IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case Number: 17785/2021

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA	Plaintiff/Applicant
and	
GORDON KEITH VAN ROOYEN	First Defendant/First Respondent
DELIA LORRAIN VAN ROOYEN	Second Defendant/Second Respondent
Heard:	**5 June 2024**
Judgment:	**21 June 2024**

JUDGMENT

Handed down by email to the parties, on 21 June 2024

KANTOR, AJ:

1. The parties will be referred to as Plaintiff and Defendants.

2. Plaintiff applies for summary judgment against defendants for payment of the amount of R234 196.28, interest and costs and for an order that Erf 1[…] Cape Town at Retreat, in the City of Cape Town, Cape Division (also known as 1[…] S[…] Road, Sea Winds, Retreat, Cape Town) ("**the Property**") be declared specially executable, subject to a reserve price. Plaintiff also brings an application in terms of Rule 46A in respect of the execution of the Property.

3. Argument was heard on 5 June 2024. The parties were given leave to deliver further submissions in relation to the question of an exercise by the court of the discretion in terms of section 85 of the National Credit Act 34 of 2005 ("the **NCA**"), particularly in the context of summary judgment proceedings. Both sets of parties took up that opportunity and this judgment is handed down thereafter.

4. More than 20 years ago, on 2 September 2002, the plaintiff and the defendants concluded a written home loan agreement ("the **Agreement**"). Pursuant to the Agreement, on 21 November 2002, the defendants caused a mortgage bond ("**the Bond**") to be registered in favour of the plaintiff over the Property as security for the loan advanced in terms of the Agreement.

5. Summons was issued in respect of the aforesaid relief in the above matter in October 2021, which is two years and eight months ago. In the absence of appearance to defend having been delivered by defendants, an application for default judgment was launched in January 2022 and set down on 15 February 2022 on the unopposed roll. The defendants attended in person and requested an opportunity to enter into a repayment arrangement with the plaintiff. The matter postponed for this purpose. Plaintiff's then attorneys sent defendants correspondence on 15 February 2022 setting out defendant's options and listing the documents required by the plaintiff to consider a payment plan. By 6 June 2022, only one of the documents requested by plaintiff had been received by it. The matter was set down again on 9 June 2022. The defendants again attended in person and the matter was again postponed for the purpose of

entering into a payment arrangement. All attempts in this regard have been unsuccessful.

6. On 8 November 2022, the matter was set down again. The defendants were granted a further postponement to obtain legal representation. On 5 April 2023, the defendants delivered a notice of intention to defend the action. In default of a Plea having been timeously delivered, the plaintiff delivered a notice of bar. The defendants served their Plea on or about 1 December 2023.

7. On 21 December 2023, the plaintiff delivered its application for summary judgment and application in terms of Rule 46A, set down for hearing on 28 February 2024. On 22 February 2024, the defendants delivered their answering affidavit. On 28 February 2024, the matter was postponed to the semi-urgent roll for hearing on 5 June 2024.

General principles on summary judgment

8. A court seized with a summary judgment application is not charged with determining the substantive merits of a defence, nor with determining its prospects of success.[1] It is concerned with an assessment of whether the pleaded defence makes out a defence which is good in law or if it is a sham put up for the purposes of obtaining a delay. A court engaged in that exercise will not become embroiled in determining disputes of fact on the merits of the principal case,[2] nor will the court determine whether or not there is a balance of probabilities in favour of the one party or the other.[3]

The defences raised

9. The following defences have been raised by the defendants in their Plea:

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[1] *Thumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at [23]
[2] *Thumileng* supra at [23]
[3] *Marsh v Standard Bank of South Africa Ltd* 2000 (4) SA 974 (W) at 949C-H. See also *Evelyn Haddon & Co Ltd v Leojanko Ltd* 1967 (1) SA 662 (O) at 667G.

