REPUBLIC OF SOUTH AFRICA

IN THE HIGH OF SOUTH AFRICA

THE GAUTENG DIVISION, PRETORIA

CASE NO.: 70554/2015

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

17/03/2021 .....
DATE SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED Plaintiff

and

SAVITA MOODLIYAR 1st Defendant
LOGANATHAN SATHIANAND NAICKER 2nd Defendant
THRIPASUNDARI NAICKER 3rd Respondent

J U D G M E N T

MNGQIBISA-THUSI J:

[1] The plaintiff is seeking for the following relief against the defendants in the following terms:

1.1 payment of an amount of R1, 646, 834.95, together with interest at the rate of 9.20% per annum, calculated daily and compounded monthly from 29 August 2015, to date of final payment;

1.2 an order declaring the first defendant's immovable property described as Holding 14 Gerhardsville Agricultural Holdings, Registration Division J.R., The Province of Gauteng measuring 2,2061 Hectares, held by Deed of Transfer No T70638/2006 (a k a 14 First Street, Gerhardsville, Gerhardsville Agricultural Holdings, Gerhardsville, Centurion, Gauteng) (the immovable property"), specially executable;

1.3 an order authorising and directing the Registrar of the High Court to issue a writ against the immovable property of the first defendant; and

1.4 and costs on an attorney and client scale, to be taxed.

[2] On or about 07 December 2006, the plaintiff, FirstRand Bank Limited, and the first defendant, Mrs Savita Moodliyar, concluded a written credit agreement which operated as an overdraft facility ("the main agreement") and an addendum with additional terms to the main agreement.

[3] The agreement provided, *inter alia*, the following terms, which are not in dispute:

3.1 That plaintiff would from time to time lend and advance monies to the first defendant in an FNB ONE facility account ("facility account") up to a maximum amount of R1, 936, 000.00 plus R17,218.25;

3.2 The term of the overdraft facility was 240 months;

3.3 The applicable initial interest rate was 10.20% based on an interest rate discount of -1.8% below the plaintiff's loan mortgage base rate of 12% per annum;

3.4 That the first defendant would pay all cheques, promissory notes, bills of exchange and other negotiable instruments which are made and accepted by the first defendant and to debit amounts to the facility account;

3.5 That the overdraft was payable on demand and the plaintiff reserved its right to call-up the facility at any time it deems necessary;

3.6 That the plaintiff would debit the facility account with all its charges consistent with the generally accepted banking practice;

3.7 That the plaintiff would calculate interest daily on any overdrawn outstanding balance from time to time at the plaintiff's applicable overdraft interest rate for the relevant class of overdraft subject to any maximum rate that may legally apply and compound such interest monthly;

3.8 That the plaintiff would register a first covering mortgage bond over the immovable property of the first defendant as security for the overdraft.

3.9 The full amount still owing under the agreement would be payable in the event that the first defendant defaults on her payment and she fails to remedy the default within 7 days from the date of the written notice of default.

3.10 With regard to the repayment of the overdraft, the bond reads as follows:

…

"6. REPAYMENT

6.1 The Mortgagor agrees that, notwithstanding any other provisions of this agreement, the Facility is always repayable on demand. Accordingly, the Mortgagor must pay the debit balance within 7 days of receipt of a notice from the Bank requesting repayment.

6.2 In addition to this, the Mortgagor must repay.

[4] On 12/17 May 2007 a mortgage bond over the immovable property in favour of the plaintiff was registered.

[5] The second defendant, Loganathan Sathianand Naicker, and the third defendant, Thripasundari Naicker, bound themselves as sureties and co-principal debtors, jointly and severally with the first defendant in favour of the plaintiff for all the debts of the first defendant up to the amount of R1,1936, 000.00.

[6] On 4 August 2015 the plaintiff sent the defendant a letter of demand, followed by a notice in terms of s 129(1)(a) of the National Credit Act[1] as a result of the plaintiff. Summons was issued and served on first, second defendants and on 02 September 2015 and 09 and 10 September 2015, respectively. Defendants filed a notice of intention to defend. Consequent thereto the plaintiff filed an application for summary judgement against the defendants to which the first defendant filed an affidavit resisting summary judgement and a plea. The second and third defendants have joined issue with the first defendant in support of her opposition to the plaintiff's claim.

[1] Act 34 of 2005.

[7] It is the applicant's contention that the first defendant was not consistent in paying her monthly instalment and as a result fell into arrears. The first defendant defaulted on payment and plaintiff issued notices to the defendants in terms of section 129 of the National Credit Act.

[8] In its plea the first defendant contends that the plaintiff was not entitled to issue summons against her because at the time summons were issued, she was not in default on her payments. It is the first defendant's contention that on a proper interpretation of the main agreement the maximum limit of the overdraft facility was intended to remain the same, that is at R1,936, 000.00 for the entire term of the overdraft facility. Further, it is the first defendant's contention that through the course of the term of the overdraft facility, the plaintiff had unilaterally and arbitrarily charged her an incorrect rate of interest which is not in line with the interest rate specified in the main agreement. As a result, the effect of the plaintiff charging an incorrect interest rate and reducing the limit of the overdraft facility resulted in her falling into default of her payments.

