



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, Functioning as MPUMALANGA DIVISION, MBOMBELA)

CASE NO: 111 \2016

DATE: 27 October 2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED.

DATE

SIGNATURE

IN THE MATTER BETWEEN

THE STANDARD BANK OF SOUTH AFRICA

APPLICANT

AND

MARGARET PENNY JONES

RESPONDENT

JUDGMENT

Matter heard on:

18 OCTOBER 2016

Judgment handed down on:

27 OCTOBER 2016

LEGODI, J

[1] This is an application for summary judgment to which the defendant, Mrs Margaret Penny Jones failed to file opposing affidavit after she had entered an appearance to

defend. The plaintiffs' cause of action is a loan to which a bond was registered in favour of the plaintiff, Standard Bank.

[2] The action instituted against the defendant was preceded by a debt review restructuring order which was granted on 24 April 2010 by the district court magistrate sitting at White River. In terms of the order, a repayment period was extended and the defendant had to pay a reduced installment per month.

[3] The defendant having defaulted to pay in terms of the order, the present action proceedings were issued on 3 March 2016 by way of summons to which the defendant entered an appearance to defend, and as I said but, failed to file an opposing affidavit to the application for summary judgment. The present application for summary judgment was therefore moved unopposed. The relief is sought as follows:

1. *" Payment of the amount of R431 334.46.*
2. *Payment of interest on the amount of R431 334.66 at the rate of 9.700% per annum as from 15 January 2016 to date of final payment, calculated daily and compounded monthly in arrears.*
3. *Payment of monthly insurance premiums of R119.95 and assurance premiums of R315.11 as from 10 February 2016 for the full period the plaintiff makes payment of such monthly insurance premiums until such time that the property is no longer registered in the name of the defendant, alternatively until such date that the risk of the property passes completely and remains with a new owner, both dates inclusive.*
4. *An order declaring specially executable the property known as:*

ERF 1458 WHITE RIVER EXTENTION 13 TOWNSHIP, REGISTRATION DIVISION J.U, THE PROVINCE OF MPUMALANGA, MEASURING 352 (THREE HUNDRED AND FIFTY TWO) SQUARE METRES, HELD UNDER DEED OF TRANSFER T336828/2007.

5. *An order authorizing the Registrar to issue a writ of execution in respect of aforesaid property.*
6. *Costs of suit on an attorney and own client scale, to be taxed.*
7. *Further and/or alternative relief."*



[4] At a first glance, this court raised the issue whether the action proceedings should not have been preceded by a notice of intention to institute legal proceedings. Attorney for the plaintiff referred this court to the following two cases: *Jill v First Rand Bank Ltd t/a Wesbank* 2014(3) SA 183 SCA and *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 CC.

[5] Section 88 (3) (b) (ii) of the National Credit Act does not require notice- it merely precludes a credit provider from enforcing a debt under debt review unless, amongst others, the debtor defaults on a debt restructuring order. Moreover, section 129(2) expressly stipulates that the requirement to send a notice under section 129 (1) is not applicable to debts subject to debt-restructuring orders.¹ A credit provider is independently entitled to enforce the loan on the basis of the breach of the debt-restructuring order and the provisions of the debt restructuring order itself.²

[6] Section 88 (3) (b) (ii) of the National Credit Act provides:

"Subject to the provisions of Section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86 (4)(b)(i), may not exercise or enforce by litigation or other process any right or security under that credit agreement until-

"(a) The consumer is in default under the credit agreement; and

(b) one of the following has occurred:

(i) An event contemplated in subsection (1) (a) through (c); or

(ii) the consumer defaults on any obligation in terms of re-arrangement agreed between the consumer and credit providers, or ordered by a court of the Tribunal". (My emphasis).

[7] The restructuring order in the present proceedings was coached as follows:

"1. That the Consumer be declared over-indebted;

2. That the Consumer payment to the Respondents be re-arranged in the following manner:

¹ Para 14 of Ferris 's judgment supra

² See further para 18 ferris supra

That the period for payment in respect of each credit agreement with each Respondent be extended and the amounts payable per month be reduced accordingly, as per the draft Court order annexed hereto marked "X".

3. *Ordering that the Respondent/s pay the costs of this application in the event of same being opposed."*

[8] There is therefore nothing in the order which precludes the plaintiff from instituting the present action proceedings without a notice. This then brings me to the next issue for consideration.

[9] The property against which an order for declaring special executable is sought is a primary residence on which a bond was registered in favour of the plaintiff. It is a bond which has been in existence since 2007 in terms of which the defendant as on 3 March 2016 was liable to pay the monthly installment of R3870.02. Furthermore, as on 15 January 2016, she was in arrears in the amount of R 25 110.61 the outstanding amount being R 431 334.66.

[10] Every person has in terms of section 26(1) of the Constitution the right to have access to adequate housing. The court is enjoined to exercise judicial oversight in an application like in the present proceedings and decide whether to declare the property in question specially executable.

[11] Having regard to the amount of arrears outstanding and the monthly installment, I am not satisfied that this is an appropriate case to declare the property in question specially executable. If the respondent was to be able to put the arrears up to date that could save her from losing her home and this she can do by having executable movables sold. For this I am inclined to grant the relief in part.

[12] Consequently an order is hereby made as follows:

12.1 Judgment is hereby granted in terms of prayers 1, 2, 3 and 6 of the application for summary judgment dated 12 April 2016 and quoted in paragraph 3 of this judgment.

12.2 Prayers 4 and 5 of the notice of application aforesaid are hereby postponed sine die pending the execution of the movables.




M F LEGODI
JUDGE OF THE HIGH COURT

FOR THE APPLICANTS: Attorney Mr Siebrits of
SWANEPOEL & PARTNERS INC

FOR THE RESPONDENTS: No Appearance
Instructed by: