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REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 1897/2011

- | | |
|-----|--|
| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: YES/NO</u> |
| (3) | <u>REVISED.</u> |

.....
DATE

.....
SIGNATURE

In the matter between:

DATE: 5/6/2015

STANDARD BANK OF SOUTH AFRICA

Plaintiff

and

SIPHO THIBA KUNENE

First Defendant

ATTOLINAH NTOMBIFUTHI KUNENE

Second Defendant

J U D G M E N T

DEWRANCE AJ

- [1] In these proceedings, the plaintiff (hereinafter referred to as “Standard Bank”) seeks a judgment against the defendants, jointly and severally, in the amount of R229 268.72; interest at the rate of 8.70% per annum, calculated daily and compounded monthly in arrears from 1 October 2010 to date of payment, both days inclusive; payment of the monthly insurance premiums of R119.18 from 1 October 2010; and costs on an attorney own client scale as provided for in paragraph 2.3.2 of the first mortgage bond and paragraph 2.4 of the second mortgage bond.
- [2] In addition to the aforementioned orders, Standard Bank also seeks an order declaring the following property executable:[.....] Ebony Park Township, Registration Division IR, Province of Gauteng, held by title of transfer T3960/1996 (“the property”). It is common cause that this is the defendants’ primary residence.
- [3] At the outset I must point out that compliance or otherwise with the National Credit Act, Act 34 of 2005, is not an issue as this has not been raised during the trial.
- [4] Before I proceed, it is important to restate the principles of the function of pleadings. The function of pleadings is threefold:¹
- [4.1] they must ensure that both parties know what the points of issue are between them, so that each party knows what case he has to meet. He or she can thus prepare for trial knowing

what evidence he or she requires to support his own case and to meet that of his opponent. The object of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvass another;²

[4.2] pleadings are to assist the court by defining the limits of the action. In *Robinson v Randfontein Estates GM Co Ltd*³, the court stated the following:

“The object of pleadings is to define the issue; and the parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within these limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings.”

[4.3] pleadings place the issues raised in action on record so that when a judgment is given such a judgment may be a bar to the parties litigating again on the same issues, enabling a party to raise a defence of *res judicata* if the other party attempts to raise the same issues.

[5] The reasons for restating the principles on pleadings will become apparent later.

[6] A proper interpretation of the issues in this matter requires an examination of the facts that gave rise to the plaintiff's claim.

STANDARD BANK'S CLAIM

[7] It is common cause that the parties entered into two written loan agreements. I deal with the two loan agreements shortly. To secure the defendants' indebtedness to the plaintiff, plaintiff registered two mortgage bonds over the defendants' home.

[8] The loan agreements were entered into pursuant to an agreement entered into between Standard Bank and the defendant's erstwhile employer, Nestle South Africa (Pty) Ltd ("Nestle"). The details of the agreement between Nestle and Standard Bank were not discovered. However, nothing turns on this.

THE FIRST LOAN AGREEMENT

[9] The first loan agreement was entered into on 15 October 1995 ("the first loan agreement"). In terms of the first loan agreement, Standard Bank lent and advanced the defendants an amount of R57 000.00, which was repayable over 240 months.

[10] Standard Bank required the defendants to acquire life assurance over the property and it is common cause that the defendants arranged "life cover". In terms of the first loan agreement "*premiums in respect of life assurance policies*" could apply in repayment of the first loan. It appears that the monthly premiums were included in the monthly instalments. It is not apparent what the monthly premiums were at

that stage. However, nothing turns on this point as Standard Bank is claiming the payment of the monthly insurance premiums from 1 October 2010.

THE SECOND LOAN AGREEMENT

[11] After entering into the first loan agreement, the parties, on 8 May 2006, entered into the second loan agreement (“the second loan agreement”). In terms of the second loan agreement, Standard Bank lent and advanced the defendants an amount of R170 000.00 on the same terms and conditions as the first loan agreement.

[12] In Standard Bank’s letter, dated 20 April 2006, wherein it informed the defendants that the second loan was successful, it informed the defendants that:

“To protect your family against financial burdens that could follow tragedies such as death or disability, we encourage you to ensure that your home loan is adequately protected, for example, by taking out Home Loan Protection Plan cover or sufficient life insurance cover.”

[13] In the same letter, the defendants were informed that the insurance premium will be calculated “*on the minimum replacement value of the improvements erected or to be erected on the property for insurance purposes of R309 397.00*”. The defendants were further informed that the “*values represent the costs of replacing or reinstating on the same site, property of the same kind or type, but not better or larger than the original insured property when it was first erected*”.

[14] The second loan agreement also required the defendants to insure the property. Clause 5.1 of the second loan agreement deals with homeowners' insurance and life assurance and provides as follows:

"5. Homeowners Insurance and Life Assurance

- 5.1 *The Bank may at any time during the period of the loan, in the name of the Bank and/or the Borrower, insure the buildings with an insurance company nominated by the Bank against loss of damage by fire and such other risks (including political riot or civil commotion) as the Bank decides is necessary. The insured amount will not be for less than the minimum replacement value of the buildings from time to time as determined by the Bank. The Borrower must ensure compliance with the Borrower's responsibilities in the letter of grant and will have no claim against the Bank for any loss suffered by the Borrower if the replacement value for insurance purposes is found to be different to the actual replacement value. The value determined by the Bank, based on the assessment, will be taken to be the reasonable replacement value for the purposes of the Act.*
- 5.2 *If the Bank agrees that the Borrower can arrange his own Homeowners Insurance cover with an insurer of his choice, the Borrower agrees that he will cede his insurance policy to the Bank.*
- 5.3 *The Bank may, without reference to the Borrower, and without requiring the Borrower's consent, in the name of the Bank and/or the Borrower, adjust, settle, compromise and/or submit to arbitration any claims, demands, disputes and other matters arising from any policy of insurance referred to in clause 5.1 above, and/or may institute or defend legal proceedings arising from the policy. The Borrower will have no claim against the Bank and/or any of its employees arising from an act or omission of the Bank and/or any of its employees in exercising or failing to make use of the authority granted in terms of clause 5.3, unless in exercising this authority, a claim arises as a result of wrongful or unlawful acts, or intentional misconduct, on the part of the Bank.*
- 5.4 *The Bank may grant receipts for any monies received by it in respect of any insurance claim, settlement or compromise and may, at its discretion,*

use the monies wholly or partially, either in reduction or payment of any amount due under the loan agreement and/or for the restoration of the buildings which are damaged or destroyed, under such conditions as the Bank may determine.

5.5 The Bank may pay any premium on any policy of insurance referred to in clause 5.1 above or any life assurance policy taken out by the Borrower in connection with the loan or on any life assurance or other policy referred to in the Act, including any policy which may be ceded or payable to the Bank as additional security for the debt, and such payment will form part of the amount due under the loan agreement and the Bank may debit such payment to any account of the Borrower with the Bank.

5.6 Nothing in the loan agreement will oblige the Bank to take out or pay any premiums on any insurance on behalf of the Borrower. If an insurer repudiates any insurance policy for any reason, the Borrower will have no claim against the Bank.

5.7 *The Bank reserves the right, at any stage, in the sole and absolute discretion of the Bank, to terminate the existing insurance or to elect not to renew an insurance policy. If the Bank elects either of these options, it will notify the Borrower of its decision in writing and it will furnish reasons for the decision.” (emphasis added)*

[15] In summary, clause 5 of the second loan agreement broadly provides that homeowners insurance is necessary; the premium of the insurance will be included in the monthly instalment and, should the insurer repudiate the insurance policy, the defendants would not have recourse against Standard Bank.

LIFE ASSURANCE POLICY

[16] A major portion of the trial dealt with the status of the life assurance cover acquired by the defendants over the property.

- [17] Shortly after the first loan agreement was granted, during the course of 1995, the first defendant attended a workshop held at a division of Standard Bank, E Bank, in Johannesburg. The workshop was conducted by one Thomas. The first defendant does not know his further particulars and/or his designation.
- [18] He attended the workshop with other people. The purpose of the workshop, according to the first defendant, was to inform the audience of the rights and responsibilities under the loan agreement. The first defendant alleged that Thomas informed the workshop that the life assurance policy covered both death and disability. As a result of this information, the defendants did not take any further action.
- [19] At some point after the first loan was granted, an entity, Standard Bank Insurance Brokers ("SBIB") entered the fray. SBIB is a financial adviser as contemplated by the Financial Advisory and Intermediary Services Act, Act 37 of 2002 ("FAIS"). It further appears that SBIB arranged the insurance cover with Liberty Life for and on behalf of the defendants. I return to this aspect later.
- [20] Ms Linah Mabena testified that SBIB is a separate and distinct entity from Standard Bank with its own legal personality.
- [21] The first defendant testified that although the insurance cover was acquired he never received a copy of the policy document.

