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

Case number 78351/2019

REPORTABLE: **NO**
OF INTEREST TO OTHER JUDGES: **NO**
REVISED. **NO**
30 MAY 2022

In the matter between

Vika William Mpisane	**First Applicant**
Nompumlelo Progress Mpisane	**Second Applicant**

And

Nedbank Limited	**First Respondent**
Sheriff Halfway House	**Second Respondent**

JUDGMENT

MAKHOBA J

1. The first and second applicants are co-owners of a private residential property situated at [....] S[....] Road, Halfway House Extension 2, Midrand.

2. The first respondent is Nedbank Limited, a duly authorised financial services provider and registered credit provider operating in South Africa

under registration number 1951/000000/06, whose address is 6 Press Avenue, Crown Mines, Selby Extension 15, Johannesburg,2091.

3. The second respondent is the sheriff of this Honourable Court responsible for the Halfway House and Alexander jurisdictions, whose business address is 614 Crescent, Halfway House. No order is being sought against the second defendant.

4. On or about 5 April 2019 and 3 June 2019 the applicants and the first respondent entered into a home loan agreement on the terms and conditions as contained in the said agreement. Subsequent thereto the applicants caused a mortgage bond to be registered over the subject prope1ty in favour of the first respondent.

5. Rule 46A application was heard by Van der Westhuizen Jon 28 July 2020 and he granted the following order:

> *"i) Payment of the sum of R2 380 841.18:*
>
> *ii) Payment of interest on the above amount at the rate of 10.00% percent per annum calculated and capitalised monthly in advance in terms of the mortgage bond, from the 01/10/2019 to date of payment;*
>
> *iii) An order declaring the Defendants' immovable property to be specially executable for the said sum plus costs;*
>
> *iv) Authorizing the Registrar to issue a Warrant of Execution for the attachment of the Defendants' immovable property;*
>
> *v) A reserve price in the amount of R2 000 000 is set;*
>
> *vi) Attorney and client costs as provided for in the mortgage bond,·*
>
> *vii) Execution of the order in prayer (iv) is suspended for a period of 6 (six) months from the date of the order; and*
>
> *viii) It is recorded that the defendants/ respondent holds an offer to purchase for an amount of R2 650 000.00 open until 15 September 2020"*

6. The applicants are therefore seeking an order rescinding the order granted on the 28th Jul 2020 as well as declaring the writ of execution issued by the registrar invalid and setting the same aside.

7. The application is brought in terms of the provisions of Rule 42(1) (b) and (C) of the uniform rules of court. The application is opposed by the first respondent.

8. The first point *in limine* raised by the applicants is that the first respondents should have sought the execution of the concerned residential property at the magistrates' court. This is in view of section 29 (1) (e) of the magistrate court Act 32 of 1944 as amended.

9. The second point *in limine* raised by the applicants is that clause 25 of the Home Loan Agreement entered into between the applicants and the first respondent is the main reason why the order granted on the 28th July 2020 must be set aside and the matter transferred to the magistrate court.

10. The first respondent also raised the following points *in limine. The* first one is that the applicants have failed to file a replying affidavit and as such it is the first respondent's submission that the version of the first respondent, as contained in the answering affidavit, stands uncontested and should be accepted as the true reflection of the facts in the matter.

11. The applicants have further failed to file heads of argument or a practice note and they also failed to take any steps to set the matter down on the opposed roll.

12. On the finding affidavit and confirmatory affidavits the first respondent raised the following points in *limine,* neither the founding affidavit, nor the confirmatory affidavit, states that the contents and facts of the affidavits are

within the personal knowledge of the deponents thereto and that the contents are both true and correct.

13. It is the case of the first respondent that this omission in the applicants' affidavits, are fatally defective, and as such that there is no evidence in support of the applicants' case before this Court.

14. Premised on the above, it is the case of the first respondent that the point *in limine* is to be upheld, the application stands to be dismissed with costs on the scale as between attorney and client.

15. The court decided to condone the shortcomings in the applicant's papers because they are lay people and unrepresented. All the points *in limine* raised by the respondent in the interest of justice are dismissed.

16. As pointed out above the applicant's case is premised on the Magistrate Court Act and clause 25 of the Home Loan Agreement.

17. Despite the points *in limine* raised by the respondent, respondent further submitted that the court order in dispute was not granted due to any error, ambiguity or omission on the part of the court. Furthermore, there was no common mistake between the parties.

18. Clause 25 of the agreement reads as follows;

> *"Jurisdiction*
>
> *In terms of section 45 of the Magistrate's Court Act 1944 and at the option of Nedbank. Any claim arising under this Agreement may be recovered in any magistrate court having jurisdiction, and the client hereby consents to the jurisdiction of the magistrate's court.* "

19. Oxford English dictionary by Maurice Waite seventh edition give the meaning of the word option as follows:

> *"thing that is or may be chosen. 2. The freedom or right to chose"*

20. In my view the simple interpretation of clause 25 is that Nedbank had a choice to choose between the magistrate court or the high court and in this instance Nedbank chose the high court because of the value of the property.

21. The argument by the applicant proffered in his founding affidavit has since been settled by the Supreme Court of Appeal in *Standard bank and others v Thobejane and others (38/2019&47/2019) and the Standard Bank of South Africa Ltd v Gqirana NO and Another (999/2019) [2021] ZASCA 9 (25 June 2021).* The SCA held that the high court must entertain matters within its jurisdiction that fall within the jurisdiction of a magistrates' courts, if brought before it, because it has concurrent jurisdiction with the magistrate court.

22. In my view there was no error when Van der Westhuizen J granted the order on the 28th July 2020

23. In the premise I make the following order:

(a) The application is dismissed.
(b) The applicants to pay costs on attorney and client scale.

D MAKHOBA
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the first and second applicant:	**In person**
For the first respondent:	**Adv Jacques Minnaar**
Instructed by:	**Hammond Pole Majola Attorneys**
For the second respondent:	**Non-appearance**
Date heard:	**21 April 2022**
Date of Judgment:	**30 May 2022**