

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/40814

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

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B.C. WANLESS

22 MAY 2023

In the matter between:

FIRSTRAND BANK LIMITED

Plaintiff

and

SELBY TEBOGO LESHABA

First

Defendant

KABELO LESHABA

Second Defendant

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Third Defendant

Neutral Citation: *FirstRand Bank Limited v Selby Tebogo Leshaba and Others* (Case No: 2021/40814) [2023] ZAGPJHC 534 (15 May 2023).

JUDGMENT

WANLESS AJ

Introduction

- [1] This is an application for Summary Judgment by FIRSTRAND BANK LIMITED (*"the Plaintiff"*) against one SELBY TEBOGO LESHABA, an adult male (*"the First Defendant"*) and purportedly against one KABELO LESHABA, an adult female (*"the Second Defendant"*) in terms of Rule 32 read with Rule 46A of the Uniform Rules of Court in which the Plaintiff claims amounts allegedly owing to it pursuant to the breach of a loan agreement entered into between the Plaintiff and the Defendants together with executability in respect of an immovable property.
- [2] It is clear from the pleadings in this matter that it is only the First Defendant that entered an appearance to defend the action instituted by the Plaintiff; filed a Plea in respect of the Plaintiff's Particulars of Claim; filed a Notice to Oppose the Plaintiff's application for Summary Judgment and filed an Affidavit Resisting Summary Judgment. In the premises, it is not competent for the Plaintiff to seek Summary Judgment against the Second Defendant, even on a joint and several basis, in the present application, with the First Defendant. Should this Court grant Summary Judgment in favour of the Plaintiff against the First Defendant this, however, may be joint and several with any judgment granted in favour of the Plaintiff against the Second Defendant in the future.
- [3] When the First Defendant filed his Plea, he also filed a Claim-in-Reconvention therewith. The Plaintiff has pleaded thereto. At the hearing of this application the Court's attention was drawn to the fact that the Plaintiff had uploaded an updated CERTIFICATE OF BALANCE (*"the Certificate"*) onto CaseLines dated the 3rd of January 2023. There was (correctly) no objection thereto from the First Defendant's Counsel.

The facts

- [4] It is common cause or not seriously disputed by either of the parties in this matter that:
- 4.1 The loan agreement (*"the agreement"*) was concluded between the First and Second Defendants and the Plaintiff on or about 9 September 2010, in terms of which the Plaintiff would loan and advance the amount of R413 039.00 to the First and Second Defendants;
 - 4.2 Annexure "A" to the Plaintiff's Particulars of Claim is a true copy of the agreement;
 - 4.3 The Plaintiff is a registered credit provider;
 - 4.4 The First Defendant's *domicilium* address is Stand 646, Fleurhof Extension 2, Roodepoort, Gauteng;

- 4.5 The Section 129(2)(a) notice in terms of the National Credit Act, 34 of 2005 was served personally upon the First Defendant and he failed to respond thereto;
- 4.6 Annexures "D1" to "D4" are copies of the Section 129(2)(a) notices and the respective returns of services;
- 4.7 On 13 October 2016 the Plaintiff obtained Default Judgment and an order in terms of Rule 46(1) as against the Defendants under case number 25056/2016 and the sale of the immovable property (*"the property"*) was not proceeded with; and
- 4.8 On 27 September 2017 the Defendants settled the arrears on their bond account resulting in the agreement being reinstated by operation of law. In the premises, the order obtained in this Court on 13 October 2016 is of no legal force and effect.

The defences of the First Defendant to the Plaintiff's application for Summary Judgment as set out in the First Defendant's Plea and his Affidavit Resisting Summary Judgment in terms of subrule 32(3)(b)

[5] The two (2) principal defences to the Plaintiff's claims are:

- 5.1 That the Defendants have overpaid the Plaintiff since the Defendants have paid an amount of R617 720.18 to the Plaintiff whereas the capital loan amount is allegedly only R490 858.80 and thus have overpaid an amount of R226 608.00 (hence the institution of the Claim-in-Reconvention based on unjust enrichment); and
- 5.2 Rule 32 does not allow for executability to be sought.

The Plaintiff's submissions in respect of the defences raised on behalf of the First Defendant

[6] The Plaintiff submits that neither of the foregoing are valid defences to the Plaintiff's claims since:

- 6.1 The Defendants have not overpaid the Applicant. Clause 2.8 of the agreement, which has been admitted by the First Defendant, clearly states "TOTAL AMOUNT REPAYABLE: R930 499.20". Thus, by the First Defendant's own admission and evidence, an amount of R617 720.18 only has been paid towards the total indebtedness and the First Defendant has not overpaid the Plaintiff, nor has the total indebtedness to the Plaintiff been settled in full.

