IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

(4) Signature Date 9/02/2018.

CASE NO: 32017/2017

9/2/18

FIRST RAND LIMITED	**APPLICANT**
and	
JOHANNES ANDREAS ROUX N.O	**1ST RESPONDENT**
KATRINA ROUX N.O	**2ND RESPONDENT**
JOHANNES ANDREAS ROUX	**3RD RESPONDENT**
KATRINA ROUX	**4TH RESPONDENT**

JUDGMENT

KHUMALO J

1] In this application, First Rand Limited ("the Applicant") seeks the following relief:

[1.1] Judgment to be granted against the Respondents jointly and severally, the one paying the other to be resolved for :

[1.1.1] Payment in the amount of R2,020 392.04

[1.1.2] Payment of interest on the amount of R2 020 392.04 calculated daily and compounded monthly, which amount is due and payable, at the RMB

Private Bank facility rate (currently 9.75%) plus 0.45% per annum, calculated from 6 February 2017 to date of final payment, both days inclusive;

[1.1.3] Cost of suit on a scale of attorney and own client;

[1.2] Judgement to be granted against the Third and Fourth Respondents for an order :

[1.2.1] declaring, Holding 19 Pashewa Agricultural Holdings,

Registration Division J R, Province of Gauteng,
Measuring: 4, 9702 hectares:
Held by Deed of Transfer No: T166045/07
Subject to the conditions therein contained specifically executable;

[1.2.2] directing execution against the mortgaged property referred to above

[2] Mr J A Roux and Mrs K Roux who are husband and wife are sued in their representative capacity as trustees of Equus Trust ("the Trust") a debtor of the Applicant, cited as the 1st and 2nd Respondent respectively. It is common cause that the 1st and 2nd Respondent in their capacity as representatives of the Trust, are in arrears with their repayments of a credit facility that has been extended to the Trust by the Applicant. They are also sureties on the credit facility having signed suretyship binding themselves as such jointly and severally as also co-principal debtors *in solidum* with the Trust. They are in that capacity cited as the 3rd and 4th Respondent.

[3] According to the terms of the facility agreement that Applicant is reliant upon:-

[3.1] default on the facility would be if:

[3.1.1.] they fail to pay any amount owing to the Applicant when it is due;

[3.1.2] they fail to pay the rates and taxes on any mortgaged property to the Applicant on time or any insurance policy.

[3.2] If in default of the facility, then the Applicant may withdraw the facility and claim immediate repayment of the full outstanding balance, or terminate the facility without affecting any of its other rights.

[3.3] a certificate signed by an authorised employee of the Applicant shall constitute *prima facie* evidence of the outstanding balance owing due and payable and of the rate of interest payable or due any other amount owing and or due and payable to the Applicant in terms thereof and or any other matter from or related to the facility.

[4] The Applicant alleges that besides the arrears on their credit facility, rates and taxes on the mortgaged property are also owed to the municipality in the amount of R81 175.90.

[5] The Applicant is as a result of the Rouxs' breach of their contractual obligations in terms of facility agreement claiming payment of the full amount payable under the facility agreement plus interest that is according to the certificate of balance an amount of R2 020 392.04 as from February 2017.

[6] The Rouxs have as security for their suretyship caused two mortgage bonds of R2 000 000.00 and R500 000.00 to be passed and registered in favour of the Applicant, over their residential property, Plot 90- 3rd Avenue, 19 Pashewa Agricultural Holdings, Tierpoort. It is the property that the Applicant seeks to be declared specially executable, in lieu of the debt owed.

[7] In their answering affidavit deposed to by Mr Roux, the Rouxs are resisting the Application even though they concede that the money is owing. They allege that at the time of the grant they were not in a financial position to make any repayments and the Applicant failed to ensure that they are creditworthy when the facility agreement was concluded in 2010. They argue that the Applicant did not act according to the provisions of s 81 (2) of the National Credit Act 34 of 2005 (" NCA") when it negligently and irresponsibly granted them the loan facility. Therefore the matter should have been referred to mediation.

[8] Moreover on 13 April 2016 the Applicant obtained a writ against their movables and they were able to settle all the arrears that were outstanding which were in the region of R554 768.00.

