

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Somniso and Another (13826/2019) [2021] ZAGPJHC 49 (11 February 2021) [2021] ZAGPJHC 49

COURT

South Gauteng High Court, Johannesburg

BEFORE

Vukeya

CASE / FILE NUMBER

13826/2019

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED: YES/NO

11/02/2021

CASE NO: 13826/2019

In the matter between:

NEDBANK LIMITED

APPLICANT/PLAINTIFF

And

MOLIE VICTORIA SOMNISO

1ST RESPONDENT/DEFENDANT

THE CITY OF JOHANNESBURG

2ND RESPONDENT

METROPOLITAN MUNICIPALITY

JUDGMENT: SUMMARY JUDGMENT

VUKEYA AJ

INTRODUCTION

AND BACKGROUND

- [1] The plaintiff applies for summary judgment against the defendant and claims for:
- 1.1. Payment of the sum of R651 472. 17 together with interest at the rate of 11.20% per annum, from 01 January 2019 to date of payment;
 - 1.2. An order declaring the defendant's immovable property known as Section No. 38 PEGASUS situated at Wilgeheuwel Extension 29 Township, City of Johannesburg held by deed of transfer number ST50818/2015, especially executable.
 - 1.3. The issuing of a warrant of execution of the said property; and;
 - 1.4. To determine if a reserve price is to be set and to set a reserve price.
- [2] According to the plaintiff's particulars of claim, the plaintiff and the defendant entered into a Mortgage Loan Agreement on 30 September 2015. The terms of the agreement were, amongst others, that the Plaintiff would lend and advance to the defendant an amount of R635 700, 00 which amount the defendant would repay in equal monthly instalments of R6339, 00 over a period of 300 months payable from 1 December 2015 to date of final payment. The agreement was subject to the registration of a mortgage bond in favour of the plaintiff over the above mentioned property.
- [3] The parties further agreed that in the event of default by the defendant the plaintiff would be entitled to claim repayment of the outstanding balance, which amount would become immediately due and payable together with interest and all other amounts owing or claimable by the plaintiff in terms of the agreement. A certificate of balance signed by a manager of any branch of the plaintiff reflecting the defendant's indebtedness would become prima facie proof of the defendant's indebtedness to the plaintiff and such a certificate would be valid as a liquid document against the defendant in any competent court.
- [4] The plaintiff alleges that it has duly complied with its obligations in terms of the agreement but that the defendant has failed to comply with the terms and conditions of the agreement by failing to make monthly instalments as agreed and is in arrears with her payments. The plaintiff further avers that the National credit Act is applicable to the agreement and that it has complied with Section 129 and all other relevant provisions of the NCA.
- [5] It is important to mention that the property which the plaintiff seeks to be executed is the primary residence of the respondent and therefore Rule 46A of the Uniform Rules of Court is applicable.
- [6] The defendant entered an appearance to defend the plaintiff's action and the plaintiff

is now applying for Summary Judgment alleging that the defendant does not have a bona fide defence and that she has entered an appearance to defend solely for purposes of delay. The application for summary judgment is opposed by the defendant and in support of her opposition she has filed an opposing affidavit stating her defence against the plaintiff's claim.

LEGAL PRINCIPLES

[7] In terms of rule 32 (3) a defendant who wishes to oppose summary judgment must provide the plaintiff with security to the satisfaction of the registrar for any judgment including costs which may be given or he may upon hearing of an application for summary judgment deliver an affidavit to satisfy the court that he/she has a bona fide defence to the plaintiff's claim or that he has a valid counter-claim against the plaintiff. The defendant has elected to follow the second of the two requirements.

[8] Rule 32 (3) (b) further provides that upon the hearing of an application for summary

judgment

the defendant may satisfy the court by affidavit or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and the grounds of the defence and the material facts relied upon.

