IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3748/2013

In the matter between:

ABSA BANK LIMITED Plaintiff
[Registration number: 1986/004794/06]

and

LOUIS FERDINAND BANTJES First Defendant
(IDENTITY NUMBER: …………….)

ANNA-MARIE BANTJES Second Defendant
(IDENTITY NUMBER: …………….)

HEARD ON: 13 AUGUST 2015

JUDGMENT BY: C. REINDERS, AJ

DELIVERED ON: 20 AUGUST 2015

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[1] This is an application to have the immovable property of the defendants, Mr and Mrs Bantjes, declared executable pursuant to judgment granted against the defendants on 14 April 2015 in the amount of R 2 199 428.83 together with interest at the rate

of 14% per annum, capitalized monthly from 1st May 2013 to date of payment.

[2] The elderly couple were sued as sureties for LF Bantjes Civil CC (the closed corporation) who entered into a loan with the plaintiff (Absa Bank). The closed corporation was liquidated and did not fulfil its obligations towards Absa Bank. As security for the said loan, a covering mortgage bond in favour of Absa Bank was registered over the immovable property.

[3] In the amended particulars of claim Absa Bank pray for an order permitting execution of the judgment to be levied against the defendants' immovable property. Such an order is ordinarily sought and granted in open court simultaneously with, and ancillary to, the order granting judgment sounding in money. (**Absa Bank v Petersen** 2013(1) SA 481 (WCC)). However, when the matter was heard on an opposed basis on 14 April 2015, the prayers permitting execution of the defendants' immovable property stood over in order for the plaintiff to bring a substantive application in terms of Rule 46 of the High Court Rules.

[4] The defendants in their opposing affidavit indicated that the immovable property (the residence at [.......], Bloemfontein) is their primary residence, and I am therefore obliged to do judicial oversight as is envisaged in Rule 46(1)(a)(ii) of the High Court

Rules and **Gundwana v Steko Development and Others** 2011 (3) SA 608 (CC).

[5] Apart from the fact that the property is their primary place of residence, the defendants also chose to place the following facts before court: they do not have any alternative accommodation and have been residing in the residence since 1989; they run "their" business from the property and derive their only income from the said business; they are of an advanced age (70 and 68 years respectively); it would be traumatic for them to relocate; they would not be able to buy another property and rental is too expensive; they would have to rent an office to conduct their business in order to earn an income; the value of properties in Bloemfontein is "not good" and selling the property on a forced sale would "probably" lead to a weak price, leaving a big outstanding balance; they would be unable to retain their dignity. An offer is also made to effect monthly payments to Absa Bank, without any further detail thereof.

[6] I will now deal with each of these facts in turn.

[7] That the mortgaged property is the Defendants' primary home, is not in itself a reason to deny the mortgagee's contractual right to realise its security. As was stated by Binns-Ward J in **Absa Bank v Petersen**, *supra* at par 37:

> "Indeed, by giving the property in security the defendant voluntarily derogate from the extent of his full dominium over the property in favour of the bank. He did so for his own benefit and upon an undertaking in favour of the bank that, if he defaulted in his payment obligations to the bank, the full amount owed by him would become immediately due and payable, and the property given as a security could be sold to realise the funds to settle the debt."

[8] It can be assumed that the defendants are not indigent. As is evident from the papers Mr Bantjes is a civil engineer, and according to Mrs Bantjes she and her husband run their business from the residence. The said business also provides their only source of income. However, no disclosure is made of the nature or extent of the business, nor is the income derived from the business disclosed. I would have expected these crucial facts to be placed before court, substantiated by proof in the likes of bank statements and business contracts.

[9] The lack of information regarding the defendants' income also places a question mark on the averment by Mrs Bantjes that they cannot afford to rent a property as accommodation, and furthermore to rent offices to continue conduct of their business. It was not disclosed by the defendants which portion of their residence is utilised for business purposes. In all probabilities, only a study or one bedroom would suffice for purposes of conducting their business. Even a two bedroomed town house

would suffice to afford the defendants housing as well as an office to conduct their business from.

[10] Not only is Mr Bantjes clearly not an illiterate person, but the defendants were legally represented, at the very least when this application was argued before me. In the absence of the information as indicated above, I have no other inference to draw but that the defendants deliberately failed to disclose the said information to create the impression that they are destitute.

