

REPUBLIC OF SOUTH AFRICA



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

Case No: 2020/28320

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
8 May 2023 DATE	 SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED

APPLICANT

and

GODFREY NYAMALUM NTI

FIRST RESPONDENT

CITY OF JOHANNESBURG

METROPOLITAN MUNICIPALITY

SECOND RESPONDENT

In re:

FIRSTRAND BANK LIMITED

PLAINTIFF

and

GODFREY NYAMALUM NTI

DEFENDANT

JUDGMENT

BERGER AJ

- [1] The applicant, FirstRand Bank Limited (the Bank), applied in terms of Uniform Rules 31(5), 46(1) and 46A for an order *inter alia* declaring specially executable the property of the first respondent, Godfrey Nyamalum Nti (Mr Nti), and directing Mr Nti to make payment to the Bank of R1 652 137.69, together with interest and costs on the scale as between attorney and client.
- [2] The Bank initially issued summons against Mr Nti, claiming *inter alia* payment of the same amount as in the application before me, together with interest and costs on the same scale, and an order declaring Mr Nti's property specially executable.
- [3] The Bank's cause of action in the summons and the application is that Mr Nti has defaulted on his obligation to pay monthly instalments to the Bank in terms of the mortgage loan agreement concluded between them.
- [4] At the hearing of the application before me, the Bank made a with-prejudice offer that Mr Nti accepted. In accepting the offer, Mr Nti undertook to pay to the Bank, on or before 1 June 2023, the full outstanding arrears, standing at R74 231.89. The Bank undertook, in the event of Mr Nti making such payment, to withdraw the summons and the application.

- [5] The only issue remaining between the parties is one of costs. It is necessary, for the determination of this issue, that I first set out the history of this matter.

The history of the matter

- [6] The Bank concluded a mortgage loan agreement with Mr Nti on 10 July 2014, so that Mr Nti could purchase a property for his residence (Mr Nti's property). The monthly instalment then payable in terms of the agreement was R13 128.20. The agreement was subject to the registration of a mortgage bond in favour of the Bank over Mr Nti's property.
- [7] After some years, Mr Nti failed to keep up with the monthly instalments. As at 17 June 2020, the arrears were R62 036.83.
- [8] Summons was issued on 30 September 2020. Mr Nti filed his notice of intention to defend on 13 October 2020. Since Mr Nti has been acting without an attorney throughout this matter, his documents are not always drafted with legal precision. I have no difficulty with this, and will deal with the matter on its merits.
- [9] In his notice of intention to defend, Mr Nti stated that he had been advised by the Bank that the minimum amount he had to pay to avoid litigation was R67 190.80, that he had raised the amount, which he was willing to pay, and that he proposed a mediation process to settle the remainder of the bond.
- [10] Mr Nti contacted the Bank's then attorneys, on 3 November 2020, with a payment proposal. The attorneys relayed their client's instructions on 10 November 2020.

They said the Bank was prepared to settle the litigation on the basis of an agreed payment schedule, but the legal fees of R5 528.05 could not be reduced. Mr Nti was asked if the proposal was acceptable to him and if so, he was requested to withdraw his notice of intention to defend.

[11] Mr Nti responded on 10 November 2020. He requested the Bank's then attorneys to draft the settlement agreement and to incorporate the Bank's payment terms. He said that he would "*accordingly withdraw my notice of intention to defend for purposes of settlement.*" The attorneys said they would draft the agreement but would have to get it approved by the Bank before sending it to Mr Nti.

[12] On 19 November 2020, the Bank's then attorneys informed Mr Nti that they were still waiting for the Bank to "*finally approve the settlement agreement.*" Mr Nti was also informed that he was required formally to withdraw his notice of intention to defend, failing which a notice of bar would be served on him.

[13] Mr Nti did not file a plea within the time required by the rules. On 19 November 2020, the Bank's then attorneys filed a notice of bar.

[14] On 20 November 2020, Mr Nti filed a notice stating: "*This is to confirm that I have reached a provisional settlement (yet to be signed) with the plaintiff (First National Bank) and as such I hereby withdraw my notice [of intention to defend] to afford an out of court settlement agreement to be finalized.*" Later that day, Mr Nti wrote to the Bank's then attorneys stating that he was "*under the mistaken impression that my formal notice of my withdrawal should only happen after finalisation of terms with your client.*" There was, however, no need for Mr Nti to withdraw his

notice of intention to defend until the parties had concluded a settlement, but that was the advice he was given by the Bank's then attorneys.

