IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:4173/2015

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES;NO
REVISED
3 August 2022

In the matter between:

NEDBANK LIMITED	**Plaintiff**
and	
TERRANCE BONNY MBAMBO **(ID NO: [....])**	**First Defendant**
CHITHEKILE SYLVIA **(ID NO: [....])**	**Second Defendant**

JUDGMENT

RAULINGA J

BACKGROUND

[1] The matter stems from a written loan agreement concluded between Nedbank, the plaintiff, and TB and CS Mbambo, the defendants. The plaintiff pleads that the defendants are in breach of the loan agreement in that the defendants failed to honor their payment obligations in terms of the loan agreement. As such, the plaintiff seeks judgment against the defendants for payment of R2 624 590.02, together with interest, and an order declaring the mortgaged residential property to be specially executable in favor of the plaintiff.

[2] The loan was secured by a first and second concern rig mortgage bonds in favour of the plaintiff that were registered over the defendants' mortgaged property. Accordingly, the loan agreement therefore constitutes a mortgage agreement as defined in section 1 of the National Credit Act (the NCA),[1] a credit transaction in terms of section 8(4)(d) of the NCA and a credit agreement in terms of section 1(b) of the NCA. The NCA is therefore the primary applicable legislation.

ISSUES

[3] Pursuant to a referral to evidence on the plaintiff's quantum by the Judge on 22 March 2022, the plaintiff called two witnesses. From the evidence led by the witnesses, a number of issues were raised with the overarching issue being the plaintiff's claim that the defendants breached their obligations in terms of the loan agreement. From thereon, the following issues arose.

[4] The defendants contended that the plaintiff had not complied with the provisions of section 129 of the NCA in that the section 129 noticed is arrived at only by virtue of the plaintiff having accelerated all amounts outstanding in terms of the mortgage bonds at a time when the defendants were not in arrears with the bond

[1] 34 of 2005.

account. The defendants further contended that the action did not comply with the Uniform Rules of Court 46(A) in that no reserve price was stipulated. For this argument, the defendants relied on the ratio in *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another*.[2]

[5] Another point of contention was the evidence led by the witnesses called by the plaintiff and the argument that given that the evidence was of an expert nature, it was inadmissible. This arose after the plaintiff's witness testified that the statement of account prepared by him contains not only a computer-generated statement but also manual calculations undertaken by him in respect of the interest.

[6] Ultimately, a reading of the papers would determine the crux of the defendants' argument being that no alternative measures to satisfy the judgment debt were considered by the plaintiff bank other than the sale of the defendants' residential property. Below, the above mentioned issues will be unpacked.

EVIDENCE

[7] The evidence led by the plaintiffs' witnesses made it evident that it was indisputable that the defendants had failed to honour the agreement between them and the plaintiff in that they had failed to pay in accordance with the agreement entered into between them and the plaintiff. Listening to the evidence of Mr. Kemp, — one of the witnesses of the plaintiff — it was clear that the amounts testified by him were a question of fact and were at no stage disputed by the defendants. Moreover, the evidence of Mr. Kemp in my view also could not be said to constitute expert evidence as claimed by the defendants given that Mr. Kemp did not testify as to his opinion on the amounts paid by the defendants but actual facts corroborated by the figures. Even though Mr. Kemp did insert the numbers manually into the computer system of the plaintiff, it was the computer that generated the capital amount owed by the defendants. Therefore, upon listening to the evidence tendered by Mr. Kemp, I agree with the plaintiff that none of it could be said to constitute expert evidence as none of the evidence led by Mr. Kemp was opinion based but

[2] 2018 (6) SA 492 (GJ).

rather, it was based on the numbers and figures before him generated by the plaintiff's computer system. Moreover, and importantly, the defendants have also yet to discharge the onus that the certificate of balance is inaccurate.

UNIFORM RULE 46(A)

[8] Rule 46(A) deals with the procedural rules for executing a judgment debt against residential immovable property. Rule 46A focuses on two main aspects: determining if it is justified to sell the debtor's home in execution and, if a sale is ordered, setting a reserve price at which the property is to be auctioned.

[9] As it requires a plaintiff to seek a court order declaring immovable property specifically executable, Rule 46 of the Uniform Rules of Court added a new sub-step during the execution of immovable property. In addition to adding a new sub-step, Rule 46 also added an extra level on judicial oversight into the execution process.