DEFENDANT'S BREACH OF THE AGREEMENTS

[22] It is common cause that the defendants breached the two loan agreements. In paragraph 7 of the plaintiff's declaration it pleads the following:

"7.1 The Defendants acted in breach of their obligations in terms of the loan agreements, by failing to pay the amounts due to the Plaintiff, and has persisted with such breach, notwithstanding demand in terms of the provisions of the loan agreements.

7.2 In the premises all amounts secured by the mortgage bonds became due and payable, and the Plaintiff became entitled to institute proceedings for an order declaring the mortgaged property executable."

[23] In its amended plea the defendants admitted that: they breached the agreements; all amounts in terms of the agreements became due and payable; that Standard Bank is entitled to institute these proceedings and for an order declaring their home specifically executable.

DEFENDANTS' DEFENCES

[24] The plaintiff, in paragraph 8 of its declaration, pleaded that, as a consequence of the breach by the defendants, an amount of R229 268.72 is outstanding on the agreements.

[25] In response to this allegation, the defendants, in their plea, pleaded that:

[25.1] they deny the outstanding amount;

[25.2] their default was “*covered by disability insurance/cover taken out by them at the time of the taking of the loan when the Plaintiff at the specific instance of the Plaintiff*”;

[25.3] in the event that the “*disability insurance defence*” is not upheld, the plaintiff is “*estopped from relying on the lack of disability cover in that during 1996 when the first mortgage bond and loan agreement was approved the Plaintiff directly or alternatively indirectly orally and in writing indicated to the First and Second Defendant that the insurance cover extended to disability cover*”. (**emphasis added**)

[26] In its replication, Standard Bank took issue with all the defences raised by the defendants. In its replication it pleaded that:

“1.1 ...

1.2 ..., the Plaintiff specifically states that clause 5.6 of the terms and conditions of loans secured by mortgage bonds, applicable to the loan agreements, specifically excludes any liability of the plaintiff and provides as follows:

‘5.6 Nothing in the loan agreement will oblige the Bank to take out or pay any premiums for any insurance on behalf of the Borrower. If any insurer repudiates any insurance policy for any reason, the Borrower will have no claim against the Bank.’”

ADMISSIONS SOUGHT AND PROVIDED BY THE PARTIES

- [27] Before the trial, the parties held several pre-trial conferences as contemplated by Rule 37 of the Uniform Rules of Court (“the Rules”).
- [28] The defendants admitted that the insurance cover was taken out with Liberty Life under Policy No. [.....] and that the insured amount was for R300 000.00. The defendants alleged that the plaintiff was in possession of the policy document.
- [29] On 20 January 2015, the plaintiff sought further admissions. It handed the defendants a copy of the bank statements under account number [.....] dated 20 January 1998 to 2 October 2014. The defendants were required to indicate: each of the debits on the bank statements that they admit; each of the debits on the bank statements that they deny; each of the credits on the bank statements that they admit; and each of the credits on the bank statements that they deny.
- [30] The defendants only admitted the entries up to 2 December 2009 but disputed the rest of the entries. I will return to this aspect later.
- [31] The defendants stated that they rely on the policy discovered as item 3 of the plaintiff’s supplementary discovery affidavit dated 19 September 2014 and attached a copy of the policy wording.⁴

[32] I now turn to deal with the defences raised by the defendants. For convenience, I will deal with the defendants' defences in the following order:

[32.1] the "*insurance disability cover*" defence;

[32.2] estoppel; and

[32.3] the quantum.

INSURANCE DISABILITY COVER DEFENCE

[33] The defendants contend that they entered into an insurance agreement which indemnified them from liability should the defendants become disabled.

[34] It is common cause that the first defendant was declared permanently disabled with effect from 27 July 2007

[35] I have already indicated that, as a condition of the loan agreements, Standard Bank required the defendants to acquire life insurance.

[36] As indicated earlier, the defendants conceded that the policy was entered into between them and Liberty Life.

[37] A letter dated 16 March 2004, from Standard Bank Insurance Centre, informed the addressees that their “*home loan insurance policy with Standard Bank*” had been upgraded to a “*DreamStart Protection Plan*” with effect from 1 May 2004. The letter is not addressed to a specific person. Ms Linah Mabena testified that this is a generic letter sent out to DreamStart policyholders. The letter provides as follows:

“Re: *The DreamStart Protection Plan upgrade*

At Standard Bank, we are constantly looking for ways of improving our products to meet our customers’ changing needs. We are pleased to inform you that your home loan insurance policy with Standard Bank has been upgraded to a DreamStart Protection Plan with effect from 1 May 2004.

