

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: 2022-060705

Date of hearing: 12 February 2024

Date delivered: 21 February 2024

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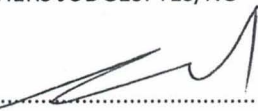
(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

(3) REVISED

21/2/24

DATE



SIGNATURE

In the application between:

FIRSTRAND BANK LTD

t/a FNB HOMELOANS

Plaintiff

and

DINA-BLESSING MMAGAUTA

MOLEFE

Defendant

JUDGMENT

SWANEPOEL J:

[1] This is an application for summary judgment in which the plaintiff claims payment of R 305 380.08, interest on the aforesaid amount, and an order declaring the immovable property situated at Section 16 in the Scheme known as Chapmans Peak, situate at Erf [REDACTED] Township, City of Tshwane Metropolitan Municipality 28 ("the property") specially executable. The plaintiff also seeks an order setting a reserve price, and costs on the attorney/client scale.

[2] The plaintiff's case is based on a loan agreement between the parties dated 28 July 2015, and a mortgage bond which was registered over the property as security in favour of the plaintiff.

[3] Defendant, who appeared in person, raised the following defences in her plea:

[3.1] That this Court does not have jurisdiction to hear the matter, as the amount claimed falls within the jurisdiction of the Regional Court;

[3.2] The defendant admits entering into a loan agreement with the plaintiff, but denies having signed the written agreement on which the plaintiff relies, and furthermore, that the loan amounted to R 320 000.00;

[3.3] The defendant denies that the summons was served at the correct domicile address;

[3.4] The defendant says that an order declaring the property specially executable would infringe on her Constitutional right to housing under section 26 of the Constitution.

[3.5] The defendant denies that the notices in terms of section 129 of the Act were sent to the correct domicile address.

[4] The defendant made much of the fact that the annexures to the summons were not served on her, and that the plaintiff had failed to comply with rule 18 (6) of the Uniform Rules. However, the defendant has not taken the point that this constituted an irregular step, and delivered a plea nonetheless. Conspicuously absent from the plea is any reliance on

reckless lending as defined in section 80 of the Act. In a claim in reconvention the defendant pleads that the plaintiff never conducted a credit assessment and that the loan constitutes reckless lending within the meaning of section 80. The defendant says that her net salary amounted to R 8 232.12, and that she was never able to afford the mortgage bond repayments. Consequently, the defendant says that her property should be declared to be "in-executable", that all amounts paid by her be repaid by the plaintiff, and for all loan agreements between the plaintiff and the defendant be declared to be null and void, even those entered into after the home loan was entered into.

[5] The counter-claim is not before me. I have to adjudicate the matter on the plea as it stands, together with the affidavit opposing summary judgment. However, as defendant is acting in person, I shall touch on the reckless lending defence which only emerges from the counter-claim.

[6] It is also perhaps appropriate to deal, at this stage, with an application brought by the plaintiff to condone the late filing of the application for summary judgment. The defendant delivered her plea and counter-claim on 6 March 2023 by email, despite the parties not having agreed to electronic service. The application for summary judgment was due on 27 March 2023, but was only served on 20 April 2022, 16 court days late. The plea and counter-claim, and the annexures thereto, amount to 94 pages, some of which were allegedly difficult to decipher. The plaintiff alleges that the defendant made a vast number of allegations, which took some time to investigate. Having read the plea and counter-claim myself, I agree that the defendant has raised numerous defences which would have taken a substantial time to investigate, and due to her being a lay person, she not always plead in a clear and concise manner. The deponent to the affidavit in support of summary judgment also suffered a family crisis in that time, to which he had to attend.

[7] The plaintiff is seeking an indulgence, and must explain the delay fully. In my view the plaintiff has done so, and I believe that condonation should be granted for the late filing.

[8] The defendant says that she obtained the home loan with the assistance of a bond originator. The bond was originally granted for R 300 000.00, the exact amount of the purchase price. At some stage the defendant was told that the transfer costs amounted to R 20 600.00, and that she would have to pay this amount before transfer could be effected. The defendant again approached the plaintiff who granted her a further loan of R 15 000.00. The defendant paid in the balance of the transfer fees.

[9] The defendant denies signing any agreement or quotation. She says that the signature on the agreement upon which the plaintiff relies was forged by someone else. Nonetheless, the defendant does not deny entering into a home loan agreement, she does not deny the terms of the agreement, nor does she deny receiving the monies (albeit that the money was paid to the conveyancers on her behalf). I must say that I find it difficult to believe that the plaintiff would advance a home loan without a signed agreement being in place. The defendant admits that she visited the bond originator's offices, but, she says, she never signed this agreement. Nonetheless, although the defendant denies that she signed the agreement, it is not in dispute that the loan agreement was entered into upon the terms contained in the written document. This defence is consequently a mere red herring.

[10] The defendant also has a problem with the fact that the home loan was for R 315 000.00, and she says that the additional R 15 000.00 should have been given to her as a personal loan. I see no difference whether the loan was termed a personal loan or a home loan. This is also no defence to the claim.

