

SOUTH AFRICA / JUDGMENT

Firststrand Bank Ltd v Mdila and Another (149/2012) [2012] ZAECHGHC 23 (3 May 2012)

[2012] ZAECHGHC 23

COURT

Eastern Cape High Court, Grahamstown

BEFORE

L D Kemp

CASE / FILE NUMBER

149/2012

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Source record**IN THE HIGH COURT OF
SOUTH AFRICA****(EASTERN CAPE,
GRAHAMSTOWN)****CASE NO.: 149/2012****Date heard: 19 April 2012****Date handed down: 3 May
2012**

In the matter between:

FIRSTSTRAND BANK LIMITED

.....Applicant

and

SIPHIWO DAVID MDILA

.....First

Respondent

NOLIFI JOSLINE MDILA

.....Second

Respondent

JUDGMENT

KEMP, A.J.:

The applicant brought an application for summary judgment and ancillary relief, including a prayer that the property be declared

executable, against the two respondents who had defended an action brought against them for the recovery of arrears on a bond over their residential property. The first defendant lost his employment in 2010 and after falling into arrears with inter alia, their bond repayments, the respondents successfully applied to be put under debt review in terms of the National Credit Act ("the NCA").¹ The respondents in their opposing papers sought on the one hand to make out a case that they were not in arrears with their bond instalments but on the other hand admitted that they had defaulted on their instalments in terms of the debt review proposal which was made an order of court. In terms of the loan agreement between the parties, secured by a mortgage bond registered on the 8th June 2007, the respondents were to pay R11,497 per month against a loan of R1,125,000 made to them. In terms of the debt review order which was granted on the 6th May 2011, the respondents were to pay R29,150 per month to be distributed amongst their creditors. The amount recorded by the debt counsellor as being owing to the Applicant at that stage was R1,112,257, with a monthly instalment of R9,959. In terms of the proposal, the respondents were ordered to pay R7,967 per month to the applicant. It is common cause that they failed to do so. On the applicant's records they shortpaid by an amount of R32,481.93 over eight months. The respondents alleged in their opposing papers that from the time the bond was registered, up to April 2010 they had paid an amount of R460,000, that from May 2010 to December 2011 a further R81,100 was paid and then from April 2011 to 7 February 2012 a further R58,323 was paid. They had clearly duplicated the period from May 2011 to December 2011 and included in the sum of R58,323 is an amount of R10,430 paid prior to the debt review order being granted. From May 2011 to February 2012 an amount of nine times R7,967 should have been paid – an amount of R71,705. What was in fact paid, was R47,892. As with the payments made prior to debt review, the respondents do not appear to have not taken into account the interest on the account.

They do not appear to seriously contend that they have either paid in advance or even kept up with their instalments. The reason for indicating how much has been paid seems to have been to give the court an idea of the extent of their commitment and involvement in the matter and to hopefully support a conclusion that it would be inequitable to deprive them of their home after making paying so many hundreds of thousands of rand. The 1st respondent conceded on the papers that they started defaulting in 2010 when he became unemployed, although he maintained some payments prior to going under debt review. The respondents also made a payment of R8,000 to the applicant in March 2012 and

undertook to pay R10,000 per month as from 4 May 2012 until such time as he again obtained employment, which they submitted was a realistic prospect, as the first respondent had recently been invited to two interviews. If however judged against the track

