

SOUTH AFRICA / JUDGMENT

First Rand Bank Ltd v Nolan and Others (1695/24) [2024] ZAWCHC 191 (24 July 2024) [2024] ZAWCHC 191

COURT

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

1695/24

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 1695/24

In the matter between

FIRST RAND BANK LTD APPLICANT AND NAHARAH NOLAN DEFENDANT CASE NO: 22648/23
FIRST RAND BANK LTD APPLICANT AND TOFIQUE FAKIR DEFENDANT CASE NO: 14955/23
FIRST RAND BANK LTD APPLICANT AND ZIA FREDERICKS CITED IN HER CAPACITY AS
EXECITRIX FOR THE ESTATE LATE SHEILA HENDRICKS DEFENDANT CASE NO: 20766/23 FIRST
RAND BANK LTD APPLICANT AND ROBYN EDNA EMMA VAN AS N.O. 1ST DEFENDANT
MICHAEL ANDREW VAN AS 2ND DEFENDANT

Date Judgment: 24 July 2024 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] All four matters in respect of which the applicant sought written reasons, were heard in the unopposed motion roll on 24 May

2024. In all four matters First Rand Bank Ltd (the Bank) applied for an order for payment of a sum of money plus interest, an order declaring immovable property specially hypothecated under the mortgage bond executable, an order authorizing the sheriff to sell the property by way of a sale in execution and costs as between attorney and client. In all four matters, a member of the public came forward either in person or on behalf of a close

relative when the matter was called. No papers had been filed, including a notice to oppose the application for judgment by default. In open court, I allowed the people who came forward to tell the court why they came forward. After they had explained the reasons for their presence in court, in matters where counsel was not aware of their presence, I stood the matters down to allow counsel to engage with them. In other matters counsel was aware and had already engaged with them.

[2] In all four matters, I made the following order respectively:

“1. The application for default judgment and the application in terms of Rule 46A are postponed to 13 September 2024.

2. The plaintiff is directed to ake contact with the defendant and to enter into reasonable negotiations with her in an attempt to make payment arrangements and/or settle the matter. In the event of such negotiations not resulting in an arrangement, the plaintiff shall file an affidavit setting out the efforts made and various steps taken to settle the matter with the defendant, without disclosing the substance of the offers and counter-offers made;
3. This order shall be served upon the defendant.
4. The costs of this postponement shall be costs in the cause.”

[3] To avoid prolixity which may result in an unnecessary long judgment, I will cite the full record of proceedings in respect of the first matter involving Naharah Nolan as the defendant. The transcript reads as follows:

“24-5-2024

COURT ASSEMBLES ON 24 MAY 2024 [10:16]

MR JONKER: As the court pleases, M’ Lord. In this matter the mother ...[indistinct]. The mother ...

COURT: Ms Nolan is here; I think she raised her hand.

MR JONKER: Yes.

COURT: Yes.

MR JONKER: The mother of the defendant is in court. As I understand, that maybe the mother can just indicate to Your Lordship what the position is of the defendant?

COURT: Alright. Let’s start here. Who are you Ma’am?

MS NOLAN ADDRESSES COURT: I’m Tasneem Nolan, the defendant’s mother, Nara Nolan. She is currently in hospital with a newborn baby.

COURT: I see.

MS NOLAN: So that is why she is not able to – however, I was made aware of this situation when I got back into the country three weeks ago; so I have literally been trying to get hold of FNB to make arrangements. I have been liaising with the attorneys. Everything that I have taken to the table they've shot down, even though I am aware the bond is in arrears of R186 000. I told them I have R125 000 in my account to transfer to them. They literally shot it down and said they want the full R180 000 that is outstanding, knowing here was anybody at the bank or the attorneys wanting to make any sort of arrangement. As a mother I am coming to say that I don't want my daughter and grandson to lose their home, but for the bank and attorneys to take that stance, it's quite horrible that they are prepared to let someone sit without a home and not make an arrangement, knowing the mother is there stating she's got R125 000 to save a child's home.

[WITNESS EMOTIONAL]

MS NOLAN: So, I'm standing in front of the court now to ask what can you do to help me save a home that they don't sit without a home?

COURT: I see, I'm sorry that you're driven to those emotions but I do understand. Counsel?

MR JONKER ADDRESSES COURT: Yes. As the Court pleases, M'Lord. M' Lord, just to start off with, the atmosphere that's been created here; the bank is not a type of entity that says if you want to pay us R125 000 we're going to say no; please don't pay us R125 000, we're not going to accept R125 000, we're only going to accept R200 000. I'm just pointing out that if there was R125 000 to be paid we are much definitely willing to accept that. That's the first point. We're not the type of entities that say no ... (intervenes)

MS NOLAN: Can I break your word?

MR JONKER: Please' don't pau us.

COURT: Just a minute, ma'am.

MR JONKER: The second issue is, given your Lordship's approach on a previous matter ...

COURT: Yes.MR JONKER: ... and now we've got a defendant requesting further assistance, May I request a similar ... [indistinct]? The reason for it is, we know at least it will be two or three months at the very least before we're back into motion.

MR JONKER: Then the attorneys can make contact with the defendants. We can enquire further about the payment and further arrangements and those circumstances which are not currently before the court can then be set out in an affidavit and the court can then be in a better position as to hear where ... I don't have those instructions as to exactly what discussions took place, what were the offers made, why is the defendant's mother saying well, the bank was simply not inclined to agree to arrear arrangements. I may just point out the arrears are now over R200 000-00. But that would be my proposal given the circumstances.

COURT: I see. Do you have anything to say to that ma'am?

