IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 4611/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

E.M. KUBUSHI 12/12/2019

E.M. KUBUSHI DATE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED APPLICANT

(REGISTRATION NUMBER: 1962/000738/06)

and

GINA NZIBA MWAMBA RESPONDENT

(DATE OF BIRTH: 16 AUGUST 1983)

JUDGMENT

KUBUSHI J,

[1] The applicant has approached court in terms of Uniform Rule 46 (1) *(a)* (ii) read with Uniform Rule 46A, in order to obtain authorisation to execute on certain immovable property held by the respondent.

[2] The respondent in opposition to the relief sought by the applicant has raised several defences, which I shall deal hereunder with, in turn. The respondent filed her answering affidavit out of time. However, the applicant is not taking issue with the late filing of the answering affidavit and, as such, condonation was granted.

[3] The respondent is said to be the registered owner of certain immovable property, which is mortgaged as security in favour of the applicant for a home loan. The immovable property is the primary residence of the respondent.

[4] Due to failure by the respondent to service the home loan, the applicant instituted action and consequently judgment by default was obtained against the respondent in respect of the monetary indebtedness. The present application is consequent upon the said default judgment.

[5] The issues for determination as premised on the defences raised in the respondent's answering affidavit are the following:

5.1. Whether the deponent to the founding affidavit possesses the requisite personal knowledge? The respondent abandoned this defence.

5.2. Whether the agreement was reinstated; if not

5.2.1 Whether the execution should be granted, and if so

5.2.2 .Whether the constitutional right to access of the respondent to adequate housing will be detrimentally affected by the execution;

5.3. Whether there is an alternative relief to execution; if not

5.4. Whether the reserve price should be set, and if so, at what amount.

Was the Agreement Reinstated?

[6] This is a wrong formulation of the issue by the parties. The respondent's defence in this regard is mistakenly premised on the old section 129 (3) of the National Credit Act ("the NCA") which provided that

"a consumer may –

(a) at any time before the credit provider has cancelled the agreement reinstate a credit agreement that is in default by paying to the credit provider all the 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; and

(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order."

[7] However, section 129 (3) of the NCA has as far back as 2015 been substituted by section 32 *(a)* of the National Credit Amendment Act 19 of 2014, which came into effect on 13 March 2015. The amended subsection (3) now provides as follows:

> *"Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied."*

[8] The subsection now speaks of a consumer remedying the default under the agreement instead of a consumer reinstating the agreement.

[9] The reason for the amendment is said to be to remedy the impression created that a credit agreement that has been cancelled, could be reinstated. Prior to the cancellation of the agreement the agreement is extant. There is therefore nothing to be reinstated. It, thus, makes sense to speak of remedying the default rather than reinstating the extant agreement.[1]

[10] Therefore, the formulation of the issue should rather be whether the default under the agreement occasioned by the overdue amounts was remedied.

[11] The section provides that at any time before the credit provider has cancelled the agreement the consumer may remedy the credit agreement that is in default by paying to the credit provider (a) all amounts that are overdue; (b) together with the credit provider's prescribed default administration charges; and (c) reasonable costs of enforcing the agreement up to the time the default was remedied.

[12] Subsection 129 (3) *(a)* of the NCA, therefore, creates an option for a debtor in an accelerated mortgage loan agreement who is in arrears with payment, to remedy such default by paying the full arrears and certain other amounts. The legal effect of such payment renders the default judgment entered against the debtor and any subsequent warrant of execution against the debtor's property of no legal force or effect. The legal effect is also that should the debtor fall in arrears again, a summons will have to be issued afresh in respect of those arrears and/or in respect of that default.

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[1] See Erasmus: Superior Court Practice Vol 2 at pD1-632M.

[13] In this instance, the respondent's contention that the default has been remedied is based on the fact that she alleges to have settled all arrears as set out in the summons in full including interest and legal costs. According to her, the amount that was reflected as arrears in the summons was R42 656, 85 (forty-two thousand six hundred and fifty-six rand, eighty-five cents) and to date of settling her answering affidavit she had already made payments in the amount of R84 129, 02 (eighty-four thousand one hundred and twenty-nine rand, two cents). This amount is far more than the arrears reflected in the summons and would as such also cover interest and the legal costs, so she argued.

