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

Case Number: 2021/10863

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

17.04.23

In the matter between:

NQABA GUARANTEE SPV (PTY) LTD

First Applicant

ESKOM FINANCE COMPANY SOC LTD

Second Applicant

and

MYENI: S M

First Respondent

MYENI: P S

Second Respondent

Neutral Citation: *Nqaba Guarantee SPV (PTY) LTD And Another v Myeni S.M and Another*
(Case No: 2021/10863) [2023] ZAGPJHC 343 (17 April 2023)

JUDGMENT

MIA, J

Introduction

- [1] There are two applications before me. One, an application for payment of money due in terms of a loan agreement coupled with an application declaring property specially executable in terms of Rule 46A of the Practice Rules of this court. Flowing from this is a counter-application by the respondents seeking to declare the agreement unlawful and to set it aside.
- [2] The first applicant is Nqaba Guarantee SPV (Proprietary) Limited (Nqaba), registration No. 2006/007610107, a private company with limited liability registered and incorporated in accordance with the company laws of the Republic of South Africa with its registered address at Megawatt Park, Maxwell Drive, Sunninghill, Sandton. The second applicant is Eskom Finance Company Soc Ltd- (Eskom), a registered state owned public company, a financial institution and credit provider, with Registration No. 1990/01322107, a registered state-owned public company, its registered address at Megawatt Park, Maxwell Drive, Sunninghill, Sandton. The first respondent is Mr Senzokosi Madlayise Myeni, a major male, with residential address and chosen *domicilium citandi et executandi* being Erf [...] Greenstone Hill Extension 7 also known as [...] [...], Greenstone Hill Ext 7, Edenvale. The second respondent is Ms Prisca Silindile Myeni, a major female with the residential address and chosen *domicilium citandi et executandi* being the same as the first respondent. The first and second applicants will be referred to as the applicants and the first and second respondents will be referred to as the respondents throughout. The second applicant supports the first applicant in the enforcement of the respondents' obligations in terms of the collective agreements. The first applicant seeks an order as follows:
- a. payment of the capital sum of R 1 674 488.96 (One million six hundred and seventy-four thousand four hundred and eighty-eight Rand and ninety-six cents), plus interest on the said amount at the rate of 10.00% p.a. (calculated and capitalised monthly in advance from 1 November 2020), an order declaring the respondents' immovable property specially executable and
 - b. legal costs on the scale of attorney and client as provided for in the Indemnity Bond.

- [3] The respondents opposed the above relief and lodged a counter application in which they sought the following relief:

- “1 Declaring that the mortgage loan agreement (the mortgage agreement) entered into by the applicants and the second respondent on 16 February 2010 is unlawful to the extent that –
- 1.1 clause 8.3 of the Schedule Terms and Conditions attached to the mortgage agreement (the clause) had a deceiving effect on the applicants or had the effect of concealing to the applicants the true cost of credit from the time of concluding the agreement, in terms of section 90 (2)(a) (iii) of the NCA;
- 1.2 the said clause it implies that the rate of interest chargeable is variable beyond what is permitted by section 103 (4) of the NCA, in terms of section 90 (2) (o) of the NCA;
2. Declaring that the said clause in the mortgage agreement is unlawful as from the date it purported to take effect, being 16 February 2010, in terms of section 90(3) of the NCA;
3. Declaring that it is just and reasonable in the circumstances to give effect to section 89 (5) principles with regard to the unlawful provision and/or the entire mortgage agreement by ordering and directing –
- 3.1 that the entire mortgage agreement is void from the date it was entered into on 16 October 2010, in terms of s90(4) (b) of the NCA;
- 3.2 the first and second respondent to refund to the applicants all moneys paid by them under the mortgage agreement, with necessary interest calculated in terms of section 9 (5)(b) of the Act;
- 3.3 that all rights of the first and second respondent under the mortgage agreement to recover any monies from the first and second applicant be and are hereby cancelled or revoked;
4. Directing the respondents to pay the applicant’s cost of bringing the application.”

