IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 1810/2012

In the matter between:

CHANGING TIDES 17 (PROPRIETARY) LI MITED N.O. Applicant

and

JOHN MARK RUITERS 1st Respondent

I.D: [6...]

PRISCILLA BERTHA RUITERS 2nd Respondent

I.D: [6...]

[Married in community of property to each other]

JUDGMENT

MBENENGE J:

[1] This action, which initially budded into and was destined to be a default judgment application, ripened, in the course of time, into a contested application that served before me in the opposed motion court.

[2] The factual background to the matter is without complication. Because of the nature of the proceedings, I shall use the appellations "*applicant*" and "*respondents*" as denoting the parties in this matter. The applicant, in its capacity as the duly

appointed trustee of the South African Home Loans Guarantee Trust and registered bond holder over the subject property which bond was registered as security for a home loan agreement entered into between the applicant and the respondents, issued summons seeking payment of R376 526.91 against the first and second respondents (the respondents), jointly and severally, the one paying, the other to be absolved, together with interest and costs, as also an order declaring the immovable property subject to the litigation[1] executable. It is common cause that the respondents are husband and wife, married to each other in community of property.

[3] After the respondents fell into arrears in their redemption of the loan the applicant instituted the action referred to in paragraph 2 above during June 2012. The respondents thereupon entered an appearance to defend the action. Thereafter, the parties concluded a settlement agreement whereby the respondents *inter alia* acknowledged that they lacked a *bona fide* defence to the main action "*whatsoever.*"

[4] In terms of the settlement agreement (the agreement) the parties recorded that the full instalment as referred to in the agreement as on 22 October 2015 was the amount of R4 133.22 per month, but would increase or decrease based on the terms of the initial credit agreement underpinning the main action.

[5] The respondents further undertook to proceed paying R4 133.22 per month towards the outstanding amount, together with an additional amount of R1866.78 per month "*towards the current arrears balance in the amount of R19 080.43 for a total payment of R6000.00 per month, commencing at the end of November 2015 and after on or before the 1st of each and every subsequent month, until the arrears have settled, where after the full instalment currently in the amount of R4 133.22 will resume*".

[6] In no time, subsequent to the conclusion of the agreement, the respondents failed to pay the agreed instalments, so much so that when the summons was issued the respondents had fallen into arrears in the sum R16 538.21, such arrears having

---

[1] Erf 14221 Bethelsdorp, in the Nelson Mandela Bay Metropolitan Municipality, Division of Port Elizabeth, Eastern Cape Province, in extent: 544 square metres, held by Deed of Transfer T35867/2007 (the property)

accumulated partially as a result of sporadic and/or non-payment of the instalment from 3 March 2008 to 1 February 2016.

[7] According to the relevant certificate of balance, as at 24 February 2016 the respondents were indebted to the applicant in the sum of R365 308.46, together with interest thereon "*calculated at the rate of 8.70% per annum compounded monthly in arrears from 01 February 2016 to date of payment (being the base rate of 6.70% as the 01 February 2016 plus 2.00%).*"

[8] The applicant thereupon resorted to the instant application, pursuant to the provisions of rule 41(4) of the Rules of Superior Court Practice.[2]

[9] The application attracted opposition from the respondents' camp. As far as it could have been ascertained, from a reading of the respondents' opposing affidavit, the following technical defences have been raised, namely:

(a) that the agreement had been entered into on 1 December 2015 whilst the applicant had signed it on a different date;

(b) that the quest for judgment pursuant to the agreement constituted an abuse of the process of court; and

(c) that proceeding with and obtaining the judgment sought would in effect infringe the respondents' constitutional rights to adequate housing.

[10] These contentions only need to be stated in order to be rejected. It is quite clear that in concluding the agreement the parties intended to bring finality to the initial litigation.[3] That was achieved, albeit that in the course of time the respondents defaulted, resulting in the instant application being resorted to. The applicants'

---

2 Rule 41(4) provides:

> "(4) Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties."

