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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

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

(3) REVISED

_____ _____

DATE SIGNATURE

CASE NUMBER: 86879/18
DATE: 30 September 2021

NEDBANK LTD Plaintiff

V

JABULISILE BUSISIWE NXUMALO Defendant

JUDGMENT

MABUSE J

[1] By the combined summons issued by the Registrar of this Court on 3 December 2018, the Plaintiff claims against the Defendant payment of money, interest on the capital amount and an order declaring the Defendant's immovable property specially executable and other ancillary relief.

[2] The Plaintiff's cause of action is based on an agreement of loan. On 24 November 2016, the Plaintiff, duly represented by an authorised agent and the Defendant entered into a home loan agreement and a written mortgage loan agreement. In terms of the agreement of loan during May 2017 the Plaintiff loaned and advanced to the Defendant a sum of R1,785,000.00 plus an additional sum of R178,500.00 for the purpose of purchasing an immovable property, to wit, [….], Registration Division JR in the province of Gauteng (the property)

[3] In terms of the said agreement of loan, the parties had agreed that:

3.1 the loan of the sum of R1,785,000.00 and the additional amount of R178,500.00 would be secured by a mortgage bond passed over the property as security for the refund of the loan amount;

3.2 the loan would be refundable to the Plaintiff in monthly instalments of R16,912.58 payable on or before the 1st day of each month;

3.3 the Defendant was to pay interest on the said loan as determined from time to time by the Plaintiff, calculated and capitalised monthly in arrears;

3.4 the monthly instalments were to be paid regularly, month by month, without any deduction;

3.5 the full balance outstanding at any time would forthwith become due, owing, and payable in the event of the Defendant failing to make any payment on the due date;

3.6 the Defendant would be obliged to pay costs on the scale of attorney and client in the event of the Plaintiff acting against the Defendant for failing to comply with the terms of the loan;

3.7 the Plaintiff would be entitled to increase or decrease the rate of interest on all the amounts in terms of the bond to the rate determined by the Plaintiff as being

payable for the class of bonds into which the bond falls and would be entitled to commensurately increase the monthly instalment from time to time;

3.8 the Defendant would be obliged to pay such fees and charges for administration and other services rendered by the Plaintiff in connection with the bond as the Plaintiff might determine, which said charges would be debited to the account of the Defendant.

[4] The Plaintiff defaulted with her payments with the result that as of 3 December 2018 she was 1.54 months in arrears in the sum of R26,125.18. As a result of the said default, the whole balance outstanding in the sum of R1,613,668.18 as proved by the certificate of balance by the Plaintiff's manager together with interest thereon at the rate of 10% per annum calculated and capitalised monthly in advance became due and payable from 1 November 2018.

[5] Upon the Defendant defaulting and as enjoined by the provisions of s130 of the National Credit Act 34 of 2005 ("the NCA"), the Plaintiff duly issued to the Defendant, by registered post, a notice in terms of s 129(1)(a) of the NCA. The said notice was delivered to the post office responsible for the delivery of post to the Defendant's address. In the normal cause of events the post office would have secured the delivery of the registered item notification slip to the Defendant that there was at the post office a registered item awaiting collection. The Defendant would, as a reasonable person, have retrieved the notice from the post office.

[6] In the said notice the Defendant was officially notified that:

6.1 she was in arrears with the payments in respect of the agreement of loan and that she had been in arrears for over 20 business days;

6.2 requested to contact the Plaintiff within 10 business days to resolve any dispute or problem or to develop a plan acceptable to both parties to bring the payments up to date;

6.3 advised to refer the matter to a debt counsellor, alternative dispute resolution agent, the consumer court, or the ombudsman for banking services.

[7] The Plaintiff complained that a period of at least 10 business days from the date of delivery to the Defendant of a notice in terms of s 129 of the NCA elapsed and the Defendant:

7.1 failed within the said period of 10 days to respond to the said s 129 notice; and

7.2 failed in terms of s 127 of the NCA to surrender the property.

