

SOUTH AFRICA / JUDGMENT

Investec Bank Ltd v Abada (43166/2019) [2020] ZAGPPHC 128 (23 April 2020)

[2020] ZAGPPHC 128**COURT**

North Gauteng High Court, Pretoria

BEFORE

Holland-Muter

CASE / FILE NUMBER

43166/2019

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
(1)

REPORTABLE: NO
(2)
OF
INTEREST TO OTHER JUDGES: NO
(3)
REVISED
CASE NO: 43166/2019
23/4/2020
In

the matter between: INVESTEC
BANK
LTD
APPLICANT
And
NOSIXWE
ABADA
RESPONDENT

JUDGEMENT

- [1] The Covid-19 Pandemic sweeping through the world is causing havoc in the general day to day life of all mankind. The legal profession is in no way excluded from adapting to new ways to deal with the day to day functioning of the courts. New initiatives are used to combat the paralyzing effect of the pandemic and to continue with the day to day running of the courts. The virus is also referred to as the "Corona-virus".
- [2] New directives were issued by the Offices of the Chief Justice and the various Judge Presidents of the different provincial divisions to suit the needs of each division in accordance with the directives by the Chief Justice.
- [3] The use of electronic communications and other means are utilized to give effect to these directives. The general approach is to use electronic video hearings (known as Zoom or Teams), or in some instances, particular in applications where oral evidence is not normally heard because of affidavits placing evidence before court. The legal representatives in the past filed heads of arguments advancing their clients' case as set out on affidavit. At a hearing the case is normally argued on the heads of arguments and the parties are seldom permitted to go beyond the existing heads of arguments.
- [4] This was the practice before the new directives came about. To combat the possible spread of the corona-virus by preventing possible contact between parties and legal representatives in open court (unless exceptional circumstances necessitates the physical presence of the parties/representatives in court), parties and or their representatives may beforehand consent that the presiding judge hear the matter on paper (the pleadings and the heads of arguments filed).
- [5] The further requirement is that all cases must be electronically loaded on the newly created caselines system. It is the responsibility of the parties to ensure that the cases are loaded onto caselines. Failure to comply herewith will result in the matter be removed from the roll on the date of hearing.
- [6] In order to give result hereto, I invited all counsel (the names appearing on the filed practice notes) to file supplementary heads of arguments should they decide to and to, where no real need for further oral arguments exists, to agree to a paper hearing instead of a virtual hearing via applications such as Zoom and Teams (via the internet} particularly where one of the parties (counsel) may have difficulties with the virtual process due to various reasons.
- [7] Counsel for both parties in this matter, after discussing it amongst themselves, informed myself that they were satisfied with a paper hearing. In conducting the paper hearing, I confined myself to the pleadings (affidavits} and the written heads of arguments. I took notice of the complaint by the attorney on behalf of the respondent with regard to the E-mail sent by Mr Eastes (counsel for the applicant}. The only possible complaint may be towards the updated Certificates of Balances on the two accounts on behalf of the applicant.

There was in my view nothing untoward in this; in fact it merely updated the most recent position of the two banking accounts. In my view there is nothing wrong because it happens almost daily in similar cases that an updated Certificate of Balance is produced at the hearing. The original Certificate is usually out-dated in view of the time lapse since the application was issued and the later hearing thereof.

- [8] The dispute between the parties has a long history since 2018. I will however refrain from making much of the issues before the Notice of Default was sent on 29 January 2019.
- [9] The application concerns two separate credit agreements entered into between the Applicant and the Respondent, the first agreement entered into on 18 September 2018. This agreement pertains to the first claim by the applicant, the agreement a written loan agreement (p 50) referred to as the mortgage bond agreement for the capital amount of R 1655 000, 00 (p 45), repayable in monthly instalment of R 15 504, 80 (p 46). The account number is 231883002.
- [10] The second agreement pertains a written private card facility account (p 103) entered into on 6 September 2016 where it was agreed that the Applicant will available an amount of R 150 000, 00 under certain standard terms and conditions as portrayed from p 103. The account number is 10011107059.
- [11] The Respondent does not dispute the agreements, including the standard terms and conditions applicable to both accounts. The Respondent's silence in her replying affidavit to the averments as to the concluding of the two agreements can be accepted that she admits the two agreements. The defence raised on the merits by the Respondent is that she denies being in any arrears when deposing to her affidavit . See par 139 on p 169.
- [12] The Applicant caused a Notice of Default on 29 January 2019 to the Respondent. See p 226. The Notice was dispatched via registered mail. In this notice the averment is made that the Respondent was in arrears in the amount of R 35 832, 97 with regard to both accounts as both account numbers are listed. It is thus not clear what the arrears, if any, on either

account were. If the arrears were related to the mortgage bond account it would be slightly more than two months arrears. The notice

mentions a total amount of R 1848 773, 10. It seems that the author of the notice combined both accounts in one notice but lost the plot as to what the exact arrears on each account amounted to.

