IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER : 26005/2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
DATE 18 /09/2020	SIGNATURE:……

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In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED	Applicant
and	
PHASWANA STEPHEN RATLOU	First Respondent
MBALI RATLOU	Second Respondent

JUDGMENT

BHOOLA A J:

Introduction

[1] This is an opposed application to set a reserve price in a sale in execution. On 6 September 2016 the applicant obtained default judgment against the respondents ordering them to make payment of the amount of R5 009 440.46 to the applicant together with interest at the rate of 10,5% p.a. and costs on the attorney and client scale. The court also declared their immovable property ("the property") specially executable. The court order preceded the promulgation of Uniform Rule 46A and the judgment in *Absa Bank Limited v Mokebe* and related cases.[1]

[2] Thereafter the parties entered into negotiations and subsequently concluded a settlement agreement in terms of which the respondents undertook to settle the judgment debt (and other monies due to the applicant) by making certain payments, failing which the applicant could proceed to enforce its rights in terms of the aforesaid court order. The respondents breached the settlement agreement by failing to make payment in terms thereof. Various sales in execution scheduled in 2018 and 2019 were cancelled based on undertakings by the respondents, which they subsequently reneged upon. At the last sale in execution the respondents threatened to stay the sale on the basis that no reserve price had been set by the court. This prompted the present application.

The issue

[3] The issue to be determined is whether a reserve price should be set.

The applicant's submissions

[4] The respondents are indebted to the applicant in the aggregate sum of R million (R4 974 284.91 plus interest at 10.25% p.a). The sworn valuation filed in terms of R46A(5) records the market value of the property as R 4.2 million and the forced sale value as R2 750 000.00. As at 5 March 2019 the

[1] *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; 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 485; 2018 (6) SA 492 (GJ) (12 September 2018). Rule 46A came into operation on 22 December 2017.

respondents were in arrears with the City of Johannesburg in respect of rates, taxes and utilities in the sum of R89 426.06. As at 18 March 2019 the respondents were in arrears in their levies to the relevant homeowners' association to the extent of R58 075.17.

[5] Counsel for the applicant, Mr De Oliveira submitted that, taking into account the forced sale value of the property and the indebtedness to the local authority and the homeowners' association, there is no equity in the property and no reason to set a reserve price.

[6] In this regard the counsel referred in *Mokebe (supra)* [2] where the court held that :

Rule 46A(8)(e), in operation since December 2017, now empowers the court to set a reserve price for the property at the sale in execution. It would, in our view, be expedient and appropriate to generally order a reserve price in all matters depending on the facts of each case. That will serve to curb the inequities of the matters such as those in Jaftha, Ntsane, Maleka, Gundwana, Nxazonke and Nkwane. The facts of a particularly case may, however, convince a court to depart from the general practice of setting reserve prices. It may well be that the debtor's obligations regarding the property can be so great that the equity in the property is close to zero or even has a negative value. This fact too, should be taken into account in order to decide whether to impose the reserve price in a particular matter. It will always be

> '*. . . in the interests of both the Banks and the judgment debtor to realise as much value in the property as reasonably possible.'*
> (Counsel's emphasis)

[7] Counsel submitted however, that to the extent that the court is inclined to set a reserve price an amount of R3 327 498.77 would be appropriate in the circumstances.

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[2] Ibid at para 59.

Respondents' answering affidavit and counter-application

[8] The respondents filed a counter application and answering affidavit in which they contend that the credit agreement upon which the judgment debt is based was reinstated in terms of section 129(3) of the National Credit Act 34 of 2005 ("the NCA") on 1 December 2016. The applicant submitted that such agreement (being a home loan agreement) cannot be reinstated between the parties in terms of section 129(3) of the Act as it was terminated in terms of section 123 of the Act. The respondents no longer persist with this defence.

Evaluation

[9] On 1 December 2016 when the respondents signed the settlement agreement they made payment of the sum of R125 449.28 in accordance with clause 9.1 of the agreement. This was in compliance with the agreement and they had in addition this amount further agreed to pay R49 415.36 per month on or before 1 December 2016 and on or before the 1st of each successive month.

