Not reportable

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO.: 2504/2020

In the matter between:

ABSA BANK LIMITED **Plaintiff / Applicant**

and

REGINOLD JAMES BOTHA **First Defendant / Respondent**

DANIELLE BOTHA **Second Defendant / Respondent**

JUDGMENT

Goosen J:

[1] The applicant seeks a judgment by default in terms of Rule 31(5)(b) of the Uniform Rules of Court. It also seeks an order in terms of Rule 46, alternatively Rule

46A, declaring the immovable property hypothecated as security for its loan to the defendants, executable. At the hearing of the application the first respondent appeared in person to oppose the application. Mr Botha had filed an affidavit setting out the basis of opposition and heads of argument to similar effect. After hearing argument, I reserved judgment so as to set out, briefly, my reasons for the order that appears below.

[2] The applicant issued summons against the defendants on 20 October 2020. It appears that the combined summons was amended to reflect a new address for service upon the second respondent on 15 December 2020. Service of the summons and particulars of claim was effected upon the first respondent personally on 28 October 2020. Service was effected on the second respondent personally on 21 January 2021.

[3] The applicant and the respondents concluded a written mortgage loan agreement during 2008 in terms of which the applicant afforded to the respondents a mortgage loan account facility. The cash amount loaned and advanced was R600 000 and the total of the principal debt amounted to R607 944.04. The loan was to be repaid over a period 240 months, at an agreed monthly instalment, subject to variation upon either escalation or reduction of the bank's prime lending rate. Pursuant to the loan agreement the respondents caused a mortgage bond to be registered over two immovable properties, in favour of the applicant for the capital amount of R1 000 000 together with an additional amount of R200 000. The two properties were Erf […] Swartkops, Nelson Mandela Bay and Erf […] Swartkops, Nelson Mandela Bay. In

terms of the bond it served as continuing covering security for any amounts that may be due to the applicant.

[4] In its combined summons the applicant alleged that the defendants were in breach of the terms of the loan agreement, having failed to honour the obligation to make payment of the monthly instalment due to the applicant. It alleged that, as at 6 August 2020, the arrear amount due to the applicant was R45 587.85. The balance of the principal debt outstanding as at 27 August 2020 was R440 379.78. The applicant accordingly claimed payment of said amount together with interest on that amount from 27 August 2020 to date of payment.

[5] Prior to instituting action the applicant caused a notice to be delivered to the respondents in terms of s 129 (3) of the National Credit Act (NCA)[1]. The notice was dispatched by registered mail to the *domicilium* address, being the street address of the hypothecated erven (14 Station Road, Swartkops); to the first respondent's residential address ([…], Westering, Port Elizabeth) and was served on both respondents personally[2].

[6] Neither of the respondents filed a notice to defend the action instituted against them. Nor did the respondents elect to proceed in accordance with any of the available remedies provided by the National Credit Act. It is upon this basis that the applicant duly sought judgment by default.

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[1] Act No. 34 of 2005.

[2] It appears from the papers that the first and second respondents were divorced in 2013. The mortgaged properties were (and remain) registered in the name of both respondents.

[7] It must be mentioned that the particulars of claim contain all of the usual averments regarding the factors relevant to determining whether or not to declare the mortgaged properties executable. I shall return briefly to these hereunder.

[8] As indicated the first respondent appeared in opposition to the application. The second respondent took no part in the proceedings. The first respondent's affidavit, which was filed together with heads of argument does not take issue with any of the procedural or substantive prerequisites for default judgment. There is thus no challenge relating to the applicant's compliance with the provisions of the National Credit Act. Importantly, the first respondent also did not seek leave to cure his default of appearance to defend and to enter upon a defence of the action.

[9] The first respondent's affidavit raises three issues. During oral argument these were repeated in submissions made by the first respondent. The first concerns a complaint about the applicant's failure to deliver statements of account to him and, so I understood, a concomitant lack of knowledge of the status of the loan account. According to the first respondent the problem arose when the applicant dispatched monthly account statements to his ex-wife's address (i.e. that of the second respondent). Despite repeated attempts to rectify the address this it was not done.

[10] The second issue relates to a fire that occurred at one of the properties. It should be noted here that the first respondent explained that neither of the properties were his (or second respondent's) primary residence. They are properties which were acquired as an investment so that they may be let for rental income. The first respondent resides at […], Westering, an unrelated property which, he stated in argument, he owns.

[11] His affidavit explains that the fire occurred at the one Swartkops property in 2015. It spread to the other, adjacent property. They were damaged extensively. The properties were insured. Although no details were provided the first respondent asserted that it was insured by the applicant. At the time he lodged an insurance claim. According to the first respondent the property was assessed as being 'underinsured'. He was paid out an amount which was R120 000 less than the costs of repairs. As a result, he has had to undertake the repairs himself. The affidavit does not explain whether the repairs were completed and what the present state of the property is.