- [13] The Applicant forwarded another letter (not a notice of default) to the Respondent on 29 January 2019 (p 230) listing the arrears on the private bank account to be R 35 832, 97 with a total amount owing R 158 941, 47. This is the same as in the notice of default above and the safe assumption to make is that the mortgage bond account was not in any arrears on 29 January 2019 (if compared with the notice of default). In another letter also dated 29 January 2019 the Applicant permits the Respondent to continue using the private bank account (card) subject to the availability of funds. No indication is given as to what funds were available.

- [14] The Applicant caused a further Certificate of Balance on 4 April 2019 (p 127) stating an indebtedness of R 139 320, 06 on the private bank account and in the accompanying letter (p 128) the arrears on the mortgage bond account estated as R 46 963, 44.
- [15] The Respondent made certain payments after receiving the Notice of Default dated 29 January 2019. This amounted to the situation where the arrears on the mortgage bond account was a mere R 2 107, 37 on 28 August 2019. See letter "819" p 262. The outstanding amount on the private bank account was R 57 559, 97 on that date. It is clear that the Respondent was making payments on both accounts. I interpose that no Court will entertain any Rule 46A application for such a meagre amount where it concerns the prime residence.
- [16] The Applicant annexed two Certificates of Balance (in respect of the two accounts) on 20 April 2020 via its supplementary heads of arguments. These certificates indicate an outstanding amount of R 60 985, 67 on the private bank account {only R 3 425, 70 more that on 28 August 2019). It in my view justifies the reasonable inference that the Respondent made further payments on this account since August 2019. The outstanding amount on the mortgage bond account is R 1 723 712, 02. This is less than the previous outstanding amount of R 1 8 48 773, 10 as set out in the Certificate of Balance on 29 January
2019. If the Applicant applied the acceleration clause in the terms and conditions of the loan agreement, I fail to see how it can be less than more than a year ago unless payments were made since then.
- [17] The Certificate of Balance relating to the mortgage bond account only mentions the alleged full outstanding amount and not what the arrears are on 20 April 2020. The last arrear in the papers on this account is that of 28 August 2019 (R 2 107, 37). No court will grant any relief on such a meagre arrear. The Applicant would have had an uphill battle on the initial Certificate of Balance on 29 January 2019 on arrears of just more than two months. It is practice in this division that arrears less than six months seldom attract a Rule 46A executable order particular with regard to a prime residence.
- [18] Much was made of the provisions of section 26 of the Constitution {the right to housing) but I am of the view that it is not necessary to address this in view of the above. Similar the question of prescription raised in the Respondent's supplementary heads of arguments needs no further attention as prescription is not applicable.
- [19] Counsel both referred to the previous hearing before Molefe J, but those arguments and or admissions made before her do not constitute evidence in this matter. In applications evidence relates to what is contained in the affidavits and annexures related thereto. I did not deem it necessary to refer thereto.
- [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 in the initial Notice of Demand and subsequent keeping apart of payments made by the Respondent after receiving the Notice of Default.

- [21] The counter-application deals inter alia with the acceleration clause and that such orders are normally obtained by way of summons procedure or through an application where no foreseeable dispute of fact existed.
- [22] From the above it is clear that a dispute of facts was foreseeable and that any relief sought should have been by way of action. The matter in my view should be referred to trial to ventilate the disputes. See Uniform Rule 6(S)(g). The applicant is afforded 20 days from date of this judgment to issue a Declaration to set out the dispute(s) regarding any arrears. The nature of the two agreements is not in dispute but for the acceleration aspect. This should be addressed in the Declaration and thereafter the normal rules regarding exchange of pleadings will apply.
- [23] The Applicant, in view of the alleged arrears of slightly more than two months on the mortgage bond account in the Certificate of Balance on 29 January 2019, should have foreseen a dispute of facts not triable on affidavit. The matter is therefore referred to oral evidence on the aspects of the arrears and issue of the automatic acceleration of debts is invalid.
- [24] The matter is referred for oral evidence. As to the costs, the Applicant is to pay the costs of the application. The question of the costs pertaining to the acceleration of debts should be decided on by the trial court.

ORDER:

1. The matter is referred for oral evidence on the aspects of the indebtedness or not of the Respondent at the time of issuing of the application;
2. The questions raised in the counterclaim is referred for evidence;
3. The Applicant is to issue a Declaration within 20 days from date of this order;
4. The normal rules with regard to time limits pertaining the further exchange of pleadings will apply thereafter;
5. The Applicant is to pay the costs of the application.

J HOLLAND-MUTER

23/4/2020

Acting Judge of the Pretoria High Court

Paper trial on 21 April 2020.

Judgment

delivered on 23 April 2020

Adjudicated on papers after receiving supplementary heads of arguments for the parties due to the National Lockdown

THE ORDER TO BE MADE AVAILABLE ON CASELINES

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Prepared on 12 October 2026 · Esheria