

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 4552/2012

In the matter between:

ABSA BANK LTD

FIRST APPLICANT

And

JENNIFER ESTER PILLAY

FIRST RESPONDENT

JENNIFER ESTER PILLAY N.O

SECOND RESPONDENT

JUDGMENT

Heard:16 October 2012

Delivered:23 October 2012

DHAYA PILLAY J

[1] In this application for summary judgment, the applicant instituted an action for foreclosure of a mortgage bond registered over the immovable property of the first respondent and her late husband who passed away on 16th December 2008. The

mortgaged property is the primary residence of the first respondent and her two children. Upon her husband's death the first respondent took over the running of their bakery. She uses the income from the bakery to service the bond. The bond is not in arrears. During his lifetime the deceased paid more than the minimum instalment stipulated in the bond. Consequently the bond is in credit in the amount of R125 986.42

[2] The applicant's cause of action therefore is not based on any default by the respondent. For reasons not advanced in the pleadings the applicant alleges that the respondents' liability to the plaintiff will not be liquidated within a reasonable period without having to execute against the respondents. The applicant also alleges that it has no knowledge as to whether the immovable property is currently occupied by the first respondent as her family residence, whether she will lose access to housing as a result of the execution against the mortgaged property and what the position of the first respondent's dependants is. Considering that the applicant could easily have obtained this information from the first respondent, the applicant's careless disregard for the plight of its customers and people defined in the National Credit Act 34 of 2005 (the 'NCA') as historically disadvantaged persons¹ is disappointing.

[3] On 23 March 2012 it delivered notices in terms of s 129 of the NCA in which it falsely notified the respondents that:

'the estate is in default under the Credit Act Agreement due to the estate's failure to make regular and required payments due in terms of the Credit Agreement and that the estate has remained in default for more than (twenty) 20 business days.'

[4] The notice added that ten (10) business days after the delivery of the notice it intended to approach a court for an order to enforce the credit agreement. The full outstanding amount on the credit agreement at the time was allegedly R268 457.87 plus interest at 9.75% which the applicant claimed had 'become due and payable'. They

¹ S 2 (6) of the NCA

were also informed that a judgment obtained against the estate followed by execution 'will usually lead to your eviction from such home'.

[5] On the facts it was common cause that the respondents were not in default and that the first respondent had continued to service the bond after her husband's passing. Precisely what the basis was for foreclosure was not apparent from the pleadings. Ms De Klerk who appeared for the applicant clarified that the applicant relied on clause 8 of the mortgage bond which provides:

'Unless otherwise agreed in writing if the Mortgagor fails to observe or confirm any of the terms or conditions of any written agreement or agreements between the Mortgagor and the Bank in respect of any amounts which are secured under this bond or if the Mortgagor fails to observe or perform any of the terms and conditions of this bond **or of the Standard Mortgage Conditions herein after referred to or if the Mortgagor upon demand by the Bank fails to pay the Bank any amount which is legally claimable by the Bank** or if the Mortgagor fails to discharge any obligation or liability to the Bank on the due date thereof, then all the amounts which are secured under this mortgage bond shall, at the option of the Bank and without the Bank being required to give notice to the Mortgagor, immediately become payable in full, notwithstanding the exercise by the Bank of any other rights, and the Bank **shall be entitled thereupon to institute proceedings for the recovery of all such amounts and for a court order declaring the mortgaged property executable.**'

[6] The applicant interpreted the highlighted portion of clause 8 to enable it to demand payment, even when the respondents were not in default, and foreclose the bond. By no stretch of any of the tools of interpretation can clause 8 lend itself to such an interpretation. Without default the amount cannot be 'legally claimable' on mere demand. If the applicant's interpretation were to prevail then on a sheer whim or fancy a creditor can foreclose a bond without even notifying the consumer. Such interpretation renders clause 8 unfair, inequitable and even unconstitutional as I expatiate below.

[7] Notwithstanding the bond pre-dating the NCA, as a pre-existing agreement, Item 4 (2) of Schedule 3 of the NCA, which deals with transitional provisions, extends the application of Chapter 1 of the NCA to the bond.. Chapter 1 sets out the interpretation, purpose and application of the NCA. I have analysed these sections under the rubric of the Constitution of South Africa in *Standard Bank v Mbuyiseni Dlamini* Case No 2877/2011 dated 23 October 2012 (unreported). However, the following emphasises the policy objective underpinning the NCA to substantively promote socio-economic equality and prevent discrimination:

‘3. The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by—

. . .

