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

Case no: 37524/2020

NOT REPORTABLE'

NOT OF INTEREST TO OTHER JUDGES

REVISED

18.05.23

In the matter between:

CHANGING TIDES 17 PROPRIETARY LIMITED N.O.

Plaintiff

and

RAMABE, MASHAKENG FRANS

Defendant

NEUTRAL CITATION: *Changing Tides (Pty) Ltd N.O. v Ramabe* (Case No: 37524/2020) [2023] ZAGP JHC 504 (18 May 2023)

JUDGMENT (SUMMARY JUDGMENT)

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 14h00 on 18 May 2023.*

MOULTRIE AJ

- [1] The plaintiff seeks summary judgment in respect of a liquidated amount in money due and owing pursuant to the defendant's breach of a loan agreement concluded by the parties, and an order declaring the immovable property it holds

as security for the defendant's indebtedness to be specially executable. The plaintiff delivered an affidavit as contemplated in paragraph 10.17 of the practice manual setting out information in support of the latter relief.

[2] In his plea and in his affidavit opposing summary judgment, the defendant does not dispute the alleged breach, the amount of the indebtedness or the security, but alleges that:

(a) the government measures put in place to combat the COVID-19 pandemic "*had a retrogressive impact on the normal servicing of the loan*";

(b) the plaintiff failed to comply with the requirements of section 129 of the National Credit Act, 34 of 2005 in that the defendant has no knowledge of various additional addresses (other than the agreed *domicilium* address) to which the plaintiff claims to have delivered the relevant notice; and

(c) the mortgaged property is his primary residence at which he resides with his family including three minor children, and that the plaintiff should be required to first execute against his movable property in satisfaction of the debt.

[3] The defendant's allegation of his inability to service the loan as a result of the COVID-19 measures does not constitute a valid substantive defence to the plaintiff's claim.

[4] I am furthermore satisfied that the plaintiff did indeed duly serve the section 129 letter on the defendant. The loan agreement relied upon by the plaintiff identifies the defendant's chosen *domicilium citandi et executandi* as being 17 Marble Street, Lenasia Ext 13, Gauteng, 1827.¹ While it appears that the plaintiff also purported to serve the section 129 letter at various other addresses, the sheriff's return submitted by the plaintiff indicates that the section 129 letter dated 23 September 2020 and addressed to the defendant at the *domicilium* address² was

¹ Caselines 013-34, 38, 40, 43 and 33.

² Caselines 013-81.

personally served on the defendant by the Deputy Sheriff at the domicilium address at 15h02 on 28 September 2020.³

- [5] While a sheriff's return only stands as *prima facie* evidence of its contents,⁴ it calls for an answer, and places an evidential burden on the party seeking to impeach it. That party must do so on the basis of "*the clearest and most satisfactory evidence*".⁵ The burden of the defendant's contentions in this regard is that he has never stayed at the additional addresses, and his bald denial of personal service does not in my view meet the standard required to successfully impugn the sheriff's return of service.
- [6] In the circumstances, I am satisfied that the plea does not raise any substantive defence to the plaintiff's claim and that the plaintiff is entitled to the monetary judgment that it seeks.
- [7] However, since the loan agreement stipulates that the loan bears interest at a variable rate, it is inappropriate to fix the interest rate as at the date of the certificate relied upon by the plaintiff, as sought in its draft order.⁶ The order for interest should instead reflect the wording of the loan agreement, with the result that the rate will continue to vary pursuant to changes in the relevant rate until such time as the debt is finally discharged.
- [8] The interest rate provided for in the loan agreement as pleaded in the (undisputed) particulars of claim is as follows:

"... the mid-market rate for deposits in South African Rand for a period of three months, which appears on the Reuters Screen, SAFETY page under the caption "yield" as of approximately 11:00 AM, Johannesburg time on the date of registration of the ... bond ... and would be reset thereafter on the same basis on the 21 February, 21 May, 21 August and 21 November

³ Caselines 013-89.

⁴ Section 43(2) of the Superior Courts Act 10 of 2013.

⁵ *Deputy-Sheriff, Witwatersrand District v Goldberg* 1905 TS 680 at 684; *Sasfin Bank Limited v Varelziz* 2018 JDR 1347 (GP) paras 206 - 217

⁶ I note that section 1(1) of the Prescribed Rate of Interest Act, 55 of 1975 (in terms of which the rate of interest is fixed "as at the time when ... interest begins to run" – see *Davehill (Pty) Ltd and Others v Community Development Board* 1988 (1) SA 290 (A) at 300I – 301C), does not apply.

(or, if that day is not a business day, the immediately succeeding business day) ("the JIBAR rate") converted to and expressed as a nominal annual rate, compounded monthly, rounded up to the nearest first decimal point ("the BASE rate"), plus 3.80% ..."