9.1. They did not receive the letter of default and notice in terms of section 129(1) (as read with section 130) in terms of the NCA ("**the s129 Notice**");

9.2. That they are over-indebted in terms of the NCA (as defined in section 79 thereof).

9.3. That the matter be referred to a debt counsellor in terms of section 85 of the NCA.

The s129 Notice

10. Clause 4 of the Agreement sets out the nominated address for notices and service of legal documents. This is the address of the Property where the defendants reside. The defendants did not give notice of any change of address.

11. On 12 August 2021, the plaintiff served the section 129 notice on the first and second defendants at the Property. Service was effected by the Sheriff. The returns of service in respect of both of the defendants record that after an attempt was made to effect personal service and that service was effected by affixing the s129 Notice to the principal door at the Property. In accordance with section 129(5)(a) and (7) of the NCA, the s129 notice was also served by way of registered post to the Property. The track and trace report reflects that on 24 August 2021 the '*first notification to recipient*' was dispatched. In their opposing affidavit, the defendants refer to an article in regard to the '*financial difficulties of the Post Office*' to explain their failure to respond to the s129 notice. The article is not annexed to the opposing affidavit.

12. I am of the view that a *bona fide* defence based on the alleged non-receipt of the s129 Notice has not been made out.

Over-indebtedness

13. Insofar as the defendants allege over indebtedness, no case was made out this was caused by them entering into the Agreement, which could, in any event, hardly not be the case because it was concluded over 20 years ago. Similarly, no case was attempted to, or could, be made out of a reckless extension of credit. This is further supported by the payment history which reflects that the defendants fell into arrears during or about May 2018, over 15 years after the Agreement was concluded. The first defendant lost his employment in 2015 which affected the defendants' financial position.

14. Defendants are over-indebted in the sense contemplated in section 79(1) of the Act. This was common cause. Section 79(1) of the NCA provides as follows:

> "A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's-
>
> (a) financial means, prospects and obligations; and
>
> (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment."

15. I do not think, however, that this aspect per se disclose a *bona fide* defence for the purposes of summary and is rather a factor to be considered in the aspect considered in the next section of this judgment.

Section 85 of the Act

16. Section 85, sub-sections 86(1), (2) and (7) and section 87 of the NCA provide as follows:

85. **Court may declare and relieve over-indebtedness**

Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is overindebted, the court may-

(a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or

(b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

86. **Application for debt review**

(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.

(2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 130 to enforce that agreement.

…

(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that …

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

(ii) that one or more of the consumer's obligations be re-arranged by-

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement …

17. The defendants did not, prior to the institution of this matter, make a substantive application in the prescribed form in terms of section 86 of the NCA. It could not do so thereafter, due to the impediment created in section 86(2) of the NCA.

18. The question is whether a case is made out for the application of section 85 of the NCA. Although an application (let alone a formal application) in terms of section 85 was not made, this is not a requirement. The trigger to the operation of section 85 is simply the allegation in court proceedings that the consumer in terms of the agreement is over-indebted (*Standard Bank of South Africa Ltd v Kallides* 2015 JDR 2289 (WCC) at paragraph 6).

19. As dealt with above, it is common cause that defendants are over-indebted.

20. One of the considerations to which a Court will have regard in determining whether to act in terms of section 85 would be the reason for a consumer's failure to have availed themselves of section 86 of the Act (*Standard Bank of South Africa Ltd v Kallides* 2015 JDR 2289 (WCC) at paragraph 6).

21. In *Firstrand Bank Ltd v Olivier* 2009 (3) SA 353 (SEC) at 360D-H it was held:

> "It is the duty of the court, as I see it, to discourage such conduct. It is therefore relevant to the exercise of the court's discretion in terms of s 85 that the defendant failed to act upon receipt of the s 129(1) notice and that he furthermore has failed to explain or ask for condonation of his failure."

22. Both of these factors count against defendants:

22.1. Plaintiff has in fact been a paragon of patience and understanding over a period of years in this matter, affording defendants multiple opportunities to resolve the matter and re-arranging the debt to assist defendants.

22.2. It is very unsatisfactory that, after such indulgence from plaintiff, defendants have only now sought relief in terms of section 85 and not previously in terms of section 86.

