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

- (1) REPORTABLE:
(2) OF INTEREST TO OTHERS JUDGES:
(3) REVISED

16 -2- 2018

DATE

SIGNATURE

Case number: 7348/17

In the matter between:

FIRSTRAND BANK LTD t/a RMB PRIVATE BANK

Applicant

Registration Number 1929/001225/06

and

JACOBUS CHRISTOFEL DU PLESSIS

First Respondent

Identity Number [...]

LINET DU PLESSIS

Second Respondent

Identity Number [...]

JUDGMENT

Molahlehi, J

Introduction

- [1] The applicant in this matter seeks an order that the respondents should pay it the sum of R3 806 447.53 including interest thereon. The claim arises from the loan which the applicant had made to the first respondent, and for which the second respondent stood surety thereof.
- [2] The applicant through the agreement provided a loan facility to the respondent which was made during October 2000. The agreement was amended or varied four times during its operation.
- [3] The original agreement made provision for the following:
- (a) The facility was approved in the sum of R800,000
 - (b) The facility was a term– type facility
 - (c) The first respondent was obliged to repay the debit balance on 240equal monthly instalments.
 - (d) The instalment was to be made on the first day of each month. The respondent was required to put forth a collateral, including, inter alia, a bond covering the property in the sum of R1 million as security.
 - (e) The applicant was entitled to relax some of the provisions of the original agreement or granted the first respondent indulgence without

affecting the validity of all the other provisions of the original agreement.

(g) Relaxation or indulgence granted by the applicant to the first respondent would not be deemed to be a waiver of any of the applicant's rights in terms of the original agreement, nor any such relaxation or indulgence be deemed novation of any of the terms and conditions thereof.

- [4] The agreement between the parties further provided that in the event of any default by the first respondent, the applicant would be entitled to withdraw the facility and claim immediately payment of all outstanding balance or terminate the facility without affecting any of its other rights.
- [5] It has not been disputed that the first respondent failed to pay the instalments in for the period, June 2016 to November 2016 in breach of the agreement. It was for this reason that the applicant decided to terminate the agreement.
- [6] On 7 December 2000 the first respondent executed a covering mortgage bond over the property in favour of the applicant, which was registered in the Deeds Office thereby providing security for the first respondent's indebtedness to the applicant in the sum of R1 million and an additional sum of R200,000.
- [7] The second covering mortgage bond over the property in favour of the applicant was made on 14 July 2005 to provide security for the applicant in the sum of R200 000.00 and additional amount of R40 000,00.
- [8] The third bond executed in favour of the applicant was in the sum of R300 000.00 with the additional sum of R60 000,00.

[9] The fourth covering mortgage bond was executed on 4 January 2008 in the sum of R3 000 000.00 with the additional sum of R600 000.00.

Factors to consider regarding the executability of the property.

[10] The following factors are to be taken into account when considering the executability of property:

- (a) The amount of the indebtedness by the respondent – i.e is the amount being very large.
- (b) The sale of the property in June 2003 was R318,000 and the property is now valued at R2,600,000.

The respondent's defence

[11] The respondents raised the following points in defence:

- (a) The authority of the deponents to attest to the founding affidavit.
- (b) That his constitutional right would be infringed if the property was to be declared executable as the property is utilised as a primary residence.
- (c) Failure to comply with the provisions of section 129 of the National Credit Act.

[12] The respondent has further requested that, should the court find that the property is executable it should stay such execution for a period of five months.

[13] The second respondent has not filed an answering affidavit, which in essence means that the application in as far as she is concerned is unopposed. Her liability is based purely on suretyship.

[14] In my view all the defences raised by the first respondent are unsustainable for the following reasons: The issue of whether or not a deponents to an affidavit in

motion proceedings need authorization was answered in *Ganes and Another vs Telkom Namibia*,¹ where the court held:

"The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof that must be authorized."

[15] The respondent has made a bold allegation that granting the relief sought by the applicant will infringe on his constitutional right, in that he would be homeless. This allegation has not been substantiated in the sense that he has not placed before this court any evidence to assist it in exercising its discretion.

[16] As stated above, the respondent has requested the delay in granting the relief requested by the applicant. The request was based on the contention that the respondent was expecting some substantial funds to come his way. This request was made in October 2017, some three and half months ago. There has been no progress to date in that regard.

[17] The respondent has made a further request for the delay in granting the order. He has however not placed anything of substance before this court to sustain the request. He simply stated that there are investors who have promised some funds to him. There seem to be no guarantee about the promise except for saying that they have promised to come forth in the next few weeks. There is no certainty as to whether they will keep to their promise.

[18] I need to pause and indicate that although the respondent's attorneys are still on the record, in that they have not withdrawn their instructions they, did not appear

¹ 2004 (3) SA 615 (SCA).

on the day of the hearing. The respondent informed me that the reason for the non-appearance was due to his lack of funds to pay them.

[19] I inquired from the respondent as to whether he had movable property of any significance that could settle the debt. He informed me that all what he has is a car and a computer which is used for his survival. In light of the above I am persuaded that the applicant's application stands to succeed.

Order

[20] In the circumstances the following order is made:

1. The respondents are to pay the applicant the one paying the other to be absolved the sum of R3 806 447 53.
2. Interest on the above amount at the rate of 9.75 per annum minus 0.35% per annum calculated daily, compounded monthly in arrears from 1 July 2016 to date of payment.
3. It is hereby declared that Portion 2 of Holding Austin Agricultural Holdings, Registration Division, JR, Gauteng Province, measuring 8565 (eight thousand five hundred and sixty five) square meters in extent and held on the Deed of Transfer number T103855/2003 is especially executable.
4. Cost of suit on the attorney and own client scale.

E Molahlehi
Judge of the High Court,
Johannesburg

Representation:

Counsel for the Applicant: Adv. R Scholtz

Instructed by: Jason Michael Smith Inc. Attorneys

Counsel for the Respondent: In person

Heard on: 5 February 2018

Delivered on: 16 February 2018.