- [9] The order that I make reflects the contractually agreed formulation with reference to the definition of the "base rate" in the loan agreement.
- [10] With regard to the order for special executability, I have taken into account the following information gleaned from the papers and from the plaintiff's paragraph 10.17 affidavit (which was not disputed by the defendant at the hearing):
- (a) The defendant's total indebtedness as of 21 October 2020 was approximately R650,000.
 - (b) It appears from the instalment and account statements attached to the plaintiff's affidavit as "MJ5 and "MJ6" that while the defendant has been making payments on a fairly regular basis, these have gradually reduced over time to R2,500 per month and the total indebtedness stood at approximately R695,000 as at December 2022. This is in circumstances where the monthly instalment is R6,913.95 and interest is accruing on the arrear balance in the amount of approximately R5,770 per month.
 - (c) The municipal valuation of the property is R728,000.
 - (d) An automated 'Lightstone' valuation dated 2 December 2022 identifies the "*expected value*" of the property as being R940,000.00.
 - (e) The plaintiff's valuation dated 12 January 2023 indicates the "*market value*" to be R770,000 and the "*forced sale*" value to be R600,000.
 - (f) The outstanding municipal charges on the property as at November 2022 were R101,332.91.
 - (g) The application of the 'usual formula' (i.e. the average of the market valuation and the municipal valuation, less outstanding municipal

charges, less 30%)⁷ would produce a result of approximately R453,366.96.

- [11] It appears from the above that the amount of the defendant's arrears has been steadily increasing and that there is little prospect that his total or arrears indebtedness will be reduced, let alone extinguished, in the foreseeable future. There also appears to be little equity remaining in the property over and above the amount owed to the plaintiff. Furthermore, there is no evidence before me of the value of the defendant's movable property – let alone whether it would be sufficient to discharge his indebtedness to the plaintiff. Against that is the fact that the defendant specifically agreed to mortgage the property as security for the debt.
- [12] In those circumstances, I am satisfied that it is appropriate that the property should be sold in execution.
- [13] Having considered the various valuations and the outstanding municipal charges, I am of the view that a reserve price of R500,000.00 would be appropriate. I have calculated this on the basis of the average of the Lightstone valuation, the market valuation and the municipal valuation (which gives a result of R812,666.66), less the outstanding municipal charges (R101,332.91), less 30%, and rounding to the nearest R10,000.
- [14] I should add that it is common cause that the loan agreement provides for the payment of enforcement costs by the defendant on the attorney and own client scale.
- [15] Judgment is granted in favour of the plaintiff against the defendant for:
1. Payment of the sum of R650,223.77.
 2. Interest on the above amount at the "base rate" as defined in clause 1.1.5 of Annexure B to the plaintiff's particulars of claim from time to time plus 3.80% per annum compounded monthly in arrears from 21 October 2020 to date of payment.

⁷ Cf. *National Urban Reconstruction & Housing Agency NPC v Morula Resources* CC 2020 JDR 2473 (GJ) footnote 21.

3. The following property is declared executable:

ERF [...] LENASIA EXTENSION 13 TOWNSHIP, REGISTRATION DIVISION I.Q., PROVINCE OF GAUTENG measuring 350 (three hundred and fifty) square metres held by Deed of Transfer No. T47550/2007 subject to the conditions therein contained ("**the property**").

4. The Registrar is authorised to issue a Writ of Execution for the attachment of the property.
5. A reserve price in the amount of R500,000.00 is set for the sale of the property in execution ("**the reserve price**").
6. In the event that the reserve price is not achieved at the first sale in execution, the plaintiff may:
 - a. proceed to a second sale in execution with the same reserve price; and/or
 - b. approach this court on the same papers, duly supplemented (including the sheriff's report in terms of Rule 46A9(c)) for the reconsideration of the reserve price; or
 - c. approach this court on the same papers, duly supplemented (including the sheriff's report in terms of Rule 46A9(c)) for the ratification and confirmation of a sale to the highest bidder at the first or second sale in execution.
7. The defendant may in terms of the provisions of section 129(3)(a) of the National Credit Act 34 of 2004 at any time before the plaintiff has cancelled the agreement re-instate the agreement by paying the amounts referred to in paragraph 8 below but the defendant may not re-instate the agreement in terms of section 129(4) after the sale of the property.
8. The defendant may prevent the sale of the property if he pays to the plaintiff all of the arrear amounts owing to the plaintiff, together with the plaintiff's permitted default charges and reasonable costs of enforcing the

agreement up to the time of re-instatement, prior to the property being sold in execution.

9. The arrear amounts, enforcement costs and default charges referred to in paragraph 8 above may be obtained from the plaintiff.
10. The defendant is advised that the arrear amount is not the full amount of the Judgment debt, but the amount owing by the defendant to the plaintiff without reference to the accelerated amount.
11. A copy of this order is to be served personally on the defendant as soon as is practical after the order is granted, but prior to any sale in execution.
12. Costs of suit on the attorney and client scale.

RJ Moultrie AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE HEARD: 16 January 2023

JUDGMENT: 18 May 2023

APPEARANCES

For the Plaintiff: M Amojee, instructed by Strauss Daly Inc.

For the Defendant: In Person