MS NOLAN IN REPLY: So, I have emails up until yesterday where they refused the R125 000 and they wanted the full amount. I've

asked them to give me four weeks for the rest of my savings to come loose to pay it finished. They shut that also down. I get it's

a business transaction, but you can't be that heartless knowingly a situation was explained that were furnished with the fact that her husband died, and she literally just gave birth, and they're not prepared to show any sort of leniency. Is that the country we live in? I said to that beautiful gentleman over there, why could I not have spoken to him in all of this time, because he pulled me aside. He said to me>"ma'am, this is what we can do – what is it called? A Rogers' order. He can propose that and give me the buy-in time to be able to settle the R60 000-odd. But in all of this time, banks and attorneys just shot down everything. There should be more people like him in this world that is prepared to help people.

COURT: I see. I can just say, just in passing, to say that I'm not the greatest fan of the Rogers' order. I think counsel who appear before me know that.

MS NOLAN: I don't even understand it.

COURT: One day when there is an opportunity, you'll know what it means and you'll have my reasons why I don't agree with it. But be this as it may. That's not taking us anywhere. I think I'm inclined to counsel's proposal that he will attend to the matter. You just have to sit down. We'll arrange a date. Once counsel has conveyed to you a date, then you can come back on that date. If the date is arranged whilst I'm still sitting, you will be advised in court of the date. But if it's after I have adjourned counsel will prepare a draft order and you will just get a copy of that order. Do you understand that? But it will be roughly three months and it is to give you an opportunity to engage with the counsel and the gentleman that you say is helpful. Maybe the process can be taken forward.

But I can just say to you, ma'am, that as you may have experienced with the gentleman that you're pointing out, in all

institutions we have people who understand what is to be done and what needs to be done, and we have those who don't understand

or refuse to understand what needs to be done. But I can tell you that our leaders converged in Kempton Park for that document that others call the bridge to a new ideal South Africa and others call it our country's birth certificate, the Constitution of the Republic of South Africa. I'm sitting here to make sure that you become a beneficiary of the ideals that are set out in that document. It's not a false promise, you can rest assured. Do you understand that? Thank you. You can stand down and counsel will attend to you later.

MR JONKER: Than you, M'Lord. As the court pleases.

COURT: Thank you.

COURT ADJOURNS:

[4] In the Western cape Division, an order granting leave to execute against residential immovable property but suspending the sale in execution for a period of six months is commonly referred to in this division as a "Rogers Order", in honour of Rogers J who introduced the practice. Generally the terms of that order are payment of a sum of money, the amount being the total arrears as at that date of order and costs of suit, an order declaring the property specially executable and an order directing that no sale in execution of the property could take place on a date earlier than 6 months from the date of the court order, but authorising the bank to issue a writ of execution and the sheriff to attach the property in the interim.

[5] One of the purposes of the National Credit Act, 2005 (Act No. 34 of

2005) (the NCA) is provided as promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers [section 3 (d) of the NCA]. In *First Rand Bank Ltd v McLachlan and Others* 2020 (6) SA 46 (SCA) it was said in para 9:

"[9] The NCA was promulgated against the background of a history of inequality in bargaining power which often resulted in large credit providers imposing their will, unreasonably, upon vulnerable credit consumers. The purpose of the NCA, broadly speaking, is therefore to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry. It provides for the protection of credit consumers against the historical abuses by credit providers in a manner articulated in ss 3(a) – (i). For purposes of the present inquiry three of these protections are of particular significance. Section 3(d) is directed at promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers. Sections 3(g) and (i) are directed pertinently at the protection of over indebted consumers. Section 3(g) seeks to protect over indebted consumers by providing mechanisms for resolving their over indebtedness 'based on the principle of satisfaction by the consumer of all responsible financial obligations'. In similar vein s 3(i) seeks to protect consumers by 'providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under the credit agreement'.

[6] Parties may rearrange their agreement, including through court procedure where necessary. The point of departure in any rearrangement must of necessity be the provisions of the NCA and in particular s 3 as set out earlier [para 15 of *McLachlan*]. A rearranged debt may extend the repayment period and may even reduce the monthly instalments. In my understanding, the arrangement must be economically rational and must lead to the full payment of the debt within a reasonable time. In the matters before me, the respondents or those who attended court to help the court mete out justice, made statements which suggested that the court was not dealing with defendants who deliberately disregarded their obligations and did not even bother themselves with court processes where they were served.

- [7] In the matter of Fakir, substantial payments were made, although erratic, but way above the instalment payable per month. It did not seem to me that the rearrangement was earnestly considered, or if considered why it was not appropriate in this matter. The matters of Fredericks and Van As involved deceased estates. In both, the executrix clearly needed some guidance, whilst in grief of a close relative. One appreciated the fact that the statements were made from the bar. However, they were made in court and could not be ignored, in the interests of justice. It is against this background that I was not satisfied that the Rogers' order was appropriate under the circumstances. In my view, it will be a salutary practice producing good effects for both debtors and creditor if the creditor in these types of matters were to take the courts into their confidence and file an affidavit setting out what steps if any, were taken to settle the matter with a defendant who responded to them or their attorneys after the process was served until the date of hearing of the default judgment application.
- [8] I am in favour of a statement under oath because it seems that some allegations in the particulars of claim are simply recited, but may be far from the truth. These include allegations that the defendant had not agreed to a proposal or has not complied with an agreed plan, when it may be the creditor who did not agree to a proposal made by a debtor, in good faith, in fulfilment of a debtor's obligations. In other words, like the Nolan matter suggested, it was FNB who did not agree to a proposal for the immediate payment of R125 000 of the outstanding R186 000 and thereafter a few weeks indulgence to pay R60 000, and not the other way round. For these reasons the orders dated 24 May 2024 were made.

DM THULARE

JUDGE OF THE HIGH COURT

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