record of being unemployed since 2010 the prospects, in the absence of any other evidence, appear to unfortunately seem to be somewhat less than convincing. As at the 29th January 2012 the monthly instalments on the account, according to the applicant, amounted to R14177 per month and the arrears had accumulated to R97,521, although the arrears in terms of the debt review arrangement were only R32,681. Once the respondents breached the terms of the debt review order however, the applicant was entitled to proceed to enforce its rights.² The respondents also submitted that the house was regarded as their children's home, that it was convenient for them, as they were studying in East London and that they had no other alternative accommodation in East London. The children are 5,8 and 10 years old. Both respondents obviously also resided on the property and although they did not specifically say that it was their primary residence, it certainly appeared to be so. The customary notices alerting the respondents to the provisions of section 26 (1) of the Constitution and Rule 46 (1) (a) (ii) of this court were contained in the summons. Although it is clear that the respondents appear to have made every attempt to pay their debts to their various creditors and that their present circumstances are not of their own doing or wishes, it seems that I am constrained to grant the applicant the relief sought. The respondents have not made out a proper defence to the applicants claim and have not placed any facts before the court which have persuaded me that it would not be in the interests of justice to permit the applicant to execute against the immovable property, even though it appears to be their primary residence. The respondents were not legally represented and that perhaps explains why the evidence placed before the court in their opposing papers was not as detailed as it could have been. Their duty in opposing summary judgment proceedings are clear. They must disclose facts which satisfy the court that a good defence exists.³ If they allege that it would be unjust to declare their property executable then they would in addition need to place such additional facts before court. If they felt that there were grounds for referring the matter back to the debt counsellor in terms of section 85 of the NCA, then they should also have placed such additional grounds before the court. I suspect however that the debt review proceedings were doomed to failure from the start. Payment of an amount of R29,000 per month appears to be unrealistic when one spouse is unemployed but I am bound to find in the absence of any evidence to the contrary, that the magistrate who considered the matter found that the payment was realistic. To find otherwise would amount to a review of the magistrate's decision without the benefit of all of the relevant facts. On the facts before me I have no idea what the second respondent's earnings were and whether such a payment was realistic or not. This does not appear to be a case where the respondents have been the authors of their own misfortune as appeared to be the case in *Mvelase*,⁴ where the respondent had approximately ten credit cards. In this case the first respondent lost his employment and that was the cause of their problems. It is important to note that in terms of the debt review arrangement that the payment of R7,967 would have covered the interest generated on the bond each month and would also have contributed approximately R958 per month towards the capital outstanding.

The short payment of, on average, R4,085 per month over eight months resulted in an underpayment of, on average, R3,218 per month less than the interest accumulating on the account. As in Mvelase, the balance outstanding on the bond has grown, in this case from the initial R1,125,000 to R1,149,284. Had they placed more facts before me it is possible, even though unlikely in view of the apparent inability of the respondents to even maintain the interest payments on the loan, that I may have been persuaded to consider referring the matter in terms of section 85 of the NCA. Whether this court is entitled to refer a matter where an order has already been made but the parties have defaulted is however not a question I need to answer. The respondents have failed to place sufficient information before me to permit me to find that it would be inequitable to authorise the applicant to sell their property in execution. Summary judgment is accordingly granted against the respondents, jointly and severally for: Payment of the amount of R1,149.284.48 (One Million One Hundred and Forty Nine Thousand Two Hundred and Eighty four Rand and Forty Eight Cents).

Payment of interest on the amount of R1,149.284.48 (One Million One Hundred and Forty Nine Thousand Two Hundred and Eighty four Rand and Forty Eight Cents), at the rate of 7.35% nominal per annum, calculated daily and compounded monthly, with effect from 7 January 2012 to the date of payment, both dates inclusive;

The immovable property described as Remainder of Erf 4056, Beacon Bay, Buffalo City Local Municipality, Division of East London, Province of the Eastern Cape, in extent 927 square metres, held under Deed of Transfer No. T2982/2007, is declared executable. Costs are awarded against the respondents as between attorney and client.

L D KEMP ACTING JUDGE OF THE HIGH COURT For applicant: Ms Watt instructed by Neville Borman & Botha Attorneys. For respondents: Personally. C:_clients\e_l\ldk judgements\grahamstown\APPLICATIONS OPPOSED\FIRST RAND BANK V MDILA.doc

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In terms of the loan agreement between the parties, secured by a mortgage bond registered on the 8th June 2007, the respondents were to pay R11,497 per month against a loan of R1,125,000 made to them.

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The respondents alleged in their opposing papers that from the time the bond was registered, up to April 2010 they had paid an amount of R460,000, that from May 2010 to December 2011 a further R81,100 was paid and then from April 2011 to 7 February 2012 a further R58,323 was paid. They had clearly duplicated the period from May 2011 to December 2011 and included in the sum of R58,323 is an amount of R10,430 paid prior to the debt review order being granted. From May 2011 to February 2012 an amount of nine times R7,967 should have been paid – an amount of R71,705. What was in fact paid, was R47,892. As with the payments made prior to debt review, the respondents do not appear to have not taken into account the interest on the account.

They do not appear to seriously contend that they have either paid in advance or even kept up with their instalments. The reason for indicating how much has been paid seems to have been to give the court an idea of the extent of their commitment and involvement in the matter and to hopefully support a conclusion that it would be inequitable to deprive them of their home after making paying so many hundreds of thousands of rand.