This has resulted in your policy paying out a total outstanding balance on your home loan in the event of your death. Now, you will have peace of mind knowing that your bond repayments will not burden your family should something unexpected happen to you.

Previously your policy would only have paid out an amount proportionate to your income contribution leaving your family with unwanted debt.

Below is a summary of your new DreamStart Protection Plan Policy Schedule reflecting your new premium due.

*Account number :
Insured Life/s :
Type of cover : Death Only
Current premium : R27.1111*

Total premium due from 1 May 2005: R61.88

...

A copy of the statutory notice and obligatory disclosure, which you are entitled to as a long term insurance policy holder are (sic) attached. The obligatory disclosure explains the terms and conditions of your policy.

...”

[38] Ms Linah Mabena, on behalf of SBIB, testified that the policy document would be reviewed from time to time. Several versions of the statutory notice and obligatory disclosures (“statutory notice”) were placed before me. A version dated April 2010 provided for death cover only. However, paragraph 8 of the April 2010 statutory notice, which contained important conditions and exclusions applicable to death benefits, provided as follows:

“8. ***Important conditions and exclusions applicable to death benefit***

The insured must provide any reasonable medical evidence of death, total and permanent disability, or impairment and should at his/her own expense undergo any medical examination required by Liberty Active.

In addition to the pre-existing condition exclusion specified above, Liberty Active will not be liable if a claim arises directly or indirectly from the Insured Persons:

- a Wilful or material violation of any criminal law; or*
- b Deliberate involvement in any riot, uprising, civil commotion, seizing of power, martial law, war, the overthrowing or influencing of any government or ruling body by force, terrorism or violence; or*
- c Exposure to atomic energy, nuclear fission or reaction, biological or chemical hazards and warfare agents; or*
- d Refusal to seek and follow medical advice; or*

- e *Attempted suicide or deliberate self-infliction of injury; or*
- f *Regular participation in any hazardous sport or pursuit. Regular participation is defined as participating in an activity more than once a year.*
- g *If the cause of death/impairment/disability is as a result of any criminal and/or illegal actions on the part of the insured, all benefits will be forfeited and Liberty Active reserves the right..."*
(emphasis added)

[39] The 2010 statutory notice differs from the 2004 statutory notice in that the exclusions in paragraph 8 contained in the 2010 statutory notice is not contained in the 2004 statutory notice. A further statutory notice and obligatory disclosure, dated January 2011, provides that the insured is only covered for death. The conditions and exclusions are similar to the 2010 statutory notice.

[40] A reading of the statutory notice documents is clear. The insured, and in this case, the defendants, were only covered for death, not disability.

[41] The evidence points clearly to the fact that the defendants were only covered for death and not disability by Liberty Life. The statutory notices cannot be understood in another way.

[42] Accordingly, this defence cannot be upheld.

ESTOPPEL

- [43] The defendants contend that should their aforementioned defence not be upheld, that the plaintiff be "*estopped from relying on the lack of disability cover in that during 1996 when the first mortgage bond and loan agreement was approved the Plaintiff alternatively indirectly orally and in writing indicated to the First and Second Defendants that their insurance cover extended to disability cover*".
- [44] The essence of the doctrine of estoppel by representation is that the person is precluded or estopped from denying the truth of a representation previously made by her or him to another person if the latter, believing in the truth of the representation, acted thereon to her or his detriment.⁵
- [45] Estoppel usually operates between the actual (or deemed) representor and the actual (or deemed) representee. Estoppel should, in principle, not be confused with vicarious liability.⁶ The requirement that, to found estoppel there must have been a representation, made by the representor to the representee, does not mean that the representor (the person against whom the estoppel is raised) necessarily made the representation himself. A person can be estopped from denying the truth of a representation made by someone who was entitled in law to do so on his behalf, for example, his agent.⁷

[46] Sonnekus⁸ explains that a person can be held bound by a representation not made by himself or by someone representing him, but by another person, when the other person made a representation regarding him (the person estopped), or his property and he neglected to speak or act in circumstances where he should have spoken or acted in order to avoid prejudice being caused to the person or acted on the faith of the representation. An example can be found in *TW Beckett & Co v B Gundelfinger*.⁹ The plaintiff claimed the ejectment of the defendant from certain fixed property which he had bought at a public auction. The defendant resisted the claim on the ground that he had a lease over the property which still had a few years to run. He was held to be estopped from raising the defence because he had, by remaining silent and failing to object when he heard the auctioneer say, in reply to a question by the plaintiff's representatives, that there was no lease on the property, led the plaintiff to believe that the property was free of any lease. An estoppel which arises in this way is usually referred to as "*estoppel by silence*", the person still being regarded as having by silence made the representation which he is estopped from denying.