[12] As a result of his troubles with the insurance claim, the first respondent made repeated efforts to ascertain why the property was underinsured by the bank. He also sought explanations from the bank on why the insurance premiums escalated and why, notwithstanding regular bond payments, the amount due by him did not substantially reduce. He stated that the bank officials constantly gave him 'the run around'. It was this which caused him to stop paying his bond instalments. He has continued to withhold payment because he remains unsatisfied with his treatment by the applicant's officials. The application for default judgment indicates that the respondents are almost 18 months in arears.

[13] The third issue raised in the affidavit is related to the insurance payment issue. He contends that because of the underpayment of the insurance claim he has been unable to repair the damaged property and, was therefore unable to earn an income from that property. Based on this he asserts that he has a claim against the applicant for such loss of income. It should be noted here that the first respondent stated during

argument that the second property is occupied by a tenant and that he continues to earn a rental income from that property.

[14] The 'defences' raised by the first respondent do not, properly construed, amount to defences which would preclude a court from granting judgment against him. The 'dispute' regarding the insurance claim dates back to 2015. The 'dispute' is framed in very broad terms. No detail is provided as to the identity of the insurer and its relationship, if any, to the applicant. The assertion that the applicant was responsible for the insurance of the property is in direct conflict with the terms of the Mortgage Loan Agreement. In this regard two clauses are relevant.

[15] The first is, Clause 3.1.10 of the Agreement which provides that the granting of the loan is subject to:

> "The property to be mortgaged being insured for not less than the total amount reflected below being the Bank's (Lender's) estimated replacement value of the property.
> Insured amount: R1, 246 2300.00"

The second is clause 12 which provides that:

> "12.1 The Borrower shall maintain during the entire duration of this agreement-
> 12.1.1 life insurance in an amount equal to the total of the Borrower's outstanding obligation to

the Bank in terms of this agreement (if applicable having regard to clause 12.5)

12.1.2 insurance cover in respect of the property for all risks against which any such property will normally be insured in an amount equal to the full asset value of the property; and

12.1.3 such insurance as is contemplated in clause 15.1.9 (if applicable), by an insurance company and in terms of a policy acceptable to the Bank.

12.1 The Borrower confirms having been informed of his right to waive a policy of insurance proposed by the Bank and substitute a policy of his own choice.

The reference to clause 12.5 in the quoted clause 12.1.1 above draws to the attention of the borrower that life insurance is not compulsory but that it has been explained that it is to the borrower benefit to maintain such policy. The first respondent sought to suggest that the applicant was under some obligation to provide life insurance cover but did not. There was a suggestion that this would have provided him with income protection in the event of disability. There is plainly no merit in such contention. Clause

15.1.9 to which reference is made is not presently relevant since it relates to a Building Loan which does not apply.

[16] The first point to highlight from these provisions is that it is the borrower's (i.e. the first respondent's) obligation to maintain insurance and not that of the applicant. The second is that to the extent that there is some dispute regarding the entitlement to payment of an insurance benefit (e.g. a payment upon a claim) such dispute plainly does not bear upon the underlying obligation to effect payment of the loan agreement. Thus to the extent that there exists a cognisable complaint regarding the payment of the insurance claim in respect of the fire, it does not absolve the first defendant from the obligation to effect re-payment of the loan.

[17] There is, however, a further difficulty insofar as the first respondent contends that he is dissatisfied with the manner in which his account has been managed. The notice issued to the first respondent in terms of s 129 of the NCA specifically drew to the attention of the first respondent his right to refer any dispute relating to the loan to an appropriate dispute resolution body or Ombud. He did not act upon that notice. It also alerted him to the opportunity to enter into a debt restructuring arrangement or to reach agreement regarding a re-payment plan which could take into account his financial circumstances. This too was not acted upon.

[18] The consequence is that there is no discernible basis upon which I can refuse to enter judgment in favour of the applicant. That leaves the question of execution against the properties. As indicated earlier in the judgment, the applicant sets out averments usually made in relation to factors to be considered regarding execution

against the properties. These include averments concerning the basis upon which the respondents acquired the property; the prospect of recovery of the debt by means other than execution and the purpose of the security held by the applicant.

[19] It is common cause that the two hypothecated properties, although residential in character, are not the primary residence of either of the respondents. Indeed, as I understood the first respondent's concession during argument: the properties were acquired as an investment in order to provide a source of rental income. Presently one of the properties is tenanted and rental income is being received by the first respondent.

[20] Despite the first respondent's investment in the properties being an essentially commercial investment, the first respondent asserted in his heads of argument that execution against the properties would infringe his right to housing as enshrined in the Constitution. The assertion is devoid of any merit. The sale in execution of the hypothecated properties will in no way infringe upon the first respondent's occupation of his residential home. Nor will it have any bearing upon the rights of the tenants occupying the properties. They, in any event, are vested with rights which may be enforceable against the new owners of the property.