[14] The payment of the arrears reflected in the summons is, however, not the test to determine compliance with section 129 (3) of the NCA. Section 129 (3) of the NCA provides for the payment of all amounts overdue. Therefore, default under the agreement is remedied by the payment to the credit provider of all amounts that are overdue together with all the credit provider's permissible default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.[2]

[15] In my understanding, at some point during the payment of the arrears the transaction history must reflect a zero balance. The fact that the respondent has been paying and that the payments she has made to date are far more than the arrears reflected in the summons served on her, does not assist her case. The section refers to all the amounts that are overdue, it does not refer to the amount referred in a pleading or up to a certain stage.

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[2] See Nkala v FirstRand Bank Limited and Others 2016 (4) SA 257 (CC) para 142.

[16] In this instance, it is common cause that the payments made by the respondent were intermittent. There were times when she could not pay at all, and by her own admission, this was because of having lost her employment, and that is, in fact, why she fell into arrears. When she resumed with her payments, she was not able to, at the same time, pay what was in arrears together with the monthly instalments that continued to be due and payable. She might have paid amounts that reflect that she has diminished the arrears that were reflected in the summons perhaps together with the prescribed default administration charges and reasonable costs, but that was not the end of the road for her. She was expected to continue paying until any other overdue amounts, over and above the arrears indicated in the summons, if any, were diminished, together with all the prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default is remedied. The evidence, in this instance, when gleaned from the transaction history provided by the applicant that incorporates all the payments the respondent alleges to have made, shows that at no stage during such history were the overdue amounts ever settled in full to reflect a zero balance. As a result, although the respondent was continually making payments, it was not full payments that covered all the overdue amounts together with the current instalment, thus, there was always arrears reflected in the statement. In such circumstances, it cannot be said that the default in the agreement was ever remedied.

[17] The respondent allege that there has been a miscalculation of the arrears, as all payments alleged to have been made could not have been taken into account. This, however, cannot be true as from the perusal of the transaction history on the statements provided by the applicant it is evident that all the payments she made have been accounted for. Her allegation that the legal costs added to the account

have not been taxed or are unreasonable is also not sustainable. The amount of costs is only R10 976, 76 (ten thousand nine hundred and seventy-six rand, seventy-six cents), (the amount is provided by the applicant) as against the overdue amount to date of R88 047, 62 (eighty-eight thousand and forty-seven rand, sixty-two cents), even if the said costs were to be taken off the account the default will not be remedied as there would still be an overdue amount.

Should the Execution Sought by the Applicant be granted?

[18] It is undoubtedly so that foreclosure of immovable property which is the primary residence of a consumer has a major impact on the rights contained in section 26 (1) of the Constitution: the right to have access to adequate housing. However, it has been held that in an order of execution against a judgment debtor's home that is mortgaged to a bank, the proper approach is to give effect to the mortgage bond unless something makes it inappropriate to do so, having regard to all the relevant circumstances of the case.[3]

[19] In order to balance the interest of the credit provider against that of a debtor Uniform Rule 46 (1) provides for judicial oversight of execution of judgment debts against immovable property. The rule prescribes judicial oversight where the property sought to be attached is the primary residence of the judgment debtor.

[20] In *First Rand Limited v Folscher* [4] when dealing with the amendment of Rule 46 (1) *(a)* (ii) requiring judicial oversight, the Full Bench suggested a comprehensive list of issues be considered by the court when deciding whether a writ should be issued or not. These issues are in the least not exhaustive and include:

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[3] See Absa Bank Ltd v Petersen 2013 (1) SA 481 (WCC) at 494F – 496F.
[4] 2011 (4) SA 314 (GNP).

