REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO
(3) REVISED

Date: 12.4.18

WHG VAN DER LINDE

In the matters between:

Absa Bank Limited v DK Mokebe, case no 2018/612,

Absa Bank Ltd v RL Kobe, case no 2017/48091

Absa Bank Ltd v MN Vokwana, case no 2018/1459

Standard Bank of South Africa Ltd v Colombrick IS and Kimberg PE, case no 2017/35579

Judgment

Van der Linde, J:

Introduction

[1] In the recess unopposed motion court earlier this week four applications were brought by two banks to foreclose on home loans where the home is, or should be taken to be, the debtor's primary residence. The applicants do not in any of the applications seek an order immediately that the property be declared executable. They also do not abandon that relief – which is asked for in their appropriate pleading – but at this time they apply only for a money judgment representing the accelerated full outstanding balance of the home loan, the acceleration having been brought about by the debtor's default in paying the monthly bond instalments due under the home loan (or the bond itself), notionally either on due date or at all.

[2] In Absa Bank Ltd v RL Kobe, case no 2017/48091, the home loan was for R237 256 repayable over 20 years at R2 450 per month. When the summons was issued on 8 December 2017, the debtor was just over eleven months in arrears, the arrear amount being R35 042. The accelerated full outstanding balance was R267 527. The bank could not confirm whether the property was the debtor's primary residence, but "suspected" that it was not. It said too that the property was then unoccupied. In the affidavit of 27 February 2018, it said that the property is used for residential purposes, although "from the information available", "the property is currently not occupied by the defendant." The information and its source are not disclosed.

[3] In the summons it says too that although the debtor was employed, she would not be in a position to satisfy the judgment debt. The reference to the "judgment debt" was a reference to the accelerated full outstanding balance under the bond, and not simply the arrears.

[4] The summons was served by affixing at a chosen domicilium citandi et executandi. In the application for default judgment, and the set down for default judgment, the bank asks for payment of R276 527, interest and costs. By then the arrears amounted to R44 345. Nothing is said about the other prayers in the summons, being an order declaring the property

specially executable, and an order authorising the issue of a writ of execution in respect of the property.

[5] In Absa Bank Ltd v DK Mokebe, case no 2018/612, there is some uncertainty about the debtor's gender. The face of the summons describes the debtor as a male, but he is later referred to frequently as a female. The bond was RR275 000 for 20 years, and the monthly instalments R3 018. As of 19 October 2017 the debtor was 6 months in arrears (R23 220) and by then the accelerated full outstanding balance – R295 697 - had been triggered. The bank suspected that the property was the debtor's primary residence, and in fact occupied by him. The summons asks for judgment for the accelerated full outstanding balance, interest, a declaration of special executability, a writ, and costs.

[6] The summons and the application for default judgment were served by affixing at the chosen domicilium citandi et executandi. The relief sought in the application is judgment for R295 697, interest and costs. Nothing is said about the executability and writ prayers in the summons. The affidavit supporting the default judgment says the full balance under the bond was triggered by the debtor's default, but not exactly when that occurred. As of 11 January 2018 the debtor was R23 220 in arrears, and as of 22 February 2018, the arrears were R24 142, representing 6 months' instalments.

[7] The affidavit further explains that after the defendant fell into arrears, he made payments but did purge the arrears. The affidavit also says that should the court grant an order declaring the property specially executable (the application does not ask for it) then, since it will take about 2 to 3 months before the sale in execution takes place, the debtor is invited to approach the bank to negotiate a repayment arrangement "in an effort to prevent the sale in execution of the immovable property". Nothing is said about the bank's intentions should a money judgment for the accelerated full outstanding balance only be granted, and in particular whether it will forthwith execute against movables on that judgment before applying later for an order declaring the property specially executable.

[8] The affidavit also says that the debtor does not currently occupy the property, but yet it says that in the absence of a suitable arrangement being made with the bank, the debtor would "in any event have to pay for alternative accommodation." It says too that under the rules no writ would be executed against the debtor's primary residence"; and "if the defendant objects to his home being declared specially executable", he should place facts before the court.

[9] In Absa Bank Ltd v MN Vokwana, case no 2018/1459, there is again the same confusion in the summons about the debtor's gender. The bank suspected that the home was his primary residence. Here the home loan was R115 000 repayable over 20 years at monthly instalments of R1 479. At 9 January 2018 the arrears were R19 767. He was then in arrears by 10 months. The full outstanding balance had been triggered by 1 November 2017. The relief sought in the summons was a money judgment for the full outstanding balance, interest, executability, a writ, and costs.

[10] The summons was served on an occupant at the debtor's residence, and the application for default judgment on the debtor's son's girlfriend at a domicilium citandi et executandi. The relief sought is a money judgment, interest and costs.

[11] In Standard Bank of South Africa Ltd v Colombrick IS and Kimberg PE, case no 2017/35579, there were two home loans and bonds in respect of the debtors' primary residence, aggregating R836 000. This was repayable in 20 years. By 15 September 2017 the debtors had fallen 4 months in arrears, and at 15 August 2017 the full outstanding balance had been triggered, amounting to R771 494. The bank claimed judgment for the accelerated full outstanding balance, interest, executability, a writ, costs and confirmation that the bank was entitled to retain all amounts paid to it under the home loans.

