



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

REPORTABLE
Case No: 8145/2015

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

And

NZIMENDE MONTGOMERY MDLETYE

1st Respondent

ABEGAIL NONTUTHUZELO MDLETYE

2nd Respondent

JUDGMENT

Gorven J:

[1] This application is for default judgment. The applicant claims a money judgment along with a prayer to declare executable an immovable property (the property) owned by the respondents. The property is their primary residence. The applicant granted a loan to the respondents to purchase the property. A mortgage bond in favour of the applicant provides security for this loan.

[2] The amount loaned to the respondents was R358 000. The agreement governing the loan was concluded on 5 December 2005. The mortgage bond was registered and secures the capital sum and an additional amount of R72 000. The repayment period of the loan is 20 years. It was agreed that if the respondents defaulted on any payments, the applicant would be entitled to invoke an acceleration clause and declare the full amount then outstanding under the loan to be due, owing and payable.

[3] The respondents admittedly defaulted on their loan obligations by not paying a number of monthly instalments. On 14 July 2015, the applicant sent a letter to the respondents indicating that the arrears in their instalments totalled R13 747.49. Demand was made that the arrears be brought up to date, failing which the applicant would invoke the acceleration clause and approach the court for an order declaring the property executable. The respondents failed to bring the arrears up-to-date. The applicant then invoked the acceleration clause. The agreement has not been cancelled.

[4] An action was instituted on 20 August 2015 by the applicant against the respondents for the sum of R291 634.33, interest, costs and an order declaring the property executable. The summons claimed that R291 634.33 was the total amount then outstanding under the loan. The respondents did not defend the action. On 2 October 2015 the applicant launched this application claiming that sum. A further affidavit was deposed to on 26 January 2016 alleging that the outstanding balance as at 25 January 2016 was R297 148.34 and that the arrears were R16 550.49.

[5] The application is opposed by the respondents. The first basis of opposition is that the amount claimed by the applicant is incorrect. In their answering affidavit, deposed to on 18 February 2016, they challenge debits on

the statement for legal costs and an amount debited against the entry ‘Renew Hoc’. They say that three payments in the respective amounts of R5 000, R4 000 and R1 000 were made on 2 February 2016 and thus not taken into account in the statement of 25 January 2016.

[6] Due to these challenges, the matter was adjourned and the applicant was given leave to deliver an affidavit clarifying the position (the supplementary affidavit). This affidavit satisfactorily clarified the debits and put up a statement of the account up to 14 June 2016. The total amount then outstanding was R275 315.04, down about R22 000 from the end of January. In argument, after delivery of the supplementary affidavit, it was conceded by the respondents that the applicant is entitled to judgment in this amount along with interest and costs.

[7] The second basis of opposition relates to the prayer to declare the property executable. It is this which forms the crisp issue in the application with the respondents arguing that judicial oversight should be exercised by refusing the prayer. In *Gundwana v Steko Development & others*,¹ the Constitutional Court held:

‘[W]here execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought, after judgment on a money debt, further judicial oversight by a court of law, of the execution process, is a must.’²

The issue of execution in such circumstances was dealt with as follows:

‘It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available

¹ *Gundwana v Steko Development & others* 2011 (3) SA 608 (CC).

² Paragraph 41.

means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.’³

[8] In *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others*,⁴ the Constitutional Court referred to certain factors to take into account when a court exercises such judicial oversight. There is no closed list, but those referred to may be summarised as follows:

- Whether the rules of court have been complied with;
- Whether there are other reasonable ways in which the judgment debt can be satisfied;
- Whether there is any disproportionality between this form of execution and other possible means to exact payment;
- The circumstances under which the debt was incurred;
- Any attempts made by the judgment debtor to pay off the debt;
- The financial position of the parties;
- The amount of the judgment debt;
- Whether the judgment debtor is employed or has a source of income to pay off the debt;
- Whether the sale of the property is likely to render the debtor and her or his family homeless;
- Any other factors relevant to the particular case.⁵

[9] In *Nkata v FirstRand Bank Limited & others*,⁶ the provisions of s 129(3) and (4) of the National Credit Act⁷ received attention. At the time, these subsections read:

³ Paragraph 54.

