

Introduction

[1] The applicant is the FirstRand Bank, a bank and registered credit provider. On 22 November 2019 it issued a combined summons against the first respondent, claiming payment an amount of R475 963.53 from her, as well as an order declaring immovable property, constituting her primary residence, specially executable in terms of Rule 46(1) and 46A(8)¹.

[2] The first respondent is an adult female with her chosen *domicillium citandi et executandi* situated at Unit 4 Riverwalk Complex, Corner of 8th and Boxwood Street, Noordwyk, Johannesburg (the mortgaged property) which formed the subject matter of this application.

Terms of the mortgage loan agreement

[3] The mortgage loan agreement was concluded on 15 June 2017. In terms of the loan agreement the applicant would lend to the first respondent the amount of R436 550.00, which was subject to a covering mortgage bond to be registered over the mortgaged property being Erf No. 2563 Riverside View Extension 33 Johannesburg Gauteng.

[4] The capital amount of R523,860.00 is the maximum secured amount in terms of the bond, which is made up of the principal debt, and an additional amount of R87 310.00 which is in respect of all interest, fees, charges and costs incurred and damages suffered by the applicant in the event of default by the first respondent.

[5] The mortgage loan agreement stipulates that if the first respondent is in default of the loan agreement then the applicant may at its option:

1. claim immediate repayment of the full outstanding balance; or
2. terminate the loan agreement, upon which all amounts whatsoever owing to the applicant by the first respondent shall then forthwith be payable in full;

¹ Uniform Rules of Court.

Relevant background facts

[6] The first respondent admittedly defaulted on her loan obligations by not paying the monthly instalments. On 12 September 2019 the applicant sent a letter to the first respondent indicating that the arrears totalled R 22 081.08 and demanded that the arrears be brought up to date within ten business days, failing which the applicant may proceed to enforce the credit agreement in terms of the National Credit Act 34 of 2005.

[7] The first respondent failed to bring the arrears up to date and as a result, on 9 October 2019 the applicant issued a Notice in terms of section 129(1)² of the National Credit Act, Act 34 of 2005 (“NCA”), which stated:

“ [if] you fail to respond to this notice or reject our clients proposals contained in paragraph 3, within 10 business days from service of this notice, our client may exercise their right, amongst any other remedies available to it, will proceed to issue summons against you for the full outstanding account balance. Should judgment be obtained it may potentially lead to the loss of your home should we proceed to selling your home by means of public auction, which will result in your or any occupiers being evicted therefrom.”

[8] Needless to say the first respondent did not bring the arrears up to date, which led to this action. Prior to issuing summons the applicant took all reasonable steps in order to conclude various payment arrangements with the first respondent to enable her to comply with her obligations under the agreement in order to avoid foreclosure.

²Required procedures before debt enforcement

129. (1) If the consumer is in default under a credit agreement, the credit provider- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.

[9] The applicant made three arrangements in order to assist the first respondent to bring the payments in arrears up to date. The first agreement to assist the first respondent was concluded in 2017, however the first respondent defaulted on the agreement and again fell into arrears. In 2019 a further payment arrangement was concluded to enable the first respondent to bring her arrears up to date. This arrangement was made because the first respondent informed the applicant that she was in the process of getting divorced. She indicated that on finalization of the divorce she would be in a position to repay the arrears. The first respondent also indicated that she was re-trenched and unemployed. However for the period 29 December 2017 to 30 November 2020 the first respondent made no payments to service the loan agreement.

[10] A third payment arrangement was concluded in October 2020 in order for the first respondent to bring the arrears up to date, but she failed to make the agreed payments for November and December 2020. The applicant advised the first respondent that the October 2020 agreement fell away due to her failure to make the agreed payments.

[11] It is clear that the first respondent was unable to adhere to any of the payment arrangements. This effectively left the applicant with only one option, which was to institute these proceedings. A smart Bond statement dated 7 September 2021 indicated the amount in arrears on the mortgage loan was R 591 402.01 with a monthly repayment instalment being R 14 958.91. The instalment included the arrear amount to be paid of R 9 845.00 per month.

Value of the mortgaged property

[12] A valuation report by Henk Claassen, a registered professional valuer estimated the value of the property to be R 550 000.00.

[13] The local municipal valuation of the property was attached to the founding affidavit and the property was valued at R 519 000.00.

[14] An amount of R 7 353.89 was owed to the local municipality as rates, taxes and other dues as at January 2020.

The first respondent's case

[15] The application was opposed by the first respondent. The first defence is that according to her there was and is a payment arrangement in place between her and the applicant in order for her to bring the arrears up to date. Secondly, she stated that the matter has been referred to the National Credit Regulator in respect of the insurance policy which the applicant failed to conclude as agreed upon in the loan agreement.

[16] The first respondent further argued that an amount of money will be paid to her on the finalisation of her divorce and that she will be able to pay the amount in arrears on the loan agreement. She also stated that a debit order instruction was submitted to the applicant by her mother for an amount R 4 000.00 per month in order to repay the arrears.

[17] The main basis of the opposition relates to the prayer declaring the property executable which the first respondent argued should be refused.

The law

[18] It is undoubtedly so that foreclosure of immovable property which is the primary residence of a consumer has a major impact on the rights contained in section 26 (1) of the Constitution: the right to have access to adequate housing. However, *in Absa Bank Ltd v Petersen* it was held that where an order of execution is sought against a judgment debtor's home that is mortgaged to a bank, the proper approach is to give effect to the mortgage bond unless something makes it inappropriate to do so, having regard to all the relevant circumstances of the case³.

³ 2013 (1) SA 481 (WCC) on page 494 to 496.

