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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/NO
 (2) OF INTEREST TO OTHER JUDGES: YES/NO
 (3) REVISED

 Date:

WHG VAN DER LINDE

In the matter between:

Matter 67 on 27/07/2016:

CASE NO. : 18581/2016

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK

Plaintiff

and

ZWANE, SIFISO

(IDENTITY NUMBER: [.....])

Defendant

Matter 68 on 27/07/2016:

CASE NO. : 19362/2016

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK

Plaintiff

and

HYSLOP, KEITH WILLIAM

(IDENTITY NUMBER: [.....])

First Defendant

HYSLOP, AINE MOIRA

(IDENTITY NUMBER: [.....])

Second Defendant

Matter 98 on 27/07/2016:

CASE NO. : 30634/2015

NEDBANK LIMITED

Applicant

and

NKUNA, BILLY

First Respondent

NKUNA, SIPHOKAZI NWABISA

Second Respondent

Summary – Foreclosure – application for money judgment for accelerated full outstanding balance as well as order declaring property executable – on the facts, order declaring property executable to be postponement – applicant bank arguing that court has no discretion but to grant default judgment for accelerated full outstanding balance – legitimacy of Motion Court Directive, Chapter 10.17, paragraph 4 in contention – held court has discretion as application for accelerated full outstanding balance integrated with order declaring property executable.

JUDGMENT

Van der Linde, J:

[1] These are two applications for default judgments for repayment of capital amounts lent, as well as for declarations rendering immovable property bonded as security for the loans executable; and one application for only a declaration that the property be rendered executable. In all three instances the property is a primary residence currently occupied by

the debtor, and it may be accepted that the property was acquired with funds availed by the applicant on its security, the parties by their agreement especially hypothecating the property for the debt.

- [2] The loan agreements are all three subject to the National Credit Act 34 of 2005 ("NCA"), and have not been cancelled in terms of that Act; the applicants' declaring that the full outstanding balance will have become payable by reason of the acceleration clause is not of itself tantamount to a cancellation. That is relevant because in each instance the debtor may still re-instate the loan agreement by paying the arrears; once cancellation has occurred, this is no longer possible under the NCA.

- [3] When the matters were called in the unopposed motion court I raised with the attorney for applicants in the first two matters, and counsel for the applicant in the third matter that, subject to argument, in view of the fact that in some instances the debtors were only around three months' in arrears, I was disinclined to declare the properties executable without more, and instead minded to postpone the applications for an appropriate period to afford the debtors the opportunity to purge their default. I had in mind paragraph 10.17 of the local Practice Manual.

- [4] The applicants both submitted that although I have a discretion to postpone the application for the declaratory relief sought, I have no discretion to do so in respect of the applications for default judgment for the capital amounts. Reliance was specifically placed on the unreported judgment given in this Division in *FirstRand Bank Ltd v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another* [2014] ZAGPJHC 117 (4 June 2014), and also more generally on the principle that contracts deliberately entered into must be honoured. This latter principle underlies, of course, the reliance on acceleration clauses which in typical home loan agreements found the right to cancel even when the arrears are few or small.

- [5] In other words, the submission brings into stark relief the question as to what happens when a court, acting under the power afforded in terms of rule 46(1)(a)(ii), declines immediately

to grant an order for execution against the debtor's home because the arrears are too few and small, but the full accelerated outstanding balance large; and instead postpones the application for executability say six months; and the debtor then pays all the arrears.

- [6] Is the court obliged nonetheless immediately to grant default judgment for the full accelerated outstanding balance, leaving the creditor free, armed with the judgment, to seek execution by other means?
- [7] At a practical level, the immediate answer for the present three applications, is that the Practice Manual proposes postponement of the application for judgment for the capital amount as well, otherwise "... this will defeat the object of postponing the matter i.e. to allow the consumer to take advice and seek to make arrangements to bring the arrears up to date or purge the default."
- [8] The provisions of the Practice Manual that propose a postponement of the application for executability survived a validity attack before the full court of this Division in *Absa bank Ltd v Lekulu*, [2014] ZAGPJHC 244 (14 October 2014), decided incidentally after *Stand 949 Cottage Lane*. The Practice Manual now expressly refers also to the application for judgment for the capital amount in the context of a postponement. FirstRand submits that the Practice Manual as justified by *Lekulu* (i.e. before the insertion of the express reference to the money judgment aspect) is contrary to the tenets of substantive law. Here it refers to the *Anton Pillar* cases for the general proposition that courts may not make law.
- [9] Those judgments predate the Constitution which has introduced the concept of a supreme law, to which others are subject, and in the light of which all others must be interpreted. The submission, with respect, also does not acknowledge the constitutional imperatives with which every court is now charged, to develop the common law by promoting the spirit, purport and objects of the Bill of Rights; and, more pertinently, to consider all relevant circumstances before ordering the eviction of a person from his or her home.

