REPUBLIC OF SOUTH AFRICA

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

CASE NO: **41691/2010**

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

__________ ________________________

Date: **WHG VAN DER LINDE**

In the matter between:

ABSA BANK LIMITED	**Applicant**
and	
SHIVAMBU, BRUCE	**First Respondent**
RUDZANI, RAMOVHA	**Second Respondent**

JUDGMENT

<u>Van der Linde, J:</u>

[1] In this matter the applicant, a bank, applies for an order declaring the fixed property which was bonded to it as security for loan to the first and second respondents to buy it, executable. A money judgment for the accelerated total outstanding amount of R400 169,21 was granted by default more than four years ago on 27 March 2012 against both respondents jointly and severally, but the prayer for executability was postponed sine die. It is now before this court. Only the first respondent, Mr Bruce Shivambu, appears to defend. The second respondent does not, and nothing further is known about his current whereabouts.

[2] The applicant's case is simple. In the affidavit supporting the application to declare the property executable, it explains that the loan was obtained to buy the property. The bond was given as security for repayment of the very loan. The loan provided for a contractual entitlement, in the event of default and judgment being obtained, to ask that the property be declared executable without first executing on the movable assets.

[3] It says that the current accelerated total outstanding amount is R707 289. The arrears on the loan are R428 664.77. The last payment made on this account was R2 850 on 13 December 2012. During the three years 2010, 2011, and 2012, Mr Shivambu paid only R28 750 in respect of the loan instalments. Thereafter he has paid nothing for the past three years and eight months. No further amounts were received on the account.

[4] In the result, the respondents have had the benefit of the loan capital for the past three and a half years without having paid any amount towards reduction of the debt.

[5] Mr Shivambu represented himself in court. He was completely open and honest about the facts. What he said in court was already contained in the two affidavits he had filed: his answering affidavit, as well as a further affidavit of 24 July 2016.

[6] He explained that the house was his primary residence. When he bought it, it was to put a roof over the heads of his young family. He has a wife and three children. He lost his employment in 2010 and could not service the instalments.

[7] He went to see the bank in 2010. They struck an arrangement, to assist him, whereby he was required for six months to pay only R2200 per month of the monthly instalments; this represented about 50% of the full monthly instalments. He tried to but could not keep this up. He failed at the fifth instalment, since at the time he was still unemployed.

[8] On 18 October 2010 the bank sued him. The arrears were then only R34 647.79. A year later, on 3 October 2011, he obtained employment with BHP Billiton at a manganese mine in Hotazel in the Northern Cape. His package was R109 904 per annum. He is still with them, and has since advanced to production manager. He approached the bank in 2011 after he obtained employment to come to some arrangement as regards the arrears, but was told that the matter is with the legal department, and that he should defend himself in court.

[9] He has, since then, attended every court hearing of the matter, despite the inconvenience of having to travel from Hotazel to be able to do so.

[10]I asked Mr Shivambu why he has not paid any instalments at all since December 2012. He said it was because he could not extract an undertaking from the bank that had he done so, they would not proceed to have the house sold anyway. I asked him whether during the last three years and eight months he has been putting away, perhaps in a savings account, the amount of the monthly instalments in the meantime.

[11]He said that he tried to do so, but he could not keep up with it, because he had other debts to pay.

[12]The bank argued that if an executability order were granted, it would not be the end of the road for Mr Shivambu. He could still obtain finance elsewhere and pay all arrears before the sale in execution takes place, in which event the loan agreement would be reinstated, since it has not been cancelled.

[13]In considering all the relevant circumstances, one takes into account that Mr Shivambu's family home is at stake. One takes into account that he has three minor children who live there and depend on him so protect their home. One takes into account that if evicted, he

would have to find accommodation elsewhere, probably in the form of rental accommodation.

[14]The two problems that appear to be insurmountable are the following. First, Mr Shivambu cannot afford the monthly loan repayments. That is clear from his answer to the question why he has not been putting away those amounts for the past three years and eight months; that he tried to do so, but could not manage because of other debts.

[15]Second, the arrears that have accumulated are more than half the capital amount outstanding. If Mr Shivambu cannot service the currently monthly instalments, he will not be able to pay up the arrears and then continue servicing the loan.

[16]The applicant is a major bank whose business includes providing finance for home acquisitions. It will not be able to continue operating in that field unless that business remains profitable. Of course, not all debts are good; some are bad, and that fact has not brought the bank down to its knees.

[17]But it would be naïve to ignore the insidious effect that bad debts have on the financial viability of institutions. This country has seen that, most recently, in a bank that has been placed under curatorship, and according to the financial press bad debts were a major contributor to its demise.

[18]In striking a balance I propose granting the order sought, but suspending its execution for an appropriate period. In the result I make the following order:

(a) The immovable property described as Erf [5240] B. A. E. [...] Township, Registration Division I.R., Province of Gauteng, Measuring 266 (two hundred and sixty six) square metres, held by the first and second respondents under deed of transfer no. T179797/2009, is declared specially executable.

(b) The Registrar of the court is authorised to issue a writ of execution.

(c) The respondents are directed to pay the costs of the application on a scale as between attorney and client.

(d) The order in paragraphs (a), (b) and (c) above is suspended until 30 November 2016.

WHG van der Linde
Judge, High Court
Johannesburg

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Date argued: 6 September, 2016
Date of judgment: 12 September, 2016