'whether the mortgaged property is the debtor's primary residence; the circumstances under which the debt was incurred; the arrears outstanding under the bond when the latter was called up; the arrears on the date default judgment is sought; the total amount owing in respect of which execution is sought; the debtor's payment history; the relative financial strengths of the creditor and the debtor; whether possibilities exist, that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence; the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the creditor might suffer if execution went ahead and he lost his home; . . . whether the property sought to be declared executable was acquired by means of, or with the aid of, a State subsidy; whether the property is occupied or not; whether the property is in fact occupied by the debtor; whether the immovable property was acquired with moneys advanced by the creditor or not; whether the debtor will lose access to housing as a result of the execution being levied against his home; whether there is any indication that the creditor has instituted action with an ulterior motive or not; the position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant of the execution process against property specially hypothecated, which the primary residence of the judgment debtor and whether the protection of s26 (1) of the Constitution is extended to the debtor who may lose what is usually his only home."

[21] As *per* the judgment in *Folscher*, if a creditor's claim is opposed, the debtor will ordinarily be in the best position to advance any contentions he may wish to

make and will be able fully to inform the court of any aspect that should be taken into account.[5]

[22] In the current matter, in opposition to the relief sought by the applicant to have the property declared executable, the respondent argues that an order for execution will infringe her right to access to adequate housing as enjoined by section 26 (1) of the Constitution. According to the respondent, she occupies the property and it is a female-headed household. She is the sole breadwinner. Four other adults related to her and who are all unemployed and one minor person further occupy the property. The property is their primary residence, their usual home. The respondent does not own any other property and does not have anywhere to go if the property is sold in execution.

[23] The applicant is said to be in a substantially stronger financial position relative to her and make use of such advantage to have the property sold in execution. The proportionality of the prejudice she will suffer far exceeds the prejudice the applicant would suffer by accepting payments of the arrears over a period of time. She is now re-employed and will be able to afford the repayments on the property. She further proposes the following alternatives, namely (a) a restructure of the loan agreement; (b) acceptance of lower instalment amounts; or (c) suspended interest on the account for a period of time.

[24] The information provided by the respondent concerning her personal circumstances is very scanty and is of no assistance in enabling me to determine why I should not order execution. Save for alleging that she is now employed, the respondent fails to give more information about the nature of her employment neither

[5] Para 42 of the judgment.

does she provides the details of the income she receives from such employment. It is not apparent from the papers why the four adults she resides with are unemployed and on what basis are they dependent on her. There is no factual evidence as to why it is that she would not be able to find any other property for accommodation, perhaps cheaper, than the property forming the subject matter of this application. The current instalment she is to pay on the present property is R8 381, 05 (eight thousand three hundred and eighty one rand five cents), this amount is adequate to can find alternative accommodation.

[25] A further submission by the respondent is that a sale in execution should only be the last resort and especially when the debt is comparatively small, the applicant is duty bound to assist in alternative ways to assist her in settling the arrears. The contention is that the selling of her home which is valued at approximately R850 000 (eight hundred and fifty thousand rand) for a debt that is less than R100 000 (one hundred thousand rand) is grossly disproportionate.

[26] The court in *Absa Bank Limited v Lekuku* (32700/2013) [2014] ZAGP JHC 244 (14 October 2014) dealing with the concerns raised by the Banks about the variable approaches adopted by Judges when adjudicating unopposed applications to declare a primary residence specifically executable, had this to say:

> *"[36] It would be inappropriate to define when arrears are low for the purpose of Practice Directive 10.17.1.6 as this would unduly restrict the discretion which a judge must exercise in the particular circumstances of each case. The Full Bench cannot give guidance in this regard, as the very purpose of the judicial oversight requires an enquiry and a strategic engagement with the parties. . . . the overriding question is*

whether execution is proportionate, having regard to all the relevant circumstances. . . . there is no definitive number or easy calculation. If there were, claims for execution against residential property would be liquidated.

[37] In seeking foreclosure in respect of low arrears the Banks must examine each case and advise the court what they have done to avoid foreclosure of a primary residence in particular with reference to engagement with the debtor as a 'with prejudice' level to avoid foreclosure. This needs to be more than a paragraph or two in the affidavit seeking foreclosure. . . Banks having considered all the facts should only bring a foreclosure application if the execution would not be disproportionate."

