement costs and default charges referred to in paragraph 6 above may be obtained from the Plaintiff.
- 8. The Defendant is advised that the arrear amount is not full amount of the Judgment debt, but the amount owing by the Defendant to the Plaintiff, without reference to the accelerated amount.
- 9. A copy of this order is to be served on the Defendant, as soon as is practicable after the order is granted, but prior to any sale in execution.
- 10. The Defendant is ordered to pay the costs of the application on an attorney and client scale.

REGISTRAR

Tim Du Toit & CO INC Applicant's Attorneys Tel: (011) 274-9800 Ref: M14940/K452//L Swart/TG