

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2022-018954

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE 29 January 2024

SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

MICHAEL GEORGE KOMANE

First Respondent

PERTUNIA NELISILE KOMANE

Second Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The applicant, Firstrand Bank Limited, the plaintiff in the action proceedings, instituted summary judgment proceedings against the first and

second respondents Pertunia Nelisile Komane and Michael George Komane, jointly and severally. The second respondent, Michael George Komane, only opposed the summary judgment application.

[2] The applicant claimed summary judgment for payment of the sum of R276 906.21 together with interest at the rate of 9.57% per annum with effect from 1 August 2022 to date of payment, both dates inclusive, an order declaring the immovable property, Erf 3[...] M[...] Ext 1[...] Township (“the immovable property”), the authorisation of a writ of execution and that a reserve price be set for the sale of the immovable property. The proceedings are based on a loan agreement concluded between the applicant and the respondents, the debt being secured by a mortgage bond registered in favour of the applicant over the immovable property. The respondents are the registered co-owners of the immovable property and debtors under the mortgage bond.

[3] The second respondent raised various defences to the summary judgment application. I deal with each defence in turn.

[4] The second respondent argued that the first respondent had a material interest in the proceedings and that the latter had no knowledge of the proceedings. The second respondent’s counsel at the hearing pertinently failed to consider the order for substituted service on the first respondent and the delivery by registered post of the notice in terms of s 129 of the National Credit Act, 34 of 2005 (“the Act”) upon the respondents as well as service of the application for summary judgment and the notice of set down of the hearing before me upon the first respondent in terms of the order for substituted service.

[5] The applicant demonstrated however that the notice in terms of s 129 and s 130 of the Act was delivered to the respondents’ chosen address, being the first respondent’s email address chosen in terms of the respondents’ home loan agreement. In addition, the applicant showed that an order for substituted service on the first respondent was granted by this Court on 28 November 2022 and that the applicant complied with the order in respect of the application for summary judgment and the notice of set down in respect of the hearing before

me, upon the first respondent. As regards the notice in terms of s 129 of the Act, service took place by registered on both the first and second respondents at Stand 3[...] M[...] Ext 1[...] Zone 91852, being the immovable property and the respondents' chosen *domicilium* address. The applicant showed that the notices arrived at the Meadowlands Post Office being the correct post office, which post office duly dispatched to the respondents notice of receipt of the registered item and to which the respondents did not react.

[6] The Constitutional Court in *Kubyana v Standard Bank of South Africa Ltd*¹ made it clear that a creditor is not obliged to ensure subjective knowledge or personal receipt by a debtor of a notice in terms of s 129 of the Act. Furthermore, the procedure utilised by the applicant to deliver the s 129 notice to the respondents complies with the requirements set out by the Constitutional Court in *Kubyana* and is sufficient given the absence of any special circumstances alleged by the respondents as to why the second respondent did not retrieve the notice from the post office. No such special circumstances were alleged by the second respondent.

[7] Furthermore, the applicant referred to *Amcoal Collieries Ltd v Truter*² in which the SCA held that parties may nominate an address for service of notices in contracts and compliance therewith, being service at the chosen address, is good service, equivalent to service on a *domicilium* address, whether or not the addressee is present at the relevant time.

[8] Accordingly, the applicant discharged its obligations in terms of s 129 of the Act and the applicant is entitled to enforce the credit agreement.

[9] Furthermore, this being an application that invokes Rule 46A, the applicant served the papers in the application for default judgment upon the City of Johannesburg Metropolitan Municipality. It must be stated, however, that the application for default judgment was abandoned by the applicant which subsequently invoked the procedure for summary judgment.

¹ *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) ("*Kubyana*").

² *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A).

[10] Moreover, the application for summary judgment and the notice of set down for this hearing were both served on the respondents in terms of paragraph 1.3 of the order for substituted service on 3 November 2023.

[11] The second respondent argued that the applicant's claims for the immovable property to be declared specially executable and for a reserve price to be set in terms of Rule 46A were not competent in terms of Rule 32, in summary judgment proceedings, as they did not meet the requirements of the rule.

