8/12/2017.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 64774/2013

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

8/12/2017
DATE

SIGNATURE

In the matter between:

ABSA BANK LTD **Plaintiff**

and

PEARL LUCY NOMVULA MATHIBELA **Defendant**

JUDGMENT

BRAND, AJ

Introduction

[1] This matter seems like a simple claim on contract, for the payment of an amount due on a house bond and for an order declaring the immovable property in question specially executable. It is, however, complicated somewhat both by the manner in which it arose and the course it has taken since.

Background

[2] The dispute between the Plaintiff (Absa Bank Ltd) and the Defendant (Ms Pearl Mathibela) arises from three mortgage bonds registered over the Defendant's property – at the time of registration of the bonds the Defendant's primary residence and still her chosen *domicilium citandi et executandi.*

[3] During 2013 the Defendant fell in arrears with the monthly payments on the three bonds. Invoking a clause of the written mortgage loan agreement it had with the Defendant, the Plaintiff issued summons in October of that year, seeking the following relief:

- Payment of the amount of R1 083 286.51 plus interest thereon at a rate of 8.5% from 12 October 2013 to date of payment.
- An order declaring Portion 17 of Erf 613 Groblersdal Township specially executable in favour of the Plaintiff.

[3] In short, therefore, the Plaintiff sought payment of the full outstanding amount on the three bonds, with interest, and the right to sell the Defendant's property in execution to recoup that payment.

[4] After summons was issued, there followed a protracted period during which the Defendant sought, but failed to obtain clarity on the amount of arrears on the basis of which the Plaintiff decided to proceed with litigation.

[5] This confusion lies at the heart of this matter, so that I will briefly relate it already here. The amount of arrears reflected in the summons (the figure that prompted the Plaintiff to issue summons, that is), is R56 681.50, reflecting 6.14 months of non-payment of a monthly instalment of R9 231.53.

[6] On the Defendant's version, since accepted by the Plaintiff, this amount is incorrect: the Defendant was instead at the time of issuing of the summons in arrears only of R16 000.00, representing instalments of approximately one and a half months (this amount is confirmed as correct by the Plaintiff in a recalculation issued in August 2016).

[7] How this error came about is instructive. The Defendant was previously an attorney. In 2012 she decided to do her pupillage during 2013 in Cape Town. As she would be receiving no fixed income for the duration of the pupillage, the Defendant applied to and received from the Plaintiff a so-called 'holiday period' of six months, from December 2012 or January 2013 to the end of June 2013, during which she was only required to pay a reduced monthly instalment on the bonds of R2 576.24. At the time of issuance of summons the Plaintiff calculated the arrears without taking account of this 'holiday period' – that is, erroneously on

the basis that the Defendant had had to pay the initial instalment of R9 231.53 all along (the existence of the agreement regarding the holiday period; the failure of the Plaintiff to take it into account in calculating arrears; and the fact that the resultant purported arrear amount was incorrect are all by now admitted by the Plaintiff).

[8] A considerable time passed between issuance of summons in 2013 and the further prosecution of the matter by the Plaintiff. It seems that after a protracted period during which the Defendant attempted to get clarity on the amount of arrears and calculation of interest, the matter finally proceeded in 2016. After twice being postponed (once by agreement between the parties; once because no judge was available to hear the matter on the allocated date) the matter landed before me for trial. Here the difficulties did not end.

Application for postponement

[9] Before me, Mr Wesley for the Plaintiff indicated that he was ready to proceed with the matter on the papers and would call no witness. Mr Mlisana, acting *pro amico* for the Defendant, informed me that the Defendant had planned to testify on her own behalf at trial, on two issues: to show that the bonded property was her family home and that, although she was herself no longer primarily resident there, it qualified her for protection under section 26(3) of the Constitution as interpreted and applied in the matter of *Gundwana v Steko Development CC and Others* (*Gundwana*);[1] and to place information before me as to the incorrectly calculated arrears and her efforts over time to persuade the Plaintiff of its error.

[10] Unhappily, however, the Defendant was not present at court, but in Cape Town, so that she would be unable to testify as planned. This prompted Mr Mlisana to

[1] 2011 (3) SA 608 (CC).

bring an application, from the bar, for postponement of the trial. This application was opposed.

[11] I dismissed the application for a postponement. My reason for doing so was simply because the Defendant could offer no good faith explanation for her absence. Mr Wesley submitted – and was able to place the necessary documentary evidence to this effect before me – that the Defendant had timeously and properly been informed of the date of trial through her attorneys of record. Indeed, this was confirmed by Mr Mlisana in the explanation he sought to offer from the bar for the Defendant's absence – that she had erroneously thought that the date provided to her was the same date but in the next month.