(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by –

. . .

(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux.’

[8] In response to probing from the court to establish what could possibly have prompted the action in absence of default by the respondents, Ms De Klerk submitted that the applicant was concerned that it had a mortgage bond with a deceased person which was untenable in law. However, the death of a mortgagor does not result in untenable legal consequences as a study of the Administration of Estates Act 66 of 1965 (the ‘AEA’) will show.

[9] The joint estate of the first respondent and the deceased, who were married in community of property, is under administration in terms of the AEA. In terms of s 35 (12) of the AEA, creditors of a deceased estate are paid only after the liquidation and distribution account has lain open for inspection and is free of objections. Although an executor may pay creditors earlier, usually if the estate is solvent, but she runs the risk of being held accountable if the payment is erroneous. Furthermore, s 38 (1) enables a surviving spouse to take over the deceased spouse's share in the immovable property with the authority of the Master.

[10] On 11 February 2009, barely two months after the passing of the deceased, the first respondent was appointed as executrix. What stage the winding up of the estate has currently reached is not apparent from the pleadings. If the children have a claim to the property and they are minors, then the first respondent has to satisfy the Master that their interests are protected. If they are minors she has to comply with s 43 of the AEA to secure the minors' portions. Therefore, in terms of the AEA, the second respondent cannot be compelled to pay creditors until the account is free of objections and the applicant can show that there is no prejudice to other creditors or the children if they are minors.

[11] If the applicant was genuinely concerned about the security of its bond being weakened following the passing of one of the mortgagors who might also have been the principal breadwinner, it had no reason to be as the bond was not in arrears. Even if its concerns were justified then the remedy it seems to be seeking is to substitute the deceased.

[12] Ms De Klerk conceded that the application for summary judgment should fail but that costs should be reserved for determination at the trial. The applicant was not prepared to withdraw the action as the pleadings could be amended in due course.

[13] The original amount of the bond was R560 000. The outstanding balance as at 2 May 2012 was R226 823. The summons issued on 4 May 2012 is for R268 457.87.

Significantly, the respondents and not the applicant attached the statements to their affidavit. As the bond is over the primary residence of the first respondent and her children, (a fact the applicant did not trouble itself to establish before launching this action), she will be homeless. This action constitutes nothing short of bullying tactics by one of South Africa's largest financial institutions against a widow who is a historically disadvantaged person as defined in s 2(6) of the NCA. The applicant's conduct is premature and predatory.

[14] In respect of the issue of jurisdiction, the bond records the first respondent's and the deceased's consent to the jurisdiction of the Magistrates' Court. However, notwithstanding such consent the applicant reserved for itself the right to institute legal proceedings against the respondents in any competent court having jurisdiction in the matter. Precisely why it elected to proceed in the High Court is not evident from the papers. Notably, proceeding in the High Court is more intimidating and costly than in the Magistrates' Court. The Magistrates' Court has jurisdiction and the applicant should have instituted the action in that court, assuming it has a valid cause of action.

[15] With regard to legal costs, the applicant reserved for itself in the mortgage bond the right to claim costs on an attorney and client scale. The bond does not record a similar countervailing right favouring the respondents.

[16] As a standard term mortgage bond, the clauses on jurisdiction and costs distort the balance that the NCA strives to establish between credit providers and consumers. Unless the applicant has a rational basis for proceeding in the High Court and for claiming costs on an attorney client scale these clauses in the mortgage bond are unfair and inequitable. The absence of rationality and the harsh impact of these clauses on the respondents also violate s 9 (1) of the Constitution.²

[17] As regards costs of the application, as the particulars of claim fails to disclose a cause of action the summary judgment application was wholly unjustified. The

² *Van der Merwe v Road Accident Fund and another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 para 54 and 55

applicants compounded the first respondent's grief and hardships following the loss of her husband with this action and the summary judgment application. The applicant should therefore compensate her fully for all costs she has incurred for opposing the application for summary judgment.

Order

1. The application for summary judgment is dismissed.
2. The applicant shall pay the respondent's costs on the scale as between attorney and client.

D PILLAY J**APPEARANCES**

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