[10] Respondents' submit that the property is their primary residence and agree that a reserve price of R3 327 498.77 should be set. Respondents however persist in their submission that they should have been provided with notice in terms of section 129(1) and 130(1) of the NCA prior to the institution of these proceedings. Mr De Oliveira submitted that there are three defences to this submission, each of which are totally unassailable. Firstly, the current proceedings do not constitute an application to the court to enforce a credit agreement as contemplated in section 130(1). A court order enforcing the judgment debt has already been granted and the current proceedings involve the determination of a reserve price. Secondly, the underlying *causa* is the settlement agreement in terms of the judgment debt and not a credit agreement. That the NCA does not regulate settlement agreements was clearly established in the same matter in which the respondents were

appellants in the Supreme Court of Appeal: *Ratlou v Man Financial Services.*[3] However, counsel submitted that even if this application is considered to constitute debt enforcement proceedings, then on the authority of *Ratlou*, there is no need to comply with the NCA. Thirdly, counsel submitted that this defence emerges for the first time and was not pleaded by the respondents in their answering affidavit. Since it is trite that in motion proceedings the pleadings constitute the evidence, the respondents' contention is bad in law.

[11] Ms Kriel, appearing for the respondents, submitted that the contention that the NCA notice requirement was not raised in the answering affidavit is not correct and referred to 19.2 thereof where the respondents allege : *Insofar as the innuendo suggests that the second respondent and I waived our rights, especially as envisaged in the [National Credit] Act, same is denied. Despite the settlement agreement the enforcement of the terms and conditions of the credit agreement were at all relevant times subject to the stipulations of the Act, applicant could not have proceeded with its enforcement in disregard thereof.* This is a reply to the founding affidavit's allegations that the respondents are in breach of the repayment agreement entered into between the parties in terms of which they undertook *inter alia* to settle the judgment debt and other monies owed to the applicant, failing which the applicant could proceed to with the recovery thereof and exercise its rights in terms of the court order.

[12] Secondly, in regard to the submission that this application does not constitute debt enforcement as contemplated by sections 129(1) and 130(1) of the NCA, counsel cited *Absa v De Villiers* [4] where she submitted enforcement was construed in a very wide sense. Counsel submitted that this application was brought by the applicant to enforce its right to proceed with sale in execution and hence it is not correct to submit that these are not debt enforcement proceedings. In any event Ms Kriel submitted, common sense determines that this is a debt enforcement proceeding.

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[3] (1309/2017) [2019] ZASCA 49 (01 April 2019).
[4] (146/09) [2009] ZASCA 140 (17 November 2009).

[13] Ms Kriel submitted further that insofar as the applicant seeks to attribute malice to the respondents based on their contrary submissions in the SCA, Ms Kriel submitted that the underlying *causa* in the SCA matter did not fall within the ambit of the NCA. Where the underlying transaction is a credit agreement which is contemplated by the NCA, Ms Kriel submitted that the settlement agreement similarly constitutes a credit agreement and hence the provisions of the NCA are applicable. In this regard counsel made reference to the matters of *Grainco (Pty) Ltd v Broodryk NO & Others* 2012 (4) SA 517 (FB), *Hattingh v Hattingh* 2014 (3) SA 162 (FB), and *Ribeiro & Another v Slip Knot Investments* 777 (Pty) Ltd 2011 (1) SA 575 SCA. These judgments are distinguishable, counsel submitted, as the underlying *causa* did not fall within the ambit of the NCA and hence it was correctly found by the respective courts that the settlement agreements did not constitute credit agreements. However, where the underlying *causa* is a credit agreement that is governed by the NCA the applicable principle is that the settlement agreement would continue to be governed by the NCA. Hence, the applicant was required to give notice in terms of the NCA to the respondents prior to commencing with debt enforcement proceedings.

[14] In referring to the SCA judgment in *Ratlou (supra)* Ms Kriel submitted that after having discussed the matters of *Grainco, Hattingh and Ribeiro* the Court found as follows:

"[26] ….. There can only be one conclusion, that the NCA was not designed to regulate settlement agreements where the underlying agreements or cause, would not have been considered by the Act.

[27] Having found that the legislator never had the intention that the NCA be applicable to all settlement agreements in terms which accord with the termination of credit transactions, in particular to the agreement concluded by the parties in this case, it is not necessary to deal with the alternatives to MAN's main argument. I may, however indicate, in respect thereof as well, that the effect of the sudden unintended conversion of a non-consumer/noncredit provider relationship into one governed by the NCA and

the chill effect that would have on settlement of disputes would still hold considerable weight. As was submitted on behalf of MAN, parties who were never credit providers, such as a once off lesser, would suddenly find themselves unable to enforce the terms of their settlement agreement, for want of registration or due assessment or a lessee for creditworthiness".