6.2 It has been held by our courts that it is competent for a Plaintiff to seek executability through Summary Judgment proceedings, provided that Rule 46A has been complied with. In this matter, a separate Rule 46A application was brought and remains unopposed. Our courts have held that the two applications should be heard together.

Findings

- [7] At the hearing of this application Senior Counsel for the First Defendant, whilst not specifically abandoning the abovementioned defences of the First Defendant, spent little, if no time at all, dealing with same during the course of argument. Rather, he confined his submissions to the discretion of this Court to refuse to grant executability of the property, taking into account, *inter alia*, the prejudice to the First Defendant and the First Defendant's family; the fact that the arrears are for a small amount and the Defendants could try and remedy their breach and the First Defendant's right to housing in terms of section 26 of the Constitution.
- [8] In the premises, it is not the intention of this Court to burden this judgment unnecessarily by dealing with the two principal defences as raised by the First Defendant in any detail. Suffice it to say, the Plaintiff is correct in its submissions that neither defence is a *bona fide* defence to the Plaintiff's claims for Summary Judgment and executability of the property. Nor do either of them raise a triable issue which would cause this Court, in the exercise of its discretion, to refuse to grant summary judgment and executability of the property in the Plaintiff's favour.

Ad the first defence (subparagraph 5.1 above)

- [9] The transaction history shows that the Defendants are in fact indebted to the Plaintiff and at no stage settled their entire contractual indebtedness to the Plaintiff. Accordingly, the Defendants are in arrears and the Plaintiff has not been unjustifiably enriched.
- [10] The First Defendant pleads, in his Claim-in-Reconvention, that the Defendants settled the principal debt between the parties during or about December 2016. This is not possible as only on the 27th of September 2017 was it that the Defendants settled the arrears on their bond account resulting in the agreement being reinstated by operation of law. This payment and reinstatement was not denied by the First Defendant in his Plea. Thus, the Defendants could not have settled the entire principal amount in December 2016 if it was only the arrears that were settled in September 2017.
- [11] Further, the First Defendant, also in his Claim-in-Reconvention, claims to have made payment of the amount of R617 720.58 and thus to have settled the principal debt in full. However, clause 2.8 of the agreement, which is admitted in the Plea and pleaded in the Claim-in-Reconvention, records that the total amount

repayable is in fact R930 499.20. Accordingly, it is clear that the Defendants have not paid the full debt due, owing and payable to the Plaintiff and thus have not overpaid an amount of R226 608.00 to the Plaintiff, as claimed in the First Defendant's Claim-in-Reconvention. In the premises, the Plaintiff has not been unjustifiably enriched.

[12] The Certificate of Balance evidences arrears of R59 468.53 as at July 2022.

[13] Under the circumstances, this defence does not assist the First Defendant in avoiding Summary Judgment.

Ad the second defence (subparagraph 5.2 above)

[14] Counsel for the Plaintiff drew the attention of this Court to a number of decisions by this and other courts in terms of which it has been held, *inter alia*, that it is not only competent but also desirable that the money judgment and issue of executability should be dealt with simultaneously.¹

[15] In the premises, provided the requirements for executability in terms of the provisions of the common law; Rule 46A and the relevant Practice Directive of this Division are met, there is no objection to this Court granting an appropriate order whereby the property is declared to be specially executable.

[16] Hence, the second defence does not assist the First Defendant in avoiding the claim of the Plaintiff in having this Court grant Summary Judgment and an order in respect of executability at the same hearing.

Conclusion

[17] Having regard to the Plaintiff's application in terms of Rule 46A, it is clear that (a) the application complies with all the necessary formal requirements in respect of an application of such a nature and (b) there was no opposition thereto by either of the Defendants and, more particularly in this case, the First Defendant. In the premises, all of the submissions made by the First Defendant's Counsel during argument, were made from the Bar and there are no facts on the application papers before this Court upon which this Court could exercise its discretion in favour of the First Defendant to dismiss the claim by the Plaintiff that the property be declared specially executable.