⁴ *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others* 2005 (2) SA 140 (CC).

⁵ *Jaftha* para 56-60.

‘(3) Subject to subsection (4), a consumer may—

- (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider’s permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and
- (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.

(4) A consumer may not re-instate a credit agreement after —

- (a) the sale of any property pursuant to —
 - (i) an attachment order; or
 - (ii) surrender of property in terms of section 127;
- (b) the execution of any other court order enforcing that agreement; or
- (c) the determination thereof in accordance with section 123.’⁸

In that matter, default judgment had been granted against the applicant for R1 472 506.89, together with interest from 1 June 2010 to the date of payment. The bank had not cancelled the agreement. An order had been granted declaring the immovable property over which the bank held a mortgage bond to be executable. A sale in execution had taken place but transfer was interdicted pending the outcome of an application to rescind the default judgement.

⁶ *Nkata v FirstRand Bank Limited & others (Socio-Economic Rights Institute of South Africa as Amicus Curiae)* [2016] ZACC 12; 2016 (6) BCLR 794 (CC).

⁷ National Credit Act 34 of 2005.

⁸ These subsections were amended with effect from 13 March 2015 by s 32(a) of the National Credit Amendment Act 19 of 2014. They now read:

‘(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.

(4) A credit provider may not reinstate or revive a credit agreement after-

- (a) the sale of any property pursuant to-
 - (i) an attachment order; or
 - (ii) surrender of property in terms of section 127;
- (b) the execution of any other court order enforcing that agreement; or
- (c) the termination thereof in accordance with section 123.’

[10] The high court refused rescission.⁹ Rogers J then of his own accord raised the issue of whether the applicant was entitled to the reinstatement of the credit agreement and to repossess the property on the basis of s 129(3). This turned on what was meant by the requirement that payment must be made of the ‘permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement’.¹⁰ The high court found in favour of the applicant. The Supreme Court of Appeal overturned that judgment¹¹ but the Constitutional Court held that the agreement had been re-instated.¹² The Constitutional Court also held that re-instatement ‘means that the default judgment and subsequent attachment would be rendered without force or effect.’¹³

[11] Accordingly, if the arrears can be eliminated and the other amounts referred to in s 129(3) paid, the agreement will be re-instated. From the date of re-instatement, the default judgment will have ‘no legal force’.¹⁴ If the property is sold by virtue of an attachment following a declaration of executability, the agreement will not be capable of being re-instated and the respondents will lose their home.¹⁵ The potential for this to occur must therefore be a factor to be taken into account in an application to declare the property executable. This factor must be placed in the scale along with all other relevant factors in deciding such an application. The significance of this is that, unlike many of the other factors

⁹ *Nkata v FirstRand Bank Limited & others* [2014] ZAWCHC 1; 2014 (2) SA 412 (WCC).

¹⁰ Now ‘prescribed default administration charges and reasonable costs of enforcing the agreement up to the time of re-instatement’.

¹¹ *FirstRand Bank Limited v Nkata* [2015] ZASCA 44; 2015 (4) SA 417 (SCA).

¹² The high court dealt with the matter prior to the amendment of s 129 (3) and (4). The Supreme Court of Appeal heard the appeal on 6 March 2015. The amendment came into effect on 13 March 2015. Judgment in the Supreme Court of Appeal was handed down on 26 March 2015. The Constitutional Court mentioned the amendment but considered the matter on the basis of the subsections prior to amendment.

¹³ *Nkata* para 131.

¹⁴ *Nkata* para (d)(i) of the order of the Constitutional Court.