[10]That brings one back to Lekulu, which implicitly overruled Stand 949 Cottage Lane, and to which this court is bound by the force of precedent. It is so that the express money judgment aspect of the Practice Manual postdates Lekulu but, for reasons that I mention below, that aspect and the aspect of executability are two sides of the same coin, and both involve, conceptually, an inroad to some extent into unbridled contractual sanctity.

[11]In any event, this court would have reasoned that absent the express insertion in the Practice Manual of the postponement of the money judgment aspect, it has a discretion to postpone the application for default judgment for the capital amount, for the reasons that follow.

[12]The starting point of the discussion is that the loan agreements all have acceleration clauses. These, and their having been triggered, are essential for the success of the applicants' applications, because in the light of rule 46(1)(a)(ii) and of section 26(3) of the Constitution, a court is unlikely to grant executability for a say mere three months' arrears in a say 240 month loan repayment scheme.

[13]This last observation already shows how integrated the claim for default judgment for the capital amount is with the claim for a declaratur for executability. The claim for the full outstanding balance under the home loan agreement is only possible because the acceleration clause enables it; and in turn the claim for a declaration of executability would likely not have been successful had it not been preceded by a claim for the accelerated full outstanding balance.

[14]Put it this way: if executability is postponed for say six months, and if during that period the debtor finds funds to pay the arrears, and is able thereafter to continue paying the regular monthly bond instalments as required, it is unlikely that a court will then nonetheless declare the property executable. But although on the hypothesis the bond arrears will have been fully paid up, the full outstanding balance of the loan will still have been rendered immediately payable by virtue of the acceleration clause.

[15]And yet the fact that the full outstanding balance will have been rendered immediately repayable, will then be meaningless, because the arrear instalments will have been paid, the property will not be declared executable, and the hypothetical debtor likely has no other assets by means of which to pay in one go a debt that he or she will have scoped for repayment over 20 years.

[16]If in this scenario a court will already have given a default judgment for the accelerated full outstanding balance of the loan before the debtor will have had the purging opportunity, this will bring into tension the existence of that judgment, ordinarily fully enforceable, with the protection the courts are enjoined to afford to the debtor who has purged the arrears.

[17]That is a situation that is unsatisfactory, if only because it will diminish respect for the enforceability of court orders and concomitantly for the rule of law. It is unsatisfactory for another reason: the creditor may seek to apply that judgment to obtain access to the debtor's movable assets, possibly depleting resources that could have been applied to paying the arrear home loan instalments.

[18]On the other hand, for a court to decline to give judgment for the accelerated full outstanding balance may be viewed as signalling inroads into the principle that agreements must be honoured, because it will in effect have rendered meaningless the effect of an acceleration clause and perhaps even a cancellation following on it.

[19]That result can be avoided if, in the specific context of section 26(3) of the Constitution, the courts have a discretion in an appropriate case to defer immediate enforcement of contractual entitlements flowing from breach, as is now already, to a degree, afforded by rule 46(1)(a)(ii) in the case of declarations of executability.

[20]Put differently, there is little purpose, in view of the foregoing, in the power to postpone declarations of executability for say six months, if there is not also a power concomitantly to postpone the granting of default judgment for the accelerated full outstanding balance where, as here, the two concepts are so integrated.

[21]If the debtor then pays the arrears in that period, thereby securing his or her home (since the court will then decline executability), the creditor may choose to abandon its acquired contractual acceleration (and possibly also cancellation) rights. Either that, or it may be left with a right which is practically unenforceable; but that will have been the consequence of the protection afforded under section 26(3) of the Constitution. The contractual right to claim acceleration must then be viewed as having been rendered subsidiary to the debtor's fundamental right under section 26 of the Constitution.