[12] Although the application for default judgment is for both the accelerated full outstanding balance and an order of executability (and interests and costs), I was informed from the Bar that the bank would ask for a money judgment only.

[13]The detailed facts in each of these cases are self-evidently different from those in the others; that will always be the case. Moreover, in the many similar cases that come before the courts of this division, the extent of the arrears outstanding when the bond is called up also varies. Sometimes periods as short as two months are involved. Further, in some cases the loan capital is small, and the monthly bond instalment commensurately small, meaning that the arrears could – conceivably – be repaid and the default thus "remedied" as envisaged in s.129(3) of the National Credit Act 34 of 2005.

[14]Still these applications all engage, to a greater or lesser extent, similar and important principles regarding: the court's function under s.26(3) of the Constitution; the meaning and applicability of s.129(3) and (4) of the National Credit Act 34 of 2005; the meaning and effect of, and the court's function under, the new uniform rule 46A (effective since 22 December 2018); and, closer home, the provisions of the latest local practice manual ("PM") in regard to applications of this nature.

[15]The applications necessarily call for consideration of some recent judgments in this division on these issues, that do not reflect a harmonious approach to them; and also for consideration of the practices that the judges in this division have been following in regard to these. Although not exactly in point, since the reference is to the doctrine of stare decisis, one cannot help but be reminded of the words of Coetzee, J (then) more than 30 years ago in the context of the lack of uniformity in applications for Anton Piller orders:

"Judicial comity also lies at its root. And so does common sense. Loyalty to the higher tribunal in the hierarchy of authority is essential for the smooth working of the system. The dignity of the Courts is bound to suffer irreparable harm if every one of the 34 Transvaal Judges can go his own merry way."[1]

[16] In view of these introductory comments I have, in consultation with the Judge President, resolved under s.14(1)(b) of the Superior Courts Act 10 of 2013 to refer these matters to the

---

[1] Trade Fairs and Promotions (Pty) Ltd v Thomson and Another, 1984 (4) SA 177 (WLD); [1984] 4 All SA 478 (W) at 487 in the context of the value of *stare decisis*. This judgment is also relevant for the sometimes overstated effect of the Latin phrase, *ubi ius ibi remediùm*.

full court of this division for further hearing. That sub-section provides as follows (emphasis supplied):

"14. Manner of arriving at decisions by Divisions
(1)
(a) Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine.
(b) A single judge of a Division may, in consultation with the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, at any time discontinue the hearing of any civil matter which is being heard before him or her and refer it for hearing to the full court of that Division as contemplated in paragraph (a)."

[17] I fully accept the possibility that in the case of one or more of these applications they may, strictly speaking, be disposed of without actually engaging the matters of principle to which I have alluded; but it would be wholly impractical if not impossible to wait until a default judgment is enrolled in the motion court that perfectly fits every aspect of the relevant statutory and common law rules that regulate the foreclosure of a bond over a primary residence, and its interaction with s.26(3) of the Constitution. I suggest respectfully that even relevant *obiter dicta* from a full court will provide guidance in an area where currently individual judges' approaches are so inconsistent.

[18]Despite having foreshadowed the order that will follow below, I nonetheless provide a brief background to these issues.

Background

[19]The latest edition of the PM provides in the above regard as follows (the emphasis below appears from the PM itself):

"Practice Manual, February 2018: Chapter 10.17 FORECLOSURE (AND EXECUTION WHEN PROPERTY IS, OR APPEARS TO BE, THE DEFENDANT'S PRIMARY HOME)

This chapter is applicable to all applications for foreclosure. (The word 'defendant' includes the word 'respondent' and vice versa. The word 'debtor' includes the word 'consumer' and refers to a 'judgment debtor').

THIS DIRECTIVE MUST BE READ IN CONJUNCTION WITH THE AMENDED RULE 46 A (WHICH AMENDMENT CAME INTO OPERATION ON 22 DECEMBER 2017). A COPY OF THE GOVERNMENT GAZETTE DEALING WITH THIS AMENDMENT IS ATTACHED HERETO AT PAGE 130 to 154.

ALL REQUIREMENTS SET OUT IN THIS PRACTICE MANAUAL MUST STILL BE COMPLIED WITH IF THEY ARE IN ADDITION TO AND NOT IN CONFLICT WITH THE AMENDED RULES.

3. Note: When arrears are low, and/or the period of non-payment is a few weeks/months, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of 6 months and that notice of set down should again be served. At the adjourned date, an affidavit should be filed, setting out what efforts the Bank has made to effect settlement and/or prevent foreclosure. ***See 16.31***

[1] NB: Default judgment should not be granted for the amount and the order for execution only postponed as this will defeat the object of postponing the matter i.e. to allow the consumer to take advice and seek to make arrangements to bring the arrears up to date or purge the default. (FRB v Various Debtors 2016 (6) SA 400 (GJ) para 46 and Petersen para 7. See Ntsane. Also see Maleke and Lekuku.) The creditor should not seek and the court (not registrar) should not give any money judgment (either for the accelerated total balance or otherwise) unrelated to an order declaring the property executable; if a money judgment is given and then executed against movables, that precludes the debtor from reinstating the bond by paying the arrears: NCA s.129(4)(b).

