IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION , PRETORIA

CASE NUMBER: 112 / 2012

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

25/ 11 / 2019
DATE

SIGNATURE

In the matter between:

FRAJO 163 CC	FIRST APPLICANT
THE DEWALD VISSER	SECOND APPLICANT
DINA JOHANNA WILHELMINA VISSER	HIRD APPLICANT
And	
NEDBANK LIITED	FIRST RESPONDENT
THE SHERIFF FOR THE DISTRICT OF VENTERSDORP	SECOND RESPONDENT

JUDGMENT

MAVUNDLA, J

[1] This court dismissed with costs the applicants':

(i) application for the statement and debatement by the first respondent of the first applicant's account;

(ii) stay of execution pending statement and debatement;

(iii) setting aside the writ of execution and declaring the immovable property to which it relates to be not executable.

[2] At the time the court did not furnish its reasons. The applicants subsequently requested for the written reasons to be furnished in terms of Rule 49(1)(c) of the Uniform Court Rules. I must confess that, unfortunately, this matter fell within the crevices of poor or lack of filling system in my chambers, so to put it, remained forgotten and unattended to, until very recently, when the file was discovered. There has indeed been an inordinate delay in providing the written reasons, set herein below. I profusely apologise to the parties in that regard.

[3] It is common cause that the first respondent entered into 3 (three) separate Nedbond Loan agreements ("the agreements") with the first applicant on or about 22 August 2006; 20 August 2007 and 6 October 2008, in terms of which the first respondent advanced R2, 310, 000.00, R742, 350. 00 and R640, 000. 00 to the first applicant.

[4] As security for the due and proper fulfilment by the first applicant of its obligations in terms of the loan agreements, mortgage bonds were registered against four of the first applicant's properties, being sections 4, 7 and 8 of the Magaliesberg Office Park, as well as portion 23 (a portion of portion 20) of the Farm Hoogeboomen ("the farm").

[5] As further security, the second and third applicants bound themselves as sureties and co-principal debtors for the fulfilment of the first applicant's obligations.

[6] It was a term of the agreements that the loans or balances thereof owing from time to time by the first applicant will initially bear finance charges as the annual finance charge rate, specified in the agreements. Finance charges will be reckoned from date on which the loans are advanced and calculated daily and debited monthly on the date on which the instalments are payable.

[7] It was further terms of the agreements that in the event of breach by the first applicant, the first respondent will have the right to claim repayment of full amounts owing, together with finance charges thereon, and to have any mortgaged immovable property declared executable.

[8] It is common cause that the first applicant breached the terms of the loan agreements by failing to make due and punctual payments in terns thereof. As a result, the first respondent instituted action and this court granted judgment against the applicants for the payment in *inter alia* the sums of R2, 049, 141. 14 (claim 1), R597, 516.14 (claim 2) and R568, 216.40 (claim 3), together with interest and costs. The court also declared all of the said immovable properties executable.

[9] Consequent to the applicants' failure to settle the judgment debt, a writ of execution was issued against the properties on 30 March 2012. Thereafter the first applicant sold the three Magaliesberg properties and the proceeds were paid to the first respondent on 1 October 2014 and 5 June 2015. The judgment debt nonetheless remained unsettled, as a result the sheriff attached the farm on 6 October 2015.

[10] The parties are *ad idem* that the issues to be determined by the court are:

10.1 the statement and debatement by the first respondent of the first applicant's accounts;

10.2 setting aside the writ of execution and declaring the farm not executable;

10.3 stay the execution pending the aforesaid statement and debatement.

[11] The first respondent contended, *inter alia*, that:

11.1 It is trite that an applicant in motions proceedings must make out a proper case in the founding papers: *Pountans' Trustee v Lahanas* 1924 WLD 67 at 68; In *Shakot Investments (Pty Ltd v Town Council of Borough of Stanger* 1976 (2) SA 701 (D) 704F-G, Miller puts the matter thus:

"In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet."

11.2 In as much as the applicants claim for statement and debatement by the first respondent of the first applicant's accounts with numbers 33035120001, 3302512002 and 3302512003, to succeed with this claim the applicants must allege and prove that:

(a) the first applicant and first respondent stood in a fiduciary relationship to each other; or

(b) the first respondent contractually bound itself to render and debate the first applicant's accounts; or

(c) it had a statutory duty to do so. *vide ABSA Bank Bpk, v Janse van Rensburg* 2002 (3) SA 701 (SCA) par [15];

11.3 the applicants do not:

(a) rely on any contractual terms or statutory provisions in terms of which the first respondent is obliged to deliver and debate the first applicant's accounts.

(b) also allege that the first respondent stood in a fiduciary relationship between them; vide *ABSA Bank Bpk, v Janse van Rensburg supra at par [16];*

[12] *In casu,* the relationship between the applicants and the first respondent is contractual, between client and the bank, in particular between a debtor and a creditor relating to a revolving credit agreement and accordingly there is no fiduciary relationship between the parties, as held by Brand AJ, in the matter *ABSA Bank Bpk, v Janse van Rensburg supra at par [16] p709 A-B.* I accept the submission of the first respondent that the applicant has placed nothing before this court obliging this court to find that the relationship between the parties was one of fiduciary.

[13] Besides, in my view, the question of debatement of the account, is not a defence to bar a creditor to take the remedial steps to secure payment through laying the hands of the law, so to speak, on the movable and or immovable assets of the defaulting party, which were provided as security for his indebtedness.

[14] In *casu* the applicant in their founding affidavit contended that the only amount owing to the first respondent is R136, 972. 21. A sale in execution can only be set aside where the debtor has settled what it owed to the creditor in full prior to the date of sale. The respondent quite correctly submitted that the applicants dispute the accuracy of the judgment debt, the proper time and manner to raise such dispute is after the relevant sale in execution, by objecting to the sheriff's plan of distribution of the proceeds and by bringing such objection before a judge for review in terms of Rule 46(14) (d). I agree with this submission.

[15] It the circumstances, a proper order is one dismissing the applicants' application with costs. Needless to state that the costs have to be borne jointly and severally, the one paying the other to be absolved.

[16] Accordingly, for the aforesaid reasons the following order is issued:

1. That the application is dismissed; and
2. That the respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs on party and party High Court scale.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 25 / 11/ 2019

FIRST APPLICANT`S ADV : ADV LC MATTHYSEN

INSTRUCTED BY : JNS ATTORNEYS

RESPONDENTS' ADV : ADV E J.J NEL

INSTRUCTED BY : VDT ATTORNEYS INC.