[9] The first defendant counter-claims against the plaintiff on the ground that the plaintiff was in breach of the agreement by charging her an incorrect interest rate during the relevant period in a total amount of R 398,462.82, resulting in the first defendant falling onto arrears with her payments. Further that the agreement did not stipulate any monthly payments to be made by the first defendant. The first defendant also demands that plaintiff should adjust its accounting records to reflect the amount of R398,462.82 as a credit in her account and to reinstate the agreed maximum credit limit of R1,936, 000.00.

[10] The issues to be decided are:

10.1 whether the plaintiff charged interest against the first defendant's account at the correct interest rate; and

10.2 whether the plaintiff was entitled to reduce the credit limit of the overdraft facility.

[11] In the event that a finding is made that the plaintiff applied the correct interest rate and that on a proper interpretation of the agreement, the credit limit was to be reduced in accordance to its period, the issue to be decided is whether an order should be granted declaring the immovable property specially executable.

[12] The plaintiff does not dispute the validity of the agreement and that the provisions of the National Credit Act[2] have been complied with.

[13] The plaintiff called Mr Shiven Govender ("Mr Govender"), an attorney, a recoveries manager in the plaintiff's Private Lending Division. His evidence is as follows. During 2006 the plaintiff offered the first defendant an FNB ONE facility account in order to assist her in consolidating her debt which would result in her saving on bank charges. According to Mr Govender, this type of account allows a client a repayment of 240 months. On 7 December the plaintiff had signed the facility and the addendum thereto subject to her registering a mortgage bond in favour of the plaintiff over her immovable property as described above. As a result, the facility letter (inclusive of the addendum) and the mortgage bond, constituted the agreement. Mr Govender admitted that

[2] Act 34 of 2005.

although the first defendant had signed the agreement and returned it to the plaintiff's offices, it was not signed by the plaintiff as this was not necessary because once the plaintiff signed, the agreement came into effect[3]. Attached to the agreement was a schedule which set out, *inter alia*, the maximum total amount of the overdraft facility (i.e R1, 760.000,00); and the additional 10% valuation (176,000.00) of the immovable property added and the term of the facility. Mr Govender testified that the that the plaintiff would calculate interest daily on any overdrawn outstanding balance from time to time at its applicable overdraft interest rate for the relevant class of overdraft subject to any maximum rate that may legally apply and compound such interest monthly.

[14] With regard to the interest to be charged, Mr Govender referred to clause 8 of the mortgage bond which reads as follows:

> "**8. DEBIT INTEREST**
>
> 8.1 Interest on the debit balance of the Facility, subject to 8.4 below, is calculated at a rate linked to the published prime rate, being the interest rate published from time to time by First National Bank … as being its prime overdraft rate, at the margin indicated in the interest table on the Facility letter.
>
> 8.2 The interest payable will be calculated daily on the debit balance as from the date that any part of the Facility sum is advanced. Interest is due monthly on the instalment date and will be capitalised on that date if not paid.
>
> 8.3 The Bank may vary the published prime rate. Variations in the prime rate and the effective date of variation will be published in the press and printed on the Mortgagor's statement as soon as possible after variation.

[3] Clause 4 of the facility letter provides that: "Unless provided otherwise in the Standard Terms and Conditions, the effective date of this Facility Letter shall be the date that: a. You have signed and returned this Facility Letter to us. b. All documents required to effect the security have been signed."

8.4 Interest on the debit balance of the Facility will be calculated at a penalty interest rate determined by the Bank in its sole discretion in the event that:

8.4.1 from the date the facility sum is exceeded to the date the excess is repaid;

8.4.2 from the date of any default by the Mortgagor or any surety, whether or not the Bank has given notice of default, to the date the default is rectified;

8.4.3 to the date that all the security required in terms of this agreement has been provided."

[15] According to Mr Govender, the first defendant's initial approved interest rate was calculated at the prime rate minus 1.8%.

[16] Mr Govender testified that on 5 December 2006, the prime overdraft rate was 12%, as reflected in the facility letter. Further, Mr Govender explained that the applicable interest rate would be 0.5% higher than the initial rate if the balance of the account exceeded 80% of the value of the prop but did not exceed 100% of the value of the property. At the time the mortgage bond was registered, the immovable property was valued at R1,760,000.00. He further explained what the term LTV (Loan to Valuation) meant and how it was applied in calculating interest due.

[17] During his evidence Mr Govender explained how the interest on the first defendant's loan account was calculated, making reference in particular to the variation of the LTV, depending on the balance was above 80%, between 80% and 90%[4] or exceeded 100%[5] of the valuation of the immovable property. He

[4] The applicable interest rate would be 0.5% higher than the initial rate.
[5] The applicable interest rate would be 1.5% higher than the initial rate.

further testified that the applicable interest rate would be changed only when the bank's prime rate changed. Furthermore, he testified during the first 10 years of the facility the initial amount of the facility reduced on a monthly basis.