[15] It is clear that in *Ratlou* the SCA was required to determine the question of whether a settlement agreement is governed by the provisions of the NCA where the underlying contracts – the rental of trucks to a corporate entity – and a suretyship in respect of the leases – are not governed by the Act. In that matter Mr Ratlou (who is also the first respondent herein), sought on appeal to set aside a declaration by the high court that the settlement agreement between his company and Man Financial Services is made an order of the court. The SCA dealt (at para [13]) with the discrete legal point of whether the settlement agreement is governed by the NCA. The high court had found that the settlement agreement was a new credit agreement which fell within the ambit of the NCA. It was a *transactio* or compromise which created between the parties a new relationship with consequential rights and obligations.

[16] In this regard the SCA dealt (at para [18]) with the argument by Mr Ratlou that the settlement agreement, as a new and independent contract, extinguished the underlying *causa* and Mr Ratlou's status in relation to the debt was altered to that of a co-principal debtor. The provisions of the NCA therefore applied. The SCA held : "[19] *Mr Ratlou argued that the underlying causa for the compromise in the form of the settlement agreement cannot be examined for the purposes of determining whether the acknowledgment of debt falls within the parameters of the NCA. This is simply because the underlying causa has been extinguished by the compromise. The argument is artificial. If the underlying causa did not fall within the parameters of the NCA, then its compromise in terms of the settlement agreement, cannot logically result in the agreement being converted to one that does."* It was accordingly held (at [28]) that the settlement agreement did not fall within the ambit of the NCA.

[17] Ms Kriel submitted that in the light of the SCA's decision, in *casu* the settlement agreement is regulated by the NCA and the applicant cannot seek to create a superficial distinction between a judgment debt and a settlement agreement. As was held by the SCA in [22]) *"it provided for payment of the amount owed in deferred instalments and interest was payable in terms thereof."* However, it must be noted that the court proceeded to state that "*on a literal interpretation the settlement agreement meets the definition of a credit transaction".*

[18] I am in agreement with the submissions by Mr De Oliveira in reply that the reliance on sections 129(1) and 130(1) of the NCA is not explicitly pleaded in the answering affidavit. The paragraph the respondents' rely upon relates to their previous reliance on the submission that they have a right to reinstatement of the credit agreement in terms of section 129 (3) of the NCA. This reliance on reinstatement has since been abandoned. In regard to the respondents' reliance on *ABSA v De Villiers (supra)* counsel submitted that it deals with an instalment sale agreement and is distinguishable since the applicant is seeking to exercise its rights in terms of the judgment debt. I agree. The terms of the settlement agreement moreover make it clear that applicant is entitled to proceed to enforce its rights under the judgment debt. It is not therefore required to give notice in terms of the NCA to the respondents. The decision in *Ratlou* moreover, as counsel submitted, makes it clear that the court is dealing with a judgment debt not a settlement agreement. The respondents' own reliance on the SCA authority therefore does not assist it in this instance.

[19] Ms Kriel submitted that if this court was not inclined to find in the respondents' favour on the applicability of the NCA, which would require a postponement of the matter in terms of section 130(4)(b) to enable the applicant to give notice to the respondents, then a reserve price should be set. In this regard the respondents are in agreement with the reserve price proposed by the applicant in the notice of motion. In regard to costs Ms Kriel submitted that there was no reason for costs on a punitive scale as the

respondents' opposition is justified and the issues it raised arise squarely from the SCA judgment in *Ratlou.* The applicant could have sought a postponement of the matter in order to ensure that the relevant notices were issued but instead chose to proceed with this application.

Order

[20] In the premises, I grant an order as follows :

20.1 That the respondents' immovable property described as Erf 600 Noordhang Extension 54 Township Registration Division I.Q, the Province of Gauteng, Measuring 1330 (One Thousand Three Hundred and Thirty square metres) in Extent and held by Deed of Transfer No. T 25957/2006 be sold by the sheriff of the above honourable court at a duly constituted sale in execution subject to a reserve price of R3 327 498.77

20.2 The respondents to pay the costs of this application on a party and party scale.

U. BHOOLA

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: Heard on 27 August 2020 by videoconference in terms of the Judge President's extended Consolidated Directive of 11 May 2020 extended to 15 September 2020.

Date of judgment: Judgment was handed down electronically and emailed to parties, uploaded onto caselines and made available to saflii.org on 18 September 2020 and is deemed to have been handed down at 10:00.

Appearances:

Counsel for the Applicant: Adv. M. De Oliveira

Instructed by: Jason Michael Smith Inc. Attorneys

Rosebank, Johannesburg

Counsel for the Respondent: Adv. Z. Kriel

Instructed by: Machobane Kriel Inc.

Brooklyn, Pretoria