IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

2|3|17.

CASE NO: A585/15

In the matter between:

JOSE AMERICO GONSALVES FELIX First Appellant

MARIA JUDITE PESTANA FELIX Second Appellant

and

(1)	REPORTABLE:	~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES:	~~YES~~ / NO
	28/02/17 DATE	SIGNATURE

NEDBANK LIMITED Respondent

JUDGMENT

Tuchten J:

1 This is an appeal from an order made by Lephoko AJ sitting in the opposed motion court. The respondent (the Bank) launched an application against the appellants for payment of the sum of R2 374 273.12, interest, an order declaring the respondents' property in Bruma, Johannesburg specially executable for these amounts and costs. I shall refer to the claims and orders for payment and interest

as the money relief and the money order and to the claim and order for execution as the execution relief and the execution order.

2 The Bank claimed the money relief on a written agreement of loan, which was attached to its founding affidavit. For the execution relief, the Bank's founding affidavit stated that the Bank relied on a single mortgage bond, for a capital amount of R200 000, a copy of which was attached to the founding affidavit. But it seems that the Bank wanted to rely on a further mortgage bond. I say this not because the Bank referred to this further bond in its founding affidavit (it did not) but because all but the first page of another mortgage bond was attached to its founding affidavit.

3 The appellants gave notice of intention to oppose and delivered an answering affidavit. They raised two defences: firstly, that the deponent to the Bank's founding affidavit was not authorised to make the affidavit; and, secondly, that the appellants had invoked the dispute resolution procedure contemplated in s 129 of the National Credit Act, 34 of 2005.

4 The appellants' defences as raised have no merit. It is not necessary for a litigant to prove that a deponent is authorised to make an affidavit upon which it relies, any more than a party in a trial is

required to prove that a witness the party calls is authorised to give evidence in support of its case. The affidavit is evidence. When tendered by a litigant, the court must have regard to it and then rule on the admissibility of the evidence tendered, if necessary, and assess its weight.

5 In relation to the s 129 defence, the evidence was that the Bank drew the provisions of s 129 to the attention of the respondents in a letter dated 23 May 2013. At that stage, the appellants were in arrears in the amount of R282 508. In response, the first appellant wrote the Bank a letter dated 10 July 2013. The entire body of the letter, after the acknowledgement of receipt of the Bank's s 129 letter, reads:

> In this regard I wish to advise that I elect option 3 of your letter, to refer the matter to an alternative dispute resolution agent.
> I trust the above is in order.

6 Section 129 contemplates that if there is a dispute, the consumer may elect to refer the dispute to, amongst other organs, an alternative resolution agent. The appellants did not suggest that there was a dispute; nor did they refer anything at all to an alternative resolution agent. Section 129 provides no bar to the Bank's claim.

7 When the matter was called in the opposed motion court on 28 July 2014, the appellants were represented by counsel. Counsel for the appellants stated that "we" had attempted to negotiate a settlement and that counsel could not take the matter further. Counsel said:

> We were attempting to perhaps get favourable terms for the [present appellants] but in any event as I said, that may happen even if your Lordship grants an order today.

8 Counsel for the Bank then put up a draft order. The court below made an order in terms of the draft, for R2 600 059 and interest on that sum from 30 June 2014 to date of payment. The court also declared the mortgaged property executable for the judgment debt and costs and made a costs order. The difference between the amount of the money judgment and the amount claimed in the notice of motion is because the interest due was capitalised to 30 June 2014.

9 By notice of application dated 5 August 2014, the appellants applied for leave to appeal against the "whole of the Judgment", which I interpret to mean the whole of the order made. The grounds relied upon are prolix, but they reduce to the following: firstly that the execution order might lead to the appellants' losing their home and infringed the appellants' constitutional right to housing; secondly, that the *in duplum* rule might be of application; thirdly that the appellants'

s 129 rights had been infringed, particularly because the case should have been referred for alternative dispute resolution; fourthly, that excessive interest had been charged; fifthly that the authority conferred upon the deponents to the Bank's affidavits had not been proved and that the contents were hearsay.

10 The application for leave came before Lephoko AJ who concluded that another court might find that the Bank was not entitled to the execution order. This, the learned judge observed, was the only ground advanced that had any merit. I agree. On that basis leave to appeal was granted. Thus the present appeal.

11 Before I deal with the merits of the appeal, there are two interlocutory applications before us. The first, chronologically, is for condonation for the late delivery of the Bank's heads of argument. The reason for the late delivery was probably that the attorney's messenger did not do his job and file them in court on the day he was instructed to do so. The messenger has an explanation which would place the blame for the late filing with the Registrar's staff. There are problems with this explanation. It conflicts with the personal knowledge of one of the members of this court. But the fault, if any, lies with the attorney, not the Bank and the late filing of the heads occasioned no prejudice. I

would therefore condone the late filing of the heads but order the Bank to pay the costs of the application for condonation.