[2] The ideal objective of the court's enquiry under R46A (infra) must be to establish a payment plan for the arrears, thereby attaining the reinstatement of the arrears, and so nullify the accelerated total balance.(Rule 46A (2)(a)(ii))."

[20]The issue that this part of the PM addresses, is what judges in this division should do when, acting pursuant to s.26(3) of the Constitution, they postpone a foreclosure application (i.e. the prayer for executability of the property secured by the bond) to give the debtor an opportunity to catch up the arrears of the bond, but the applicant bank asks nonetheless for an immediate money judgment for the accelerated full outstanding balance in the meantime.

[21]If such a money judgment is given, what often occurs is that the creditor bank, armed with the judgment for the accelerated full outstanding balance under the bond, proceeds immediately to attach and sell in execution movable assets of the debtor, such as a motor

vehicle, in partial satisfaction of the judgment debt for the accelerated full outstanding balance.

[22]The **National Credit Act 34 of 2005** provides in s.129 as follows (emphasis supplied):

129. Required procedures before debt enforcement.—(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 agreement 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 to proceedings in a court that could result in such an order.

(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

[Sub-s. (3) substituted by s. 32 (a) of Act No. 19 of 2014.]

(4) A credit provider may not re-instate or revive 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.

[Sub-s. (4) amended by s. 32 (b) of Act No. 19 of 2014.]

(a) Does a court have a discretion, when postponing an application for executability to afford the debtor an opportunity to "... *remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue ...*", and the applicant bank asks for an immediate money judgment for the accelerated full outstanding balance under the bond, to decline that request and postpone it too so that it is ultimately dealt with at the same time and in the same enquiry when the executability application is dealt with?

(b) If the court does have such a discretion, meaning that the court may in its discretion decline to grant a default money judgment for the accelerated full outstanding balance immediately, should the PM request uniformity of treatment by the judges in this division?

(c) If so, what should that uniformity of treatment be? In particular, is the current suggested manner of dealing with the issue, as stated above in the excerpt from the PM, objectionable/desirable?

[25]As matters of law, these issues raise the following (I am sure there are others too) questions:

(a) Does such an immediate money judgment (and its subsequent execution by say the sale of an attached movable) for the accelerated full outstanding balance qualify as *"any other court order enforcing that agreement"* for purposes of s.129(4)(b) of the NCA?

(b) If it does so qualify, does it have the implication of prohibiting the reinstatement or revival of the credit agreement – despite the arrears having been paid up - once the applicant bank, on the strength of such a judgment for the accelerated full balance, will have attached and sold in execution movable property of the debtor?

(c) If such a judgment could be given on the basis that it would be capable of being set aside or declared null and void later if the debtor does "... *remedy a default in such credit*

agreement by paying to the credit provider all amounts that are overdue ...", is it desirable that the court makes such an order, given -

(i) its potential for attachment and execution of movables (potentially the wherewithal to purge the arrears) in the meantime? and

(ii) that it may be undesirable to make an order which is not final in that it may potentially be set aside/declared null and void later?

[26]There have been conflicting judgments on aspects of these issues in this division:

(a) FirstRand Bank Ltd v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another [2014] ZAGPJHC 117 (4 June 2014).

(b) Absa Bank Ltd v Lekulu, [2014] ZAGPJHC 244 (14 October 2014) (full court).

(c) FirstRand Bank Limited t/a First National Bank v Zwane; FirstRand Bank Limited t/a First National Bank v Hyslop and Another, Nedbank Limited v Nkuna and Another (18581/2016, 19362/2016, 30634/2015) [2016] ZAGPJHC 203; 2016 (6) SA 400 (GJ) (29 July 2016).

(d) Absa Bank Ltd v Njolomba, RC and Another, Case no. 20321/2017 (5 March 2018).

Conclusion

[27] Having regard to the foregoing, I accordingly make the following order:

(a) The hearing of the applications in the following cases are discontinued before me and are referred to a full court of this division under s.14(1)(b) of the Superior Courts Act 10 of 2013:

Absa Bank Ltd v DK Mokebe, case no 2018/612

Absa Bank Ltd v ~~DK Mokebe,~~ case no ~~2018/612~~ kobe 48091/2017

Absa Bank Ltd v MN Vokwana, case no 2018/1459

Standard Bank of South Africa Ltd v Colombrick IS and Kimberg PE, case no 2017/35579

WHG van der Linde
Judge, High Court
Johannesburg

13 April 2018

For the Applicant: Adv V Fine

Instructed by:

Lowndes Dlamini Attorneys
Applicants' Attorneys
56 Wierda Road east
Wierda Valley
Sandton
011 – 292 5700
Mr P Lagarto