[22]That is not to draw a line through the principle that contracts must be adhered to. It is rather to give meaningful effect to the need to constrain the enforcement of private contracts where this would lead to a result that offends the rights in the Bill of Rights.

[23]It is true that if a default judgment were granted at the outset, that judgment might in any event ultimately be rendered nugatory if the debtor pays the arrears; why then refuse the judgment? The only difference is that if in the interim period there is no default judgment for the accelerated full outstanding capital amount, the creditor is precluded from seeking execution against movables during the period when the debtor will be trying to pay the arrears. That is a far more preferable situation and, as the Practice Manual says, it fits the purpose of the postponement of the application for a declaration of executability.

[24]There is another way of reaching the same result. The inherent power and obligation under section 173 to regulate own process, taking into account the interests of justice, justifies the court postponing also the applications for default judgment for the accelerated full balance, for the reasons advanced above.

[25]It follows that, apart from the provisions of the Practice Manual, in my view in these types of applications the court has a discretion to postpone the applications for default judgment for the accelerated capital amounts, and so to tie those applications in with the applications for declarations of executability. The consequences of this conclusion for the specific applications are as follows.

[26]In FirstRand Bank Ltd v Zwane (16/18581) (no. 67 on the roll) the following considerations are pertinent. The bond instalments are R7694.95, and the arrears as of 23 June 2016, R23410.29. That reflects just over three months' instalment arrears. The accelerated full balance is R708452.85. In this context, arrears of just over three monthly instalments are in my view "few", in the context of paragraph 4 of chapter 10.17 of the Practice Manual.

[27]The home loan agreement has not been cancelled, and the respondent is thus still able to re-instate it under section 129(3)(a) of the NCA. If a judgment for the accelerated balance is given now, the applicant could take out a writ against movables and the respondents will be prejudiced under section 129(4)(b) of the NCA.

[28]Consequently I make the following order in this matter:

- (a)The application is postponed sine die, and may not be set down before the expiry of four months.
- (b)When set down again, the notice of set-down must be served in accordance with the provisions of chapter 10.17 of the Practice Manual, and must be accompanied by an affidavit as envisaged therein.
- (c)The costs of the postponement are costs in the cause.

[29]In FirstRand Bank Ltd v Hyslop (16/19362) (no. 68 on the roll) the following considerations are pertinent. The bond instalments are R11205.79, and the arrears as of 29 June 2016, R33194.75. That reflects just under three months' instalment arrears. The accelerated full balance is R953399.28. In this context, arrears of just under three monthly instalments are in my view "few", in the context of paragraph 4 of chapter 10.17 of the Practice Manual.

[30]The home loan agreement has not been cancelled, and the respondents are thus still able to re-instate it under section 129(3)(a) of the NCA. If a judgment for the accelerated balance is given now, the applicant could take out a writ against movables and the respondents will be prejudiced under section 129(4)(b) of the NCA.

[31]Consequently I make the following order in this matter:

- (a) The application is postponed sine die, and may not be set down before the expiry of four months.
- (b) When set down again, the notice of set-down must be served in accordance with the provisions of chapter 10.17 of the Practice Manual, and must be accompanied by an affidavit as envisaged therein.
- (c) The costs of the postponement are costs in the cause.

[32]In *Nedbank Ltd v Nkuna* (15/30634) (no. 98 on the roll) the following considerations are pertinent. The applicant has before, on 11 May 2016, obtained a money judgment for the accelerated balance of R840255.46. The bond instalments are R7770.76, and the arrears as of 24 August 2015, R46800.89. That reflects just over six months' instalment arrears, and at a point in time some nine months before. In this context, arrears of just over six months' instalments, nine months before the application was made, are not in my view "few", in the context of paragraph 4 of chapter 10.17 of the Practice Manual.

[33]The court did not declare the property executable, but it is unclear whether it was in fact asked to do so. That part of the relief sought was simply not granted, and according to the court order itself not postponed, which rather leaves the impression that executability was not asked. Either way, I expect that the applicant will report to the court what has transpired since then because the affidavit supporting the application is already somewhat dated.

[34]It follows that in this matter, if the bond arrears have not been purged, I will likely grant a declaratur that the property be rendered executable, and costs; and a suitable draft order may be prepared.

WHG van der Linde
Judge, High Court
Johannesburg

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