[47] *In casu* the insurer was Liberty Life, as conceded by the defendants. I find it difficult to draw the line back to Standard Bank. It is clear that SBIB was at all relevant times the intermediary between Liberty and the defendants.

[48] For the defendants to succeed, the defendants must show that an official from Standard Bank had the necessary authority to bind Liberty Life. No such evidence was led during the course of this trial. Accordingly, this defence can also not be upheld.

QUANTUM DEFENCE

[49] The defendants deny that they owe the applicant the amount of R229 268.72. The essence of the defendant's defence is that they dispute that they made the deposit of R66 243.64 on 2 December 2009. This defence is confusing because if the aforementioned amount is disregarded the defendants' indebtedness to Standard Bank is more than that claimed by Standard Bank in these proceedings. I nevertheless deal with this point. I now turn to deal with the deposit made.

[50] During the first defendant's presentation of his evidence, he was adamant that he did not make the deposit on 2 December 2009. In fact, the evidence shows that the first defendant queried this amount with Standard Bank on several occasions.

[51] I am faced with two different versions of which a deposit of R66 243.64 was made on 2 December 2009 into the defendants' home loan account. The first defendant disputes that he made the deposit. Standard Bank disputes that it, out of its own accord, made the deposit.

[52] The technique generally employed by courts in resolving factual disputes was summarised in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others*.¹⁰ In this case, the court said the following:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[53] Both Ms Sohini Rubykisoona ("Rubykisoona") and the first defendant's evidence was credible, but the probabilities are in favour of Standard Bank. Accordingly, I find that, based on the test in the SFW Group matter *supra* that Standard Bank's version of events is to be accepted.

[54] In any case, as I have earlier indicated, should the defendant's version of events be accepted, their indebtedness to Standard Bank would be more than what Standard Bank claims in these proceedings.

[55] The defence must fail.

ORDER TO DECLARE PROPERTY EXECUTABLE

[56] Standard Bank seeks an order that the property be declared executable. In *Firststrand Bank v Folscher*,¹¹ the full court of this court stated that absent any extraordinary circumstances a judgment creditor will normally be entitled to enforce his judgment by executing against the immovable property that is bonded as security. The special hypothec registered in favour of the creditor, as security for the monies advanced for the purchase of the home and capital loans, is entered into between borrower and lender consciously, deliberately and for mutual benefit.

[57] The full court further stated that it is impossible to provide a list of circumstances that might be regarded as extraordinary, which would persuade a court to decline a writ of execution. They would usually consist of factors that would render enforcement of the judgment debt an abuse of the process, which a court is obliged to prevent. The creditor's conduct needs to be wilfully dishonest or vexatious to constitute an abuse. The consequences of intended writs against hypothecated properties, although *bona fide*, may be iniquitous

because the debtor will lose his home, while alternative modes of satisfying the creditor's demands might exist, that would not cause any significant prejudice to the creditor.

[58] The full court identified some of the factors that need to be taken into consideration by a court when deciding whether a writ should be issued or not. They are:

- whether the mortgaged property is the debtor's primary residence;
- the circumstances under which the debt was incurred;
- the arrears outstanding on the bond when the latter was called up;
- the arrears on the date default judgment is sought;
- the total amount owing in respect of which execution is sought;
- the debtor's payment history;
- the relevant financial strengths of the creditor and the debtor;
- whether any possibility exists that the debtor's liability to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence;

- the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;
- whether any notice in terms of section 129 of the National Credit Act was sent to the debtor prior to the institution of the action;
- the debtor's reaction to such notice, if any;
- the period of time that elapsed between the delivery of such notice and the institution of the action;
- whether the property sought to be declared executable was acquired by means of, or with the aid of, a state subsidy;
- whether the property is occupied or not;
- whether the property is in fact occupied by the debtor;
- whether the immovable property was acquired with monies advanced by the creditor or not;
- whether the debtor will lose access to housing as a result of execution being levied against his home;

- whether there is any indication that the creditor has instituted action with an ulterior motive or not;
- the position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant.