[15] It is clear that Mr Nti's withdrawal of his notice of intention to defend was not done so that the Bank could proceed to take judgment against him unopposed.

[16] On 7 December 2020, Mr Nti wrote to the Bank's then attorneys to enquire about the settlement agreement. He said he was "*following up to make sure that I have not missed any other correspondence in between. Please confirm that we are still awaiting settlement documents from your client.*" He was reassured that he had not missed any correspondence. The settlement agreement was sent to Mr Nti later that day. The document was not subsequently signed. In my view, that does not detract from the fact that agreement was reached between the parties.

[17] In terms of the agreement, Mr Nti was to make payment of R60 000 by no later than 15 December 2020. Thereafter, he was to make payments of R14 998.20 per month, in addition to his then monthly instalment of R14 428.82, so that the arrears could be repaid, as well as "*the legal costs incurred by the Plaintiff since inception of legal action*". It was specifically agreed that Mr Nti would be liable to the Bank for "*legal costs on an attorney and client scale including disbursements which have been incurred by the Plaintiff to date hereof.*"

[18] On 15 December 2020, Mr Nti wrote to the Bank's then attorneys. He said that he was applying his mind to the terms of the "*draft settlement agreement*". He attached proof of payment of R75 000 "*in the spirit of this agreement. It includes the agreed R60 000 plus R14 428.82 advance instalment for December 2020 per*

the agreement". He added: "*(I have also submitted this to FNB and do await an updated statement, which should reduce my monthly instalment).*" Mr Nti made further proposals which he hoped could cancel his arrears sooner. He also said that he would "*raise a further R5530 to cover your legal fees.*" He concluded: "*I look forward to hearing from you.*"

[19] Inexplicably, neither the Bank nor its then attorneys responded to Mr Nti's email.

On 23 February 2022, more than 14 months later, the attorneys withdrew as the Bank's attorneys of record. A further 6 months later, on 18 August 2022, the Bank appointed its current attorneys of record.

[20] In the intervening 20 months, from 15 December 2020 to 18 August 2022, Mr Nti continued to pay his monthly instalments, with a small top-up. Instead of paying the instalment of R14 428.82, he paid R15 000 every month, except for January and June 2021 when he missed his monthly payments. He was therefore making a contribution towards the arrears of R571.18 per month. He continued to pay his R15 000 per month after August 2022.

[21] As at December 2020, the arrears were standing at R148 810.42. The arrears were reduced between December 2020 and August 2022. By 6 September 2022, the arrears were R85 859.76.

[22] In settling his arrears, Mr Nti did not pay as much as was agreed in the settlement agreement. He says that he was waiting for the Bank to amend the document so as to record that he had paid R75 000 upfront, instead of the R60 000 as agreed. Mr Nti's understanding of how contracts work is clearly limited. In his email of 15

December 2020, he stated that the R75 000 contained “*the agreed R60 000 plus R14 428.82 advance instalment for December 2020 per the agreement*”. In other words, once the R60 000 was paid, the balance of R15 000 was earmarked as follows: R14 428.82 towards the instalment for December 2020, and R571.18 as a further contribution towards the reduction of the arrears.

[23] There was no need for an amendment of the settlement agreement. If the Bank had taken the time to explain the position to Mr Nti, the issue could have been resolved, the agreement signed, and the arrears settled as agreed. However, the Bank and its then attorneys did not address Mr Nti's concerns. They ignored Mr Nti, and left the matter in abeyance.

[24] On 18 August 2022, the day of their appointment as the Bank's new attorneys of record, the Bank's current attorneys emailed Mr Nti, seeking his current details. The attorneys were, however, able to contact him because his email address had not changed in the intervening 20 months. Instead of responding to Mr Nti's email of 15 December 2020, the attorneys requested him to “*advise if you are able to enter into a payment arrangement with the bank, and thus pend legal action.*” The new attorneys ignored the fact that “*a payment arrangement*” had long since been approved by the Bank so as to avoid legal action.

[25] On 9 September 2022, the Bank's Mr Cyril Daniels (of Home Loans Legal) spoke with Mr Nti. On 19 September 2022, Mr Daniels sent Mr Nti copies of emails from 2020 to remind him of the agreement that had been reached between the Bank and Mr Nti.