[10] In order to ensure compliance with the right to access housing in terms of section 26 of the Constitution, judicial oversight is required before any immovable property is declared executable and this requirement was as such incorporated into the then Rule 46(1). Subsequently, the Constitutional Court in *Gundwana v Steko Development*[3] held that it was unconstitutional for the registrar of a court to declare immovable property executable when ordering default judgment, and that only a court could declare a judgment debtor's primary residence executable.

[11] *Gundwana,* together with other judgments, therefore resulted in various amendments to Rule 46. In 2010, Rule 46(a)(ii) was amended to provide that, even if immovable property had been declared specially executable, if it was the primary residence of the judgment debtor, the court had to consider 'all relevant circumstances' before deciding whether to authorise a sale in execution. Finally, a new Rule 46A was introduced in December 2017. Apart from requiring court oversight before permitting execution against a debtor's primary residence, the new rule also required the court to 'consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution …' (Rule 46A(2)(a)(ii)). In

[3] 2011 (3) SA 608 (CC).

addition, this rule permitted a court, in appropriate circumstances, to determine conditions to be included in the conditions of sale and to set a reserve price for the sale (Rule 46A(8)).

[12] While the original Rule 46 has changed considerably in order to assist a debtor in retaining his or her residential property, even the current Rule 46A can be seen to introduce a limitation to section 26 of the Constitution in that it allows for the attachment of a debtor's primary residence.[4] This possibly controversial element is that the right of access to adequate housing is therefore not absolute, as this rule still allows for an owner to lose a home in certain circumstances.

[13] It must be noted that section 36 of the Constitution provides that the rights contained in the Bill of Rights are subject to limitations, on condition that such limitations must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The application of this section to a default on a mortgage loan agreement can be interpreted as a measure to balance the rights of a creditor against the protection given to debtors by section 26, insofar as possible, prior to the foreclosure process being explored.

[14] As the court in *Mokebe* held, the purpose of the NCA is to balance the rights and obligations of consumers and credit providers. This balancing act is difficult as the rights of the credit providers are driven by profit, while that of consumers are driven by the ability to access the credit market'. Most mortgage loan agreements entered into by individuals fall within the ambit of the NCA, and this balancing act can be seen in such instances, where the rights of both parties need to be considered and aligned with the constitutional provisions of section 26. Although a credit provider, in agreements where the consumer has offered their house as security, has the right to foreclose on the property, should the consumer fail to adhere to the rights and obligations contained in the said credit agreement, this right can only be exercised as a last resort. In both the *Mokebe* decision, and the earlier *Nkata v Firstrand Bank*[5] decision, the NCA has been interpreted so as to provide as

[4] Section 26 of the Constitution provides that 'everyone has the right to have access to adequate housing'.
[5] 2016 (4) SA 257 (CC).

much relief as possible to indebted consumers faced with the loss of their primary residences.

[15] It is also for this reason that the NCA contains further attempts at the prevention of the execution of a primary residence, whilst still acknowledging the rights and interests of the creditor. An example of such measures are the debt review proceedings contained in sections 86 and 88 of the NCA, which aim to acknowledge and enforce the terms of the initial agreement whilst ensuring that the consumer remains protected from foreclosure. The purpose of this remedy is to achieve an end result which provides an amicable solution to a breach of contract for all parties concerned, by extending the repayment period of the loan. Although this will increase the amount of interest due to the creditor, it nevertheless protects the consumer from the loss of their house.

[16] In the *Mokebe* matter the Full Bench sought to resolve the issue of whether an application for a monetary judgment and an order of execution against immovable property must be brought simultaneously or separately before a court. The court considered the history of the foreclosure process and expressed concern over the lack of consistency and clarity. This lack of clarity resulted in different approaches by creditors for the enforcement of their claims. In particular, while some creditors initially proceeded to obtain a monetary judgment against their debtors, and after some months proceeded to obtain an order of execution (ie, separately); other creditors proceeded to obtain monetary judgment and execution in a single application (ie, simultaneously).

[17] The court held that there was a need for certainty and consistency in practice and stated that an application for a monetary judgment and an order of execution must be brought simultaneously. The court confirmed that the monetary judgment is an intrinsic part of the cause of action in foreclosure cases and it is inextricably linked to the claim for an order of execution. It was thus both necessary and desirable for these issues to be heard simultaneously and not piecemeal. The court further confirmed that it was the duty of the creditor to bring its entire case, including monetary and execution claims, before the court in a single proceeding.