[9] Once an allegation has been made by the applicant that the respondent has no defense and that he/she has entered an appearance to defend solely for the purpose of delay, the defendant has a duty, in his/her affidavit, to fully disclose the nature and grounds of the defence and the material facts he relies upon in order to satisfy the court that he has a bona fide defence to the claim as provided in Rule 32 (3) (b). The issue is not whether the defence to be raised is likely to succeed or fail, but merely whether it is bona fide.

[10] The approach of the court to summary judgment should be as set out by Corbett JA in the *Maharaj v Barclays National bank Ltd* 1976 (1) SA 418 (A) case in which he stated as follows:

‘Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has “fully” disclosed the nature and ground of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may

be. The word “fully” as used in the context of the Rule; (and its predecessors) has been the cause of some judicial

controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence

relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient

particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence . . . At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading.’

[11] In *Venter v Kruger* 1971 (3) SA 848 (N) the court held that it is not intended in Summary Judgment proceedings, that a court should investigate the defence and decide whether the probabilities of success are with the defendant or not. What the plaintiff has to do is to verify his claim and what the defendant has to do is disclose in his affidavit fully the nature and the grounds of his defence. Also see the classic and much-quoted case of *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) in which it was stated that the rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive

the defendant with a triable issue or a sustainable defence of his/her day in court. What the rule requires is that the defendant must set out in his or her affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff’s claim.

SUBMISSIONS

AND EVALUATION

[12] Before I deal with the defendant’s answering affidavit and her defences to the summary judgment, I wish to pause and state that the defendant was unrepresented during the hearing of the summary judgment and that she drafted her own papers to oppose the application. Her affidavit is inundated with information that is somehow unnecessary for opposing a summary judgment application but, be that as it may, it was easy to extract from her lengthy statement the defences she relies on to oppose the application, with the assistance of the heads of argument filed and the submissions she made during the hearing.

[13] In its founding affidavit in the summary judgment application, the applicant confirms its cause of action and alleges that the defendant

did not comply with his obligations in terms of the aforementioned agreement and therefore the amount prayed for is due and payable in terms of the agreement. It may be noted from the defendant's affidavit that she does not dispute that she fell into arrears with her payments after she lost her permanent employment and therefore does not place her indebtedness to the plaintiff in issue. She however relies on the fact that there are other means that should have been adopted by the plaintiff to prevent foreclosure of the property.

- [14] In her answering affidavit the defendant raises as one of her defences the plaintiff's refusal to provide her with a statement reflecting the history of the account (certificate of balance); the plaintiff's failure to adopt other alternative or creative means to recover the debt; for an example approve her request to rent out the property or approve her request for extension of the home loan, in a form of reducing the monthly repayments as an attempt to prevent the foreclosure.
- [15] The defendant submits that to prevent foreclosure of the property by the plaintiff, before her account fell into arrears, when she learned that there was a possibility that she might not be able to meet her obligations, she approached the plaintiff and requested the plaintiff to reduce her monthly instalments and extend the term of re-payment but her request was rejected.
- [16] When she became unemployed the defendant again approached the plaintiff about an option to rent-out the property as a temporary measure and to recover the debt. In terms of the agreement, the plaintiff had to consent to such an arrangement and despite the fact that she had approached the plaintiff with this proposal the plaintiff went on to evaluate the property for purposes of foreclosure and ignored her proposal.
- [17] She prayed for a dismissal of the application and submitted that granting the application will deprive her and her daughter of a basic human right of access to adequate housing. She further submitted that if summary judgment is granted she will be left homeless with no shelter for her and her daughter and prayed for the court to dismiss the application for summary judgment with costs. The plaintiff denies that the defendant was refused access to her statements and submits that if she was refused access to her statements she could have gone to another branch.
- [18] The Maharaj case guides the courts to look deeply into the defendant's defence contained in her affidavit to determine if it is bona fide. The defendant therefore has a duty to disclose the material facts upon which she bases her defence with sufficient completeness to enable the court to satisfy itself that the defence is bona fide. The bona fide's of the defence depend on the merits of the defence as raised in the affidavit. The question is whether the defences raised by the defendant in this matter constitute a good defence in law.
- [19] When a court deals with a matter where a debtor's home must be declared executable and where the property sought to be attached is the primary residence of the judgment debtor it must consider all facts as stated in Rule 46A of the Uniform Rules of Court. It is therefore the duty of the court, as an overseer of the process, to ensure that the primary residence of the

