IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 1481/2012

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

STEPHANUS DAVID WESSEL DU TOIT First Defendant
(I.D.: 8[…]

MONA DU TOIT Second Defendant
(I.D.: 8[…])
(Married in community of property)

HEARD ON: 18 FEBRUARY 2014

JUDGMENT BY: C. REINDERS, AJ

DELIVERED ON: 6 MARCH 2014

---

[1] On 11 April 2012 the Plaintiff issued summons against the 1st and 2nd Defendants for:

"1. Payment of the sum of R 371 672,39.

2. Interest on the sum of R371 672,39, together with interest on the sum of R0 - 180 000.00 at the rate of 8.00% per annum and interest on the sum of R 180 000.00 - 371 672.39 at the rate of 9.00% per annum compounded monthly in arrear from 15 March 2012 to date of payment.

3. Monthly insurance premiums from 15 March 2012 on the sum of R 235,20 to date of payment.

4. An order declaring:

   ERF 1508 ODENDAALSRUS (EXTENSION 2) DISTRICT ODENDAALSRUS, PROVINCE FREE STATE, MEASURING 644 SQUARE METRES, HELD BY DEED OF TRANSFER NUMBER T 20555/2008, to be specially executable.

5. Cost of suit on an attorney and client scale."

[2] Hereafter the Plaintiff applied for summary judgment, which application was dismissed on 2 August 2012. Defendants filed their plea on 19 September 2012.

[3] During the Rule 37-conference held on 17 January 2014 the parties noted that the issues to be decided are "as contemplated in the pleadings". However, at the commencement of the proceedings I was informed by Mr Olivier, on behalf of the Plaintiff, that the parties agreed that all allegations in the particulars of claim are admitted safe for the question whether the Plaintiff's termination of the Defendants' debt review under Section 86(10) of the National Credit Act 34 of 2005 (The NCA) was premature. Mr van Rensburg on behalf

of the Defendants confirmed same. The latest transaction record of the outstanding amount due by Defendants in respect of the bond (R452 674,94 on 18 February 2014) was handed up by Mr Olivier with Mr van Rensburg admitting the correctness of the contents thereof. I have marked it as “Exhibit A”, whilst the Defendant handed up a bundle (containing inter alia the pleadings, opposition to the summary judgment application and documentation pertaining to the application for debt review by the Defendants) which I have marked as “Exhibit B”.

[4] Section 86(10) of the NCA reads as follows:

> “If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to-
>
> (a) the consumer
>
> (b) the debt counsellor; and
>
> (c) the National Credit Regulator,
>
> at any time at least 60 business days after the date on which the consumer applied for the debt review.”

[5] It is thus clear from sec 86(10) that the following prerequisites for termination of the debt review by the credit provider should exist: The consumer must be in default under the credit agreement that is being reviewed; notice of termination of the debt review should be given by the credit provider to the

consumer, the debt counsellor and the National Credit Regulator and least 60 business days should have expired from the date on which the consumer applied for debt review before the said notice can be given.

[6] *In casu* the Defendants were in default with their repayments under the bond and by reason of their failure to pay any or all of the agreed instalments, the whole of the outstanding amount became due. In par 10 of the Plaintiff's Particulars of Claim it is averred that

> "(t)he defendants have failed to timeously and punctually perform their obligations under the terms and conditions of the said mortgage bonds by falling into arrears with the monthly instalments, and which arrears, the Defendants despite demand fails and/or refuses and/or neglects to pay."

As per the submissions made to me by Mr Olivier, and confirmed by Mr Van Rensburg, this fact was not in issue. Mr van Rensburg conceded that the Defendants were in arrears with their repayments but submitted that they fell behind as phrased by him "due to the process", hinting that the defendants had fallen in arrears by virtue of the fact that they had made an application for debt review and accrued debt counsellor fees and legal costs as a consequence thereof. Mr van Rensburg argued that the Defendants had voluntarily applied for debt review before the Plaintiff issued summons. Although the latter fact is undisputed, it is also common cause that the Defendants were in arrears with the monthly

instalments of the mortgage agreement at the time when the Plaintiff gave notice in terms of sec 86(10) of the NCA and whilst the debt review was still pending. This is evident from the Defendants' opposition to the summary judgment application where it is stated in par 3.15 as follows:

> "The initial bond repayments were made since 30 January 2010 until 28 May 2011. At this point we ran into financial trouble. It is therefore that no payments were made for June to August 2011 and that we applied for debt review in June 2011."