[8] A copy of the summons was served upon the Defendant on 19 January 2019. According to the summons, the Defendant was supposed to file her notice of intention to defend the Plaintiff's action against her on 1 February 2019 but failed to do so. It was for that reason that on 23 March 2021 there was an application by the Plaintiff for default judgment against the Defendant in terms of Rule 31(5) of the Uniform Rules of Court ("the rules") and for an order in terms of Rule 46A of the rules of the Court. These two applications came before the Court on 23 March 2021 when Adv Minnaar represented the Plaintiff and the Defendant appeared personally.

[9] The application in terms of Rule 46A of the rules was predicated on the founding affidavit of Kerusha Pillay ("Ms Pillay"), the legal manager of the Plaintiff. The affidavit starts with the familiar clause or allegation that she has been authorised to make the affidavit.

9.1 She confirms that the facts stated in the affidavit are within her direct knowledge and believe;

9.2 she confirms furthermore that she does not know the Defendant. It is of course not surprising or unusual that she does not know the Defendant. What is of paramount importance though is that she does not know the personal circumstances of the Defendant. She can only deal in her affidavit with factors which are within her knowledge. Under the circumstances she would not know that the Defendant is unmarried and furthermore that the property is occupied by the Defendant and her 9-year-old daughter.

[10] It is correct that the debt which the Plaintiff seeks to enforce was incurred for the purpose of acquiring the property which the Plaintiff seeks to be declared executable. As correctly pointed out by the deponent, the property is a residential immovable property and is the primary residence of the Defendant and her minor daughter. It is occupied by both. If the property were to be attached and sold in execution, the Defendant may lose what is usually her only home.

[11] At the time of the hearing, the deponent did not dispute her indebtedness to the Plaintiff. She was aware that she breached the agreement of loan between her and the Plaintiff and that she owed the Plaintiff. She explained, in her opposing affidavit, how it came about that she should be in arrears with her monthly instalments.

[12] Adv Minnaar, who appeared for the Plaintiff, informed the Court that on 23 March 2021, during the hearing of both the application for default judgment and the application in terms of Rule 46A of the rules that the matter has not been settled. According to him the Plaintiff and the Defendant had sought to settle the matter. Settlement negotiations were ongoing at the time the matter was heard. Apparently, a settlement agreement, on the terms the Plaintiff thought were agreed between the parties, had been sent to the Defendant for the Defendant’s signature. The Defendant had not signed and returned the settlement agreement, so he informed the court. For that reason, nothing was,

according to him, taking place. He acknowledged that the Defendant had made some payment towards the debt and the last payment was R260,000.00 which was made on 17 July 2020.

[13] The Defendant informed the Court that there were continuous negotiations between her and the Plaintiff. She told the Court that she called the Plaintiff about the matter in January 2021 when they told her how much she owed. She confirmed that she had received the written settlement agreement. After receiving it she considered it and made a counteroffer. The Plaintiff accepted the counteroffer. The written settlement agreement that she received did not contain her counteroffer or counterproposals. She paid R40,000.00 and thereafter R54,000.00, based on the proposals that she had sent to the Plaintiff. She had paid R315,000.00 towards the arrears. She was unhappy with, and disagreed, with the settlement figures set out in the settlement agreement.

[14] The settlement agreement came back with figures that she did not understand. The house belongs to her and her daughter. She is now self-employed. She is also a consultant for the Government. At the time she fell into arrears she was not working. She cannot pay the Plaintiff only. She has other debts to pay. She does not want to lose her house. She also pays school fees for her daughter.

[15] A copy of the combined summons was served on the Defendant on 19 January 2019 by affixing it to the principal door. Service of a copy of the summons on her is not challenged. Therefore, the inevitable conclusion that there was proper service of the summons on her.

