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

CASE NO: 31305/2016

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

.....**28 February 2017**.....
DATE SIGNATURE

In the matter between:

ABSA BANK LIMITED

Applicant

And

M S

First Respondent

M M E

Second Respondent

JUDGMENT

RATSHIBVUMO AJ:

1. This is an opposed application for summary judgment wherein the applicant seeks an order in the following terms:
 - 1.1 Payment of the amount of R138 942.34;
 - 1.2 Interest in the above amount, calculated at the rate of 9.00% per annum, capitalized monthly, from 25 August 2016 to the date of payment;
 - 1.3 For an order declaring the following immovable property specially executable: Erf [...] Diepkloof Extension Township, Registration Division I.Q. Province of Gauteng Measuring 455 square metres held under deed of transfer T38229/2001 subject to the conditions contained therein and specially to the reservation of mineral rights.
 - 1.4 Costs of suit on attorney and client; and
 - 1.5 Further and/or alternative relief.
2. The respondent filed an affidavit in opposing the application in which he *inter alia* avers that he believes the value of the house is currently in excess of R1 million; that he and the three children aged 25, 18 and 10 reside in the property; that he and the second respondent are in the process of divorce and they have agreed to have the property sold and have utilize the proceeds to pay up the debt owing to the applicant. He concluded by making an offer to increase his monthly instalment from R3 209.00 by R800.00 to R4 009.00 to reduce and cover the amount in arrears.

3. The matter was set down for hearing on 17 February 2017. On that date, the applicant asked that the application be postponed until after the date set down for the divorce matter, the details of which he did not have. This was refused in that I was not persuaded as to the link between the two matters or how the divorce matter would have any impact on this application. Upon arguing the merits of the summary judgment application, counsel for the respondent was quick to concede that there was no *bona fide* defence in the affidavit by the respondent. He however went on to submit that then order sought by the applicant was not just and equitable in the circumstances.
4. Under normal circumstances, in application for summary judgment, the court would have to either grant the summary judgment or leave to defend. But the foreclosure request invokes Practice Directive 10.17.2 of this division. In so doing, the court asks the question as to whether the order sought is just and equitable. In exercising its judicial oversight, court has a duty to balance the duty the respondent has to service his debt, the financial difficulties he finds himself in; the amount in arrears and the bond history.¹
5. At the time the summons was issued in September 2016, the total amount in arrears was R24 496.09.² This had gone up to R33 619.25 by 12 December 2016.³ A payment of just over R4 000.00 was received since and the amount in arrears is now in the region of R32 000, as presented by the applicant's counsel. One interesting aspect is that while the respondent is adamant that he can secure a buyer for a good price than it otherwise would if it was sold by the sheriff following a court order, he has not secured any offer as yet.

¹ See *Sebola and Another v Standard Bank of South Africa LTD and Another* 2012 (5) SA 142 (CC) & *Absa Bank Limited v Lekuku* (32700/2013) [2014] ZAGPJHC 244 (14 October 2014)

² See particulars of claim on p. 25 para 8.

³ See Chapter 10.17 affidavit on p. 3 para 4.4

From the address by his counsel it would appear confusion reigns as to whether he could do this before the divorce or it could be part of the divorce settlement hence the earlier request for the application to be heard after the divorce.

6. While I am concerned over the amount in arrears which equals to just over 9 months, it is the other factors that make me have reservations on whether this order would be just and equitable at this stage. The respondents have faithfully serviced this bond since 22 May 2001. The respondents have made the payments over the period that exceed three quarter of the total period as per the credit agreement. The times that the respondents started to default on their payments coincide with their divorce, a clear indication that the divorce also played a role. Is it unreasonable for the first respondent to ask for indulgence so he could pay the arrears or have the house sold at market value in the circumstances of this case? I do not think so. The amount in arrears is still less than the arrears for a year and the total amount owing is far less than the principal debt. If the respondents succeed in his attempts to sell the house on their own, everyone walks away a winner, the applicant and the respondent. Granting the summary judgment would have only one winner and it would be very unfair to the respondents given all the above.
7. In the result, I make the following order:
 - 7.1 The matter is postponed sine die;
 - 7.2 The matter may not be set down before the expiry of 6 (six) months from the date of this order;
 - 7.3 And that notice of set down should again be served on the Respondent.
 - 7.4 The respondent is ordered to pay the costs of this application.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard: 17 February 2017

Reasons Delivered: 28 February 2017

For the Applicant: Adv. L Van Rhyn van Tonder
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Johannesburg

For the Respondent: S Ncube
Instructed by: Lindsay Keller Attorneys
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