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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 20823/2019

(1) **REPORTABLE:**

(2) **OF INTEREST TO OTHER JUDGES:**

(3) **REVISED:**

(4) **Signature:**_____

Date: _____

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE DSM TRUST

First Applicant

DINEO SELETSWANE N.O.

Second Applicant

ELIZABETH RATHEBE N.O.

Third Applicant

DINEO SELETSWANE

Fourth Applicant

and

MERCANTILE BANK LIMITED

First Respondent

THE SHERIFF: DISTRICT OF RANDBURG WEST, GP

Second Respondent

MALEKA TB

Third Respondent

THE REGISTRAR OF DEEDS: PRETORIA

Fourth Respondent

JUDGMENT

Kumalo J

INTRODUCTION

- [1]. This is an opposed application regarding the setting aside of the sale in execution of an immovable property by the first respondent.
- [2]. On 18 December 2020, a default judgment was granted against the Applicants, cancelling the agreement between the parties and ordering the Applicants to pay the amount of R3,229,684.54. The property described as ERF 9[...] D[...], Extension 6, Township, was declared specifically executable without a reserve price.
- [3]. After judgment was granted, the Fourth Applicant mistakenly made five payments to the First Respondent; however, these payments were allegedly made into her overdraft account instead of the bond account.
- [4]. The First Respondent proceeded to obtain a date for the sale in execution, which was scheduled for 26 April 2022. The Third Applicant thereafter entered into negotiations with the legal representatives of the First Respondent, which resulted in an agreement requiring the Third Applicant to pay an amount of R2,000,000.00 immediately. This amount was to be reflected in the Respondent's nominal account by the close of business on 25 April 2022. A further amount of R1 300 000.00 was to be paid in monthly instalments of R20 000.00, commencing on or before 31 May 2022, until the compromised amount had been settled in full.
- [5]. It was the conditions of the agreement that any breach of the monthly repayments would result in the full and outstanding balance becoming due and payable, i.e the compromised amount would be forfeited, and the First

Respondent would be entitled to enforce its rights in terms of the judgment and place the property up for sale in execution again.

- [6]. The Third Applicant made payment of R2,000,000.00 as per the parties' agreement and, in so doing, averted the sale in execution scheduled for the 26th of April 2022.
- [7]. The Third Applicant subsequently breached the agreement by failing to make the required monthly payments. The First Respondent placed the property on public auction on 30 May 2023, which auction was postponed by agreement to 4 July 2023.
- [8]. On 4 July 2023, and before launching an urgent application to interdict the sale in execution, the Third Applicant attempted to negotiate a stay in execution and offered to settle the amount of R1 300 000.00 in full immediately.
- [9]. No agreement could be reached in this regard, and the Third Applicant approached the court *ex parte* on an urgent basis. The property was sold to the Third Respondent without a reserve price while counsel was still arguing the matter in court, thereby removing the urgency in the matter.
- [10]. Part of the applicant's submissions, then and now, was that the mortgage bond or agreement had been revived, and in terms of section 129 of the National Credit Act, the sale in execution was unlawful.
- [11]. On 7 July 2023, the Applicants removed the matter from the urgent roll and filed this application before this court.
- [12]. The Applicants' case, therefore, seems to be that the home loan agreement was revived and reinstated when the Third Applicant paid the R2 000 000.00 in accordance with the undertaking of 22 April 2022. The payment agreement on

22 April 2022 constituted a new credit agreement, which the First Respondent failed to cancel before proceeding with the sale in execution on 4 July 2023.

[13]. Perhaps it is appropriate to analyse the provisions of Section 129 of the National Credit Act, Act No. 34 of 2005.

[14]. Section 129 of the Act provides as follows:-

“129(1) If the consumer is in default under a credit agreement, the credit provider- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the contract up to date; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or

(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 reinstate 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.”

[15]. The Applicants submitted that, upon the payment of R2 000 000.00 in arrears on 25 April 2022, the initial agreement between the parties would revive. The submission was based on the provision of section 129(3)(a), which provides that a customer may at any time before the credit provider has cancelled the agreement reinstate a credit agreement that is in default by paying to the credit provider all overdue amounts, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement.

[16]. This court is of the view that the above-stated provisions are not applicable. The agreement was cancelled, and the First Respondent obtained a default judgment which declared the property specifically executable. Once an instalment sale agreement has been terminated, it may not be revived. Section 129(3) so provides.

[17]. The agreement between the parties centred around the default judgment. Mercantile Bank agreed to hold off on executing its order, subject to the Applicant repaying the debt. The agreement was that the third Applicant would pay R2,000,000.00 on or before 25 April 2023 and would pay the balance in monthly instalments of R20,000.00 until it had been paid in full.

- [18]. It was explicitly agreed between the parties that should the Third Applicant default, the entire balance would become due and payable, and the Third Applicant would forfeit the compromised price.
- [19]. The First Respondent was not required to comply with the provisions of Section 129 of the NCA. The secondary agreement hinged on the default judgment of 2020. That judgment was valid and was never rescinded or set aside by any court. It declared the property in question specifically executable.
- [20]. Furthermore, the applicants were aware of this fact, as they attempted to rescind the judgment but ultimately abandoned the application.
- [21]. To advance the case of the Applicants, Counsel for the Applicants sought to rely on the Constitutional Court decision in the matter of *Jafta v Schoeman and Others*¹ which dealt with the question of whether a law permitting the sale in execution of people's homes due to unpaid debts violates the right to access adequate housing under Section 26 of the Constitution.
- [22]. The principle enunciated in the *Jafta* matter is in the context of the constitutional right to housing and the plight of a debtor who may lose her tenure. The First Respondent's submission that the said principles are embedded in the current approach to executability of residential properties, including Rule 46 and Rule 46A of the Uniform Rules of Court, is correct. The Applicants' case is not about the loss of tenure or a deprivation of the right to adequate housing. It is clear from the Applicants' papers that the property was an investment. She bought the house and rented it out. The Applicants' problems commenced when the tenant failed to fulfil its obligations to pay rent. The second tenant vandalised the property to an extent that the Third Respondent could not rent it out and needed to repair it before it could be rented out again.

¹ *Jafta v Schoeman & Others; Van Rooyen v Stoltz and Others* 2005 (1) BLLR 78 (CC).

[23]. The Applicants argued the forfeiture, unreasonableness and the Botha judgment. The facts in the Botha judgment are distinguishable from the facts before this court. Botha had concluded an instalment sale agreement to buy immovable property from a trust. The agreement had a cancellation clause that stated that should Botha breach the deal, it would be entitled to cancel the contract and retain all payments.

[24]. In this case, the First Respondent does not own the property but had lent money to the Applicants. The money paid was used to reduce the Applicants' indebtedness to the First Respondent. There was therefore no money forfeited, as the amount the Applicants paid towards the judgment debt was deducted from the debt, and the First Respondent was entitled to it in terms of the default judgment.

[25]. The Applicants, in their heads of argument, raised section 52(1) of the Consumer Protection Act. This court cannot seriously consider this argument. It was not pleaded in the Applicants' papers and is therefore not properly before this court.

[26]. In the circumstances, the following order is made:

1. The Applicants' application is dismissed.
2. The Applicants are to pay the costs of this application jointly and severally on the high court scale "C".

MP Kumalo
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant: Adv J Sullivan

Instructed by: Waldick Inc Attorneys Inc.

For the first respondent: Adv I Oschman

Instructed by: Bouwer & Olivier Inc.