3 *Cf Siebort & Honey v Van Tonder* 1981(2) SA 146 (O) (481)

replying affidavit makes it plain that the applicant signed the agreement during March 2016 and that reference to "*1 December 2015*" as being the date on which the agreement was signed came about through inadvertence. The applicant, in any event, enforced the agreement after March 2016. The respondents were not prejudiced by this obvious error. There is nothing abusive about the launch of the application at the opportune stage, pursuant to the breach of a valid and binding agreement, in terms of the applicable regulatory framework (i.e rule 41(4)).

[11] Much as the respondents have the fundamental right of access to adequate housing,[4] that right is not absolute as it may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[5]

[12] It is now trite law that a family home may be declared executable when a defendant falls into arrears under a home loan agreement.[6] Courts have accordingly resorted rather to fixing conditions as to time of the sale in execution and the resulting vacation of the property, than otherwise.

[13] At the hearing of the application the contentions raised in the respondents' opposing affidavit were not pursued. I found that stance to have been prudent. The respondents were merely content to seek a further indulgence – a postponement (from the Bar) of the matter to enable them to raise funds and place themselves in a position to remedy their default and avoid losing the property to execution. The postponement application, which was vehemently opposed by the applicant, was refused as it was

---

4 Section 26(1) of the Constitution of the Republic of South Africa Africa, 19996 (the Constitution)

5 Section 36(1) of the Constitution

6 *See Absa Bank Ltd vs Paterson* 2013 (1) SA 481 (CC) para [37], where it was held:

> "The fact that the mortgaged property is the defendant's family home is, in itself, not a reason to deny the mortgagee's contractual right to realise its security. Indeed, by giving the property in security the defendant voluntarily derogated 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. If he defaulted in his payments obligations to the bank, the full amount owed by him would become immediately due and payable, and the property given as security could be sold to realise the funds to settle the debt."

indeed clear that the respondents were being dilatory, to the detriment of the applicant. No reasonable prospect of reinstating the credit agreement within a short period of time was pointed to. The history of this matter reveals that the applicant has been more than benevolent towards the respondents. The respondents should also derive consolation from knowing that section 129(3) of National Credit Act 34 of, 2005 protects consumers who face the sale in execution of their properties by allowing them to reverse the credit provider's election to foreclose, conditional upon the consumer fulfilling the requirements for reinstatement (i.e payment of all amounts that are overdue).[7]

[14] I am satisfied that the applicant has made out a case for the grant of relief it is seeking.

[15] I therefore order that:

(a) the respondents pay the applicant the sum of R376 526.91, together with interest thereon at the rate of 7.60% per annum compounded monthly and calculated from 2 May 2012 to date of payment;

(b) the property known as *"ERF [1...] B., IN THE NESLON MANDELA BAY METROPOLITAN MUNICIPLAITY, DIVISION OF PORT ELIZABETH, EASTERN CAPE PROVINCE, IN EXTENT: 544 SQUARE METRES, HELD BY DEED OF TRANSFER T[...] SUBJECT TO THE CONDITIONS THEREIN CONTAINED OR REFFERED TO"* (the property) is declared executable;

(c) the Registrar of this Court is hereby authorised to issue a warrant of attachment in respect of the property; and

---

[7] Also see *Nkata v First Rand Bank Ltd & Others* 2016(4) SA 257 (CC) at para [131] where it was held that section 129(3) amounts to a statutory remedy for rendering a default judgment and attachment order ineffectual in an where the credit agreement has been reinstated by the payment of all overdue amounts and allied administrative and legal costs by the consumer.

(d) the defendants shall pay the costs of this application on the attorney and client scale, save that such costs shall be taxed on the Regional Court scale.

_____

S M MBENENGE

JUDGE OF THE HIGH COURT

Counsel for the Applicant	:	*K D Williams*
Instructed by	:	Velile Tinto & Associates Inc PRETORIA C/O Jacques Du Preez Attorneys 96 Mangold Street Newton Park PORT ELIZABETH
The respondent	:	In person
Date heard	:	9 February 2017

Judgement delivered : 16 February 2017