IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **30528/2021**

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
20 October 2022

In the matter between:

INVESTEC BANK LIMITED Applicant

and

NOSIZWE ABADA Respondent

JUDGMENT

DE VOS AJ

Introduction

[1] The applicant seeks to enforce two contractual claims. The first is premised on a home loan agreement and the second on a private bank credit facility.

[2] The parties agree on the agreements, their terms and that the respondent breached the agreements. Centrally, the indebtedness of the respondent is not in dispute.

[3] The respondent has raised several points in limine. The Court dismisses the points in limine. The points are dealt with, conveniently and unconventionally, at the end of this judgment. The Court considers the merits of the two claims.

MERITS

Claim 1

[4] The parties entered into a home loan agreement and secured the debt through a mortgage bond in September 2018. In January 2019, the respondent fell into arrears. This is four months after entering into the home loan agreement. As a result of the failure to pay the arrears, the bank seeks to enforce the home loan agreement. Specifically, the applicant seeks payment for the amount of R 1 830 625.35, interest and that the immovable property over which a home loan agreement was granted, be declared specially executable. The home is the respondent's primary residence.

[5] The respondent's last payment was made on 29 April 2020 in the amount of R 20 000. The respondent has not made a payment in 27 months. The Court offered the respondent an opportunity to provide any information of payments that had been made between the close of pleadings and the hearing of the matter. The respondent did not place any such facts before the Court. The updated and common cause position is that the respondent has not met her obligations for a period of more than two years.

[6] The arrears, as at 3 May 2021, was in the amount of R 228 718.86. The Court requested an update on these amounts. The Court was provided by a Statement of

the Home Loan dated 1 August 2022. The statement shows that, as at the hearing of the matter, the respondent's arrears were R 427,355.72. The arrears therefore, at present, is a quarter of the full amount lent to the respondent. The arrears have therefore almost doubled between the institution of proceedings and the hearing of the matter. It is a position that cannot continue.

[7] The applicant has on numerous occasions attempted to assist the respondent to rectify the arrears. Despite these attempts, to date, no settlement plan or payment arrangement has been reached.

[8] On 9 March 2021 the applicant addressed a letter of demand in terms of sections 129 and 130 of the National Credit Act to the respondent. The letter informed the respondent of the arrears. The letters demanded the payment of the arrears and/or the full outstanding amounts. The respondent penned an email in response to the section 129 letter. In the response, the respondent acknowledged her indebtedness by stating that she will work on "a way to address the backlog" referring to her arrears and promised to settle her "debt". Despite this acknowledgement, the respondent has presented no facts of any steps taken to address her arrears after receipt of the letters.

[9] It weighed with the Court that the home is a primary residence where the respondent resides with her husband and two children. The Court must, in these circumstances be satisfied that an order declaring the home specially executable is proportionate and justified. The respondent's opposition to the application is technical and very little in the nature of substantive allegations were pleaded to the applicant's case. In essence the Court knew that the home was a primary residence and that the respondent had lived there since 2011 before buying the property in 2019. To ensure the Court was appraised of all relevant circumstances, the Court issued directives providing the parties an opportunity to place additional facts before the Court and if necessary to make submissions based on the additional facts. The directive, dated 16 August 2022, reflects the factors identified as relevant by the

jurisprudence dealing with Rule 46A.[1] The applicant responded to the invitation and presented the Court with specific information regarding the relevant factors. The respondent declined the Court's invitation to place the relevant facts before the Court and extended its procedural and technical complaints.

[10] All of this to say, despite invitation, the respondent has presented the Court with no factual basis to tip the scales of proportionality in her favour and against the execution of her home.

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[1] The directive provided as follows -

> THE COURT INVITES the parties to file short affidavits (no more than five pages) dealing with the issues itemised below. The respondent is provided until Wednesday 17 August to file an affidavit in compliance with this directive and the applicant is provided until 23 August 2022 to respond to the affidavit, if needs be.
>
> The parties are requested to upload the written submissions that were used before His Lordship Holland-Muter to caselines before 23 August 2022. The issues are:
>
> 1. Whether the mortgaged property is the debtor's primary residence;
> 2. The circumstances under which the debt was incurred;
> 3. The arrears outstanding under the bond when the latter was called up;
> 4. The arrears on the date default judgment is sought;
> 5. The total amount owing in respect of which execution is sought;
> 6. The debtor's payment history;
> 7. The relative financial strength of the creditor and the debtor;
> 8. Whether any 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;
> 9. The proportionality of prejudice the creditor might suffer if execution were to be refused compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;
> 10. Whether any notice in terms of section 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to the institution of action;
> 11. The debtor's reaction to such notice, if any;
> 12. The period of time that elapsed between delivery of such notice and the institution of action;
> 13. Whether the property sought to have declared executable was acquired by means of, or with the aid of, a State subsidy;
> 14. Whether the property is occupied or not;
> 15. Whether the property is in fact occupied by the debtor;
> 16. Whether the immovable property was acquired with monies advanced by the creditor or not;
> 17. Whether the debtor will lose access to housing as a result of execution being levied against his home;
> 18. Whether there is any indication that the creditor has instituted action with an ulterior motive or not;
> 19. The position of the debtor's dependants and other occupants of the house.
> 20. Any alternative means by the judgment debtor of satisfying the judgment debt, other than execution against such debtor's primary residence
> 21. Information regarding the persons occupying the primary residence of the judgment debtor and the circumstances of such
> 22. The effect of the inclusion of appropriate conditions in the conditions of a possible sale in execution of the judgment debtor's primary residence