Background

- [4] The first and second respondents, are married in community of property. On 16 February 2010 they entered into a mortgage loan agreement with the second applicant (Eskom) whilst the first respondent was employed with Eskom. The first respondent, due to his employment with Eskom, qualified for a loan in the amount of R 2 000 000.00 at a preferential interest rate. An indemnity bond was registered over the immovable property in favour of Eskom on 1 April 2010 as security for the mortgage loan. The first applicant, Nqaba, guaranteed the respondents' indebtedness to Eskom in terms of the loan agreement and the indemnity agreement. The respondents signed the relevant agreements during February 2010 and April 2010, which included the mortgage loan agreement, with the standard mortgage conditions, the schedule terms and conditions, the indemnity agreement (collective agreements). The agreement notably authorised the execution of the indemnity bond over the property.
- [5] In October 2016, Eskom terminated the employment contract of the second respondent. Nonetheless, the respondents continued making payments thereafter but then skipped a number of payments over a period of time. There were at least 52 missed payments for the duration of the agreement at the time the matter was enrolled before this court. The respondents stopped paying completely in October 2020 and failed to make an arrangement to make up the missed payments or to propose an alternative arrangement to pay the arrears. The applicant dispatched a section 129 notice in terms of the National Credit Act 34 of 2005 (NCA). On 15 April 2021, the present application was served upon both the respondents' chosen *domicilium* address by personal service on the second respondent. The respondents did not file a notice of intention to oppose the application, they served an opposing affidavit only in April 2021 and subsequently a counter-application.
- [6] As alluded to already, during the first respondent's employment with Eskom, he (like all Eskom employees) enjoyed a preferential interest rate. Eskom Finance Company (EFC) was established by Eskom in 1990 to provide finance to employees of the Eskom Group on preferential terms and conditions. It afforded employees lower than market-related interest rates to finance home loans. Eskom employees are afforded this benefit against a guaranteed payroll

deduction from Eskom to EFC. This changes once an employee resigns or their employment is terminated. The rate then changes to a higher rate. It increases to a rate of up to 2% above the prime lending rate. The loan is thus recalculated at a higher rate and takes into account the particular ex-employee's risk to EFC¹. If an ex-employee is willing to sign a debit order the interest rate may be reduced to 1.5% above prime rate. The respondents did not sign a debit order or make an arrangement with Eskom and were charged the higher rate which was 2% above the prime lending rate.

- [7] Upon the first respondent's termination of employment with Eskom, the interest rate that he previously enjoyed automatically lapsed. The rate significantly increased compared to what he enjoyed during the term of his employment, under the mortgage agreement. He maintained payments initially and paid more increased amounts to pay off the loan quicker. This was not sustainable and the respondents, were unable to maintain payments when the first respondent's consulting business experienced a hiatus in incoming projects and accumulated income became depleted coupled with the down turn in consulting projects during the Covid 19 pandemic.
- [8] Once the respondents' ceased to make payments, the second applicant called in the mortgage for the payment of the accelerated balance (R1 674 488.96 together with interest). On 4 March 2021, when the respondents failed to pay the amount, the second applicant instituted foreclosure proceedings. The applicants launched the application enforcing payment of the accelerated balance, coupled with an order declaring the residential property specially executable in terms of Rule 46A.

Issues to be determined

- [9] The issues for determination are as follows:
- 9.1. whether the first applicant has made out a case for special executability and whether respondents have raised a *bona fide* and legally tenable defence to the applicants' claims.

¹ Caselines Founding Affidavit, clause 8.3 of the Schedule Terms and Conditions attached as "A7"

- 9.2. whether the reserve price for a sale in execution needs to be judicially determined by this court.
- 9.3. whether the mortgage agreement should be invalidated and declared void in terms of the NCA as prayed for in the counterapplication.

Rule 46A and the existence of bona fide defence or legally tenable claims

[10] The first applicant seeks an order that the property be declared specially executable. It contends that it has complied with the requirements of the Practice Directives of this Division when seeking an order to declare a property specially executable in terms of Rule 46A, based on the authority of a plethora of cases that the Practice Directive is based on.² The property is the primary residence of the respondents and the notice of the application has come to the attention of the respondents as is evident from their opposition of the application. The communication between the parties prior to the application also indicates that there were attempts to discuss and settle the interest rate. The factors relevant to Rule 46A have been addressed in the applicants' affidavit relating to the value of the market property which is currently R 2 400 000 and may achieve a substantially higher market price. The outstanding amount due on the municipal services account at the time of the application is R 21 161.62 and the respondents are paying this off.