[12] The second respondent's argument in this regard, however, is without merit in that the applicant's claim is for payment of a liquidated amount of R276 906.21 and the claim for special executability arises from the mortgage bond that is itself a liquid document. Thus, the claim for special executability qualifies in terms of summary judgment proceedings under Rule 32(1)(a). The setting of a reserve price in terms of Rule 46A together with the granting of an order for special executability in terms of Rule 32, were considered by this court in *Absa Bank Ltd v Sawyer*,³ in which the court considered that the order for special executability is ancillary to the claim for the money judgment and is an integral part of the cause of action relied upon. Accordingly, the applicant's claim for a declaration of special executability and the setting of a reserve price, which is ancillary thereto in terms of Rule 46A, meet the requirements of Rule 32 and are competent in terms thereof.

[13] Furthermore, claims for money judgments and orders for special executability are determined in this court simultaneously and not separately.⁴

[14] As to the second respondent's argument that the deponent to the applicant's affidavit in support of summary judgment did not himself have personal knowledge of the various allegations made in the affidavit, our courts have long since adopted a practical approach by permitting deponents on behalf

³ *Absa Bank Ltd v Sawyer* [2018] ZAGP 662 (14 December 2018).

⁴ *Absa Bank Ltd v Mokebe* 2018 (6) SA 3492 (GP).

of corporate litigants and financial institutions such as the present applicant, to rely on documents and records relevant to the particular matter for their personal knowledge of at least certain of the relevant facts, and the deponent's ability to swear positively to such facts.⁵

[15] The point raised by the second respondent that the deponent to the applicant's affidavit relies on a certificate of balance for knowledge of the amount claimed and that the certificate of balance was signed by another employee of the applicant, is irrelevant. This is because first-hand knowledge of every fact should not be required of a deponent on behalf of a financial institution. See in this regard.⁶

[16] Furthermore, contrary to the second respondent's allegations, the applicant's deponent does allege that he perused the various documents. Accordingly, the absence of first-hand knowledge on the part of the deponent to the applicant's verifying affidavit in respect of certain allegations, is not determinative of the applicant's claim.

[17] In respect of the second respondent's complaint that the applicant debited its account with legal costs, the applicant complied with the requirements set out in *Nkatha v Firstrand Bank Ltd*.⁷

[18] The home loan agreement between the parties permits collection costs on the scale as between attorney and client in the event of enforcement of the home loan agreement by the applicant, such enforcement having indeed occurred. Furthermore, the applicant, in compliance with *Nkatha*, drew the cost to the second respondent's attention in terms of a separate demand for payment of the legal costs, dated 22 September 2022 and 6 October 2022, giving the respondents seven days to make payment of the legal costs, failing which the respondents would be deemed to have accepted the costs being debited to the respondents' home loan account, as duly transpired. The respondents failed to

⁵ *Shackleton Credit Management v Microzone Trading* 2010 (5) SA 112 (KZP) para 14.

⁶ *Rees & Another v Investec Bank Ltd* 2014 (4) SA 220 (SCA).

⁷ *Nkatha v Firstrand Bank Ltd* 2016 (4) SA 257 (CC) ("*Nkatha*").

make payment and the legal costs were debited accordingly to the respondents' home loan account. In any event, having looked at the documentary evidence of the respondents' home loan account, the legal costs amount to approximately R7 000.00 to R8 000.00 and do not constitute a triable defence to the applicant's claim for summary judgment.

[19] The second respondent argued that the first respondent possessed various movables capable of being sold and the proceeds utilised to liquidate the arrears on the respondents' mortgage bond and the outstanding balance on the loan. The movables comprised of a Toyota Corolla vehicle with registration number W[...] and a Mercedes Benz with registration B[...].

[20] The second respondent alleged that the vehicles were not subject to finance agreements but the value of the vehicles was not furnished by the second respondent. and nor was the year of the vehicles' make or the respective mileage of the vehicles. Furthermore, the second respondent alleged that the first respondent was in possession of the vehicles whilst the second respondent had no knowledge of the first respondent's whereabouts and thus, no knowledge of the whereabouts of the vehicles.