[11] The applicant pressed on the Court that the relief must be considered in circumstances where -

a) The respondent fails and/or refused to give information about the nature of her employment, neither does she provide the details of income she receives from such employment. It is not apparent whether the respondent's husband is employed and if so what his salary is.

b) There is no factual basis as to why it is that the respondent would not be able to find any other property for accommodation, perhaps cheaper, than the property forming the subject matter of this application.

c) The applicant has attempted to come to the aid of the respondent and had meeting with her prior to calling up the bond. To no avail.

d) There was also an initial application launched by the applicant, which was withdrawn. Despite this previous application and the demands for payment the respondent still did not make any payments or arrangement to settle the indebtedness.

e) Due to the enormity of the total amount owing it is submitted that there is no alternate means to attain the same end.

[12] The Court concludes that the requirements of Rule 46A have been met.

[13] The Court must consider the appropriate reserve price. The estimated market value of the property is R 2 2 000 000.00. The estimated forced sale value of the property is R 1 540 000.00. The information before the Court is that the property is neglected. The Court considers that the outstanding debt at the hearing of the matter is closer to R1,9 million. The Court weighs the need to settle the debt and that if the house is sold for less than the debt, both parties lose. The Court therefore sets the reserve price at R 1 850 000.00.

<u>Claim 2</u>

[14] The applicant seeks an order for payment of the amount of R 65 462.76 and interest on the amount due to the cancellation of a private bank facility agreement. The only defence raised by the defendant is that the claim has prescribed. The responded pleads that the agreement came into being in September 2006. The debt became due on 6 September 2006 and prescribed on September 2009.

[15] The respondent's argument ignores a subsequent payment. On 27 August 2019 the respondent made a payment in the amount of R 10 456.94. Section 14 of the Prescription Act has been considered by the Court in *Cape Town Municipality v Allie NO*.[2] The upshot of the court's judgment is that a payment under a credit agreement interrupts prescription and amounts to an acknowledgement of debt that is owing.

[16] The Court concludes that the debt has not prescribed. No other substantive defence to the debt has been raised.

POINTS IN LIMINE

Res judicata and lis pendens

[17] The applicant issued an application against the respondent under case number 43166/2019. The application dealt with the two claims before the Court presented, however, presented as one claim. The respondent opposed the relief. The case suffered a fatal defect from the outset. The applicant had combined the two separate causes of indebtedness into one claim instead of two separate claims (as they are presented in this matter). This created confusion in so far as the amounts owed at various times is concerned. As a result, a dispute arose to the indebtedness owed by the respondent on the two accounts which were claimed in one claim. This is clear from the judgment of Holland-Mutter AJ (para 20): "I am of the view that the applicant should have kept the two different accounts separate in different applications which would most probably avoided the confusion caused."

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[2] 1981 (2) SA 1 (C) at 5G-H

[18] The matter was referred to oral evidence by His Lordship Mr Justice Holland-Mutter AJ. The ruling of Holland-Muter AJ directed the applicant to file a declaration and the respondent to file a plea. After filing the replication the applicant elected to withdraw the case under 43166/2019. The reason for the withdrawal was that the case had conflated the two claims in this matter. In order to fix the fatal flaw in the case, rather than let it limp on, the applicant elected to withdraw the matter and tender costs. It is common cause that the case was withdrawn, the applicant tendered costs for the withdrawal and the respondent accepted the withdrawal and the costs. The case under 43166/2019 is properly, undisputedly, withdrawn.

[19] The respondent contends there is a remaining lis under case number 43166/2019. Lis pendens requires a lis pending in another court. In *Hassan and Another v Berrange NO*[3] the Court held that the plea requires that the same plaintiff has instituted action against the defendant for the same thing arising out the same cause of action. In this case, the Court need not engage with the specific requirements of lis pendens as the very first fact, the existing of another case, is absent. The case has been withdrawn. There is no outstanding lis between the parties under case number 43166/2019.