[19] In *Gundwana v Steko Development & others*⁴ the Constitutional Court held:

“[W]here execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought, after judgment on a money debt, further judicial oversight by a court of law, of the execution process, is a must.”

[20] The issue of execution in such circumstances was dealt with as follows:

*“It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.”*⁵

[21] In *Jaftha v Schoeman & others*⁶ and *Van Rooyen v Stoltz & others*⁷ the Constitutional Court referred to certain factors to take into account when a court exercises such judicial oversight. There is no closed list, but those referred to may be summarised as follows:

- Whether the rules of court have been complied with;
- Whether there are other reasonable ways in which the judgment debt can be satisfied;
- Whether there is any disproportionality between this form of execution and other possible means to exact payment;
- The circumstances under which the debt was incurred;
- Any attempts made by the judgment debtor to pay off the debt;

- The financial position of the parties;
- The amount of the judgment debt;
- Whether the judgment debtor is employed or has a source of income to pay off the debt;
- Whether the sale of the property is likely to render the debtor and her or his family homeless;
- Any other factors relevant to the particular case.

⁴ 2011 (3) SA 608 (CC) at paragraph 41 and 54.

⁵ Ibid 2

⁶ [2004] ZACC 25 at paragraph 56.

⁷ 2005 (2) SA 140 (CC) at paragraph 60.

[22] Therefore in order to balance the interests of the credit provider against that of a debtor Uniform Rule 46 (1) provides for judicial oversight of execution of judgment debts against immovable property where the property sought to be attached is the primary residence of the judgment debtor.

[23] In *First Rand Limited v Folscher*⁸ the position as stated in the matter of *Jafta* when dealing with the amendment to Rule 46(1)(a)(ii) to judicial oversight was confirmed.

Analysis

[24] The first respondent will ordinarily be in the best position to advance any contentions she may wish to make and will be able to fully inform the court of any aspect that should be taken into account in deciding the issue of declaring the property executable.

[25] The information provided by the first respondent concerning her personal circumstances is very scanty and is of minimal assistance to the court to determine why the property should not be declared executable. The following factors were placed before the court;

- i. The first respondent currently occupies the property, therefore the property is her primary residence.
- ii. She secured employment during September 2021, the nature of the employment was not place before me, neither the income she will receive from such employment.
- iii. As and when the divorce is finalized she will be able to pay an amount on the arrears of the loan agreement, the details of the amount due to her was not placed before me.
- iv. Her mother is assisting her financially to repay the arrears in the amount of R4000.00.
- v. There is no factual evidence as to why she would not be able to secure any other cheaper property for accommodation. The current instalment on the

⁸ 2011 (4) SA 314 (GNP).

mortgage bond is in the region of R14 000.00, this amount will be adequate for her to find alternative accommodation.

[26] The first respondent argued that when her divorce is finalized she will be in a position to pay the arrears on the loan account. She did not indicate any timeline as to when the divorce will be finalized, neither did she indicate the amount available to repay the arrears. It cannot be expected of the applicant to wait for an undetermined time for the divorce to be finalized, while in the meantime the amount in arrears escalates.

[27] The first respondent argued that her mother signed a debit order for the amount of R4000.00 instructing the Bank to effect payment on the loan account. It is evident that the debit order is totally insufficient to have any reasonable impact on the arrears.

[28] It is clear from the reading of the papers and the argument presented by the applicant that much was done by the applicant to assist the first respondent with the payment of the arrears before summons was issued against her. In fact three payment agreements were concluded in order for the first respondent to adhere to the outstanding balance on the loan account.

[29] The first respondent did not put up facts to indicate alternative means of satisfying the judgment debt. The applicant provided the information required by subrule 46A(5) relating to the market value of the property, the local authority valuation, the amounts owing on the mortgage bonds and to the local authority. In the circumstances the court can give effect to subrule 46A(8). I accept the applicant's argument that the debt owing to it cannot be satisfied by alternative means other than execution of the judgment debtor's primary residence. In the result I find that the mortgaged property is executable and must order execution in terms of subrule 46A(8) (d).

Costs

[30] Clause 2.19 of the mortgage bond provides that costs incurred in litigation shall be paid by the first respondent as between attorney and client.

Order

[31] I make the following orders:

The first respondent shall pay to the applicant: :

1. the sum of R475 963.53.
2. Interest on the above amount at the variable rate of 13.84% nominal per annum, calculated daily and compounded monthly from 1 November 2019 to date of final payment, both days inclusive.
3. The immovable property known as Erf 2563 RIVERSIDE VIEW, EXTENSION 33 TOWNSHIP, Registration Division J.R., Province of Gauteng measuring 180 square metres, held by Deed of Transfer No. T17/76681 ("the property") is declared specially executable.
4. The Registrar of this Court is authorized to issue a Warrant of Attachment calling upon the Sheriff of this Court to attach and sell the property.
5. The Sheriff of this Court is authorized to sell the property by auction arranged in terms of the provisions of Uniform Rule 46.
6. The reserve price for the sale of the property by the Sheriff of this Court on auction is set in the amount of R308 467.62 ("the reserve price").
7. In the event that the reserve price is not met for the property at the auction sale, then the Sheriff of this Court is hereby authorized to submit a report to this Court within 5 days of the auction for an order that the property be sold to the person who made the highest offer or bid as provided.
8. The first respondent shall pay the costs of this application on the attorney and client scale

CSP OOSTHUIZEN-SENEKAL
Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg

DATE OF HEARING: 04 October 2021

DATE OF JUDGEMENT: 22 October 2021

APPEARANCES:

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