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

DATE: 24 May 2013
CASE NO: 21201/12

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED ✓

23/5/2013

DATE SIGNATURE

In the matter between:

ABSA BANK LTD PLAINTIFF

And

ERNEST TINAHSE MABONGA 1ST DEFENDANT

MARGARET SIBONGUMUSA MABONGA 2ND DEFENDANT

JUDGMENT

EBERSOHN AJ

[1] This is a judgment in an opposed summary judgment application.

[2] The applicant is ABSA BANK LIMITED, a bank (the plaintiff).

[3] The defendants are Ernest Tinashe Mabonga and Margaret Sibonumusa Mobonga ("the defendants").

[4] In terms of agreements the plaintiff advanced monies under security of bonds B94246/2007,B13483/2008, B40962/2008 and B94114/2008 to the defendants.

The total amount lent and advanced by the plaintiff to the defendants amounts to R2 943 799,55 which amount is further subject to interest at the rate of 9% per annum from 29 March 2012 to date of payment, the said interest to be calculated and capitalized montly.

The agreements made provision therefore that the outstanding amount on the loans would be payable on demand.

[5] The last payment made by the defendants on the loan was in the amount of R100,00 on 31 March 2012.

[6] Defendants have in terms of the four bonds mortaged in favour of the plaintiff the property Erf 36, Country View Estate Township, Registration Division J.B Gauteng Province, Measuring 981 square metres held by the defendants in terms of deed of transfer no T75573/2007.

[7] The defendants also undertook to pay costs, on the scale of attorney and client in the event of litigation between plaintiff and defendants.

[8] Due to the failure of the defendants to pay the monthly payments the plaintiff decided to commence proceedings against the defendants.

[9] In terms of the bonds and loan agreement the amount owing under the bonds could be proven by a certificate issued by a responsible official of the plaintiff. Such a certificate was issued and was attached to the simple summons as annexure 6.

[10] Due notice in compliance with the provisions of section 129 of the National Credit Act, No 34 of 2005, was forwarded by the plaintiff to the defendants per registered post. According to the track and trace report, annexure "B1" to the single summons, it was not collected at the post office for four months by the defendants and was then returned to sender.

[11] The summons was then issued and served on the two defendants on the 27th June 2012 by affixing it to the main gate of the bonded property in terms of the provisions of rule 4(1)(a)(iv), it being their chosen *domicilium citandi et executandi.*

[12] After an appearance to defend was filed and served by the defendants' attorney the plaintiff brought an application for summary judgment which was to be heard on the 12th November 2012.

[13] The affidavit filed in support of the application for summary judgment seems to be in order.

[14] On the 12th November 2012 the application for summary judgment was postponed sine die for the defendants to file an opposing affidavit.

[15] Subsequent thereto the defendants' attorney of record withdrew by notice dated the 25th January 2012 and served on the 31st January 2013.

[16] Before the defendant's attorney withdrew, however, a notice of re-enrolment of the application for summary judgment was served on the attorney on the 24th January 2013. The new date for the hearing of the application was the 11th March 2013. On this day the matter was for some reason struck from the roll shortly after 10:20 instead of being stood down until the end of the roll. The motion courts are running simultaneously and the advocates move from Court to Court and applicant's counsel advised she was in another motion court and this matter should have been stood down in the court it was supposed to be heard in until the end of the roll but somebody, apparently, the first

defendant, called the matter in court and as the plaintiff's counsel was in anther court, as she had the right to be, and thus absent the matter was removed from the roll.

[17] The matter was re-enrolled for the 15th April 2013.

[18] The amount owing to the plaintiff is not in dispute by the defendants.

[19] The only defence the defendants raised in the opposing affidavit is that the plaintiff has offered them a "Helpusell" being an optional facility that helps the debtor to sell its property at a market related price to pay their bond.

[20] The defendants attached to their opposing affidavit the ABSA Helpusell Brochure, but not the required properly signed mandate in favour of the plaintiff to sell their property in terms of the scheme. According to the papers the Helpusell Mandate was e-mailed to the defendant by the plaintiff on the 15th October 2012 requesting them to sign the mandate and return it to the plaintiff as a matter of urgency (See p.48 of the paginated papers.) The defendants were also requested to send copies of their ID documents and of the latest rates and taxes statement of the property. This they did not do.

[21] On the 22nd October 2012 the first defendant advised the plaintiff that he was just waiting for his wife, the second defendant, to return and

sign the Helpusell brochure after which he would forward it to the plaintiff. This did not happen.

[22] The Helpusell Mandate brochure specifically makes provisions that the mandate does not diminish or limit any right which the plaintiff may have to any other legal remedies in respect of the loan agreement and/or mortgage bonds and that the plaintiff reserves the right to uninterruptedly continue with the legal collection process during the mandate period.