12 The second such interlocutory application is one brought by the appellants for the postponement of the appeal itself. The application was brought by the appellants personally. The ground advanced is one sadly familiar to those who serve on this Bench. This appeal was set down for hearing on 22 February 2017. The appellants have neglected to file the notice of set down of the appeal as part of the record but the appeal must have been set down many months ago. The appellants allege that their attorney and advocate withdrew without giving reasons on 3 February 2017. No heads of argument were filed on behalf of the appellants.

13 According to a notice dated 17 February 2017, the appellants are now represented by Khoza Attorneys. Why these attorneys did not sign the application for postponement is not explained. The appellants allege that their present attorneys agreed to represent them and briefed one Advocate Shaw for this purpose. But Adv Shaw was, as must have been known to the appellants and their attorney at the time, unavailable. He had to be in Cape Town on the date upon which this appeal was set down for hearing. Why the appellants' attorney briefed

an advocate who was not available to argue the appeal is not explained.

14 Adv Shaw drafted a letter on his own letterhead for submission to the court in which he makes the case for a postponement. He submits that the Bank was obliged to arrange rescheduled payments for the appellants. But the appellants have not put up a single fact on the strength of which it might be said that rescheduling the appellants' debt is a practical commercial option; nor is it suggested that the appellants have in the more than three years since the Bank launched its application in the court below ever approached the Bank with a concrete proposal for rescheduling the appellants' debt.

15 The appellants' present lawyers say that they cannot act until they are put in funds and that it will then take them a month to prepare for the appeal. But the appellants do not explain whether they put their previous lawyers in funds and why they are unable to provide their new lawyers with funds. Nor do they explain why they could not retain the services of the advocate who had been briefed on their behalf by their previous attorney who, it must be presumed, would have been able to prepare properly for the appeal.

16 When the appeal was called, however, the appellants were represented by counsel, Mr RF Onovo, who said that he had been briefed merely to move for a postponement. Adv Onovo said when questioned by the Bench that he was unable to address the court on the appellants' prospects of success on appeal. He could not explain why he was unprepared on this score. Prospects of success are relevant to an application for postponement of this kind. This is because a court will be disinclined to grant a postponement when the ultimate outcome is a foregone conclusion.

17 Dealing with prejudice to the Bank, which the appellants appear to concede is relevant to the request for a postponement, the appellants say this:[1]

> In comparison with the prejudice that the [appellants] will suffer as a result of their property being declared specially executable, the prejudice to the [Bank] is negligible, *since it is the [appellants'] intention to settle this matter and bring the payments fully up to date.*[2]

18 The appellants will suffer no prejudice arising from the order for execution. It is common cause that the property is the appellants' home. So the Bank could not take steps to sell the property in

1 Para 15 of the founding affidavit in the application for postponement

2 My emphasis

execution or evict the appellants without further court proceedings on notice to the appellants. The only practical effect of the execution order is that it permits the Bank to levy execution, subject to the Rules of Court, on the property without first executing against the appellants' movables. But the execution order, by itself, would not entitle the Bank to execute against the appellants' property. Rule 46(1)(a) provides:

> (a) No writ of execution against the immovable property of any judgment debtor shall issue until-
> (i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or
> (ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31 (5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.

19 The appellants are also wrong in saying that the prejudice to the Bank is negligible. To explain why I say this, I must refer to the Bank's answering affidavit in the application for postponement. This answering affidavit was served on the appellants personally[3] on 21 February 2017, the very day that the application for postponement

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3 By service on the second appellant

was served on the Bank. But Adv Onovo was not briefed with the answering affidavit. At some inconvenience to members of the Bench, the appeal stood down until after the luncheon adjournment to enable Adv Onovo to take instructions and consider his position. All counsel was prepared to submit when the court reconvened was that the deponent to the Bank's affidavit had not provided proof of his authority to speak on behalf of the Bank. I have dealt with this argument in another context. It has no merit. There was no suggestion from counsel that the appellants might want to file a replying affidavit.

20 I draw from the answering affidavit the following few but important facts, which are substantially corroborated by the appellants' own affidavit: the last payment made by the appellants in reduction of their admitted indebtedness to the Bank was R20 000, which was made on 13 August 2014. The arrears are in excess of a million rands, the equivalent of almost 55 instalments.