[18] Having regard to all of the information placed before it and applying the relevant factors to be considered in respect of both Summary Judgment (which are trite)

¹ *Absa Bank Limited v Sawyer* [2018] ZAGP JHC 662 (14 December 2018); *Changing Tides 17 (Pty) Limited v Rademeyer & Others* [2019] ZAGP PHC 165 (13 May 2019); *Jaftha v Schoeman & Others*; *Van Rooyen v Stoltz & Others*, 2005 (2) SA 140 (CC); *Nedbank Limited v Pettitt & Another* (24418/2019) [2021] ZAGP JHC 74 (4 June 2021); *Absa Bank Ltd v Mokebe*, 2018 (6) SA 3492 (GJ); *Absa v Makola* [2019] ZAM PMHC 26 (3 December 2019).

and Rule 46A applications² It is clear that it would be just and equitable if this Court granted Summary Judgment in favour of the Plaintiff together with an order that the property be declared specially executable.

[19] As to the “finer” details of the order, this Court is satisfied that the property should be sold subject to a reserve price and that the reasoning behind the Plaintiff coming to a reserve price of R453 831.00 is sound. However, for the purposes of the order to be made, this reserve price will be “rounded up” to be the sum of R460 000.00.

[20] The order of this Court will also be made in terms of the remarks made earlier in this judgment pertaining to joint and several liability and the uploading by the Plaintiff of an updated Certificate of Balance.

Order

[21] In the premises, this Court makes the following order:

1. SUMMARY JUDGMENT, together with an order in terms of Rule 46A, is granted in favour of the Plaintiff against the First Defendant, such to be joint and several with any judgment granted against the Second Defendant, as follows:

1.1 Payment of the amount of **R277 654.96**.

1.2 Interest on the above-mentioned amount at the variable rate of **10.10%** *per annum* calculated daily and compounded monthly from **31 December 2022** to date of final payment.

1.3 That the immovable property known as:

**ERF 646 FLEURHOF EXTENSION 2 TOWNSHIP
REGISTRATION DIVISION I.Q., THE PROVINCE OF GAUTENG
MEASURING 188 (ONE HUNDRED AND EIGHTY-EIGHT) SQUARE
METRES HELD BY DEED OF TRANSFER NUMBER T10163/2011
SUBJECT TO THE CONDITIONS THEREIN CONTAINED**

(“*the immovable property*”) be declared specially executable.

1.4 THAT the Registrar of the abovementioned Honourable Court is authorised to issue a Warrant of Attachment herein.

1.5 THAT the Sheriff of the abovementioned Honourable Court is authorised to execute the Warrant of Attachment herein.

² *Jaftha at 161I-163B; Nedbank Ltd v Mortinson 2005(6) South Africa 462 (W); Standard Bank v Saunderson 2006(2) SA 264 (SCA) at 277 C-F; FirstRand Ltd v Folscher & Another and Similar Matters, 2011(4) SA 314 (GMP) at 332 C – 333 D; Absa Bank Ltd v Ntsane, 2007(3) SA 554 (T) at 567 A – 568 A.*

- 1.6 A copy of this order is to be served on the First and Second Defendants as soon as practically possible after this order is granted.
- 1.7 Declaring that the abovementioned immovable property may be sold by the Sheriff subject to a reserve price of **R460 000.00**.
- 1.8 That in the event that the reserve price is not achieved at the first sale in execution, the applicant may approach the Honourable Court on the same papers, duly amplified, to consider an alternative reserve price.
- 1.9 The First and Second Defendants are advised that the provisions of section 129(3) and (4) of the National Credit Act 34 of 2005 ("*the NCA*") apply to the judgment granted in favour of the Plaintiff. The First and Second Defendants may prevent the sale of the abovementioned property, if the First and Second Defendants pay the Plaintiff the amounts that are overdue together with the applicant's prescribed default administration charges and reasonable costs of enforcing the credit agreement up to the time the default was remedied, prior to the property being sold in execution.
- 1.10 The amounts that are overdue referred to in subparagraph 1.9 above may be obtained from the Plaintiff. The First and Second Defendants are advised that the arrear amounts that are overdue may not be the full amount of the judgment debt but the amount owing by the First and Second Defendants to the Plaintiff, without reference to the accelerated amount.
- 1.11 The First and Second Defendants are directed to pay the costs of this application on the scale as between attorney and client.

B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 17 January 2023
Ex Tempore: 15 May 2023
Transcript: 22 May 2023

Appearances

For Plaintiff: R Peterson
Instructed by: Glover Kannieappan Inc.

For First Defendant: SW Mkhize SC
Instructed by: Mnanzana Hlaselani Attorneys