23. That being said, defendants serviced their home loan with plaintiff faithfully for over 15 years and only started experiencing problems when first defendant fell on hard times. Further, the defendants have not simply stopped paying and nor have they paid token or negligible amounts, but have rather on average paid amounts which approximate 85% of the current instalment of R4 117.59 (the court was informed of the current instalment by the plaintiff). The impression I am left with is that the defendants

have intend to honour their commitments and avoid losing their home for which they have been paying for over 20 years.

24. In these circumstances, I am of the view that should there be any avenue capable of reasonable consideration which may have any reasonable prospect of achievement, it ought to be explored.

25. The following factors are to be considered before the exercise by the Court of the discretion in terms of section 85 (these factors are underlined. My comments thereon follow the underlined words): [4]

25.1. The circumstances under which the debt was incurred: This has been explained above and is not a factor which counts against defendants.

25.2. Whether the consumer is employed or has a source of income to pay off the debt: First Defendant receives a grant in the amount of R2 080 per month and the second defendant is employed and receives an income of R9 700 per month. This is accordingly not a factor which counts against defendants.

25.3. Whether the consumer failed to voluntarily avail himself or herself of the opportunity to approach a debt counsellor prior to debt enforcement: This is a factor which counts against defendants. However, it has engaged with the plaintiff. The conduct of the plaintiff cannot be criticised in any respect.

25.4. Whether the consumer provided a sufficient explanation for such failure and requested condonation in respect thereof: Defendants did not do so. This counts against them.

[4] *Firstrand Bank Ltd v Olivier* 2009 (3) SA 353 (SEC) 359D-H; *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W) 375B-C; *Standard Bank of South Africa Ltd v Hales* 2009 (3) SA 315 (D); *Van Heerden & Lotz* 2010 (73) THRHR 502; *Van Heerden* 2013 De Jure 968; *Absa Bank Ltd v Nogayi and Another* [2014] ZAECPEHC 10 (27 February 2014).

25.5. The degree of prejudice to the credit provider if the consumer is afforded the protective measures of the Act: There does not appear to be any material prejudice to Plaintiff. Defendants have not abandoned their obligations and are paying approximately R3 500 per month to Plaintiff. Furthermore, there is significant equity in the Property and no prospect that Plaintiff will not be paid in full should execution follow in six months' time, or even in a year. Plaintiff did not suggest otherwise, and, I believe, nor could it do so. Plaintiff raised the question of prescription which will be dealt with separately below.

25.6. The purposes of section 3 and other relevant sections of the Act (as backdrop): This appears to be a neutral factor on the facts of this matter.

25.7. That the consumer is not merely alleged to be over-indebted, but is in fact over-indebted: This is satisfied because it is common cause that defendants are over-indebted.

25.8. Whether the consumer has disclosed other indebtedness: Defendants have done so.

25.9. Whether the consumer attempted to make any further payments under the credit agreement or whether he abruptly stopped paying anything further: This is satisfied in that the defendants have consistently paid on average approximately R3 500 per month (some months more, some months less).

25.10. The potential to successfully re-schedule the indebtedness under the agreement: This is the main issue in contention and will be dealt with separately.

25.11. Other relevant circumstances.

26. The factor of the potential to successfully re-schedule the indebtedness under the Agreement is what became the focus of debate in oral argument. Ms Mahilall, who

appeared for the plaintiff, submitted that there is no potential of a successful re-scheduling of the indebtedness under the Agreement in terms of section 85 of the NCA. She pointed out that the plaintiff accommodated the defendants by extending the original 20 year bond to 30 years and that it is on this basis that the current reduced instalment of R4 117.59 is payable. She further contended that the period of the loan cannot be increased further. While that may be so from the plaintiff's perspective, but I do not see any limitation in section 86(7) of the NCA. Ms Makua of Legal Aid South Africa, who appeared for defendants, submitted that an instalment of R3 500 could be paid and the period of the loan extended to accommodate this. She further pointed out that the defendants are and have been paying monthly amounts to Plaintiff in respect of their indebtedness, albeit not the full amount of the instalment due. Defendants are over-indebted, although not excessively so on the figures presented which showed a deficit of R2 314 in a situation including expenditure of R4 500 in respect of the Agreement and income of R11 780. In my view, it therefore cannot be excluded that, were there to be a referral to a debt counsellor in terms of section 85, a recommendation may be made in terms of section 86(7)(c)(ii)(aa) "extending the period of the agreement and reducing the amount of each payment due accordingly".

