

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Seema (78547/2018) [2024] ZAGPPHC 369 (23 April 2024) [2024] ZAGPPHC 369

COURT

North Gauteng High Court, Pretoria

BEFORE

YVAN COERTZEN

CASE / FILE NUMBER

78547/2018

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 78547/2018

1. REPORTABLE: YES/NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED

DATE: 23 April 2024

SIGNATURE:

In the matter between:

FIRSTRAND BANK LIMITED

PLAINTIFF/APPLICANT

and

MERLE DIPUO SEEMA

DEFENDANT/RESPONDENT

REASONS**FOR JUDGMENT****COERTZEN AJ:**

[1] On 25 March 2024 I granted the following order:

“THAT judgment is hereby granted in favour of the plaintiff/applicant against the defendant/respondent for:

1. Payment of the amount of R518,328.28 (FIVE HUNDRED EIGHTEEN THOUSAND, THREE HUNDRED TWENTY EIGHT RAND AND TWENTY EIGHT CENTS);

2. It is recorded that interest is currently accrued at a variable rate of 0.00% nominal per annum, calculated daily and compounded monthly from 30 June 2023, as per the plaintiff's/applicant's certificate of balance dated 29 February 2024;

3. The immovable property of the defendant/respondent, described as:

ERF 2030 LETHLABILE-A TOWNSHIP, REGISTRATION DIVISION J.Q., NORTH WEST PROVINCE, MEASURING 506 (FIVE HUNDRED AND SIX) SQUARE METRES, HELD BY DEED OF TRANSFER NUMBER T[...], SUBJECT TO THE CONDITIONS THEREIN CONTAINED,

- ('the immovable property'), is hereby declared executable;

4. The Registrar is authorised to issue a writ of execution against the immovable property, which writ of execution shall be suspended for period of 4 (four) months from date of this order;

5. A reserve price of R550,000.00 (FIVE HUNDRED AND FIFTY THOUSAND RAND) is hereby set in terms of Rule 46(9)(a);

6. Should the reserve price set in terms hereof not be achieved at a sale in execution, the provisions of Rule 46A(9)(c), (d) & (e) will apply;

7. The defendant/respondent is ordered to pay the plaintiff's/applicant's costs on a scale as between attorney and client.

8. Should any of the parties require reasons for this order, a written request must be made to the Registrar within 10 (ten) days of this order.”

[2] The defendant requested reasons for the order. These are the reasons.

[3] On 11 September 2012 the parties concluded a mortgage loan agreement – ('the agreement'). In terms of the agreement the plaintiff lent and advanced an amount of R394,500.00 to the defendant. The home loan under the agreement is secured by a mortgage bond, registered

in favour of the plaintiff over the defendant's aforementioned immovable property for a maximum amount of R468,000.00. The loan amount and interest at a variable interest rate, were repayable to the plaintiff in 240 monthly instalments, which monthly instalments, on date of the agreement, amounted to R5,180.16. It was agreed that in the event of the defendant's failure to pay any amount payable in terms of the agreement, the plaintiff would be entitled to claim immediate repayment of the full outstanding balance of the loan. The plaintiff would further be entitled to foreclose on the mortgage bond. The plaintiff would also be entitled to legal costs on a scale as between attorney and client. In terms of the agreement a certificate of balance signed by a manager of the plaintiff shall constitute prima facie proof of the outstanding balance due to the plaintiff in terms of the defendant's home loan account under the agreement.

- [4] Pursuant to the defendant's default in terms of her monthly repayment obligations, the plaintiff instituted action against the defendant during 2018. The defendant did not enter an appearance to defend. The defendant opposed the plaintiff's application for default judgment and the relief sought for an order to declare the defendant's bonded immovable property executable.[1]
- [5] The application was served on the defendant personally on 17 February
2020. The defendant filed opposing papers on 26 February 2020. When the application came before the court on 2 February 2021 the defendant appeared in person. The court postponed the application sine die, and granted the plaintiff leave to resend a notice to the defendant in terms of section 129(1) of the National Credit Act, 34 of 2005 ('NCA').[2] The plaintiff was also granted leave to send the notice by email to the defendant. It is not in dispute that the defendant actually received the plaintiff's subsequent notice on 15 February 2021. In accordance with the order, the plaintiff notified the defendant that action has been instituted against the defendant; that an application in terms of r 31(2)(a), r 46(1) and r 46A(8) has been launched; that the application has been postponed sine die; and that as on the 24 of January 2022, the amount in arrears was R128,139.62.
- [6] The application was re-enrolled for hearing on 18 March 2024. The defendant has been unrepresented since the institution of the action. When this matter came before me on 22 March 2024, there was a brief appearance on behalf of the defendant by one advocate Senne. Counsel indicated that he was requested by Senne Attorneys to assist. According to counsel, Senne Attorneys have their offices in the Pretoria CBD. I indicated to counsel that there was no notice of appointment of attorneys of record on behalf of the defendant on the electronic case file. I point out that there was also no representative from an attorney's office present in court. Counsel who appeared also did not file heads of argument. I requested counsel to inform his instructing attorney to attend court. The matter stood down. During the adjournment, an unsigned notice of appointment of Senne Attorneys, together with what purported to be a supplementary answering affidavit, were uploaded to the electronic case file. These documents were uploaded to the electronic case file from the personal profile of the defendant. When the court resumed counsel indicated that the attorney was not present.