SECTION 129 OF NCA

[18] Section 129(1) provides –

> "Required procedures before debt enforcement — (1) If the consumer is in default under a credit agreement, the credit provider —
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –
>
> > (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
> > (ii) meeting any further requirements set out in section 130."

[19] Having regard to the above, it is evident that a section 129(1)(a) notice has to be delivered to the consumer prior to enforcement proceedings and the section 129(1)(a) notice is therefore a required notice prior to cancellation of a credit agreement. The defendants however contend that there has been no compliance with the provisions of section 129(1)(a) and argue that proper notice was therefore not effected.

[20] When having regard to disputes pertaining proper delivery of a section 129 notice, the Constitutional Court's decision in *Kubyana v Standard Bank of South Africa Ltd*[6] is dispositive. *In casu,* the Court had to determine the necessary steps a credit provider had to take in order to ensure that a notice of default reached a consumer before it could commence litigation and further what a credit provider had to prove in order to satisfy a court that it had discharged its obligation to effect proper

[6] 2014 (3) SA 56 (CC).

delivery of a statutory notice. The Court held that a consumer could not claim non-delivery of a notice if she has been unreasonably remiss in failing to engage with the notice and that the Act did not require a credit provider to bring the contents of a section 129 notice to the subjective attention of the consumer.

[21] Having regard to the above, *in casu,* the defendants never disputed having received the section 129 notices, which, bearing in mind the scheme of section 129, is the essence of the section. Having regard to the case law, in my view, if no dispute exists regarding delivery of a section 129 notice, a judgment debtor cannot claim non-compliance with the section given that delivery of the notice is the very essence of the section. As such, once delivery is objectively met, there can be no dispute regarding compliance with the section.

CONCLUSION

[22] Regarding the defendants' argument that a reserve price was not set, the matter in *Mokebe* is dispositive as there, the court held that a reserve price needed to be set in instances where the property in question was the primary residence of the debtors who were individual consumers and natural persons; as is the case in this matter. Compliance with setting a reserve price should have therefore been adhered to by the plaintiff bank but the court in *Mokebe* did however provide that the facts of a particular case may warrant deviation from the general rule of having to set a reserve price.[7]

[23] Ultimately, when having holistic regard to the matter, it appears that the defendants primary issue of contention is the alleged failure on the part of the plaintiff bank to consider other means to satisfy the debt due to it other than seeking to have the primary residence of the defendants declared specially executable. As was held by Froneman J in *Gundwana,*[8] if there are no other proportionate means to achieve the same end (being to exact payment of the judgment debt due), execution

[7] *Mokebe* at para 59.
[8] *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC).

may not be avoided. This *ratio* is consistent with Rule 46A(8)(a).[9] My view therefore is that the onus now lies on the plaintiff bank to show that there are no other reasonable measures that can be taken other than undergoing the execution process to exact payment of the judgment debt. Whether other reasonable and workable measures exist other than the execution process to exact payment would be for the court to decide exercising the necessary judicial discretion, having regard to the factors which need to be considered by a court when declaring an immovable property specially executable.[10]

[24] As the court in *Mokebe* held, in matters where execution of property to satisfy a judgment debt is sought, a balance needs to be struck between the interest of the commercial institution on the one hand, and the importance of a debtor's right to adequate housing on the other. However, *in casu,* from a reading of the papers, it appears that the defendants have relied on a number of interlocutory skirmishes to stave off execution and have in the process infringed the rights of the plaintiff bank to seek to exact payment of the judgment debt.

[25] In the circumstance, the plaintiff succeeds in its action and accordingly an order is made in its favor.

> [25.1] The plaintiff's action succeeds. The defendants are ordered to pay the plaintiff's costs.

T. J RAULINGA
JUDGE OF THE HIGH COURT

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[9] This Rule states that a court is enabled in terms of the amended rule to 'order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt.'
[10] See *First Rand Bank Ltd v Folscher and Another* [2011] ZAGPPHC 79.

Appearances

Applicant's Counsel	: G T Avvakoumides SC
Applicant's Attorneys	: Snyman de Jager INC
Respondent's Counsel	: S S Cohen
Respondent's Attorney	: Messrs. Ledwaba Attorneys
Date of hearing	: 22 March 2022
Date of judgment	: 03 August 2022