[16] The notice in terms of s 129(1) of the NCA was sent by registered post. One can safely assume that she received it, read, and understood it. She did not tell the Court what she did after receiving it. She seems to have been acting on her own without the benefit of

any legal assistance. Judging from the contents of the s 129(1) notice, she was made aware that if she did not bring her payments up to date or did not take one of the routes she had been advised to follow in the s 129 notice, she ran the risk that the Plaintiff might institute legal proceedings against her for the recovery of the debt and that that might lead to the attachment and sale of her house and that might also lead to eviction.

[17] After a copy of the combined summons was served on her, for reasons unknown to the Court, she did not defend the action. There is no doubt that the Plaintiff has made out a good case for the default judgment. I see no reason why the Court should not grant the monetary claim against her and not the default judgment as claimed in the application for default judgment.

[18] It is the proceedings in terms of Rule 46A of the Rules that she opposes. She has, for that purpose, delivered a notice to oppose that was followed by an opposing affidavit.

[19] Earlier I pointed out that, nothing prevents this Court from granting a monetary judgment against the Defendant. The Plaintiff has, in that regard, made out a good case for the relief that it seeks. Moreover, the Defendant has not filed any papers to resist the action against her. In fact, the Defendant is opposed to the application in terms of Rule 46A of the rules. She wants to preserve the immovable property.

[20] For the following reasons, the Court is disinclined to grant the Plaintiff's rule 46A application:

20.1 there is clear evidence that the parties herein were involved in some negotiations to resolve the dispute around her failure to pay the instalments properly and that those negotiations have not been concluded;

20.2 it is also clear that the Defendant appears to be in a better position to make payments and that, in fact, she has paid a sum of R260,000.00 and has thereby liquidated the arrears she was owing;

20.3 the immovable property which the Plaintiff seeks to have declared specially executable is her primary residence;

20.4 she occupies the said immovable property together with her minor daughter;

20.5 there are other methods of resolving the dispute between her and the Plaintiff than declaring the immovable property executable;

20.6 Rule 46 of the rules provides as follows:

"Subject to the provisions of Rule 46A no writ of execution against the immovable property of any judgment debt shall be issued unless –

(i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ";

As the Plaintiff has not placed any return of service of any process issued against the Defendant's movable property, this Court is unable to grant an order declaring the immovable property of the Defendant specially executable.

20.7 The Plaintiff has not furnished this Court with the debtor's payment history.

[21] Among the papers on Carelines is an affidavit on arrears. It is called "arrears affidavit". It does not explain much but reflects the following figures:

"2.1 Balance R1,744,597.78;

2.2 Arrears R201,086.52;

2.3 Months in arrears: 13.17;

2.4 Instalment payable: R14,679.81;

2.5 Date of last payment: 7/2/2021;

2.6 Amount of last payment: R260,000.00"

Having considered these figures one can be forgiven for concluding that since the Defendant paid the sum of R260,000.00 at the time the arrears were R201,086.52, one can therefore be forgiven for concluding that with that payment of R260,000.00 she has wiped off all the arrears of R201,086.52 and over and above has paid an amount of R59,913.48.

According to the replying affidavit, the outstanding amount on the bond is R1,632,584.94. According to the arrears affidavit the balance is R1,741,597.78. In the application for default judgment the amount claimed is R1,613,668.18. On the said December 2018 when the action was instituted, an amount of R1,613,668.18 was claimed. Subsequently, an amount of R260,000.00 was paid by the Defendant. The arrears affidavit does not explain how much is now due and payable by the Defendant to the Plaintiff, nor does it show the impact that the payment of the amount of R260,000.00 that the Defendant paid has made on the total amount due and payable.

[22] Based on that the Court grants default judgment as follows:

1. **Payment of the sum of R1,613,668.18.**
2. **Interest on the said amount at the rate of 10% per annum calculated and capitalised monthly in advance from 1 November 2018 to date of payment.**
3. **Costs of the suit.**
4. **The application in terms of Rule 46A is hereby postponed sine die.**

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PM MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:	Adv J Minnaar
Instructed by:	Hammond Pole Majola Inc.
For the Defendant:	In person
Dates heard:	23 March 2021
Date of Judgment:	30 September 2021