IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 17658/202

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED. YES
23/09/2021

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

And

SOLOMON SITHOLE First Respondent
NOBESUTHU SITHOLE Second Respondent

JUDGMENT

MINNAAR AJ:

1. The applicant seeks the following relief:

Claim A: Against the first and second respondents, jointly and severally, the one paying the other to be absolved, for:

1.1. Payment of the sum of R1 697 905.78 together with interest thereon at the rate of 5.75% per annum, calculated daily and compounded monthly in arrears from 12 May 2020 to date of payment, together with monthly insurance premiums of R2 847.74;

1.2. Declaring the following immovable property executable:

Remaining Extent of Erf [....] Hurlingham Township, Registration Division I.R, the Province of Gauteng, measuring 2568 (two thousand five hundred and sixty-eight) square metres, held by Deed of Transfer No. T[....] ("the Immovable Property");

1.3. Authorising the Registrar of this court to issue a Warrant of Execution against the Immovable Property of the first and second respondents;

1.4. Setting a reserve price in the amount of R3 525 000.00;

1.5. Costs of the application on the attorney and own client scale.

Claim B as against the first respondent, for:

1.6. Payment of the sum of R215 492.33 together with interest thereon at the rate of 7.75% per annum, calculated daily and compounded monthly in arrears from 25 April 2020 to date of final payment;

1.7. Costs of the application on the attorney and own client scale.

2. Claim A is premised on a Liberator Agreement concluded between the parties on 26 June 2007. As security for the respondents' indebtedness under the Liberator Agreement, the applicant holds five continuing covering mortgage bonds over the Immovable Property.

3. Claim B is premised on an overdraft facility entered into between the applicant and the first respondent during May 2015.

4. The conclusion and existence of the agreements are common cause between the parties. The respondents, through the first respondent (being the deponent to the answering affidavit) states that he does not dispute the applicant's claim in principle, and he is willing to pay it. He further admits that they are in breach and states that they are fully intended to make the payments that were not made and that they will continue to make payments as cash flow permits.

5. As at 28 January 2020 the arrears in terms of the Liberator Agreement was an

amount of R145 758.54. I have requested updated arrears to be uploaded. I am of the view that this should be a requirement in all foreclosure applications concerning primary residences. This updated evidence will assist the court in determining the seriousness of consumers in protecting their primary residence. If, for instance, there was a serious effort by a respondent to continue to make payment, then I am of the view that such positive approach should be to the benefit of a respondent. The contrary is however also true.

6. In terms of the updated arrears, the arrears have escalated. As at 17 August 2021 the arrears in terms of the Liberator Agreement, was an amount of R1 401 739.49.

7. Despite admitting their breach and undertaking to rectify same when their cash flow allows for it, the respondents, as they are entitled, raised various technical defences. Save for a possible defence of reckless credit, the other defences raised are of no assistance to the respondents.

8. With regard to the alleged reckless credit, it is the case of the respondents that no credit assessment, as provided for in sections 80 and 81 of the National Credit Act 34 of 2005 ("the NCA") was done and as such that the agreements should be declared reckless in terms of the provisions of section 83 of the NCA. On a reading of the replying affidavit, evidence is provided that assessments were in fact done in respect of both the Liberator Agreement and the overdraft facility. The respondents' stance is that this court should ignore the evidence presented in the replying affidavit pertaining to the assessments that were done as same should have been included in the founding affidavit. I cannot agree with the respondents in this regard. It cannot be expected of an applicant to foresee what defence will be raised in an answering affidavit and to counter same by addressing all possible defence in the founding affidavit. The respondents raised this defence in their answering affidavit and as such the applicant was fully entitled to reply to same.

9. The respondents' reliance on alleged reckless credit and/or over indebtedness at this stage, seems misplaced if one has regard to their unequivocal undertaking to still settle the arrears as and when their cash flow permits same. The respondents cannot be allowed to have the best of both worlds. It is evident that they

would wish to honour their obligations in terms of the agreement and as such the reliance on this defence does not assist the respondents in any way. The respondents have failed to make out a case that an order as envisaged in section 83 of the NCA should be granted.

10. The only real defence raised by the respondents is that they do have alternative means to satisfy the judgment debt. The evidence presented on this aspect by the respondents is impressive as it speaks of millions of rands of coal, shares and immovable property. The hard reality is however that no attempts were made to liquidate any of these assets to facilitate payments towards the increasing arrears.