[11] The applicants have engaged with the respondents on three occasions in writing in an attempt to find a resolution to the issue relating to the arrear payments. They notified and advised the respondents to consider their options in terms of section 129 of the NCA. The section 129 in terms of the NCA notice was served on the domicilium as provided in terms of the agreement.³ The applicants contend that the sale of the property is the only realistic possibility of realising sufficient value to settle the arrear amounts due to it without

² See *Standard Bank of South Africa Ltd v Hand* 2012 (3) SA 319 (GSJ) para 5 and cases cited with approval therein. See also *Standard Bank of South Africa Ltd v Saunderson & Others* 2006 (2) SA 264 (SCA). *Sebola & Another v Standard Bank of South Africa Ltd & Another* 2012 (5) SA 142 (CC).

³ Caselines 03-13, Clause 10 and 03-23, clause 13

prejudicing the respondents who will need their vehicle for travel to employment and future accommodation they may acquire.

[12] The respondents seek an order in their counterclaim for a credit re-arrangement plan on the basis that they are over-indebted. The respondents have not placed sufficient information before the court to even vaguely consider any kind of relief to determine whether they are over-indebted or to consider re-arranging their credit agreement with the applicants. The respondents do not indicate on what basis this should be considered. There simply has been no payment since October 2020. There is no indication of any income at present and how it is expended and what expenses receive priority. The information placed before the court related to the historical payment history prior to October 2020 and the respondents' family and a child with a physical challenge requiring specific resources in the area. That on its own does not make out a case for the relief contended for in the absence of a payment schedule. Over and above, there is no indication how the respondents' request is legally tenable as a defence to the application that the property be declared specially executable. Counsel for the respondents submitted that the agreement was unfair as the respondents were not aware that the interest rate would increase.

[13] Whilst the respondents challenged the change in the interest rate, the agreement caters for the change in circumstances.⁴ The case for the respondents was that the interest rate was not in terms of the NCA. Counsel for the respondents submitted that the respondents were not aware that the interest rate could become prejudicial to them and could increase to the extent that it did. In so far as the rate changed, they were not made aware of the possibility. Consequently, counsel submitted the agreement was unfair to them. Counsel for the respondents, therefore, sought as a just and fair remedy that the agreement be set aside only in relation to the interest rate.

[14] Counsel for the first applicant submitted that the loan agreement made provision in clause 4.3.1 (of the Mortgage Bond) specifically for the full payment of the loan amount unless the parties agreed in writing otherwise. Clause 4.3.2 provided for the payment of pension monies toward the payment of the

⁴ Caselines 02-28 Mortgage Loan Agreement, annexure "A5" to the FA, clause 5.1

settlement of the loan. Clause 5 also provided for the determination of interest. The first respondent was aware of these terms when he signed the agreement.⁵ Counsel for the first applicant contended that the change in the interest rate affected the new risk the first applicant was exposed to with the respondents' changed circumstances and there was no longer a guarantee against the Eskom salary coupled with the respondents' failure to negotiate a new payment plan. This justified the higher rate. The NCA provides in section 103(4) that:

“a credit agreement may provide for the interest rate to vary during the term of the agreement only if the variation is by fixed relationship to a reference rate stipulated in the agreement, which reference rate must be the same as that used by that credit provider in respect of any similar credit agreements currently being used by it “

- [15] Counsel for the first applicant submitted that when it considered that it had no guarantee against the Eskom payroll in respect of the loan to the first respondent previously guaranteed by the Eskom salary, this justified the increased rate. This increased rate so it was submitted is not contrary to the provision of the NCA. The agreement made provision specially for the rates of interest and refer to the JIBAR rate and for the maximum rate of interest permissible in terms of the NCA. The respondent signed the agreement indicating that he was aware of the agreement and that he could obtain alternative advice at the time he signed the agreement.
- [16] Applying the principles extracted from above authorities, and on the undisputed facts of this matter, the first applicant has complied with the requirements of Rule 46A. In contrast, the respondents have not raised a *bona fide* or a legally tenable defence to the applicants' claims. The respondents do not make out a case for the variation of the agreement as sought.
- [17] I proceed to address the counter application where the respondents seek that the mortgage agreement be invalidated in terms of section 90(2)(b) of the NCA

⁵ Caselines 02-28 above

and that the entire agreement be declared void in terms of section 90(3)(b) of the NCA.