[21] In any event, the applicant is possessed of a contractual right to execute upon its security comprised of the immovable property, hypothecated in favour of the applicant in respect of monies loaned to the respondents at their special instance and request.⁸

[22] The second respondent objected to the applicant's reference to and reliance upon the certificate of balance. The second respondent argued that it was not apparent that payments made by the second respondent from August 2022 had been taken into account as the respondents' arrears on the home loan account had increased since the mortgage bond was called up by the applicant.

⁸ *Standard Bank of South Africa v Saunderson & Others* 2006 (2) SA 264 (SCA) para 2.

[23] The use of a certificate of balance as an evidentiary tool to facilitate proof of an indebtedness has long been accepted by our courts.⁹

[24] Furthermore, the parties' loan agreement provides that a certificate of balance signed by any authorised employee of the bank shall constitute evidence of the outstanding amount as at the date specified therein, the rate of interest and any other amount due and payable by the consumer under the loan agreement. Accordingly, the applicant is contractually entitled to refer to a certificate of balance, duly signed, as a method of proof of the indebtedness of the respondents.

[25] The second respondent queried the arrears claimed by the applicant as well as the full outstanding balance given payments made by the second respondent since August 2020. However, a perusal of the payment history of the respondents' home loan account demonstrates sporadic and inconsistent payments in amounts less than the required monthly instalments. As a result of the respondents' payment history and the prevailing environment of increasing interest rates over recent years, the respondents' arrears have not reduced and the amount in arrears as at 17 May 2023 stood at R47 497.45 as per the applicant's certificate of balance. Furthermore, the applicant alleged that the arrears amounted to approximately 12.556 months of arrears, the last payments being R2 000.00 on 4 February 2023.¹⁰ It is noteworthy that the arrears stood at R34 064.91 when the applicant called up the mortgage bond.

[26] It is apparent from that set out above that the second respondent does not set out a *bona fide* defence or a triable issue in opposition to the applicant's claim as required by the long standing authority of *Maharaj*.¹¹ The defences upon which the second respondent places reliance are dilatory at best and the applicant meets the test and the requirements for summary judgment.

⁹ *Rossouw & Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) para 48; *Investec Bank Ltd v W.S.M* (30110/19) [2022] ZAGPPHC 333 (7 July 2020).

¹⁰ See CaseLines 14-20.

¹¹ *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418.

[27] The second respondent argued that the immovable property was his primary residence as well as the primary residence of his daughter and three minor grandchildren. The second respondent argued that execution over the immovable property would deprive the family of their Constitutional right to adequate housing and deprive them of a home. The second respondent's daughter is an Uber driver earning allegedly minimal income although the amounts thereof were not specified. The second respondent engages in informal trading from the proceeds of which he makes the payments reflected on the home loan account since August 2022. The second respondent did not provide an approximate amount of his monthly income or his daughter's monthly income.

[28] The dilemma of this Court is that the second respondent cannot afford the monthly instalments payable under the home loan agreement, the arrears are increasing and the second respondent does not have fixed or even stable employment or a stable source of income from which he can pay the monthly instalments and liquidate the arrears within a reasonable time thereof. The second respondent to date has failed to enter into an agreement with the applicant in respect of payment of the monthly instalments and liquidation of the outstanding arrears.

[29] Furthermore, the second respondent did not provide details of any assistance that his daughter might probably be able to proffer to the situation by way of rental.

[30] Whilst the outstanding arrears are relatively low, the applicant has a contractual right to exercise its security especially in circumstances where the respondent is without means to pay the monthly instalment and liquidate the arrears over a reasonable period of time. Notwithstanding the relatively low amount of the arrears, they are increasing and I cannot find that the applicant's application is an abuse of this Court's process. See in this regard *Firststrand Bank*

*Ltd v Folscher & Another and similar matters*¹² and *Jaftha v Schoeman; Van Rooyen v Stoltz*.¹³

[31] The market value of the immovable property is R625 000.00 whilst the municipal valuation is R375 000.00. The arrear rates and taxes amount to R43 858.27. The applicant sought an order for execution and a reserve price of R306 141.73. The second respondent alleged that a reserve price of R331 141.73 was appropriate and fair to the respondents.¹⁴

[32] The second respondent also sought an order that execution be stayed for six months so as to enable the immovable property to be sold privately.

