**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**(1) NOT REPORTABLE**

**(2) NOT OF INTEREST TO OTHER JUDGES**

**(3) REVISED.**

**CASE NO: 21875/2014**

**28/3/2018**

In the matter between:

**THE STANDARD BANK OF SOUTH AFRICA LTD** APPLICANT

and

**NEIL ANDREW OOSTERLAAK** 1st RESPONDENT

**(IDENTITY NUMBER:[….])**

**CHARMAINE OOSTERLAAK** 2nd RESPONDENT

**(IDENTITY NUMBER: [….]**

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**JUDGMENT**

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**AC BASSON, J**

[1] This matter emanates from an action instituted by the applicant (Standard Bank of South Africa Ltd) against the two respondents (Neil Andrew Oosterlaak and Charmaine Oosterlaak). The action was opposed and was enrolled for trail. Prior to the hearing date. the said action was settled

when the parties concluded a settlement agreement on 7 March 2017.

[2] In terms of the settlement agreement, the defendants (the respondents before court) by their signature withdrew their defence to the action and waived all defences raised in respect thereof.

[3] In terms of the settlement agreement, the respondents were required to eradicate the arrears in respect of their home loan account as per the terms of the settlement agreement within a period of six months whilst simultaneously continue to pay the normal instalments contemplated in terms of the loan agreement.

[4] According to the applicant, the respondent did not comply with the terms of the settlement agreement in that the arrears were not eradicated by the end of September 2016. During October 2016 the respondents were granted some lenience to eradicate the arrears by 7 December 2016. According to the respondents this also did not happen.

[5] On 13 January 2017 a notice of breach was dispatched to the respondents as per the settlement agreement. In this letter it is, *inter alia,* stated that an indulgence had been granted to have the arrears settled by 7 December 2016. It is further recorded that the respondents were currently in arrears in the amount of R153 257.90 and that they have not been making any payments since 28 October 2016. The respondents were advised that if payment is not made the applicant would proceed with default judgment.

[6] The respondents did not eradicate the arrears within the time period and the applicant thereafter proceeded with an application for default judgment seeking an order that judgment be entered against the respondents for the outstanding indebtedness and for an order in terms whereof the immovable property relevant to the legal nexus between the parties be declared specifically executable.

[7] The matter was opposed. On 2 May 2017 the court made an order in terms of which the application for default judgment was to serve as a notice of motion and that the affidavit filed in support of the application for default judgment would serve as the founding affidavit. The defendants (the present respondents) were directed to file an answering affidavit.

[8] In the opposing affidavit, the respondents dispute that there was a breach of the agreement and further raise the defence that there was complete compliance with the terms of the settlement agreement. The respondents further submitted that due to the full payment of all indebtedness in terms of the settlement agreement, it was incumbent upon the applicant to again comply with the provisions of section 129 of the National Credit Act[1] ("NCA") and institute action afresh.

Was there compliance with the settlement agreement?

[9] If regard is had to the settlement agreement, it is clear that it was aimed at affording the respondents an opportunity to reinstate the loan agreement by settling the arrears which have accrued as at the date of undersigning the settlement agreement whilst continuing to serve the monthly instalments due.

[10] In terms of the settlement agreement, the respondents were obliged to pay the normal instalments contemplated in the loan agreement (in the amount of R31 505.53). Such payments would strictly be made on or before close of business on 7 April 2016 and thereafter strictly on the 7th day of each month. In addition thereto, and on the 7th of each month, the respondents would pay an additional amount of R167 263.74 per month for a period of 6 months until the arrears have been settled in full. The respondents were required to strictly comply with these obligations in respect of payment. For the leniency period which the settlement agreement allowed for, same would imply. In other words, an amount of R198 769.27 was payable monthly. Should this amounts have been paid, at the end of September 2016, the arrears on the account would have been reduced to R0.00 and the respondents would thereafter have been required to pay their normal monthly instalments as per the loan agreement. In terms of the settlement agreement, the respondents would be notified in writing of any breach of the terms of the settlement agreement. Ten days after having formally informed the respondents of the said breach, the applicant would be

[1] Act 24 of 2005.

entitled to apply for default judgment for the outstanding amount and the relief would include execution of the immovable property. A certificate of balance would constitute prima facie evidence of the indebtedness and any other fact relating to such indebtedness.

[11] The respondents made the following payments:

(i) The required payments in the correct amount were made during April 2016 and May 2016.

(ii) In June 2016 a payment of R190 000.00 was made.

(iii) In July 2016 the respondents were ahead in their payments payable in the amount of R2461.46.

(iv) In August 2016 a short payment was made in the amount of R90 000.00.

(v) In September 2016 a further short payment was made in the amount of R140 000.00.

[12] At the end of September 2016 an amount of R1 224 338.88 was payable of which only R 1027 538.54 was made. In so far as the settlement agreement provided that the arrears had to be settled by the end of September 2016, there clearly was a breach.

[13] In October 2016 the respondents made a further belated payment. At the end of October, a further amount was paid but at the end of October 2016 the account remained in arrears in the amount of R58 414.73.

[14] The respondents were granted an indulgence and were afforded an opportunity to eradicate the arrears up until January 2017 when the breach notice was issued. At that time an amount of R1 382 410.83 was payable in respect of the arrears whereas an amount of R1 197 538.54 was made. The account as at January 2017 therefore remained in arrears in the amount of R184 872.29.

