FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.:99/2013

In the matter between:

NEDBANK LIMITED	Applicant
and	
WERNER LE ROUX BOTHA (Identity Number:)	1st Respondent
SANDRA BOTHA (Identity Number:)	2nd Respondent

JUDGMENT BY: LEKALE, J

HEARD ON: 25 APRIL 2013

DELIVERED ON: 9 MAY 2013

INTRODUCTION AND BACKGROUND

[1] On the 9th January 2013 the applicant issued simple summons against the respondents for recovery of an amount of R962 397,57 on, *inter alia*, the basis that they failed to pay the instalments payable regularly and punctually and that an order of debt restructuring granted in their favour has been set aside.

[2] The respondents entered appearance to defend the action on the 21st January 2013, whereafter, the applicant filed an application for summary judgment on the 7th February 2013 for hearing on the 28th February 2013.

[3] On the 26th February 2013 the respondents filed an affidavit opposing summary judgment pointing out, in *limine*, and enclosing documents showing, *inter alia*, that the debt restructuring order was still in place and that the applicant received a total payment of R149 940,72 in terms thereof between January 2011 and December 2012. The respondents, further, dispute the outstanding balance and aver that, to the best of their knowledge, all further payments are up to date.

[4] On the 28th February 2013 the application was postponed and the respondents were ordered to file an application for condonation of the late filing of their opposing papers with a concomitant order for the applicant to file a reply if so advised.

[5] The parties have since obliged with the respondents, *inter alia*, grumbling that, in their view, there exists no necessity for condonation because rule 32 of the Uniform Rules of Court ("the Rule"), which regulates the application in the instant matter, does not prescribe time periods within which an opposition to an application for summary judgment may be delivered.

[6] In opposing the condonation application the applicant, effectively, maintains that condonation is necessary in terms of Practice Rules of this court and that the respondents have no reasonable prospects of success in their opposition of the summary judgment application.

[7] This judgment, therefore, concerns the respondents' application for condonation of the late filing of their opposition to summary judgment.

ISSUES IN DISPUTE

[8] The papers before me *ante omnia* raise, for determination, the issue as to whether or not the affidavit opposing summary judgment was filed late so as to necessitate a condonation application.

[9] The parties are, further, in dispute over whether or not the respondents' opposition of the summary judgment application has merit.

RESPONDENT'S CONTENTIONS

[10] Mr Grewar submits that the Rule does not prescribe the time limits for filing affidavits in opposition of summary judgments.

[11] It is, further, submitted that the delay involved, in any event, was negligible in so far as the opposing affidavit was filed two days before the date scheduled for the hearing of the summary judgment application.

[12] Mr Grewar, further, contends that although there are arrears on payments made to the applicant, the respondents dispute the outstanding balance and, as such, they have a triable issue which entitles them to have their day in court. Condonation should, therefore, in his view be granted to the respondents as well as leave to defend the matter.

<u>APPLICANT'S CONTENTIONS</u>

[13] Mr Van Aswegen submits for the applicant that Practice Rule 7.2 of the Free State Court requires that affidavits and all other documents in, inter alia, the application for summary judgment be filed on a Friday immediately before the date on which the application is to be heard.

[14] It is, further, submitted that the condonation application has no merit in so far as, on the respondents' own version, it is clear that they are in default with regard to their payments as ordered by the court.

[15] It is, furthermore, contented that the certificate of balance is clear and acceptable evidence of the outstanding balance.

[16] The applicant's case is, further, that it is entitled to proceed against the respondents in terms of section 88(3) of the National Credit Act, 33 of 2005 ("the NCA") because the respondents have defaulted on the debt re-arrangement order and are also in default under the credit agreement.

APPLICABLE LEGAL PRINCIPLES

[17] It is correct, as submitted for the applicant, that the Free State Practice Rule places a limit on the filing of affidavits and documents intended for use in the motion court in so far as it requires the same to be filed before noon on a Friday preceding the relevant Thursday on which the documents are to be used. (**See Practice Rule 7.2 of Free State Court.)**

[18] As pointed out for the applicant, a certificate of balance is admissible in summary judgment proceedings under the Rule and "… **it is merely arithmetical calculation based on the facts already before the court."** (See **Rossouw and Another v First Rand Bank Limited t/a FNB Homeloans (formerly First Rand Bank of South Africa Ltd)** **2**010 (6) SA 439 (SCA) at para [47].

[19] It is, further, correct, as Mr Van Aswegen submits, that a credit provider, in the position of the applicant, is entitled to enforce its rights under the credit agreement without further notice to

the consumer where the latter is in default under the credit agreement as well as in terms of a re-arrangement ordered by a court. (See **First Rand Bank Limited v Fillis and Another** 2010 (6) SA 565 (ECP) and **Collett v First Rand Bank Limited** 2011 (4) SA 508 (SCA).)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

[20] It is clear from the papers that the opposing affidavit was not filed on a Friday preceding the 28 February 2013 but was, in fact, filed on the Tuesday preceding that date. There was a delay involved in that regard and it was, as such, necessary for the respondents to apply for condonation.

[21] To the extent that the respondents insinuate that the Free State Court has no business to regulate timeframes for opposing applications for summary judgment, I can only point out that the Judge President of this court is authorised to make rules for regulating proceedings of this court with reference to, *inter alia*, the times for the holding of the courts. **(See section 43 of the Supreme Court Act 59 of 1959.)**

[22] It is, probably, because the Rule herein does not regulate opposition to summary judgments adequately with regard to timeframes, that Free State Practice Rule 7.2 was made.

[23] Mr Van Aswegen correctly submits that the delay involved has

not been adequately explained regard being had to the fact that the application for summary judgment was served on the 7 February 2013 and consultations with counsel only took place on the 20th February 2013, while opposing papers were only filed on the 26 February 2013 instead of before noon on the 22 February 2013. No explanation is advanced as to why consultations only took place on the 20 February 2013. The date on which counsel was briefed as well as the date on which the documents were secured is not apparent *ex facie* the condonation application.

[24] I am, further, not persuaded that the respondents have reasonable prospects of success in their opposition of summary judgment in so far as the parties agreed, in the loan agreement, that a certificate of balance is binding on the respondents and constitutes *prima facie* proof of, *inter alia*, the extent of their indebtedness to the applicant. It is, further, common cause between the parties that the respondents are in default with payments of monthly instalments.

[25] It is, further, clear from the opposing papers that the certificate of balance is, most probably, correct regard being had to, *inter alia*, the amount paid by the respondents to the applicant between January 2011 and December 2012 on their own version.

[26] The applicant is, therefore, entitled to follow the respondents

legally to enforce its claim in terms of section 88(3) of the NCA.

[27] The applicant no longer seeks an order declaring the mortgaged property specially executable.

ORDER

[28] The application for condonation is, thus, dismissed with costs.

[29] Summary judgment is granted against the respondents jointly and severally in terms of prayers 1.1, 1.2, 1.4 and 2 of the application for summary judgment.

L. J. LEKALE, J

On behalf of applicant: Adv. W. A. van Aswegen
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of respondents: Adv. D.M. Grewar
Instructed by:
Jordaans Rijkheer
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