[20] The plea of res judicata, similarly, is rejected by the Court. The order of Holland-Mutter AJ is not final in nature. It is a decision to refer an issue to trial. A referral to oral evidence cannot coexist with a final determination of substantive rights. The ruling is not dispositive of the substantive rights of the parties and the plea of res judicata is dismissed.

Finding on acceleration

[21] The respondent contends that in the judgment referring the matter to trial Holland-Muter AJ made a finding as to the validity of the automatic acceleration of debts. The finding of Holland-Muter AJ was that the applicant should have foreseen the dispute of facts were not triable on affidavit. In that context Holland-Muter AJ makes the decision to refer to oral evidence "the aspects of the arrears and the issue

[3] 2012 (6) SA 329 SCA at paragraph 19F

of the automatic acceleration" of the debt's validity. The respondent pegs its argument on this one-liner, referring the matter to oral evidence.

[22] The respondent relied on this one-liner where Holland-Muter AJ refers the issues to trial as a finding of invalidity of the acceleration clause. The line relied on by the respondent is not a finding on the validity of the acceleration clause, it is the identification of issues to be referred to oral evidence. The respondent was invited in Court to direct the Court to anything else in the judgment that supported its interpretation of this line. None could be found. The respondent was also invited to direct the Court to anything in the judgment of Holland-Muter AJ that would suffice as reasons for a finding on the invalidity of the acceleration clause. Again, none could be presented. There is nothing in the judgment of Holland-Muter AJ that supports the respondent's reading of this one-liner.

[23] The respondent contends that this is a final judgment on the issue. That is incorrect, were a final judgment achieved then there would have been no need to refer the matter to oral evidence. The referral to oral evidence only makes sense if the Court is not in a position to make a finding. The respondent's contention that the referral to oral evidence is a finding on the issue that was referred to oral evidence is unfortunate.

Defective section 129 notice

[24] The respondent contends that the section 129 notice is defective as the applicant cannot claim the full outstanding amount by "using the National Credit Act". The position is stated again that "section 129(1) cannot be used to claim the whole outstanding amount". The factual basis for the argument the respondent seeks to advance is lacking. The section 129 letter identifies the arrears as well as the full outstanding amount and then demands as follows - "Pay the amount of R 203 414.84 in respect of the arrears together with legal costs, *alternatively* settle the full outstanding balance of R1 809 188.21".

[25] The complaint is that the section 129 notice is required to notify the respondent only of the default not the full outstanding balance. At worst for the

applicant they provided the respondent with more information than the notice required. The claim for the full outstanding amount is clearly stated as an alternative. It is common cause that the respondent made no payments and took no steps to reinstate the agreement.

[26] The respondent did not provide a response to the factual requests set out in the directive. However, a set of written submissions raising a host of new technical and procedural issues were raised, unrelated to the directive. In the absence of an agreement or permission granted from the Court, this was improperly placed before the Court and the Court will not consider these arguments.[4]

Order

[27] In the result, the following order is granted:

Claim 1

a) The respondent is ordered to make payment of R 1 830 625 35 and pay interest on the aforesaid amount at the rate of prime less 0.70% with effect from 11 May 2021, calculated daily and compounded monthly to date of payment.

b) The Court declares as specially executable the immovable property known as

Remaining Extent Erf [....] W[....] Township

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[4] The LPC Code of Conduct provides -

> "After a hearing when judgment is awaited, a legal practitioner shall not place before, or try to send to, a judicial officer any further material of whatever nature, except by agreement among representatives of all parties; provided that, if consent is unreasonably withheld, the placing of such further material may, in an appropriate case, be the subject matter of an application to re-open the hearing to receive it or, if the further material consists only of references to authorities which might offer assistance to deciding a question, a legal practitioner may address a request in writing to the judge's registrar or equivalent court official to approach the judicial officer with an invitation to receive the references."

Registration Division IR Province of Gauteng measuring 1586 (one thousand five hundred and eighty six) square metres

Held by Deed of Transfer [....]

c) The Registrar of the Court is authorised and directed to issue a warrant of execution against the immovable property referred to in prayer c above, in terms of Rule 46A of the Uniform Rules of Court.

d) The immovable property is to be sold at a ale in execution with a reserve price of R 1 890 000.00.

e) The applicant is granted leave to approach the Court again for a reviewed reserve price should the applicant require that a reviewed reserve price be set.

Claim 2

a) The respondent is ordered to make payment in the amount of R 65 462 76 as well as interest on the aforesaid amount at the rate of 7% with effect from 11 May 2021 calculated daily and compounded monthly to date of payment, both days inclusive.

b) The respondent is to pay costs as between attorney and client.

I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the plaintiff:	**BD STEVENS**
Instructed by:	Delport van den Berg Inc
Counsel for the Respondent:	**S LUTHULI**
Instructed by:	Delberg Attornesy
Date of the hearing:	02 August 2022
Date of judgment:	20 October 2022