[9] Furthermore, they claim not to believe that they consented to the fact that the loan facility be transferred to a mortgage bond. They say the money was used to renovate the property and admit that they did not make payments according to the loan agreement during 2016.

[10] They point out that they had however in respect of this application tendered payment of all the arrears and all the costs involved in bringing this Application. A letter dated 3 July 2017 in which their attorney tenders the payment and requests to be furnished with the calculations of the amounts to be paid is annexed to the Affidavit. The letter was sent to Applicant's attorneys by fax on the same day.

[11] They therefore pray for the Application to be dismissed with costs and the matter to be stayed and that the Applicant delivers a declaration so that the matter can be heard with verbal evidence.

[12] In Reply the Applicant denies that a thorough investigation of the Rouxs financial standing was not done and attaches the outcome of such a test, indicating a high score of 28 to prove that it ensured that the Rouxs will afford the bond and be able to repay. The Applicant for that reason disputes that the matter should be referred to mediation. Seemingly the Respondents had no conviction on the point, as it was not argued any further by the Respondent's Counsel.

[13] The Applicant also acknowledges that there was indeed a prior default by the Rouxs in 2016 and that the credit agreement was definitely reinstated as alleged when they settled the arrears and the total costs. However he argued that with their request for reinstatement amount in this Application, the Respondents are abusing the process and that cannot continue.

[14] The Applicant further argues that with the amount that is owing to the municipality, the Respondents have committed a breach that, in accordance with the facility agreement, takes them out of the realm of s 129 (3) of National Credit Act protection. Hence they cannot in that case reinstate the credit agreement, subsequent to the acceleration of the debt.

[15] Section 129 (3) (a) of the NCA reads:

'Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement.

[16] Whilst s 80(1) of the NCA reads:

Reckless lending

1. A credit agreement is reckless if, at the time that the agreement was made, or the time when the amount proved in terms of the agreement is increased, other than an increase of s 119 (4)-

(a) The credit provider failed to conduct an assessment as required by s 81 (2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) The credit provider, having conducted an assessment as required by s 81 (2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that-

(i) the consumer did not generally understand or appreciate the consumer's risk, cost or obligations under the proposed credit agreement; or

(ii) entering in to the credit agreement would make the consumer over indebted

[17] The Applicant has indicated that a thorough investigation was conducted and the Rouxs got a Financial Rating of 28, which is a very good rating. The allegation of reckless lending and of mediation therefore has no merit. Especially if its compared to the assertion the Rouxs made regarding their previous settlement of the arrears plus costs and the tender they made on this occasion to settle the overdue amounts and the costs, their allegation is indeed irrational as observed by the Applicant's Counsel. The Respondents have also not furnished the court with sufficient from which it could be established if a case is made to find that it the credit was granted recklessly in contravention of s 80 (1) of the NCA.

[18] Nevertheless, as sureties the Rouxs do not fall within the definition of a consumer in s 1 of the Act. They are not considered as such for the purpose of s 80 (1) and their existence neither here or there until the principal debtors have failed to comply with their obligations. In the matter of *Absa Bank v De Beer and Others* 2016 (3) SA 432 (GP), at '[54]

and [61], the court held that the requirement that reasonable steps must be taken to assess the proposed consumer's existing means, prospects and obligations also meant that the assessment must be done reasonably, i.e not irrationally. It was clearly irrational to have taken the sureties' income into account in reaching the conclusion that the "existing financial means" existed to pay the instalments. A surety did not fall within the definition of a consumer in s 1 of the NCA. It was emphasised that a surety remains totally out of the picture until the principal debtors have failed to comply with their obligations.

[19] With regard to the tender made to pay the arrears and costs in order to reinstate the agreement in terms of s 129 (3), it has been argued on behalf of the Applicant that the credit agreement is not capable of reinstatement due to the fact that the Rouxs' other breach relied upon by the Applicant is independent from the facility agreement, for that reason the Respondents are barred from reinstating the agreement.

[20] The argument is misguided. Provided both arrear debts and the concomitant costs are all paid up, resulting in the correction of the breaches committed, if the contract not yet cancelled, the credit agreement should be capable of resuscitation.