[26] On the same day as the Bank was sending emails to Mr Nti, 19 September 2022, the Bank's current attorneys launched the application in terms of Rules 31(5), 46(1) and 46A (the Rule 46A application).

[27] Mr Nti responded to Mr Daniels on 3 October 2022. He said he had been paying the R15 000 every month "... *in the spirit of the basic or original agreement as I intended to return to normal monthly payments as I had agreed to whilst awaiting FNB to update.*" He continued: "*If FNB had reached out to me anytime throughout these last two years, I would have arranged with my sponsors to make good on any outstanding amount, or even the R85 859.76 within 30 days.*" He maintained that he was still willing to settle the arrears, but disputed his liability for costs.

Liability for costs

[28] Clause 2.16.2 of the mortgage loan agreement provides: "*Collection costs on the attorney and client scale will be charged by the [Bank] in the event of the [Bank] having to enforce the terms and conditions of this Agreement.*"

[29] Ms Carvalheira, who appeared on behalf of the Bank, submitted that a settlement agreement was not concluded between the parties because the document was not signed. According to this argument, there was no binding settlement between the parties; Mr Nti remained obligated to honour his monthly instalments due in terms of the mortgage loan agreement and had a duty to settle his arrears, failing which the Bank was entitled to proceed with legal action, as it did. In any event, Mr Nti did not keep to the terms of the "*draff*" settlement agreement.

[30] Ms Carvalheira further submitted that Mr Nti was not entitled to “*hold the arrears hostage*” while insisting that the settlement agreement be updated; no update was required; Mr Nti was contractually bound to clear the arrears and to keep up with his monthly instalments; and there was nothing preventing him from settling his arrears without any input from the Bank.

[31] Mr Nti submitted that the Bank should have engaged with him before incurring the additional legal costs of the Rule 46A application. He argued that the Rule 46A application was unnecessary. He noted that he has continued to reduce his arrears, which currently stand at R74 231.89.

[32] The question, in my view, is whether it was necessary for the Bank to launch the Rule 46A application, as and when it did, in order for it “*to enforce the terms and conditions*” of the mortgage loan agreement.

[33] The Bank was entitled to issue summons, as it did on 30 September 2020. It was not entitled, however, to regard the matter as unopposed on the basis of Mr Nti having withdrawn his notice of intention to defend and failing to file a plea. The Bank knew very well that this had been done because the parties were talking to each other and discussing settlement.

[34] Whether or not the Bank believed, on 15 December 2020, that a settlement had been reached, Mr Nti made his first payment thereafter according to the terms of the document prepared by the Bank's then attorneys and with the approval of the Bank. Mr Nti's email of 15 December 2020 called for a written response from the Bank. The Bank could not leave the matter in abeyance for 20 months, and then,

without responding, instruct its new attorneys to launch an application for *default* judgment, calling upon Mr Nti to appear in this Court on 17 October 2022.

[35] On 18 August 2022, the Bank knew that the matter was not unopposed and that Mr Nti had only withdrawn his notice of intention to oppose because of the Bank's insistence that he do so in order to facilitate the settlement discussions. The Bank also knew that Mr Nti's email of 15 December 2020 remained unanswered.

[36] In addition, between 9 and 19 September 2022, the Bank resumed discussions with Mr Nti. In my view, it was premature for the Bank to launch the Rule 46A application on the very day that Mr Daniels was emailing Mr Nti so as to sort out the issue of the outstanding arrears. The Bank ought to have allowed Mr Daniels to pursue those discussions with Mr Nti until it became apparent (if it did) that the Rule 46A application was necessary.

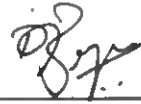
[37] Mr Nti has always accepted his liability for the costs up to 15 December 2020. The Bank's then attorneys put the costs at R5 528.05. In my view, Mr Nti is not liable for any further legal costs from 15 December 2020 to date.

[38] Accordingly, I make the following order:

38.1. The first respondent/defendant is directed to pay the applicant's/plaintiff's costs up to 15 December 2020, subject to the said costs being capped at R5 528.05.

38.2. The first respondent/defendant is not liable for any costs that have been incurred by the applicant/plaintiff from 15 December 2020 to the date of this judgment.

38.3. Save as aforesaid, the parties shall bear their own costs.



D I Berger

**ACTING JUDGE
OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 8 May 2023.

Heard on : 19 April 2023

Delivered: 8 May 2023

Appearances:

For the Applicant:

Ms R Carvalheira

For the First Respondent:

Mr Nti (in person)