¹⁵ Before the amendments to s 129(4), the section provided that a ‘consumer’ may not reinstate after the sale of a property pursuant to an attachment order. This was amended to provide that a ‘credit provider’ may not reinstate thereafter. The import of this amendment has not been determined but it seems to me that it is not material for the purposes of this judgment. No argument was advanced which dealt with this.

which relate to alternative ways of satisfying the entire judgment debt, re-instatement does not require payment of the full judgment debt, only the arrears and other specified charges.

[12] In their answering affidavit, the respondents tender to maintain the monthly instalment plus pay an additional R1 000 per month until the arrears are eliminated. They aver that one of their sons, who lives with them in the property, recently obtained employment and has undertaken to pay R3 000 towards the arrears. Their other two children are not employed. The 2nd respondent suffered a stroke in December 2015 and now struggles with severe depression requiring treatment. They are pensioners with a joint pension of R15 000 per month, arising from their previous employment with the Department of Correctional Services. They say that, in all the circumstances, the property should not be declared executable.

[13] The supplementary affidavit dealing with the payment history of the respondents since delivery of the answering affidavit shows that they have complied with their tender. This much the applicant accepts. It is clear that they have reduced both the total amount outstanding and the arrear instalments. No indication has been given as to the amount likely to be needed to pay the 'prescribed default administration charges and reasonable costs of enforcing the agreement'. Despite this, I am of the view that there is a reasonable prospect that the agreement is capable of being re-instated within a relatively short period of time.

[14] Other relevant factors mentioned in *Jaftha* and which must be weighed in the balance are as follows. There are no other ways to satisfy the entire judgment debt. As indicated, the respondents have made attempts to bring the arrears up to date. The respondents have a source of income by way of their pensions and any

contributions made by family members who are employed and able to do so. The respondents are 2.04 months in arrears with their instalments. The property is their primary residence and that of their family members. An additional factor is the age of the respondents which makes it unlikely that they will be able to purchase another property if the property is lost to them.

[15] The applicant persists in the prayer for executability. It submits that the execution process takes time and that, if the respondents continue the tendered payments, the agreement may be re-instated before the property is sold in execution. It is so that execution takes time but s 129(4) prohibits re-instatement of the agreement once a sale pursuant to an attachment has taken place. This would close the door to the respondents if that happens before re-instatement.

[16] In my view, proper judicial oversight would not be served by leaving that to chance. In all the circumstances, it seems to me that granting the order declaring the property executable at this stage would amount to ‘disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose’.¹⁶

[17] I say ‘at this stage’. I do not say that the applicant will never be entitled to such an order. Much will depend on the track record of the respondents in the ensuing period. For this reason, it is also not appropriate to dismiss the application to declare the property executable. An adjournment of this aspect of the application along with an order that the matter not be set down sooner than six months from the date of judgment, along with other procedural directions, seems to me to meet the exigencies of the matter.

¹⁶ *Gundwana* para 54.

[18] In the result:

1. Judgment is granted in favour of the applicant against the respondents jointly for:
 - a. Payment in the sum of R275 315.04;
 - b. Interest on the said sum from 15 June 2016 to date of payment at the rate of 10.65% per annum, calculated daily and compounded monthly;
 - c. Costs of suit on a scale as between attorney and client.
2. The application to declare the immovable property executable is adjourned sine die. The application may not be set down sooner than six months from date of judgment. If the matter is set down;
 - a. Notice must be given to the respondents;
 - b. The applicant is given leave to deliver an affidavit setting out the payment history, the steps taken to execute and any other relevant matter no later than 10 court days prior to the date of set down; and
 - c. The respondents are given leave to answer to this affidavit.

GORVEN J

DATES OF HEARING:	7, 21 June 2016.
DATE OF JUDGMENT:	1 July 2016.
FOR THE APPLICANT:	P Bramdhew, instructed by Glover Kannieappan Inc.
FOR THE RESPONDENT:	MP Mhlongo, instructed by Durban Justice Centre.