27. In further submissions prepared by Ms Mahilall on behalf of Standard Bank, reference was made to the 30 year period of prescription (in section 11(a)(i) of the Prescription Act 68 of 1969 – "**the Prescription Act**") and it was submitted that, were the period of the loan to be extended beyond this 30 year period (to which it has already been extended) plaintiff would lose its security. I do not agree with this submission: the claim is what prescribes, not the security. There is no question of any debt having prescribed. Nor could it, with defendants having acknowledged the indebtedness, including in these proceedings and therefore having interrupted the period of prescription and it having begun to run afresh, as contemplated in section 14 of the Prescription Act which provides as follows:

> "(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place …"

28. Some further submissions made by Ms Mahilall in her further written submissions:

28.1. "*While a debt counsellor can facilitate the restructuring of debt to assist a consumer in meeting their financial obligations, they cannot unilaterally extend the bond term beyond what is legally permissible under the Agreement*", citing section 86(7) of the NCA as support for this. The court is, however, in my view, empowered to do this by means of section 86(7).

28.2. Ms Mahilall also contended that the *in duplum* rule was in peril of being breached at some stage were there to be an extension, with the consequent adverse effect provided for in section 103(5) of the NCA. The simple answer to this is that it could be addressed by the arrears being capitalised. No case was made out that this impact would be within the limited time frame in which I would be prepared to postpone this matter for referral to a debt counsellor. Although this does not address the issue raised by Ms Mahilall in principle, from a practical perspective a delay of a few months for a reference to and recommendation from a debt counsellor and return to court will not result in any material impact in that time frame, bearing in mind that the 30 year bond period still has approximately eight years to run (and defendants are paying the bulk of the monthly instalments).

29. This is probably the last opportunity for defendants to avoid losing their home for which they have been paying for over 20 years. Taking into account all of the above factors and in the exercise of my discretion, on balance I am inclined to afford them that opportunity.

30. This, however, is not to be indefinite and this matter must be finalised one way or the other as soon as possible. The matter will be postponed to a specific date (7 October 2024) for reference, in terms of section 85 of the NCA, directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a proposal and recommendation to the court in terms of section 86(7) of the NCA by 29 July 2024. I consider that to be more than ample time bearing in mind that, according to paragraph 33 of the supplementary submissions delivered on defendants' behalf, they have already approached a debt counsellor and received an outcome from him/her. That paragraph 33 reads: "*Since the opposed motion proceedings were postponed the Respondents approached A debt Relief for an assessment. The outcome is that the Respondents will be paying R3590.00 for a period of 8 years.*"

31. Defendants and the debt counsellor are requested to consider all possible means within reasonable bounds to increase the amount of the monthly instalment in order to reduce the period for repayment.

32. It is noted that while section 86(7) refers to 'the Magistrate's Court', it has been held with reference to section 86(11) that this must be read to include the High Court: *Collett v Firstrand Bank Ltd and Another* 2011 (4) SA 508 (SCA) at paragraph 17 and *Mercedes Benz Financial Services (South Africa) (Pty) Ltd v Dunga* 2011 (1) SA 374 (WCC) at paragraphs 16-23 and 33-44, especially paragraph 36. The same considerations apply, in my view, to section 86(7) (which is referred to in section 85).

Additional aspects raised in defendants' supplementary written argument

33. In their supplementary written submissions, the defendants added three aspects which went beyond the ambit of the leave given in that respect. Those aspects are not covered in the plea and the affidavit opposing summary judgment. They are accordingly not properly before the court.