[33] Execution of the immovable property will not serve in my view to deny the second respondent his right to adequate housing along with that of his family members as both he and his daughter have some income. This is evidenced by the second respondent's allegations and by the payments under the home loan, albeit that they are inconsistent and in amounts less than the required instalments under the mortgage bond. Notwithstanding, the second respondent together with assistance from his daughter will be in a position to pay for cheaper accommodation, albeit not a house of their own or accommodation owned by them.

[34] I am inclined in the circumstances of this matter to permit a stay of execution for a limited period in order to assist the second respondent to obtain alternate accommodation and to attempt to sell the immovable property privately, if at all possible. However, I am not minded to stall the execution process for six months given that payment by the second respondent of the mortgage bond instalments is inconsistent and less than the required monthly instalment. A stay of execution for a period of four (4) months will be appropriate and ordered by me.

¹² *Firststrand Bank Ltd v Folscher & Another and similar matters* 2011 (4) SA 314 GMP.

¹³ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

¹⁴ *Changing Tides 17 (Pty) Ltd v Muriritirwa and Another* (5290/2019)[2020] ZAGPPHC 132 (7 April 2020).

[35] Furthermore, the reserve price for any sale in execution that does transpire in the future, regard being had to the stay of execution for four months, will be the sum of R320 000.00.

[36] Accordingly, an order is granted against the first and second respondents, jointly and severally the one paying the other to be absolved, in the following terms:

1. Payment of the sum of R276 906.21;
2. Interest thereon at the rate of 9.57% nominal per annum calculated daily and compounded monthly with effect from 1 August 2022 to date of payment, both days inclusive;
3. Declaring the immovable property known as Erf 3[...] M[...] Extension 1[...] Township, Registration Division I.Q, the Province of Gauteng measuring 260 (two hundred and sixty) square metres held by deed of transfer T[...] specially executable;
4. The Registrar of this Court is authorised to issue a warrant of attachment herein;
5. The Sheriff of the above Honourable Court is authorised to execute the warrant of attachment herein;
6. The immovable property of the/ respondents shall be sold by the Sheriff subject to reserve price of R320 000.00;
7. The effect of paragraphs 4, 5 and 6 of this order are suspended for a period of four (4) months from the date of this judgment, being 29 January 2024, in order to permit the second respondent to locate alternate accommodation and to permit the immovable property to be sold privately by the second

respondent. If no agreement of sale has been secured by the end of this four month period, the orders for execution in terms of paragraphs 4, 5 and 6 of this order will automatically take effect.

8. The respondents are ordered to pay the costs as between attorney and client.
9. The respondents are advised that the provisions of section 129(3)(a) and (4) of the National Credit Act, 34 of 2004 ("the NCA") may apply to the judgment granted in favour of the applicant. The respondents may prevent the sale of the immovable property if the respondents pay to the applicant all of the arrear amounts owing to the applicant, together with the applicant's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement, prior to the property being sold in execution.
10. The arrear amounts and the enforcement costs referred to in paragraph 7 may be obtained from the applicant. The respondents are advised that the arrear amount is not the full amount of the judgment debt that the amount owing by the respondents to the applicant, without reference to the accelerated amount.

CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this

matter on CaseLines. The date of the judgment is deemed to be **29 January 2024**.

COUNSEL FOR THE APPLICANT: ADV. H SALANI

INSTRUCTED BY: VAN HULSTEYNS ATTORNEYS

COUNSEL FOR THE RESPONDENT: ADV. J LIEBENBERG

INSTRUCTED BY: ALLAN LEVIN & ASSOCIATES

DATE OF THE HEARING: 24 January 2024

DATE OF JUDGMENT: 29 January 2024