[21] It will therefore mean that since the Applicant had relied on both breaches in enforcing the acceleration of the debt, both being mentioned in its s 129 Notice and the particulars of claim, for the tender to be adequate to put off the acceleration of the debt, it must also include the undertaking to pay up or allegation to have paid up (to correct) the municipality debt also . In that case if there is no indication of the other breach having been corrected or of a specified undertaking to do so, the tender will not be sufficient to delay the Applicant from enforcing the payment of the accelerated debt. At the time of such a tender and its fulfilment, the agreement should not have been cancelled.

[22] The Applicant has argued that the tender should have resulted in a payment for it to be effective. However in the instance where the credit provider has failed to respond to a request for the calculations of the total arrears and costs, such a tender should be sufficient to challenge the enforcement of the acceleration of the debt; see De Bruin v First Rrand Bank Limited t/a Wesbank (42493/2015) [2017] ZAGPJHC 132 (5 May 2017). It should be clear that it is not good to reinstate the credit agreement but to delay the enforcement of the accelerated debt; see *Nkata v First Rand Bank Limited and Others* 2016 (4) SA 257 (CC) AT [51], reinstatement can be effected by paying the amounts s 129 (3) requires. At [68] Cameron J held that what it mean is that Ms Nkata had to pay those costs, or, at least, to tender payment of them.

[23] The Applicant's final argument on that point was that their request for reinstatement amount in this Application, is an abuse of the process and that cannot continue. In *Nkata v First Rand Bank Limited and Others*, despite periodically falling behind in her payments, Ms Nkata paid up all her arrears and the court found the credit agreement to have been reinstated in all those instances. Moreover taking into account that the credit agreement was not cancelled, therefore legible for reinstatement when the arrears were settled.

[24] The Rouxs tender however did not address the issue of the second breach. It therefore is not good for the purpose of preventing the Applicant from enforcing the acceleration of the debt. The Applicant is therefore entitled to a judgment for the accelerated debt.

[25] On the order that is sought for the execution of the surety's property that has been registered as security for the debt. I have been implored to take into account that the property mortgaged is the primary residence of the Rouxs and to consider the application in of the provisions of Rule 46 (1) (a) that states that:

> 'No writ of execution against immovable property of any judgment debtor shall issue until_
>
> > (i) a return shall have been made or any process which may have been issued against the immovable property of the judgment debtor from which it appears that the said person has not sufficient immovable property to satisfy the Writ; or
> >
> > (ii) such immovable property shall have been declared to be specially executable by the court, or in the case of a judgment granted in terms of Rule 31 (5) , by the Registrar: provided that, where the property sought to be attached is the primary residence of the judgment debtor, no Writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property"

[26] There is no reason for the court to declare the property specially executable. The property is indeed the Rous primary residence'. All the Notices and the legal proceedings were served at the property which is indicated to be their residential address. In Gondwana v Steko Development and Others the CC held that :

> 'Where the 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.

[27] I have also for the consideration of this order taken into account that they have tendered the payment of the amount required to bring the payments under the facility up to date. The fact that they have previously managed to settle their arrears and all the Applicant's costs reinstating the credit agreement. The debt was not secured for the purpose of buying the property but for improvements. The age of the Rouxs being 49 and 50 years old respectively. The Applicant did not file a statement to indicate the status of the debt at the time of the Application for default judgment.

[28] Under the circumstances the following order is made:

> [1] Judgment is granted against the Respondents jointly and severally, the one paying the other to be resolved for :
>
> > [1.1] Payment in the amount of R2,020 392.04
> >
> > [1.2] Payment of interest on the amount of R2 020 392.04 calculated daily and compounded monthly, which amount is due and payable, at the RMB Private Bank facility rate (currently 9.75%) plus 0.45% per annum, calculated from 6 February 2017 to date of final payment, both days inclusive;
> >
> > [1.3] Cost of suit on a scale of attorney and own client;

[2] the Application for Judgement to be granted against the Third and Fourth Respondents for an order :

[2.1] declaring, Holding 19 Pashewa Agricultural Holdings,

Registration Division J R, Province of Gauteng,
Measuring: 4, 9702 hectares:
Held by Deed of Transfer No: T166045/07
Subject to the conditions therein contained specifically executable;

[2.2] directing execution against the mortgaged property referred to above.

is postponed sine die

[2.3] execution to be effected against the movables

N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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