The 1st respondent conceded on the papers that they started defaulting in 2010 when he became unemployed, although he maintained some payments prior to going under debt review. The respondent also made a payment of R8,000 to the applicant in March 2012 and

undertook to pay R10,000 per month as from 4 May 2012 until such time as he again obtained employment, which they submitted was a realistic prospect, as the first respondent had recently been invited to two interviews. If however judged against the track

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As at the 29th January 2012 the monthly instalments on the account, according to the applicant, amounted to R14177 per month and the arrears had accumulated to R97,521, although the arrears in terms of the debt review arrangement were only R32,681. Once the respondents breached the terms of the debt review order however, the applicant was entitled to proceed to enforce its rights.²

The respondents also submitted that the house was regarded as their children's home, that it was convenient for them, as they were studying in East London and that they had no other alternative accommodation in East London. The children are 5, 8 and 10 years old. Both respondents obviously also resided on the property and although they did not specifically say that it was their primary residence, it certainly appeared to be so. The customary notices alerting the respondents to the provisions of section 26 (1) of the Constitution and Rule 46 (1) (a) (ii) of this

court were contained in the summons.

Although it is clear that the respondents appear to have made every attempt to pay their debts to their various creditors and that their present circumstances are not of their own doing or wishes, it seems that I am constrained to grant the applicant the relief sought. The respondents have not made out a proper defence to the applicants claim and have not placed any facts before the court which have persuaded me that it would not be in the interests of justice to permit the applicant to execute against the immovable property, even though it appears to be their primary residence.

The respondents were not legally represented and that perhaps explains why the evidence placed before the court in their opposing papers was not as detailed as it could have been. Their duty in opposing summary judgment proceedings are clear. They must disclose facts which satisfy the court that a good defence exists.³ If they allege that it would be unjust to declare their property executable then they would in addition need to place such additional facts before court. If they felt that there were grounds for referring the matter back to the debt counsellor in terms of section 85 of the NCA, then they should also have placed such additional grounds before the court. I suspect however that the debt review proceedings were doomed to failure from the start. Payment of an amount of R29,000 per month appears to be unrealistic when one spouse is unemployed but I am bound to find in the absence of any evidence to the contrary, that the magistrate who considered the matter found that the payment was realistic. To find otherwise would amount to a review of the magistrate's decision without the benefit of all of the relevant facts. On the facts before me I have no idea what the second respondent's earnings were and whether such a payment was realistic or not.

This does not appear to be a case where the respondents have been the authors of their own misfortune as appeared to be the case in *Mvelase*,⁴ where the respondent had approximately ten credit cards. In this case the first respondent lost his employment and that was the cause of their problems.

It is important to note that in terms of the debt review arrangement that the payment of R7,967 would have covered the interest generated on the bond each month and would also have contributed approximately R958 per month towards the capital outstanding. The short payment of, on average, R4,085 per month over eight months resulted in an underpayment of, on average, R3,218 per month less than the interest accumulating on the account. As in *Mvelase*, the balance outstanding on the bond has grown, in this case from the initial R1,125,000 to R1,149,284.

Had they placed more facts before me it is possible, even though unlikely in view of the apparent inability of the respondents to even maintain the interest payments on the loan, that I may have been persuaded to consider referring the matter in terms of section 85 of the NCA. Whether this court is entitled to refer a matter where an order has already been made but the parties have defaulted is however not a question I need to answer. The respondents have failed to place sufficient information before me to permit me to find that it would be inequitable to authorise the applicant to sell their property in execution.

Summary judgment is accordingly granted against the respondents, jointly and severally for:

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Costs are awarded against the respondents as between attorney and client.

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ACTING JUDGE OF THE HIGH COURT

For applicant: Ms Watt instructed by Neville Borman & Botha Attorneys.

For respondents: Personally.

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1Act No 34 of 2005

2See Firstrand Bank Ltd v Fillis and Another 2010 (6) SA (ECP)

3See Erasmus – Superior Court Practice- Commentary to rule 32 and the authorities cited (Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426; Arend v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 303 and 304; Cronj, v Cooper 1978 (1) SA 268 (N); District Bank Ltd v Hoosain 1984 (4) SA 544 (C) at 547–8

4Firstrand Bank Ltd v Mvelase 2011 (1) SA 470 (KZP) at para 71

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