[21] As I have indicated earlier in the judgment, the first respondent has no defence against the applicant's recovery of the debt due to it. Once judgment is entered in favour of the applicant, its rights to execute based on its security is subject only to the supervision of the court as provided by Rules 46 and 46A. The primary purpose of such supervision is to protect, as far as may be possible, persons from homelessness and to ensure fairness and equity in the execution process.

[22] In this instance the first respondent has not indicated the existence of a means other than execution by which the debt may be settled. I accept, upon the undisputed facts alleged by the applicant, that the only means available to the applicant to secure payment of the amount due to it is to order execution against the properties. I am satisfied that execution against the properties would not be disproportionate having regard to the extent of the indebtedness and the lack of alternative means to settle the debt. The fact that the first respondent has, by reason of a dispute regarding an insurance payment, deliberately withheld payment of the monthly instalments due in terms of the loan agreement and the fact that he has continued to earn rental income from one of the properties weigh very heavily in favour of ordering execution. It is to be noted that the first respondent did not raise an inability to pay as the basis for his breach of the mortgage loan agreement. His heads of argument suggest that he "cannot afford" to make payment since he has been unemployed for 20 years and his only income is in the form of a disability payment. It is perhaps only necessary to point out that he acquired the properties within the last 20 years and earns an income from them.

[23] Rule 46A(9) requires the court to consider setting a reserve price. Some of the factors to be considered are those set out in the sub-rule. In this instance there are two properties which serve as security for the payment of amounts due to the applicant. The capital sum claimed is an amount of R440 379.78. As at 3 August 2021 the arear amount due in terms of the loan agreement had grown to an amount of R120 765.52 and the outstanding balance to R475 551.13. On the same date the amounts

due to the Nelson Mandela Bay municipality amounted to R948.36 in respect of Erf […] Swartkops and R12 308.55 in respect of Erf […] Swartkops.

[24] According to the valuation reports submitted in support of the applications, Erf […] has a municipal valuation of R440 000 and Erf […] a value of R420 000. The market valuation (the expected value) of each erf is an amount of R560 000. It is not indicated what value is likely to be realized upon a forced sale, although the expected low market value is reflected to be the municipal value in each case.

[25] It appears from these facts that there is, relative to the debt secured by the properties, equity in a not insubstantial amount which is likely to be realized upon the sale of the properties. The comparative sales data indicates a value of between R500 000 and R700 000 for comparable properties. However, the number of sales has declined between 2018 and 2020 when the valuation was done. Thus, while there is equity to be realized the low number of sales suggest it may not be readily realizable at a forced sale. I nevertheless consider that setting a reserve price would be fair and appropriate. There is no discernable difference between the properties as far as can be ascertained. Setting a reserve price at a value too high would undoubtedly limit the prospect of a sale with concomitant ongoing prejudice to the respondents as debtors. Based on the data disclosed in the valuation reports and taking into account the debt to equity ratio it seems to me that a reserve price of 50% of the market value would ensure realization of sufficient funds to meet the respondents' debt obligations. In the event that the reserve price is not attained the applicant is at large to rely upon Rule46(9)(c).

[26] In the result I make the following order:

1. The respondents are ordered to pay to the applicant:

    1.1. The sum of R440 379.78;

    1.2. Interest on the amount of R440 379.78 at the rate of 5.4% per annum from 27 August 2020 to date of payment, both dates inclusive;

2. An order declaring the following property specially executable:

    ERF […] SWARTKOPS, NELSON MANDELA BAY METROPOLITAN MUNICIPALITY, DIVISION OF PORT ELIZABETH, EASTERN CAPE PROVINCE in extent 981 (NINE HUNDRED AND EIGHTY-ONE) square metres.

    ERF […] SWARTKOPS, NELSON MANDELA BAY METROPOLITAN MUNICIPALITY, DIVISION OF PORT ELIZABETH, EASTERN CAPE PROVINCE in extent 465 (FOUR HUNDRED AND SIXTY-FIVE) square metres.

3. An order declaring that the immovable properties of the first and second respondents may be sold in execution subject to the reserve price of R280 000 in respect of each property.

4. Costs of suit as between attorney and client.

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G.G. GOOSEN

JUDGE OF THE HIGH COURT

APPEARANCES

Obo the Applicant	:	*Adv N. Barnard*
Instructed by	:	*McWilliams & Elliott Inc.* *152 Cape Road, Mill Park, Port Elizabeth*
Obo the Respondents:	:	*First Respondent in Person*
Heard	:	*16 November 2021*
Delivered	:	*30 November 2021*