34. Bearing in mind the order which I will grant in this matter, that is presently of no moment. If defendants intend to raise these points, they will need to seek to amend their plea and, if that is achieved, thereafter plaintiff will be entitled to deliver an affidavit for the purposes of summary judgment dealing with the further aspects added to the plea and defendants will then have an opportunity to deliver a further opposing affidavit for the purposes of summary judgment dealing with the further aspects. Further heads of argument will also need to be delivered dealing with any new aspects pleaded, the proposal and recommendation from the debt counsellor and what the court should order, if anything in terms of section 86(7) of the NCA. The order granted below will cater for all of these steps and the delivery of all of these documents.

35. Be the above as it may, some brief comments will be made on the three new aspects raised in defendants' supplementary written submissions (albeit that they are not properly before the court).

36. *Res judicata*:

36.1. In paragraph 32 of plaintiff's supplementary written submissions, it is noted that judgment was taken against defendants in May 2017 in terms of the same loan agreement under case number 4182/2017 of this court.

36.2. Defendants assert in their supplementary written argument that this renders plaintiff's claim *res judicata*.

36.3. This loses sight of the fact that that judgment was more than seven years ago and further instalments in terms of the Agreement would have become payable.

36.4. In paragraph 33 of plaintiff's supplementary written submissions, it is recorded that the Agreement was reinstated and this also appears from the facts before the court.

37. *In duplum*:

37.1. In their supplementary written argument, Defendants identify that the interest which has been claimed over time is greater than the original capital amount and claim that the *in duplum* rule has been breached.

37.2. This fails to recognise two aspects of the *in duplum* rule, namely:

37.2.1. The rule only applies to arrears and not to interest already paid.

37.2.2. Once a judgment is granted, the *in duplum* rule begins to run afresh (this would be relevant to defendants' reliance on the earlier judgment taken against defendants in May 2017 in terms of the same loan agreement under case number 4182/2017 of this court).

37.3. It also fails to take into account that:

37.3.1. In terms of the Agreement interest is capitalised.

37.3.2. In terms of the re-arrangement of the debt and the extension of the bond from 20 to 30 years, the arrears (including interest) were capitalised.

37.4. In order to raise the *in duplum* rule properly, these aspects would have to be taken into account. Defendants have failed to do this.

38. Liquidated claim:

38.1. Defendants assert in their supplementary written argument that plaintiff's claim is not liquidated.

38.2. This appears to me to be incorrect: plaintiff's claim is a matter of calculation.

39. As I have mentioned, these aspects are not properly before the court and would need to be pleaded. Should that materialise then they will be factors in the context of this matter. They need to be given proper consideration in light of the observations above.

Order

40. The following order is made:

1. The application for summary judgment and the application in terms of Rule 46A are postponed for hearing in the Fourth Division on 7 October 2024.

2. The matter is referred directly to a debt counsellor to be chosen by defendants, whose identity is to be disclosed to plaintiff's attorneys by no later than 5 July 2024, who is to evaluate the defendants' circumstances and to make a proposal and recommendation in writing to the court (copied to the plaintiff) in terms of section 86(7) of the National Credit Act 34 of 2005 by no later than 29 July 2024.

3. Should defendants wish to amend their plea in any or all of the further respects referred to in their supplementary written submissions delivered on 20 June 2024, their notice of intention to amend in terms of Rule 28 must be served by 12 July 2024.

4. Should defendants' plea be amended in any or all of the further respects referred to in their supplementary written submissions delivered on 20 June 2024:

4.1. plaintiff shall deliver its further affidavit for the purposes of summary judgment dealing with those further respects within 10 days of the amendment being effected;

4.2. defendants shall deliver their further affidavit for the purposes of summary judgment dealing with those further respects within 10 days of the delivery of the affidavit referred to in paragraph 4.1 above.

5. Plaintiff shall deliver heads of argument by 16 September 2024 dealing with the content of the further documents delivered in this matter in terms of this order.

6. Defendants shall deliver heads of argument by 23 September 2024 dealing with the content of the further documents delivered in this matter in terms of this order.

7. Costs are to stand over.

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A Kantor

Acting Judge of the High Court

For the Plaintiff: **Adv U Mahilall (Cape Bar)**

For the Defendant: **Ms C Makua (Legal Aid)**