[12] Even were I able to consider that explanation (which, it being offered by Mr Mlisana only from the bar, of course I could not), it would not have assisted the Defendant. As correctly pointed out by Mr Wesley, the date on which the Defendant on this version would have thought the trial was scheduled, was a Saturday. A mistake of this nature on the side of the Defendant, herself an officer of this court, after having been informed of the trial date by her attorneys, would not have constituted an acceptable explanation of her absence.

[13] Having so dismissed the application for postponement, I instructed the two counsel to prepare and submit written heads of argument and directed that I would decide the matter on the papers.

The Plaintiff's claim

[14] Mr Wesley presented the Plaintiff's case in simple and seemingly unassailable terms. In short, as if arguing an application for summary judgment, he submitted that the Defendant had no defence in law against the claim:

- there was a valid contract between the Plaintiff and Defendant, which in part determined that, should the Defendant fall into arrears with her monthly payments on the bond, the Plaintiff may unilaterally cancel the contract and claim payment in full of any amount outstanding on the bonds;

- the Defendant had fallen in arrears and the Plaintiff, invoking the relevant clause of the contract, cancelled the contract;

- the Plaintiff is now entitled to claim the outstanding amount from the Defendant, and to recover that amount through sale in execution of the bonded property.

[15] To this, Mr Mlisana for the Defendant had a two-fold response. First, he relied on the well-known judgment of the Constitutional Court in the *Gundwana* matter (above) to urge this court to consider in particular the Plaintiff's claim for sale in execution of the bonded property in light of considerations of justice and equity. Second, seemingly in reliance on the common law exception of *de errore calculi* in combination with the purported inordinate delay by the Plaintiff in prosecuting its claim, he urged this court to consider the fact that the Plaintiff would in all probability not have succeeded with its claim at the outset, had the correct amount of arrears been determined from the start.

[16] The major difficulty facing the Defendant with this two-fold defence is that the latter depends on the former. In order for this court at all to take account of the issues of justice and equity that the Defendant seeks to raise in the second leg of

its defence, it must be established that *Gundwana* and its progeny applies. That is, it must first be established that the bonded property is indeed a home.

[17] And here lies the rub: there is nothing on the papers, whether in the Plaintiff's particulars of claim or the Defendant's plea and the reams of supporting documentation to indicate whether or not the bonded property was indeed the Defendant's home; and the absence of the Defendant at trial deprived this court of the benefit of her oral testimony, tested under cross examination on this issue.

[18] This, Mr Wesley submitted, means that I cannot but hold that *Gundwana* does not apply. I cannot agree, for three reasons.

[19] First, the Constitutional Court in *Gundwana* was clear that it is the duty of a court to determine *mero motu* whether indeed a bonded property was a home; and if so, then of its own accord also to enquire into the relevant circumstances to determine whether or not it may be declared specially executable.[2] I am not excused of this duty simply because neither of the parties have placed information to that effect before me.

[20] Second, in *Standard Bank of South Africa Ltd v Natha*[3] my brother Legodi, then of this Division, held that where a plaintiff seeking an order declaring a bonded property specially executable seeks to escape application of *Gundwana*, it must

---

[2] *Gundwana* (above) para [43].

[3] (12133/2011) [2012] ZAGPPHC 103 (13 June 2012).

in its particulars of claim make a positive averment that the property in question is not a home:

> *[10]. … I think it is important to make such an averment if a party wishes to have immovable property to be declared specially executable or an order of execution against such a property. Reference to section 26(1) of the Constitution … in my view is not sufficient.*

[21] The Plaintiff in this matter has of course made no such positive averment – the only reference to the issue in its particulars of claim is to be found in paragraph 15.1. There, in much the same terms as were found insufficient in *Natha* (above), it simply draws the Defendant's attention to section 26(1) of the Constitution and states that, should the Defendant claim that an order for special execution against the bonded property will infringe that right, it must place information to that effect before the court.

[22] Third, I must approach this matter, as any other matter involving constitutional rights, with a generous approach to law and facts 'suitable to give to individuals the full measure of the fundamental right[…]' in question.[4] That is, to the extent that there is doubt here, the benefit of that doubt should go to the Defendant.

[23] In this light I am satisfied that, for purposes at least of considering the second leg of the Defendant's defence as set out above, the bonded property is the Defendant's family home, where her parents still live and to which she periodically returns.

---

[4] *Minister of Home Affairs v Fisher* [1980] AC 319 at 328H, as cited with approval in *S v Zuma and Others* 1995 (2) SA 642 (CC) para [14].

[24] From the papers it is clear that, prior to the Defendant leaving for Cape Town to do her pupillage, the bonded property was her home in this sense. The existence of the 'holiday period' agreement and the reasons for which it was concluded between Plaintiff and Defendant (all of which is common cause between the parties) indicate to me that the bonded property was at the very least at the time that summons was issued, but is most probably still today, her home in that sense.

