

FIRSTRAND BANK v SONI

[2007] JOL 21006 (N)

Judgment date: 2 November 2007

There are certain pitfalls that may arise from the situation where a homeowner stops making her monthly bond repayments after she has entered into an agreement of sale in respect of the mortgaged property. This judgment highlights the unwanted consequences.

The facts

Ms Soni bought immovable property in 2006. She paid the purchase price by obtaining a loan (R 635 000), which loan was secured by the registration of a bond in favour of FirstRand Bank. The transfer and bond was registered simultaneously during September 2006. In February 2007 Ms Soni entered into an agreement to sell the property and by April 2007 the transferring attorney wrote a letter to FirstRand's cancellation department to advise them of the sale, request discharge figures and the release of the title deeds. Somewhere in early to mid May the bank duly appointed bond cancellation attorneys to act on its behalf in the course of the standard conveyancing context. The instruction to cancel the bond was presumably issued by the bank's bond cancellation department (but note that the judgment does not provide clarity on this point.).

However, at this stage, Ms Soni's account with FirstRand was in arrears and the full outstanding amount owing was almost R 665 000, which is some R 30 000 more than the amount secured under the mortgage bond, and this amount was escalating monthly. FirstRand considered that its security was at risk and instructed attorneys to issue summons against Ms Soni based on her default. Summons was issued on *16 May*, presumably on instructions of the bank's foreclosures department. (The judgment unfortunately does not mention whether anyone at FirstRand bank knew of the two 'conflicting' instructions sent by the different departments in the bank in the month of May in respect of the same loan account.) So, here was a situation where the bank, in the same month, issued two conflicting instructions; first the one department instructed conveyancers to cancel the bond (against simultaneous registration of transfer) and the other department instructed litigation attorneys to take legal action in respect of the arrears on the bond.

When Ms Soni received the summons, she entered appearance to defend and FirstRand thereupon applied for summary judgment. (At this point it is relevant to mention that the agreement of sale that Ms Soni had concluded in February provided for a purchase price of R750 000 and one wonders why the parties did not come to an agreement at this stage. The judgment does not make mention whether the sale agreement was perfected, but the fact that the transferring attorney had sent the initial correspondence to the bond cancellation institution (FirstRand) seems to indicate that the sale would proceed.)

Ms Soni defended the action on two grounds: She alleges firstly that she was never notified of the alleged breach nor requested to remedy the breach; and, she was not notified that in case of her failure to rectify the breach, action will be instituted against her. Secondly she argued that FirstRand condoned the alleged breach when they fixed the amount owing at a certain amount when issuing the cancellation figures. When it issued the cancellation figures, FirstRand (via its bond cancellation department) had been aware that the property had been sold and that transfer would pass with simultaneous cancellation of the bond and payment of the amounts owing to them.

In other words (our own words), Ms Soni alleged that FirstRand had never advised her to continue making her monthly payment after she had (via the transfer attorneys) told them that she had entered into an agreement to sell the property, nor had she received a letter of demand to alert her that the sale of the property would be in jeopardy, and lastly that, by instructing their bond cancellation attorneys, the bank created the perception that they were happy to proceed with cancellation according to normal conveyancing customs.

Held (per Madondo J)

On reading the terms and conditions of the loan agreement with FirstRand, the court found that Ms Soni was not entitled to receive formal notice to remedy her default. The relevant clause in the bond provided as follows:

“16. Default by Mortgagor

16.1 If ...

16.1.1. The mortgagor fails to pay any amount due in terms of this bond or any other amount due to the bank in respect of any other liability of whatsoever nature to the bank on the due date or commits a breach of any other provision of this bond (whether such breach is material or not),...

then, all amounts whatsoever owing to the bank by the mortgagor shall forthwith be payable in full notwithstanding the exercise by the bank of any other rights granted to it in terms of this bond, and the bank may institute proceedings for the recovery thereof and for an order declaring the mortgaged property executable...”

The judgment confirms our law on the issue as follows:

- It is not necessary to send a letter of demand to a creditor where the parties have contracted that money should be paid on a certain date. The fixing of the time of performance is in itself sufficient to give rise to automatic default if performance is not made within the stipulated time, and dispenses with the necessity for a demand. (This is, in effect, what the practical application of *mora debitoris* comes down to.)

Accordingly when Ms Soni failed to make her monthly payments as agreed with FirstRand, she was immediately in default. She knew (or should have known) full well that the terms of her agreement with FirstRand stipulated that upon default, the whole balance of the loan amount would become due and payable. It was therefore not necessary to inform her of the breach and of the intention to institute proceedings for the recovery of the outstanding amount. These were, in terms of the loan agreement, the sequelae of her default.

- Addressing Ms Soni’s second defence, the court held that there could be no condonation of her default (amounting to a waiver by the bank of its rights to declare the property executable) since clause 19 of the mortgage bond document contained a non waiver clause – ‘any failure by the bank to exercise its rights in terms of the bond and any indulgence allowed to the mortgagor shall not operate as a waiver or abandonment by the bank of any of its rights.’

The court held, accordingly, that FirstRand had shown that it acted within its rights and that it did not need to notify Ms Soni of her breach before instituting execution proceedings; and also that the issuing of cancellation figures to Ms Soni’s representative (the transferring attorney) did not constitute condonation of her breach.

(In casu, however, the court did not declare the property executable (at this stage) since FirstRand had not shown that it had notified the third parties (the purchasers to whom Ms Soni had sold the property) of the proceedings. Accordingly it would not be just and equitable to grant an order that the property is executable before Firstrand can give proof that the third parties have been informed of the application.)

The judgment is a useful reminder to all practitioners to remain aware of a seller’s obligations, even after the sale of property, towards the bondholder. A seller should never assume that it is in order to stop making the loan repayments to the bank, and perhaps transfer attorneys and

bond cancellation attorneys will do well to issue a standard reminder to all sellers, as soon as they receive instructions.

This is especially important where a seller of immovable property is in arrears with the mortgage loan repayments . The seller should be encouraged to make suitable arrangements with the bank immediately on sale of the property, to stop further legal action or execution proceedings . The transfer attorney could play a valuable role here, although there is surely no legal obligation on him or her to become involved. From a practical perspective, however, it is in the interest of every stakeholder in the transfer process if the transfer attorney will take a pro -active stance.

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