[15] In light of the aforegoing, the applicant submitted that the arrears have therefore not been settled as per the settlement agreement and in the premises, the respondent did not comply with the settlement agreement entitling the applicant to proceed with this application. I am in agreement

with the applicant in light of what is provided for in the settlement agreement (especially in light of its purpose to allow for the respondents to eradicate the arrears within a period of six months), that the respondents have breached the settlement agreement entitling the applicants to proceed on the basis provided for in the settlement agreement.

Section 129 notice in terms of the NCA

[16] The respondents have also contended that the applicant should have instituted litigious steps afresh. I do not agree. In general, a consumer will statutorily be entitled in terms of section 129(3) of the NCA to reinstate a credit agreement in terms of which he/she had defaulted provided that all amounts that are overdue were paid. The effect of such reinstatements that the consumer is again placed in the position to continue with the standard terms of the credit agreement originally concluded. Section 129(3) reads as follows:

> **"129. Required procedures before debt enforcement**
>
> (3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied."

The Constitutional Court in *Nkata v Firstrand Bank Ltd*[2] explains:

> "[105] The reinstatement occurs by operation of law. This is so because the wording of the provision is clear that the consumer's payment in the prescribed manner is sufficient to trigger reinstatement. She *may reinstate by paying to the credit provider all arrears that are due, permissible default charges and legal*

[2] 2016 (4) SA 257 (CC).

*costs.*[3] Reading in a requirement of prior notice to the credit provider, as well as a reinstatement that does not occur automatically against due payment, would unduly limit the value to the consumer of the remedy of reinstatement. It would unduly diminish the usefulness of the relief of reinstatement if the consumer were saddled with procedural requirements most consumers are likely to falter on."

[17] In terms of the settlement agreement, all arrears had to be eradicated within a period of 6 months (as extended). If that had been done, the credit agreement would have been reinstated. This did not happen. The applicant was therefore entitled to enrol the matter for default judgment for the full indebtedness amount. It was, in light of these circumstances, not necessary to have re-issued the notices as contemplated in terms of section 129 of the NCA.

Rule 26 relief

[18] In terms of the settlement agreement, the respondent acknowledged that the property may be sold in execution in the event of non-compliance with the settlement agreement. The respondents claim that execution must be levied against movable property first before the immovable property may be declared specifically executable.

[19] If regard is had to the decision in *Firstrand Bank Ltd v Folscher and Another And Similar Matters*[4] it is clear that a court has a discretion to declare immovable property specifically executable. Although the issue of whether movable property account, it is not an absolute requirement. It is furthermore for the debtor to place any factor befo.re the court to assist the court in exercising a discretion.

[20] In the present matter, the respondents have not placed facts before the court that could persuade a court to decide against granting an order for

[3] My emphasis.

the execution of the immovable property. It is also relevant to point out that as at July 2017, the arrears on the account was R 342 944.24 which constitutes 10.7 months in arrears. In terms of the updated certificate of balance dated 5 March 2018, the amount due, owing and payable is the sum of R 5 067 694.63. This is substantial. I can find no reason not to grant an order that the immovable property be declare specially executable.

[21] Lastly, the applicant was also criticized for not having attached a certificate of balance *" signed by any manager of the plaintiff whose appointment it shall not be necessary to prove...".*

[22] In terms of the settlement agreement, it was agreed that a certificate of balance would constitute *prima facie* proof of the indebtedness amount. In this regard the court in *F & I Advisors (Edms) Bpk en 'n ander v Eerste Nasionale Bank Van Suidelike Afrika Bpk*[5] the court held that where a certificate of balance is utilized, it is not necessary for a plaintiff to deconstruct the manner in which the amount was constituted unless the amount is placed in disputed upon a tenable basis.

[23] In the event the following order is made.

1. Payment in the sum of R5 067 694.63.
2. Interest thereon at the rate of 8.000% per annum on the amount of R3 800 000.00 and charged at a rate of 8.450% per annum on the balance of the amount owing above R3 800 000.00, interest calculated daily and compounded monthly in arrear from 5 March 2018 to date of final payment, both dates inclusive.
3. Payment of the monthly insurance premiums of R1 778.62 per month from 5 March 2018, for the full period the applicant makes payments of such monthly insurance premiums in relation to the mortgaged property mentioned in Annexure "81", "B2"and "83".
4. Costs of suit to be taxed on a scale as between attorney and client.
5. ERF [….]

   REGISTRATION DIVISION J.R

[4] 2011 (4) SA 314 (GNP).

PROVINCE OF GAUTENG

MEASURING 3886 (THREE THOUSAND EIGHT HUNDRED AND EIGHTY-SIX) SQUARE METERS
HELD BY DEED OF TRANSFER T87132/2003

SUBJECT TO THE CONDITIONS THEREIN CONTAINED

Also known as: [….]

is declared specially executable.

6. The Registrar is authorised and directed to issue a writ of execution against the hypothecated property above in accordance with the terms of this judgment.

**JUDGE AC BASSON**

**JUDGE OF THE HIGH COURT**

[5] 1999 (1) SA 515 (SCA).