Counsel then informed the court that he did not believe that he was properly briefed, and that he wished to withdraw and to be excused. Counsel then promptly left the court. The defendant then proceeded to address the court once again in person.

- [7] It was not in dispute at the hearing that the defendant was in arrears with her repayment obligations in terms of the agreement, although the defendant disputed the balance owing. In her address to the court the defendant submitted that she was under the impression that she was “under debt review”.
- [8] It was common cause at the hearing that the defendant had made certain payments to the plaintiff since the institution of the action. According to the defendant the last payment made to the plaintiff was on 29 February 2024 in an amount of R7000.00. A bank statement placed before the court shows that as on 17 August 2020 the amount in arrears was R81,490.03. An updated certificate of balance dated 29 February 2024 shows that the arrears have increased to R156,422.97, and that the monthly instalment amounted to R3,381.15. The balance due and owing to the plaintiff by the defendant was certified in terms of the certificate to be an amount of R518,328.28.[3] In my view the plaintiff has prima facie shown that it has accounted for payments made prior to the date of hearing. There is no need for the court to perform a calculation

itself. In *Rossouw and another v First Rand Bank Ltd t/a FNB Home Loans (formerly First Rand Bank of SA Ltd)*

[2011] 2 All SA 56 (SCA) it was held:[4]

“...To the extent that the certificate reflects the balance due as at the date of hearing, it is merely an arithmetical calculation based on the facts already before the court which the court would otherwise have to perform itself. Such calculations are better performed by a qualified person in the employ of a financial institution. And to the extent that such a certificate may reflect additional payments by the defendant after the issue of summons, or payments not taken into account when summons was issued, this constitutes an admission against interest by the Bank and the Bank is entitled to abandon part of the relief it seeks. Certificates of balance handed in at the hearing (whether a quo or on appeal) perform a useful function...”

- [9] The defendant alleges her supplementary affidavit that the plaintiff overcharged interest on the defendant’s account over a sample period of three years. According to the defendant the plaintiff was requested to recalculate the interest from date of inception of the bond. The plaintiff allegedly failed to do so. In the absence of actual facts placed before the court to rebut the prima facie proof presented by the plaintiff in terms of the certificate of balance, I was prepared to accept the correctness of the plaintiff’s

certificate of balance as proof of the balance due. A certificate of balance is an evidentiary tool provided for in an agreement to facilitate proof of the amount of the indebtedness – *Thrupp Investment Holdings (Pty) Ltd v Goldrick* 2008 (2) SA 253 (W).[5] As was pointed out in *Senekal v Trust Bank of Africa Ltd* [1978] 4 All SA 43 (A):[6]

“...There might be several items to which such a certificate relates, some of which may appear to be unassailable while others may either be shown to be inaccurate or appear to be of dubious reliability, or might require some modification or adjustment. I can find no reason why in such circumstances the certificate is to be entirely disregarded merely because it is found or thought to be inaccurate or unreliable in certain respects. At the end of the case, when all the evidence (which includes the certificate) is in, the Court must decide whether the party upon whom the onus rests has discharged it on a proper balance of probabilities...”

[10] As for debt review, the plaintiff points out that the defendant failed to exercise her rights within 10 days of receipt of the plaintiff's notice. It appears from a string of emails exchanged between the plaintiff's debt review department and Zero Debt, on 11 March 2021 and 6 April 2021, as attached to the defendant's supplementary affidavit, that a provisional proposal was forwarded to the plaintiff, but that the account in question was excluded from debt review. According to a notice placed before the court by the plaintiff, the relevant debt counsellor, filed a notice of withdrawal of the application under case number 2005/2021 in the Magistrate's Court, Brits. I was satisfied that there were no debt review in place.

[11] It follows that in my view the plaintiff was entitled to a money

judgment.

[12] I proceeded to consider whether the execution against the immovable property of the defendant was warranted.

[13] It was common cause at the hearing that the property is the primary residence of the defendant. It was common cause that the defendant did not acquire the property by means of a state subsidy.

[14] In terms of r 46A(5) I had to consider, amongst other factors which may be necessary to give effect to subrule 8, the market value

of the property, the local authority valuation, the amount owing on the mortgage bond, the amount owing to the local authority as rates and other dues and the amounts owing to a body corporate as levies. It was common cause that there is no amount owing to a body corporate as levies.