[11] As far as the jurisdiction defence is concerned, the Constitutional Court has disposed of this issue.¹ A High Court may not refuse to exercise its jurisdiction in a matter in which a Magistrates Court has concurrent jurisdiction. It may, however, be appropriate only to award costs on the Magistrates Court tariff.

[12] The defendant's allegation that both the summons and the section 129 notices were sent to the incorrect address, and that she never received the section 129 notices can be disposed of simultaneously. The defendant's chosen domicile address according to the agreement is 721 Stanza Bopape Street, Arcadia.

[13] It is now trite that if a section 129 notice is delivered to the domicile address by registered mail, and the delivery is proven by proof of posting by registered mail, and a track and trace report evidencing delivery to the nearest post office, that is sufficient to prove delivery for purposes of section 129.² The plaintiff has delivered the section 129 notice in accordance with the *Sebola* judgment. The plaintiff has also shown that the summons was served by the Sheriff of Court at the domicile address on 19 January 2023. Once again, this point does not raise a triable issue.

[14] The further point to consider is the defendant's allegation that her Constitutional right to housing would be infringed should the order be granted declaring the property specially executable. The Constitutional Court has held on a number of occasions that it is not unconstitutional to declare a property specially executable, but that, where it is a person's primary residence, as in this case, a Court must determine whether it is justifiable to make such an order, given the individual facts of each case.³

¹ *South African Human Rights Commission v Standard Bank of South Africa Ltd* 2023 (3) SA 36 (CC)

² *Sebola and Another v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC)

³ *Gundwana v Steko Developments and Others* 2011 (3) SA 608 (CC) at para58

In *Jafftha v Schoman and Others; Van Rooyen v Stoltz and Others*⁴ the Court said:

“Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure.”

[15] The property is the primary residence of the defendant and her husband and children. In this case the defendant willingly put up the property as security for the loan. As at 13 April 2023, shortly before the application for summary judgment was launched, the defendant owed R 313 945.70 on the property, and she was in arrears with approximately ten instalments totaling R 37 753.33. By June 2023 the arrears had escalated to R 45 941.02. the last payment on the bond was made on 3 February 2023 in the sum of R 2000.00. In addition, the defendant was indebted to the body corporate of the Sectional Title Scheme in the sum of R 167 861.58 in respect of arrear levies.

[16] Even if I were to exercise my discretion against granting an order declaring the property specially executable, it is likely that the body corporate will at some stage foreclose on the property. On the defendant's own version, she is unemployed and unable to afford the bond payments. As much as I sympathize with the defendant's position, I cannot find any basis not to grant the order sought.

[17] Finally, although reckless lending was not pleaded, it was touched on in the counter-claim, and in argument, and I will deal with the issue in this judgment. Effectively the defendant says that it was crystal clear to all concerned, that when the loan was granted, the defendant could not afford to service the bond. In her heads of argument, the defendant says that she became unemployed in 2019. Until then, she says, she paid the

⁴ 2005 (2) SA 140 (CC)

bond "without fail". Her salary was paid into her account monthly, and the debit orders were invariably paid. That fact, in my view, puts paid to the defendant's assertion that she was always unable to afford the loan. She in fact paid the loan for some four years without defaulting.

[18] In my view the defendant has not demonstrated any triable issue. I am satisfied that summary judgment should be granted. However, to allow the defendant the opportunity to locate alternative accommodation, or to resolve the arrears (if possible), I intend to suspend the order for three months.

[19] Consequently, I make the following order:

[19.1] The late filing of the application for summary judgment is condoned;

[19.2] Judgment is granted for payment of the amount of R 305 380.08;

[19.3] Defendant shall pay interest on the aforesaid amount at a variable rate of 12.76% nominal per annum calculated daily and compounded monthly in arrears from 30 November 2022 to date of payment;

[19.4] The immovable property described as:

a.) Unit consisting of Section No. 16 as shown and more fully describe on sectional Plan No. SS156/1982, in the scheme known as CHAPMANS PEAK in respect of the land and building or buildings situate at ERF [REDACTED] [REDACTED]

TOWNSHIP, LOCAL AUTHORITY: CITY OF TSHWANE
METROPOLITAN MUNICIPALITY, of which the floor area,
according to the said sectional is 39 (THIRTY NINE) square
metres extent; and

- b.) An undivided share in the common property in the scheme
apportion to the said section in accordance with the
participation quota as endorsed on the said sectional plan.

Held by Deed of Transfer no [REDACTED]


is declared to be specially executable for the aforesaid
amounts.

[19.5] The Registrar is authorised to issue a Writ of
Execution in terms of Rule 46 as read with Rule 46A for
the attachment of the Property;

[19.6] The reserve price is set at R 100 000.00;

[19.7] Costs of suit on the attorney and client scale, to
be taxed.

[19.8] This order is suspended for three months from
date of judgment.



SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

COUNSEL FOR PLAINTIFF:

Adv. A Ellis

ATTORNEY FOR PLAINTIFF:

**Friedland Hart
Solomon Nicolson
Attorneys**

COUNSEL FOR DEFENDANT:

In person

ATTORNEY FOR DEFENDANT:

In person

DATE HEARD:

12 February 2024

DATE OF JUDGMENT:

21 February 2024