[27] From the reading of the papers in this instance, it does not appear that much was done by the applicant to assist the respondent with the payment of the arrears before summons was issued against her. In its founding papers, the applicant refers to the general procedure it ordinarily follows in attempting to collect arrears from its debtors. There is nothing specific in the papers to indicate that a similar process was carried out in respect of the respondent; save to mention only in two lines that 'all attempts to date through the aforesaid process at arranging payment of arrears as required by Appellant/Plaintiff, has been unsuccessful'. The applicant does not specify what it is that was done in relation to the respondent to try to collect the arrears owed by her.

[28] What is only apparent is that the applicant made contact with the respondent before proceeding with litigation to negotiate payment of the arrears. The respondent

was afforded an opportunity to pay 50% of the arrears to stay litigation or alternatively to consider Easysell (the applicant's assistance to sell the property). The respondent opted to make a lump sum payment, which, unfortunately, did not cover the 50% of the arrears as it was agreed, and without much ado, the applicant instituted action against the respondent.

[29] Any further contact or attempt to remedy the default, as appears from the papers of the respondent, was by her after default judgment was granted. According to the respondent, her proposal to settle the arrears in instalments was refused by the applicant. The applicant in its replying affidavit confirms the settlement proposals made to it by the respondent, but argues that the proposals of the respondent were rejected because they were not satisfactory and that in further settlement proposals it could not consider such proposals because the respondent failed to provide it with the requested documents.

[30] It, thus, appears to me that the parties have always wanted to enter into negotiations to enable the respondent to settle the arrears due but could not do so because of, perhaps, communication breakdown. The appellant confirms in its papers that its primary objective has always been payment rather than litigation. The respondent on the other hand is desirous to pay off the arrears and has in her papers requested that she be given an opportunity to make arrangements with the bank to pay off the arrears.

[31] It has been held that a court faced with an application by a mortgage lender for (i) default judgment for the accelerated full balance of the mortgage loan; and (ii) an order declaring the mortgaged property executable would, if the mortgage

property were the debtors' primary residence, have a discretion to postpone both applications to afford the debtor an opportunity to pay the arrears.[6]

[32] I am of the view that taking the extent of the overdue amount in these proceedings, the respondent stands to suffer more prejudice if the property is sold in execution than the applicant if the respondent is given a chance to pay off the overdue amount. The amount in arrears is also not clear. In argument before me, it appeared as if the amount that is overdue in the respondent's account is R88 047, 62 (eighty-eight thousand and forty-seven rand, sixty-two cents). However, according to the applicant the total instalments payable from date of summons to date of the replying affidavit were R192 734, 46 (one hundred and ninety-two thousand seven hundred and thirty-four rand, forty-six cent) and the total payments made by the respondent were R157 229, 02 (one hundred and fifty-seven thousand two hundred and twenty-nine rand, two cents), which still left an overdue amount of R35 505, 44 (thirty five thousand five hundred and five rand forty four cents).

[33] I find it, therefore, in the interest of justice that the respondent be afforded an opportunity to pay off the arrears which appears to be quiet minimal.

[33] In the circumstances, I make the following order:-

1. The application is postponed *sine die*.
2. The respondent is afforded an opportunity to pay off the arrears within a reasonable time.
3. The applicant is allowed to approach the court on the same papers for relief, should it so desire, if the arrears remains unpaid after a reasonable time.

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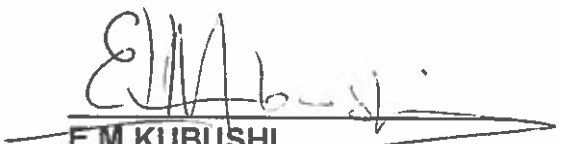
[6] See FirstRand Bank Ltd t/a First National Bank v Zwane and Two Others 2016 (6) SA 400 (GJ)



E.M KUBUSHI
JUDGE OF THE HIGH COURT

Appearance:

Appellant's Counsel	**: Adv. D. Theodorellis**
Appellant's Attorneys	**: Strydom Britz Mohulatsi Inc.**
Respondent' Counsel	**: Adv. CL Markram-Jooste**
Respondent' Attorneys	**: Noa Kinstler Attorneys**
Date of hearing	**: 3 September 2019**
Date of judgment	**: 12 December 2019**