[23] Paragraph 9 of the defendant's opposing affidavit reads as follows:

> "In our case this has not happened because the product which we were entitled to as an Absa client was not offered to us nor where (sic) we provided the opportunity to accept/decline it."

[24] In paragraphs 20 and 21 supra, they detailed that the brochure was in fact forwarded to the defendant and on the 22nd October 2012 the first defendant indicated that he was just awaiting the return of his wife to sign the brochure.

[25] There is no allegations in the opposing affidavit that the conditions set out in the brochure were ever complied with namely inter alia:

a) they must sign the brochure;

b) they must continue paying the monthly bond payments;

c) they must furnish their ID documents and the latest statement regarding rates and taxes.

[26] The first defendant was present in court on the 15th April 2013 and he was given the opportunity to address the court after advocate Pretorius argued the matter on behalf of the plaintiff.

[27] He handed up a "supplementary affidavit" deposed to by himself and his wife.

[28] The Helpuseil Mandate of which a copy was now attached as annexure "A" to the supplementary affidavit was purportedly signed on the 16th October 2012 by both defendants. Yet in the opposing affidavit which was deposed to on the 10th November 2012 there in both defendants under oath stated that the Helpusell Mandate was not offered to them by Absa. They thus openly lied to this court under oath.

[29] Clause 7.9 of the Helpusell Mandate reads as follows:

> "7.9.......agree that this mandate does not diminish or limit any right which the Bank may have to any other legal remedy in respect of my/our PB1 Loan Agreement and/or mortgage

bond with the Bank and furthermore understand and acknowledge that the Bank reserves the right to uninterruptedly continue with the legal collection process during the mandate period. The Bank may exercise its discretion to postpone the granting of judgment and/or a Sale in Execution."

[30] The court cannot come to any other conclusion that the signed Helpusell Mandate attached as annexure "A" the to supplementary opposing affidavit was not signed on the day it is purported to have been signed.

30.1 It is clear that no binding Helpusell Mandate came into being between the plaintiff and the defendant.

30.2 Even if such an agreement came into being the defendant did not pay the monthly instalments and have hopelessly fallen into arrears with their payments and the plaintiff is entitled to proceed with the legal process.

30.3 It is clear that summary judgment should be granted.

30.4 According to the addendum to the "supplementary" opposing affidavit the defendants were unemployed and paid only R100 on the bonds and is hopelessly in arrears. It is evident that the defendants were and are in no position to bring the arrears up to date as both are unemployed.

30.5 This matter has been delayed for several months already by the first defendant's manoeuvres. The defendant enjoyed staying in the luxurious property without paying for the privilege and the arrears are escalating to the detriment of the plaintiff.

30.6 The defendant agreed in the loan agreement and bonds that in the event of them falling into default of their contractual obligation, the plaintiff would be entitled to institute proceedings against them for payment and for a court to declare the mortgaged property executable (see *Absa Bank Limited vs Gary Edgars Petersen* Case 932/2011 in the Western Cape High Court, Cape Town, being a judgment of BINNS-WARD J)

[31] No facts had been placed before this court as to why execution against the property should not follow the ordinary course and there is no proof or any indication at all before this Court that the defendants possess sufficient movable assets to sell in execution to satisfy the

judgment debt, and/or would ever be able to liquidate the arrear instalments.

[32] Not to grant the right to execute and sell in execution would only bring about a purposeless delay, be an unreasonable and unjustifiable impingement on the plaintiff's contractual rights, extra legal cost and an unnecessary additional burden on the court's time and resources (See [35] of the judgment of BINNS-WARD J referred to supra).

[33] The history has shown that the plaintiff has been very accommodating of the defendant's financial problems and it is time that this now ends.

[34] The following order is made:

"The Court grants summary judgment against the two defendants jointly and severally payment by the one releasing the other one as follows:

1. Payment of the amount of R2,943,799.55,
2. Interest on the amount of R2,943,799.55 at the rate of 9% per annum from 29 March 2012 to date of payment, the said interest to be calculated and capitalized monthly;
3. An order declaring the property known as:

Erf 36 Country View Estate Township, Registration Division J.R.,Gauteng Province, measuring 981 (NINE HUNDRED AND EIGHTY ONE) square meters and held by Defendants in terms of Deed of Transfer No T75573/2007, **("the immobable property"),** executable

4. Cost as between Attorney and client to be taxed, which costs wil include the cost of the 12th November 2013, 11th March 2013 and 15 April 2013.

5. That the Registrar be authorized to issue a Writ of Execution against the immovable property referred to in order 3 above, to give effect to the order granted in terms of prayer 3 above so that the property can be sold in execution.

P.Z. EBERSOHN

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on:	15 April 2013
For the plaintiff:	Adv L.A Pretorius
Instructed by:	Van Zyl Le Roux
For the defendant:	Mr Mabonga
Date of Judgment:	24/05/2013