[18] Section 90(2)(b) of the NCA provides:

“(2) A provision of a credit agreement is unlawful if

(a) its general purpose or effect is to

(i) defeat the purposes or policies of this Act;

(ii) deceive the consumer; or

(iii) subject the consumer to fraudulent conduct”

[19] The respondents have not made out a case on the papers that the applicants’ conduct is fraudulent. I have had regard to counsel’s submissions and the heads of argument that the respondent bore the onus to plead and prove the fraud or deception it relied upon. This the first applicant also pointed out is contrary to the first respondent’s version in relation to the mortgage bond document which he acknowledged in clause 23.8 of the agreement that they:

“23.8.1 were free to secure independent legal advice as to the nature and effect of each provision of this Agreement and that they have either taken such independent legal advice or have dispensed with the necessity of doing so;

23.8.2 each provision of this Agreement is fair and reasonable in all the circumstances and is part of the overall intention of the parties in connection with the Agreement.”

And

“23.9 that they acknowledged, understood and appreciated:

23.9.1 the risks and costs of obtaining the Loan and entering into this Agreement and 23.10 that they acknowledged, understood and appreciated their rights and obligations in terms of the Agreement”

[20] The respondents’ agreement contradicts their statement that they were misled. In the opposing affidavit, there is no explanation for this. They have had the benefit of legal representation and there is no explanation for the incongruent

versions placed before this court. Counsel for the first applicant has pointed out the respondents' mutually destructive versions. There has been no tenable explanation for the counter application and having regard to the history of the matter and the rules of court and the respondents' unequivocal withdrawal of admissions made on affidavit by counsel before this court makes their case even weaker. In *Brummund v Brummund's Estate*⁶ the court held:

"Where a party in motion proceedings wishes to withdraw an admission made in his affidavits, he is obliged to give a full and satisfactory explanation on affidavit as to how the admissions came to be made and, if they were made in error, to apply formally for their withdrawal. It is insufficient to instruct counsel to state from the Bar that a mistake has been made and that the admissions should be ignored"

The first respondent's affidavit in opposing the application read with the counter application does not make out a case for the relief sought.

[21] In summary, having regard to the requirements of Rule 46A, the respondents have not furnished sufficient information to indicate that their liabilities will be liquidated within a reasonable period, no payments having been made since October 2020, the first applicant has no other remedy available other than what Rule 46A provides: execution against the residence. The respondents received notice in terms of section 129 of the NCA prior to the institution of application. The respondents did not pursue an arrangement to pay the debt or pursue debt review proceedings in the appropriate forum. As I have already found, they have not placed sufficient information before this court whilst referencing a form of debt review, thus making it impossible to consider any such relief.

[22] For the reasons above, I make the following order:

Order

1. The respondents are to pay the sum of R1 674 488.96 (One million six hundred and seventy-four thousand four hundred and eighty-eight rands and ninety-six cents.) with interest on the above amount at the

⁶ *Brummund v Brummund's Estate* 1993 (2) 494 SA 494(Nm).

rate of 10.00% percent per annum calculated and capitalised monthly in advance from 1 November 2020 to date of final payment;

2. The immovable property described as Erf [...] Greenstone Hill Extension 7 Township; Registration Division I.R., Gauteng Province, extent 584 (Five Hundred and Eight Four) square meters held by Deed of Transfer No. T19792/2010, situated at [...] [...], Greenstone Hill, Ext 7, Edenvale is declared specially executable.
3. A copy of this order is to be served on the respondents, personally.
4. The respondents are advised that the provisions of section 129(3) and (4) of the National Credit Act 34 of 2004 ("the NCA") apply to the judgment granted in favour of the applicant. The respondents may prevent the sale of the property, described as Erf [...] Greenstone Hill Extension 7 Township; Registration Division I.R., Gauteng Province, extent 584 (Five Hundred and Eight Four) square meters held by Deed of Transfer No. T19792/2010, situated at [...] [...], Greenstone Hill, Ext 7, Edenvale if they pay to the applicants all of the arrear amounts owing to the applicant together with all enforcement costs, default charges, prior to the property being sold in execution.
5. The arrear amounts and the enforcement costs referred to in paragraph 4 above may be obtained from the applicant. The respondents are advised that the arrear amount is not the full amount of the Judgment debt, but the amount owing by the respondents to the applicant, without reference to the accelerated amount.

SC MIA
JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances

For the applicants:	Adv T Halgryn
Instructed by	PME Attorneys

For the respondents: Adv Siseko Madikizela
instructed by: Mkhize PR Attorneys

Heard: 17 October 2022

Delivered: 17 April 2023