The Defendants then gave an exposition of the monthly payments that they proceeded to make in the amount of R1526,78, being less than the bond instalment of R3364,98. That the Defendants were in default in terms of the mortgage bond on 23 November 2011 cannot be disputed.

[7] It is common cause that the Defendants applied for debt review on 29 August 2011. On 23 November 2011, 62 business days after the application for debt review, the Plaintiff gave notice of termination of the debt review to the Defendants (per registered post), the debt counsellor and the National Credit Regulator (both via e-mail).

[8] Mr van Rensburg argued that the Plaintiff was "actively involved in the debt review within the sixty day period" due to the fact that the application for debt review was opposed by the Plaintiff, and that the position would have been different had the Plaintiff

not “participated” in the debt review proceedings. I cannot agree with Mr Van Rensburg. There is no indication in sec 86(10) that the Plaintiff is precluded from terminating the debt review in the event of any involvement in the pending debt review within the prescribed 60 day period.

[9] According to Mr van Rensburg the Plaintiff did not act in good faith by issuing summons against the Defendant after being involved in the debt review proceedings opposing the application thereof, and thus the Plaintiff did not have the right to terminate the debt review. Whilst it is true that the defendant could have raised the Plaintiff’s failure to act in good faith as a request to the court not to grant summary judgment, it does not follow that the Plaintiff could for the same reason not terminate the debt review and issue summons. No request for a resumption of the review process as is envisaged in Sec 86(11) of the NCA was made by Defendant. (**Collett v Firstrand Bank Ltd** 2011 (4) SA 508 (SCA) par [17])

[10] The question as to when a credit provider is entitled to terminate a debt review was extensively dealt with by the Supreme Court of Appeal in **Collett**, *supra*. It was confirmed that a credit provider may terminate a debt review in terms of Sec 86(10) of the NCA even after a matter has been referred to the magistrate’s court (par [6] and [14] at 511E-F and 517B-D). The court articulated per Malan JA at par [12] (516 D-E):

> "It is not that the credit provider is 'derailing' the process when he terminates the debt review: it is the consumer that is in breach of contract, not the credit provider."

[11] Mr van Rensburg pressed hard upon me to consider the aim of the NCA and also the Constitution when deciding the matter. Indeed, the overriding purpose is to protect consumers from a relatively unbrindled freedom of contract. Credit providers also have rights, and the balance is struck by a push/pull tension between the consumer and credit provider. However, not only are the interests of consumers and credit providers at stake when determining where the balance should be struck, but also the national economic interest which is affected by consumers borrowing and over- or underspending and credit providers' ability to recover debts. (**Firstrand Bank Ltd v Mvelase** 2011 (1) SA 470 (KZP))

[12] I am bound by the decision of the SCA as stated in **Collet**, *supra* and cannot find otherwise as that the Plaintiff was acting within their rights to terminate the debt review in terms of Sec 86 (10) of the NCA and issue summons against the Defendants.

[13] Plaintiff prayed for an order permitting execution of the judgment to be levied against the defendant's immovable property. Such an order is ordinarily sought and granted in mortgage-bond cases contemporaneously with, and ancillary to, the order granting judgment sounding in money, and should

be entertained by the court. (**Absa Bank v Petersen** 2013 (1) SA 481 (WCC))

[13] The Defendants pleaded that the premises is their primary residence and I am therefore obliged to do a judicial oversight of all the relevant circumstances as is envisaged in rule 46(1)(a)(ii) and **Gundwana v Steko Development and Others** 2011 (3) SA 608 (CC) before granting the defendant's immovable property specially executable.

[14] Mr van Rensburg submitted that there is no allegation by Plaintiff in the summons that the immovable property is the only property belonging to the defendants, thereby suggesting that the defendant might have other immovable or movable property available for sale in execution to satisfy the judgment debt. In the application for debt review the debt counsellor indicated in par 7.7 as follows:

> "I must reiterate that the Consumers informed me that they have no other means and/or assets to realize in order to reduce and/or clear their debt…"

[15] Apart from the submissions by Mr van Rensburg as stated in par [6] and [14], no other facts were placed orally before me as to why execution against the property should not be granted.

[16] However, par 2.8 of Defendant's plea contained facts which were taken into account by me in reaching a conclusion as to why execution against the immovable property should follow or not: the property is the Defendants' primary residence; the Defendants would be left with a financial burden; the property is valued at "more than R 700 000,00"; the Defendants had made an offer to the Plaintiff which is still pending; selling the property on an auction would prejudice the Defendants and Plaintiff failed to engage in other means to recover outstanding amounts.