[59] Standard Bank showed that when the first defendant was declared permanently disabled he received a lump sum in the amount of R829 329.10. The first defendant's bank statements show that the lump sum was deposited into the first defendant's account on 1 September 2009. On the same day, he withdrew an amount of R274 000.00 to buy a BMW motor vehicle. His bank records indicate that he made regular large withdrawals from his bank account, to such an extent that his account reflected a negative balance during the course of March 2010. The reason for the withdrawal, according to the first defendant, was that he purchased a motor vehicle and lent money to his brother and that he generally withdrew all his money in the Standard Bank account in order to deposit these amounts into his other account because at that stage he was angry with Standard Bank for not honouring "*their policy*".

[60] When summons was issued on 14 January 2011, the first defendant had already withdrawn all the monies from his Standard Bank account.

[61] The first defendant testified that he is unemployed and only receives a disability grant of R1 300.00 per month. He occupies the property with his wife, his two children and two grandchildren. They are all unemployed. The defendant's wife is ill and is in no position to find employment.

[62] This is indeed a sorry state of affairs. The first defendant stopped making payments towards the two loan agreements. On the day that the lump sum amount for the disability was paid into his account, on 1 September 2009, the defendants' outstanding amount in respect of the home loan amounted to R267 045.66. He had more than enough money to settle the bond. Instead, he chose to purchase a BMW motor vehicle in the amount of R274 000.00 on the same day he obtained the lump sum amount. This was clearly a poor choice. He continued to squander the disability lump sum, to such an extent that today he is destitute.

[63] The first defendant testified that he is not in a position to satisfy the judgment debt.

[64] Having said that, I have to weigh the prejudice Standard Bank may suffer if execution was to be refused. As indicated, the first defendant testified that he is in no position to pay the judgment debt and his wife and children are unemployed.

[65] Should an order not be granted to declare the property executable, the judgment cannot be enforced, which means that Standard Bank will not be able to recover any money from the defendants in the foreseeable future.

[66] In this case, there are no extraordinary circumstances which will prevent Standard Bank from enforcing its judgment by executing against the property. Accordingly, I am satisfied that Standard Bank has made out a case for an order that the property be declared specifically executable.

ORDER

[67] Accordingly, judgment is granted against the defendants, jointly and severally, in the following terms:

- (a) payment in the sum of R229 268.72;
- (b) interest thereon at the rate of 8.70% per annum, calculated daily and compounded monthly in arrears from 1 October 2010 to date of payment, both dates inclusive;
- (c) payment of the monthly insurance premiums of R119.18 from 1 October 2010;
- (d) an order declaring the following property specifically executable:

Erf [...], Ebony Park Township

Registration Division I.R., Province of Gauteng

Measuring 298 (two hundred and ninety-eight) square metres

Held by Deed of Transfer No T3960/96;

- (e) an order in terms of Rule 46 to authorise the Registrar to issue a warrant of execution against the immovable property to obtain an attachment over the property and an ultimate sale in execution;
- (f) costs on an attorney and own client scale as provided for in paragraphs 2.3.2 and 2.4 of the respective mortgage bonds.

DEWRANCE, AJ

Representation for the plaintiffs:

Counsel

Instructed by Attorneys:

Adv M T Shepherd

Findlay and Niemeyer
1027 Francis Baard Street
Hatfield, Pretoria
Ref: M Ludik/meg/F3582

Representation for respondent

Counsel

Instructed by

Adv M Steenekamp

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- 1 Daniels *Beck's Theory and Principles on Pleadings and Civil Actions* (6th ed)
Butterworths, p 43
- 2 See Rule 18: *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D); *Kali v*
Incorporated General Insurance Ltd 1976 (2) SA 179 (D) at 182; *Imprefed (Pty) Ltd v*
3 *National Transport Commission* 1996 (3) SA 94 (A).
1925 AD 173 at 198
- 4 The policy is also listed as item 36 of the defendants' supplementary discovery
affidavit dated 15 July 2013
- 5 See *Aris Enterprise (Finance) (Pty) Ltd v Protea Assurance Co Limited* [1981] 4 All
SA 238 (A), 1981 (3) SA 272 (A) at 291; see *SA Broadcasting Corp v Coop* [2006] 1
All SA 333 (SCA), 2006 (2) SA 217 (SCA)
- 6 See Sonnekus, *The Law of Estoppel in South Africa*, 49
7 *Harriram v Kahn* 1950 (2) SA 200 (N) at 202; *Union Government (Minister of*
Railways and Harbours) v Landau & Co 1918 AD 2388 at 402
- 8 Sonnekus *supra* at p 50
9 (1897) 4 OR77
10 2003 (1) SA 11 (SCA) at para [5]
11 2011 (4) SA 314 (GNP)