[18] With regard to the interest calculations done by the first defendant in order to prove that she was over-charged on interest, Mr Govender testified that the first defendant's calculations were incorrect in that she had applied that incorrect interest rate and had also not adjusted the interest rate applicable on the day when the prime rate changed.

[19] The first defendant's evidence is as follows. The first defendant testified that according to her knowledge and since no specific monthly instalment was stipulated in the facility letter, the maximum facility amount would remain the same for the entire term of the loan and that she was not aware that it would be reduced during the course of the loan. Further that the only condition she was aware of with regard to the facility amount was that it was not supposed to be above the maximum amount loaned. She also denied knowing what the term LTV meant. However, the first defendant, despite her initial assertion that the plaintiff had consistently applied an incorrect interest rate, concede that her calculations of the applicable interest rate were wrong. In light of her assertion that the facility amount was not supposed to be reduced through the term of the facility, on being questioned as to how she was going to repay the loan at the end of its term, the first defendant testified that she and her husband had planned other options on how to repay the loan.

[20] With regard to the executability of the immovable property, it is common cause that the property is the primary residence of the first defendant and her husband. The first defendant further testified that the second dwelling on the property is used by the second and third defendants and the third dwelling is leased to a third party.

[21] The following facts are not in dispute:

21.1 that the amount of the overdraft was R1,936,000.00 and that it was repayable over a period of 240 months;

21.2 that the initial interest rate applicable would be prime minus 1.8%;

21.3 that when the facility letter was signed the prime rate was 12%;

21.4 that the applicable interest rate would change in line with any changes in the prime rate and the balance outstanding on the loan;

21.5 that at the time the mortgage bond was registered that immovable property was valued at R1,760,000.00.

21.6 that the overdraft was payable on demand and that the plaintiff was entitled to call up the loan at any time it deemed it necessary;

21.7 that there were certain months when the first defendant did not pay any amount towards that loan; and

21.8 that the plaintiff sent monthly statements of the loan account to the first defendant.

[22] The evidence of the first defendant that she was not aware that she had to make at least monthly payments on the loan in order to reduce the amount due is not plausible if one takes into account that the period of the loan was 240 months.

The first defendant's contention that she had plans on how to repay the amount owing at the end of the term of the loan is not convincing. In his evidence, the plaintiff's witness succinctly testified as to the applicable interest rate from time to time. His evidence in this regard was convincing, having regard to the terms of the facility to which the first defendant had agreed upon. The first defendant did not provide any evidence to controvert the plaintiff's evidence on the applicable interest rate applied and on the fact that, in view of the period of the term, the amount of the loan was susceptible to a reduction through the first defendant making monthly repayments towards the loan. The first defendant has conceded that she did not make any payments during some months and that her calculation of the applicable interest rate was incorrect. Furthermore, in light of the fact that on certain months the first defendant did not make any repayments, she could not dispute the plaintiff's assertion that she was in default of her obligations under the agreement to make payments towards the loan.

[23] I am satisfied that the plaintiff has shown on a balance of probabilities that the first defendant was in breach of the agreement and that it was entitled in terms of the provisions of the facility to demand payment of the total outstanding amount of the loan. The interpretation the first defendant wants to be ascribed to the terms of the agreement with regard to repayments on the loan, the applicable interest rate and her default in making payments towards the loan are far-fetched and do not accord with the clear terms of the agreement.

[24] No submissions were made on behalf of the defendants with regard to the executability of the immovable property and there is no plausible reason why

the plaintiff should not be granted an order for the execution against the immovable property. However, although summons was issued before the provisions of Uniform Rule 46A, its provisions have to be complied with.

[25] In the result the following order is made:

1. The defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay to the plaintiff an amount of R1, 646, 834.95, together with interest at the rate of 9.20% per annum, calculated daily and compounded monthly from 29 August 2015, to date of final payment;
2. an order is made declaring the first defendant's immovable property described as Holding 14 Gerhardsville Agricultural Holdings, Registration Division J.R., The Province of Gauteng measuring 2,2061 Hectares, held by Deed of Transfer No T70638/2006 (aka 14 First Street, Gerhardsville, Gerhardsville Agricultural Holdings, Gerhardsville, Centurion, Gauteng) (the immovable property"), specially executable;
3. an order authorising and directing the Registrar of the High Court to issue a writ against the immovable property of the first defendant subject to a reserve price being determined; and
4. the defendants to pay the costs on an attorney and client scale, to be taxed.

N P MNGQIBISA-THUSI

Judge of the High Court

Appearances:

For the Plaintiff: Adv J H Mullentzy (instructed by PDR Attorneys)

For the Defendants: Adv Bedhesi (instructed by Moodliyar & Bedhesi Attorneys)