[17] That the mortgaged property is the Defendant's primary home, is not in itself a reason to deny the mortgagee's contractual right to realise its security. As was stated by Binns-Ward J in **Absa Bank v Petersen**, *supra* at par 37:

> "Indeed, by giving the property in security the defendant voluntarily derogate from the extent of his full dominium over the property in favour of the bank. He did so for his own benefit and upon an undertaking in favour of the bank that, if he defaulted in his payment obligations to the bank, the full amount owed by him would become immediately due and payable, and the property given as a security could be sold to realise the funds to settle the debt."

[18] From Exhibit B (p46) it is clear, with respect, that the Defendants are not indigent. The gross salary of the First Defendant is indicated as R 25 059,41, with no submission

before me that this amount has been reduced. Surely it is possible that the Defendants would be able to obtain accommodation by renting a place even if not suitable to their needs, and that they would not be left completely homeless. It was confirmed by Mokgoro J in **Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others** 2005 (2) SA 140 (CC) at 162 F that a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. It was not argued, nor can it be derived in any way, that there was an abuse of court procedure *in casu*.

[19] The averment that the Defendants would be left with a financial burden is in conflict with the averment that the property worth more than R 700 000,00, taking into account that the amount owing to the Plaintiff is R 452 674,94. One can only wonder why the Defendants did not attempt to market the property and place this information before court. As for the averment that selling the property on a forced sale would prejudice the Defendants, it is also without substance, because it would defeat the purpose of having the immovable property as security. As far as the “pending” of an offer and the Plaintiff’s failure to engage in other means to recover the outstanding amounts is concerned, it has already been considered and confirmed by me that the Plaintiff acted within its rights to terminate the debt review and institute litigation. More than a year has lapsed since the Defendants had filed their plea and opposition to summary judgment, and due to the fact that no

new information was placed before me for consideration, the inference drawn by me is that these were the only circumstances relied upon by the Defendants.

[20] In considering the payment history of the defendants up until the hearing, it is clear that the Defendants endeavoured to make payments on a regular basis and that the legal costs contributed to the outstanding amount and the arrears of R42 258,66 (120 days+). However, the balance owing on the mortgage bond (R 452 674,94) exceeds the amount of the loan (R 355 000,00) by almost R 100 000,00. If the defendants were attempting to obtain the money owing from another source, I would have expected such information to be placed before me at the hearing, but in the absence thereof I have no other inference to draw as that the Defendants would not be able to pay the arrears. In fact, in opposing the application for debt review the Plaintiff indicated that the Defendants proposal for repayment was not fair, just and rational. The plaintiff as a financial institution has a legal right and obligation towards clients whose money is being utilised to fund mortgage bonds, to minimise its losses. As Froneman J articulated in **Gundwana**, *supra*, at 626 par [54]:

> "It must be accepted that execution in itself is not an odius thing. It is part and parcel of normal economic life."

[21] Taking all the above relevant factors into account, it leaves me to conclude that the Plaintiff is entitled to an order declaring the immovable property specially executable.

[22] No submissions were made before me regarding the prayer for payment of insurance premiums. I am thus not willing to grant such a prayer as it appears from Exhibit A that monthly insurance premiums are being debited. As far as costs are concerned Mr van Rensburg conceded that cost should follow the cause. I find no reason to deviate therefrom, safe that I find no reason to award costs on an attorney and client scale.

[23] In the premises the following order is made:

1. Payment in the amount of R 452 674,94.

2. Interest on the said amount calculated from 18 February 2014 as follows:
   On the first R 180 000,00 at 8,00% per annum.
   On the balance at 9,00% per annum.

3. An order declaring:
   ERF 1508 ODENDAALSRUS (EXTENSION 2) DISTRICT ODENDAALSRUS, PROVINCE FREE STATE, MEASURING 644 SQUARE METRES, HELD BY DEED OF TRANSFER NUMBER T 20555/2008, to be specially executable.

4. Cost of suit.

C. REINDERS, AJ

On behalf of Plaintiff:	Adv J Olivier Instructed by: Hugo & Bruwer Attorneys BLOEMFONTEIN
On behalf of Defendants:	Adv HCJ Van Rensburg Instructed by: Van Pletzen Lambrecht Attorneys BLOEMFONTEIN

/sp