21 So the appellants have lived in their property for over two years at the expense of the Bank. There is not a bottomless pit of funds available to the reputable banking sector for loans to aspirant home owners. New loans can only be granted if banks obtain fresh capital for this purpose or deploy the funds paid by existing mortgagors towards reduction of their indebtednesses. Mortgagors who do not repay their

loans as they fall due prejudice the entire corpus of aspirant home owners because their failure to pay reduces the fund available for new entrants into the home ownership market, ie by and large young people who are trying to make their way in life.

22 There is not a single concrete allegation made by the appellants that casts any doubt on the correctness of the Bank's bookkeeping. So on the admitted facts, the appellants have no prospect of success in its appeal against the money judgment. They have not shown how they intend to pay what they owe. In addition, the appellants have put up nothing to show that they can pay any costs order made against them if the appeal is postponed.

23 Finally, there is the prejudice to the administration of justice. Three judges have been required to prepare for and devote time towards this appeal. All that time and effort will probably be wasted if a postponement is granted because it is unlikely that the same members of the Bench would be empanelled to hear the appeal if it were once again to be set down for hearing.

24 To summarise: the appellants have given a poor explanation for why they need a postponement; they have no prospects of success on one of the two substantive orders appealed against; their own prejudice is

negligible if the appeal goes ahead; and the prejudice to the Bank and the administration of justice if the appeal does not go ahead is substantial. For these reasons, we refused the postponement, with costs, and directed that the hearing of the appeal itself proceed. Counsel for the appellants then withdrew and shortly thereafter left the court.

25 The merits of the appeal may be disposed of in short order. The conclusion of the agreement of loan is not in dispute; nor is the fact that the appellants have failed to pay instalments under the loan on due date. The allegations as to the quantum of the appellants' indebtedness were not placed in dispute by any credible evidence. But it was, no doubt, overlooked in the court below that the second appellant's indebtedness to the Bank arises from a deed of suretyship, in terms of which her liability was limited to the sum of R1,8 million together with such further sum or sums for interest, charges and costs including legal costs on an attorney-client scale as should from time to time have accrued or become due and payable thereon.[4] The money order must therefore be amended to incorporate this limitation. Subject to that, the appeal against the money judgment must fail.

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4 Clause 1 of the deed of suretyship

26 It is trite that in motion proceedings the affidavits fulfil the functions both of pleadings and of evidence. In relation to the appeal against the execution order, the Bank simply did not allege in its founding affidavit the mortgage bond upon which the Bank sought to ground the major part of its claim to a security for the loan it made. The position is thus that the Bank did not give evidence of that component of its security. The appeal against the execution order must therefore succeed and be replaced by one of absolution from the instance. This means that the Bank may bring such fresh proceedings in relation to execution upon its money judgment as it sees fit.

27 As to costs: the appellants have been substantially successful on appeal. That would usually carry an award of costs. But the appellants and their lawyers have not in any way contributed to the constructive resolution of this appeal. On the contrary, the appellants have contrived, whether deliberately or inadvertently, to obstruct the hearing of the appeal and their lawyers were not adequately prepared and gave no assistance to the court. In my view it would be just to direct that each party pay its own costs in relation to the appeal.

28 In relation to costs in the court below: the Bank was substantially successful. There is no reason why costs should not follow the result. The respondents agreed in the agreement of loan to pay costs on the

attorney and client scale in the event of litigation such as the present. The costs order in the court below must therefore be confirmed.

29 I therefore propose the following order:

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1.1 The late submission of the respondent's heads of argument is condoned.

1.2 The respondent must pay the costs of the application for condonation on the unopposed scale.

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2.1 The application for the postponement of the appeal is refused.

2.2 The appellants must pay the costs of the application for postponement.

3 The appeal succeeds in part.

4 The order in paragraph 1 of the order of the court below dated 28 July 2014 is replaced by the following:

"Payment of the amount of R2 600 059; provided, however, that the indebtedness of the second respondent, Maria Judite Pestana Felix, is limited to the sum of R1,8 million together with such further sum or sums for interest, charges and costs including legal costs on an attorney-client scale as shall from time to time have accrued or become due and payable thereon."

5 The order in paragraph 3 of the order of the court below dated 28 July 2014 is replaced by the following:

"On the applicant's claim for the respondents' property, erf 38 Bruma Township, to be declared specially executable, the order is one of absolution from the instance."

6 The order in the court below that the respondents pay the costs of the application on the scale as between attorney and client is confirmed.

NB Tuchten
Judge of the High Court
27 February 2017

I agree. An order is made
as set out in paragraph 29 above.

RG Tolmay
Judge of the High Court
28 February 2017

I agree

PM Mabuse
Judge of the High Court

28 February 2017

FelixNedbankA585.15