[15] The municipal valuation of the property as on 24 April 2019 was R122,000.00. An updated municipal statement reflects the municipal valuation during December 2023 as R553 000.00. The market value of the property as on 27 August 2018 was R530,000.00. As on 22 January 2024 the market value of the property was R780,000.00 and the forced sale value was R624,000.00. The arrear rates and taxes owing to the local municipality as on 24 April 2019 amounted to R16,069.25. As on 19 December 2023 the arrear rates and taxes have increased to R80,678.56. The plaintiff pointed out that the arrear amount owing to the plaintiff equates to more than 46 months of default. When the application was previously enrolled, the arrears represented an amount of R81,490.03. The arrear amount owing to the plaintiff has therefore almost doubled. The plaintiff submits that the defendant cannot afford to live in

the property.

- [16] The defendant submitted that her circumstances have improved. She runs a software company. She is also a traditional healer. The defendant submitted that she has alternative means to make payment to the plaintiff and that she required an opportunity to until the end of this year. I pause to point out that it is for this reason that I deemed it appropriate to order that the writ of execution shall be suspended for period of four months, which was in my view a more reasonable period. The defendant submitted that she is currently unable to make payment of the arrears to the plaintiff. She is also currently unable to make a lump sum payment to the plaintiff. According to the defendant's supplementary answering affidavit she earns in the region of approximately R16000 per month. She also receives an amount of R8000 – R9000 per month from her sister in the United States of America. The defendant submitted that the arrear amounts owed to the local municipality should not be a concern, as the local municipality writes off half of the debt owed by the local community in respect of their properties, every four years, closer to the elections. No evidence to support this submission was however placed before the court.
- [17] In terms of r 8(d) a court considering an application under r 46A, may order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt. Even accepting that the defendant's circumstances have improved, the defendant has not in my view shown that she will be able to meaningfully address the substantial arrear amount which has accrued on her home loan account.
- [18] Having considered all relevant circumstances and factors, I was persuaded that no other reasonable alternative exists for the plaintiff to exact payment of the debt by the defendant. In my view the order to declare the defendant's immovable property as executable, would not constitute an abuse of process, and would not infringe the defendant's right to access to adequate housing in terms of s 26 of the Constitution of the Republic of South Africa, 1996. Considering the present income of the defendant I am of the view that she will be able to obtain adequate alternative housing for herself and her family.
- [19] There appears to be no disproportionality between execution against the property and other possible means to exact payment of the judgment debt - NPGS Protection and Security Services CC and another v Firststrand Bank Limited
- [2019] 3 All SA 391 (SCA).[7] No other possible means, other than a statement that by the defendant that she will be able to make payment to the plaintiff if given an opportunity until the end of the year, has been proffered by the defendant. In the circumstances I was inclined to exercise my discretion in favour of the plaintiff. In my view execution against the immovable property was warranted.
- [20] I proceeded to consider whether a reserve price should be set.

- [21] It is evident from the order that I set a reserve price. In the plaintiff's papers the plaintiff submitted that a reasonable reserve price would be an amount of R385 871.44. However, counsel for the plaintiff conceded in argument that this amount was in the circumstances, too low. Counsel submitted that a revised reserve price of R550,000.00 would be more appropriate. It is evident from the order that I agreed with this submission.
- [22] In arriving at the order, I also considered that it remains open to the defendant to remedy her default in terms of the home loan agreement, by paying the arrear, overdue amounts, together with the costs and charges as contemplated in terms of s 129(4) of the NCA[8]. Even after a judgment is granted, the defendant will have the right to remedy her default, until the proceeds from a sale in execution have been realised. In this sense the defendant is given greater leeway in relation to the maintenance of the home loan account.[9] Counsel for the plaintiff indicated that the plaintiff remains open to the possibility of a payment arrangement.
- [23] For these reasons I granted the order in this matter on 25 March 2024.

YVAN COERTZEN

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 22 March 2024

Date of order:

25 March 2024

Date of

reasons:

23 April 2024

The reasons for the order were provided electronically by circulation to the parties' legal representatives by email and by uploading same to the electronic case file on Caselines. The date and time for delivery of the reasons are deemed to be at 10h00 on 23 April 2024.

Appearances:

Counsel for the plaintiff/applicant: Adv L Badenhorst Instructed by: Coetzer and Partners,
Pretoria MD Seema - defendant/respondent: In person

- [1] An application in terms of r 31(2) & r 46(1) & r 46A(8) of the Uniform Rules of Court.
- [2] In terms of s 130(4)(b).
- [3] It is recorded that in the certificate that interest is currently accrued at a variable rate of 0.00%.
- [4] At para 47.

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- [5] At para 6.
- [6] On p 47.
- [7] At paras 55 & 62.
- [8] *Nkata v Firststrand Bank Limited and Others* 2016 (4) SA 257 (CC) at para 131; *Duma v Absa Bank Limited* 2018 (4) SA 463 (GP) at para 17.
- [9] Erasmus, Superior Court Practice, D1-632S.
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