[25] Accordingly, I hold that *Gundwana* indeed applies to this matter, so that I must consider the Plaintiff's claim, and in particular is claim for an order declaring the bonded property specially executable, in light of all relevant circumstances to determine whether granting the relief that the Plaintiff seeks, would be just and equitable.

[26] In this consideration again I am hampered by the failure of the Plaintiff and, to a lesser extent, the Defendant to place information at my disposal. Neither party has given any direct information about the impact, for instance, that granting the relief sought would have on the Defendant and her family in her constitutional housing rights. Very little has been placed before me also with respect to the actual prejudice that the Plaintiff would suffer would such relief not be granted.

[28] This is where the second leg of the Defendant's defence comes into focus and, as it happens, to my aid.

[29] Mr Mlisana in his heads of argument and indeed in his submissions during trial urged me to take into account the error in calculation of arrears at the time of

issuing summons, in my consideration of the justice and equity of the relief sought. He did not do so properly to invoke the exception of *de errore calculi*: to except to the Plaintiff's claim on grounds that it had incorrectly calculated the debt owed it (this, incidentally puts paid to Mr Wesley's objection that the Defendant had contracted out of reliance on this exception).

[30] Instead, Mr Mlisana simply urged me to consider that, had the arrears been calculated correctly, given the relatively trifling amount of real arrears at the time, the Plaintiff would in all probability never have issued summons, and even had it, would most probably not have succeeded at an ensuing trial.

[31] To this, he continued, must be added that the Plaintiff has taken an inordinate time eventually to prosecute its claim to trial, electing not to utilise summary judgment procedure at the outset and frustrating attempts of the Defendant to determine the correct amount of arrears and ensuing interest before eventually conceding that the original amount of arrears on the basis of which summons was issued was wrong. This means to him that any growth in the Defendant's debt to the Plaintiff in the interim, is not the fault of the Defendant.

[32] In light of these circumstances, he concluded, it would not be just and equitable for this court to grant the Plaintiff the relief it seeks.

[33] I agree with Mr Mlisana. In terms of the practice directive currently in force in this Division, applications for summary judgment where the arrears on the basis of which summons were issued are low and for a short time are routinely postponed *sine die* or for a lengthy specified period in order to allow the Plaintiff to recoup arrears through engagement with the Defendant, rather than through

litigation that leads to the loss of a home. If the correct amount of arrears were reflected from the outset, the Plaintiff would have had very little chance of succeeding in a summary judgment application, had one been brought. It is for this reason that it is highly unlikely that the Plaintiff would have issued summons originally had it known that the arrears at the time was only R16 000 and for approximately one and a half months.

[34] In addition, with the almost four years that have ensued since summons was issued to the date of trial, there was ample opportunity available to the Plaintiff, once it had become aware of its error, to attempt to resolve the matter through negotiation rather than proceeding to trial. That the Defendant was open to such resolution is indicated by the fact that she continued to make payments on the bonds to as late as May of 2017, when she made a payment of R60 000.00 (I was informed of this by Mr Mlisana from the bar, with Mr Wesley confirming the fact and amount of payment).

[35] In short, this is exactly the kind of 'disproportionality between the means used ... to exact payment of ... [a] debt, compared to other available means to attain the same purpose' that the Constitutional Court referred to with respect to the execution process in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*.[5]

[36] Accordingly, I hold that in light of all the relevant circumstances, but in particular the relatively low amount of arrears on the basis of which summons was initially issued; the long time it took for this matter to reach trial; and the apparent lack of effort from the Plaintiff to resolve this matter through any other means than a trial

---

[5] 2005 (2) SA 140 (CC)

leading to sale of the bonded property in execution, the Plaintiff is not entitled to the relief it seeks.

[37] I would think it eminently possible for the Plaintiff still at this late stage to come to an agreement through which it can recoup its arrears, while the Defendant retains her family home and would urge it to attempt to do so.

[38] This conclusion and my resultant judgment in this matter, of course, does nothing to prevent the Plaintiff, should it be unable to reach such a solution through agreement, approaching this court again for relief.

[39] The Plaintiff not having succeeded in its claim, it is unnecessary for me to deal with the question whether I should regard myself bound by the agreement between the parties, embodied in the bond agreement, that the Defendant shall be responsible for payment of costs of litigation ensuing from that agreement, on an attorney-client scale. Costs here simply follow the result.

[40] In the result, I order as follows:

The Plaintiff's claim is dismissed, with costs.

JFD Brand

Acting Judge of the High Court

Appearances:

For the Plaintiff: Mr Wesley

Instructed Snyman de Jager Inc

For the Defendant: Mr Mlisana

Pro amico