

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

05/05/2011
Case No: 15043/2009

In the matter between:

~~STANDARD BANK OF SA LTD~~ ~~APPLICANT~~

And

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

2011/05/05
DATE SIGNATURE

MATHLABE JOSEPH MOLWANTWA 1ST RESPONDENT

CHRISTINA MITA MOLWANTWA 2ND RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] This is an opposed application for summary judgment against the defendants, for:

- (1) payment in the amount of R1 690 652, 80;
- (2) interest on the aforesaid amount calculated at the rate of 11.95% per annum from 5 March 2009;

- (3) An order declaring the property known as ERF 1164 Waterkloof ridge ext 2, REGISTRATION: J.R. GAUTENG, MEASURING 1823 SQUARE METRES and held by DEED OF TRANSFER T67258/1990 executable;
- (4) Costs of suite; and
- (5) Further and/or alternative relief.

[2] It is common cause that the applicant's claim arises from moneys lent and advanced to the respondents, which are secured by a covering bond registered against the immovable property of the respondents mentioned in paragraph 1 herein above.

[3] In resisting the summary judgment the respondents have attached, inter alia, a copy of a judgment of Pretorius J dated on 21 October 2008 granting an order in favour of the first respondent against Telekom SA. Limited, under Case number 33739,2003, for payment of an amount R2, 453,492, 03 together with interest a tempore morae at the prescribed rate as well as costs. They further submit that although Telkom has

noted an appeal against the judgment of Pretorius J, they have been advised that the appeal has no prospect of success. They further contend that the aforesaid amount exceed the amount claimed by the applicant, upon payment thereof by Telkom they would be in a position to extinguish their indebtedness to the applicant.

[4] The respondent further pointed out that the relevant property is worth R4, 000, 000, 00 and the amount which was outstanding at the time the applicant took legal steps against them was R130, 540, 86. They further contend that the property is their residential place in which they live together with their minor children.

[5] They further submitted that although the applicant had sent them a letter in terms of section 129 of the Credit Act, they intended to refer the matter to a debt counsellor or alternative dispute resolution agent to try to find a solution to the difficulties which flow from a judgment being granted.

[6] The respondents further submitted that this Court is In terms of Rule 32(5) not obliged to grant the summary judgment against them but should exercise its discretion in their favour. They contend that the grant of a summary judgment, in particular the execution order against of property, would infringe upon their constitutional rights for adequate housing.

[7] The applicant contended that the respondents have not disclosed a defence as required by Rule 32(3)(b). They further submit that the discretion the court has should not be exercised capriciously. Reliance in this regard is made of the matter of Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 TPD at 229B-E.

[8] In terms of Rule 32(3)(b) in a summary judgment application, the defendant must satisfy the court that he has *bona fide* defence to the action and disclose fully the nature and grounds of the defence and the material facts relied upon.

[9] In the *Breitenbach v Fiat SA (Edms) Bpk*¹ the court said that: “...if, on the material before it, the Court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is sufficient basis on which to exercise its discretion in favour of the defendant.”

[10] It brooks no argument that the respondents have constitutionally enshrined rights, inter alia, to life, housing, and dignity². *In casu* they stated that the relevant property is worth R4,000, 000, 00. The amount that was owing at the time of the applicant taking measures to recover what it was owed was R130, 540, 86. They have also shown that they have a potential amount of R2, 453,492, 03 that would enable them to expunge the applicant's claim. These factors require that before I grant the order of execution of the immovable property of the respondents, I must have regard to the respective interest of the parties, the stringent nature of summary judgment applications.

¹ *Supra* at 229H

² *Occupiers of 51 Olivia Road & Main Street, JHB v City of JHB* 2008 (3) SA 208 (CC) at 216E.

[11] The applicant has as much rights as the respondents. It is entitled to be paid what is due to it. Were I to grant an order to declaring the immovable property of the respondents executable, they run the risk of loosing a roof over their heads. Not only they would suffer the consequences of such steps but even their minor children. On the other hand, in the event I do not grant such order, the applicant will not suffer much prejudice because it can proceed against the defendants by selling their movable properties to defray the amounts outstanding.

[12] I am of the view that, where it is sought, an order that has the potential of encroaching drastically upon the fundamental rights of a person, the applicant who seeks such an order, must first exhaust other less invasive remedies before resorting to a cause that is much more invasive. I am further of the view that in matters of this nature, such as *in casu*, the applicant must place before the court evidence showing the market value and

forced value of the immovable property.³ The court should then consider the amount due to the applicant, and the value of the property and decide what would be just in those circumstances.

[13] Although, in my view, the respondents have not disclosed a defence in the strict sense as envisaged in rule 32, however, in the exercise of my discretion, I am disinclined to grant the applicant the relief sought; *vide Sylko Paper Co. (Pty) Ltd v Castle Supremarket*.⁴

[16] In the result I make the following order:

1. That the application for summary judgment is refused and the respondents are given leave to defend.
2. That the costs of the summary judgment application are reserved for decision at the trial.

³ Vide *Firtstrand Bank Ltd v Maleke and Three Similar cases* 2010 (1) SA 143 (GSJ) at pages 153-155 paragraphs [8]-[59].

⁴ 1977 (3) SA 698 (N.P.D.) at 700F.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 05/05/2011

APPLICANT'S ATT : FINDLAY & NIEMEYER INC.

APPLICANT'S ADV : MR. S.T. POTGIETER

RESPONDANTS' ATT : SHAPIRO & SHAPIRO

RESPONDANTS ADV : MR. M. HASKINS