11. On 20 August 2020, the first respondent, after receipt of the application, made an offer to settle the arrears by the immediate payment of R100 000.00 and payment of the balance over a period of 24 months. According to the first respondent no response was forthcoming and as such he elected not to make the payment. From the replying affidavit it is evident that there was a reply, and a proposal was made that a formal settlement agreement be concluded. This was to no avail. The stance adopted by the first respondents does not show any seriousness on behalf of the respondents in securing their primary residence. The contrary is true as the arrears have increased to a staggering amount.

12. There is a challenge as to whether the Immovable Property is in fact the primary residence of the first respondent. Nothing turns on this point as it is clear that the Immovable Property is in fact the primary residence of at least the second respondent.

13. The provisions of Rule 46A of the Uniform Rules of Court now provides some sort of protection to investments made in a primary residence as a reserve price need to be set. This position, and the approach to be adopted was clearly enunciated by the Full Court in *Absa Bank Ltd v Mokebe and Related Cases*.[1]

14. According to the applicant, the Immovable Property has the following relevant values and obligations:

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[1] 2018 (6) SA 492 (GJ).

14.1 Market value: R5 400 000.00

14.2 Forced sale value: R3 525 000.00

14.3 Municipal value: R6 082 000.00

14.4 Rates and taxes: R115 261.33

14.5 Full balance outstanding: R1 697 905.78

15. The applicant is relying on a sworn valuation by a registered appraiser, one Mr. Du Toit. The respondents take issue with the fact to no confirmatory affidavit by Mr. Du Toit is attached to the founding affidavit. Same is attached to the replying affidavit. This court has difficulty in understanding how the absence of such confirmatory affidavit to the founding affidavit would render the application defective or would prejudice the respondents in any way. The sworn valuation formed part of the founding affidavit served on the respondents and the respondents, if they so wished, could have countered same by presenting their own valuations. In line with *Mokebe* they actually had a duty to present such evidence to this court if they were not in agreement with the evidence presented by the applicant regarding the value of the property.

16. It is the case of the respondents that the property has a value of R6 082 000.00. In this instance reliance is placed on the municipal valuation of the Immovable Property and no independent valuation is presented by the respondents. The respondents further stated that the current liability in terms of the rates and taxes is the amount of R143 627.49.

17. The applicant proposes a reserve price in the amount of R3 525 000.00. It is the respondents' case that the setting of such a reserve price would be prejudicial as the property has more value.

18. The first bond over the Immovable Property was registered in 1992. Thereafter four more bonds were registered over the Immovable Property. Improvements to, and investments in a primary residence are one of the factors that need to be considered in the setting of a reserve price. By logical conclusion this court accepts that there were such improvements to, and investments in the

Immovable Property. Under the circumstances a reserve price in the amount of R4 750 000.00 will be set.

19. The applicant has proved its case on a balance of probabilities and as such the order prayed for will be granted. Based on the equity in the Immovable Property and the fact that the first mortgage bond was registered in 1992, this court will however grant the respondents an indulgence to suspend the execution of the order in terms of Claim A. This is done in the hope that the respondents will realise the seriousness of the situation and will make a concerted effort to settle the arrears and save their primary residence.

20. With regard to the attorney and own client costs prayed for in terms of Claim B no such provision could be found in the overdraft agreement.

ORDER:

In the premises the following order is made an order of court:

Claim A: Against the first and second respondents, jointly and severally, the one paying the other to be absolved, for:

1. Payment of the sum of R1 697 905.78 together with interest thereon at the rate of 5.75% per annum, calculated daily and compounded monthly in arrears from 12 May 2020 to date of payment, together with monthly insurance premiums of R2 847.74;

2. Declaring the respondents' immovable property:

Remaining Extent of Erf [....] Hurlingham Township, Registration Division I.R, the Province of Gauteng, measuring 2568 (two thousand five hundred and sixty-eight) square metres, held by Deed of Transfer No. T[....] ("the Immovable Property") executable;

3. Authorising the Registrar of this court to issue a Warrant of Execution against the Immovable Property;

4. A reserve price in the amount of R4 750 000.00 is set;

5. Costs of the application on the attorney and own client scale.

6. The execution of this order under claim A is suspended for a period of 6 (six) months from date of service of this order.

Claim B as against the first respondent, for:

7. Payment of the sum of R215 492.33 together with interest thereon at the rate of 7.75% per annum, calculated daily and compounded monthly in arrears from 25 April 2020 to date of final payment;

8. Costs of the application.

J MINNAAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed electronically by uploading same on CaseLines and by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 23 September 2021.

Appearances:

Applicant's Counsel: M De Oliveira
Applicant's Attorney: Jason Michael Smith Incorporated Attorneys

Respondent's Counsel: J Moorcroft
Respondent's Attorney: Ncube Inc Attorneys

Date of hearing: 18 August 2021
Date of judgment: 23 September 2021