judgment debtor is executed in a manner that will not interfere with the constitutional rights of a person otherwise it will render the process unconstitutional. The right to adequate housing is one such right and it goes without saying that the process of execution of property which is a primary residence of a judgment debtor is equivalent to a 'not-so-obvious' eviction process.

- [20] During the hearing of the application I engaged counsel for the plaintiff to make submissions regarding the relevance and application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and whether the Local Counsel should not have filed a report stating if alternative accommodation can be provided to the defendant. His submissions were that the PIE Act was not applicable because granting the summary judgment does not necessarily mean that the defendant will be automatically evicted from the property after it has been sold in an auction. His view was that the buyer will have to apply for an eviction order against the defendant and that would be separate application altogether.
- [21] I disagree with counsel for the plaintiff in his argument hence I stated in this judgment earlier that the process is a 'not-so-obvious' eviction process. The defendant may decide to stay after foreclosure has been granted but she will only be postponing the inevitable and risking a cost order for an eviction application that will obviously follow. It is for this reason that I am of the view that a court dealing with an application of this nature must carefully examine the circumstances of the case as a whole before granting an order to execute a primary residence of a person. The court has to take all the necessary steps to ensure that it has all the facts before it before making a decision. In such an instance it is important for the court, acting in its supervisory capacity, to have all information relating to whether there will be alternative accommodation available for the debtor should the order be granted. Granting the order without any such information at its disposal will lead to an injustice and a violation of a right to adequate housing as entrenched in our Constitution.

CONCLUSION

- [22] I am convinced that the defendant made numerous attempts, as can be seen in her opposing affidavit, to negotiate with the plaintiff creative means which could be adopted to recover the debt but the plaintiff was not willing to negotiate with her. Rule 46A (2) (a) (ii) enjoins a court to consider alternative means of "satisfying the judgment debt". In *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005
- (2) SA 140 (CC) at para [40] Mogoro J stated: "It is difficult to see how the collection of trifling debts in this case can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated, possibly permanently, especially where other methods exist to enable recovery of the debt".

- [23] Furthermore, I am of the view that granting an application for Summary Judgment, in which a residential property is to be specially executed, without having considered all the relevant circumstances surrounding any arrangement for alternative accommodation will amount to breach of the defendant's right to adequate housing. It will leave her and her daughter destitute and out in the cold without accommodation.
- [24] I am in agreement with the view expressed by Vally J in a judgment which he wrote separately in the case of Absa Bank Limited v Lekuku (32700/2013) [2014] ZAGPJHC 244 (14 October
- 2014) where he said "In a case which involves the constitutional rights of persons, and where there is a real prospect of those rights being trampled upon, it is imperative that the Court examines very carefully the circumstances under which this occurs, failing which there is real danger of an injustice prevailing. There are therefore good grounds to deploy the inherent jurisdiction of the Court to avert such injustice".
- [25] In the absence of any report from the Local Counsel and after having found that the plaintiff has failed to employ other creative or alternative means to recover the debt, I am of the view that the information before me is insufficient to grant Summary Judgment in favour of the plaintiff where the defendant's primary residence is to be declared specially executable. I therefore find that the defendant has a bona fide defence and that she has a triable and a sustainable issue to justify the granting of an order in her favor.

ORDER

[26] Accordingly I make the following order:

26.1. The application for Summary Judgment is dismissed, with costs.

26.2. The defendant is granted leave to defend the action.

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION - JOHANNESBURG

Heard on: 06 August 2020

Judgment Delivered on: 11 February 2021

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Prepared on 14 October 2026 · Esheria