[11] Defendants' indebtedness to Absa Bank is not disputed by them. In considering the payment history, the outstanding balance amounted to R 2 951 464,81 as on 15 May 2015. It is common cause that no payments were made to Absa Bank since May 2013, and even before that many debit orders were unpaid. As already mentioned above, although an offer is made by defendants in their opposing papers to effect monthly payments to Absa Bank, no detail is given, and in view of the absence of proof of their income, this offer cannot be taken seriously. If they were indeed serious, I would have expected them to have started regular payments of what they aver they can afford in order to show their *bona fides*.

[12] Furthermore, it appears that when the matter was before court for trial during October 2014, defendants abandoned their opposition to the action and instead moved for a postponement to be afforded the opportunity to sell the residence to their

children, who would then in turn have obtained a loan to settle Absa Bank's claim in full. Ten months down the line the property has not been sold to their children or any other purchaser for that matter. This indulgence by the court was not even mentioned by defendants, nor is any mention made of attempts to engage the help of estate agents to effect selling of the residence. I would have expected such information to be placed before me in their opposing affidavit or at least at the hearing, but in the absence thereof I have no other inference to draw but that the defendants would not be able to pay their indebtedness to Absa Bank.

[13] It was alleged by defendants that properties in Bloemfontein has devaluated. No proof of such a tendency was furnished. To the contrary, Absa Bank indicated that the immovable property is located in a prime spot in Bloemfontein, close to a well-known school and in an area where businesses are being conducted. A valuation of the immovable property in the amount of R 1 800 000.00 was annexed to the application. Mr Sander for defendants pressed hard upon me to accept that this valuation was indicative of the truth in respondents' contention that they would still be left with a big outstanding amount indebted to Absa Bank after a forced sale. Mr Heymans on behalf of Absa Bank indicated that this apparent disproportionality was to be blamed on the defendants themselves, who for a period of more than two years since summons was issued, did not make any attempts to sell the

property but rather utilised delaying tactics. He argued that Absa Bank cannot afford to lose thirty thousand rand monthly in interest, let alone the considerable amount that it already stands to lose when selling the property.

[14] I am in agreement with Mr Heymans. The plaintiff as a financial institution has a legal right and obligation towards clients whose money is being utilised to fund mortgage bonds, to minimise its losses. As Froneman J articulated in **Gundwana** supra at 626 par (54):

> "It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life."

[15] Personally I have sympathy with Mr and Mrs Bantjes. That relocating would be traumatic to them is understandable, especially given their mature age and the lengthy stay that they have enjoyed at the residence, including their involvement in their church. The elderly in our society should be respected and accommodated, and their dignity should also be preserved as far as possible. However, the defendants cannot expect to occupy a property and utilise it as a business indefinitely without paying anything for this privilege. Although I have considered all the evidence placed before me, this is not an application for eviction. On the evidence before me I cannot see how the defendants will be able to settle the debt. There is no

evidence of any movables or a realistic available method of repayment. The inevitable cannot be delayed indefinitely.

[16] It was confirmed by Mokgoro J in **Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others** 2005(2) SA 140 (CC) at 162 F, that a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. It was not argued, nor can it be concluded that there was an abuse of court procedure *in casu*. To the contrary, given the lengthy history of this matter, it is quite clear that Absa Bank has bent over backwards and endured all the opposition and even postponements on request of the defendants.

[17] Taking all the above relevant factors into account, it leaves me to conclude that the plaintiff is entitled to an order declaring the immovable property executable. It is trite that cost should follow suit and I find no reason to deviate therefrom, save that I am not prepared to award cost on a scale of attorney and client.

[18] I issue the following orders:

1. The immovable property known as :

ERF: […], BLOEMFONTEIN (EXTENSION 46), DISTRICT BLOEMFONTEIN, FREE STATE PROVINCE;
IN EXTENT: 1317 (ONE TREE ONE SEVEN) SQUARE METES;
HELD BY: DEED OF TRANSFER NUMBER T9125/1998;
SUBJECT TO THE CONDITIONS THEREIN CONTAINED.

is declared executable.

2. Cost of suit on a party and party scale.

C. REINDERS, AJ

On behalf of applicant:	Adv. P.J. Heymans Instructed by: EG Cooper Majiedt Incorporated BLOEMFONTEIN
On behalf of respondents:	Adv. A. Sander Instructed by: Willie Botha Inc BLOEMFONTEIN