Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates:	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 600/2018

Heard on: 07/09/2018

Delivered on: 19/02/2019

In the matter between

S N K-T **Applicant**

AND

ABSA BANK LTD **First Respondent**

F H T **Second Respondent**

CECILIA ALBERTYN **Third Respondent**

REASONS AS REQUESTED BY THE FIRST RESPONDENT

PAKATI J

[1] This is an application to stay the sale in execution of two properties namely, [….], held by deed of transfer number [….] also known as [….] Kimberley (‘the H Property’) and the other known as [….], Kimberley, held by deed of transfer number [….] also known as [….], Kimberley (‘the D Property’), pending the finalisation of the divorce proceedings between the applicant, Ms S N K-T, and the second respondent, Mr F H T (“the T’s”). The divorce action is pending in this court under Case Number 328/16. Both properties are situated in Sol Plaatje Municipality, District of Kimberley, Northern Cape Province. Absa Bank Limited, and Mr T, the first and second respondents, oppose the application.

[2] The third respondent, Ms C A, is currently the lessor of the flat situated on H Property in terms of a verbal lease agreement with the Ts. Absa Bank Ltd conducts business at 80 Bultfontein Road in Kimberley, Northern Cape and elsewhere in the Republic of South Africa.

[3] On 18 September 2018 the first respondent, Absa Bank Limited, filed a notice requesting written reasons *‘in respect of the order made on 06 September 2018’.* These are the reasons.

FACTUAL BACKGROUND

[4] The applicant, Ms S Nahid K-T, a general practitioner, and the second respondent, Mr F H T (“the Ts”), a neuro-surgeon practising as such [….], were married in community of property and their marriage still subsists. Ms T resides at H and D Properties with four minor children aged 14 years, 11 years, 7 years and 5 years respectively. These two properties are combined. Mr T used to share it with them but moved out of the shared residence around April 2016 leaving her and the minor children.

[5] On 11 December 2012 the Ts requested the bank to open a Private One Cheque Account Number [….] in their names and honour all cheques, vouchers bills and other negotiable instruments drawn on the bank and purporting to be signed, made or accepted by the bank and to debit their account with the relevant amount whether the account had a credit or not or otherwise. The Ts undertook to pay the following:

5.1 All bank charges, interest and other charges as the bank may from time to time levy in accordance with general banking practice;

5.2 To the bank on demand, should the account at any stage be overdrawn, the amount in respect of which the account is overdrawn;

5.3 Interest calculated daily and compounded monthly on any overdrawn balance at the rate charged by the bank for accounts to which the Ts' account belonged;

5.4 The bank's legal costs on a scale as between attorney and client. They further agreed that a certificate signed by any bank manager shall constitute proof of the facts therein stated, including the capital amount owing together with interest and the rate thereof.

[6] The bank opened a business cheque account in the T's names. It lent and advanced monies to them and disbursed the said monies for and on their behalf culminating in the said account becoming overdrawn in the amount of R 2 507 177-21. The bank complied with its obligations in terms of the agreement.

[7] On or about 19 March 2013 the T registered a first mortgage Bond Number. B268/2013 (Annexures "D" and "F") in favour of the bank and the following ('the H and the D Properties were hypothecated. On the same date they registered a second mortgage bond No

B7316/2013 (Annexure "F") and [….] situated in Cape Town, held under Deed of Transfer No. T. [….] also known [….]. The mortgage bonds were given as security for any monies lent and advanced to the Ts by the bank as well as any amounts for which the Ts might have to pay to the bank from time to time regardless of the cause. The bank alleges that:

7.1 The Ts waived their legal exceptions and they needed to get insurance over the hypothecated properties;

7.2 Should they fail to pay their monthly instalments any monies so secured in terms of the mortgage bonds would become due and payable immediately without further notice and all the interest would be capitalised on date thereof; and

7.3 A certificate signed by any branch or other manager of the bank in which the amounts due and payable together with interest were set out would be *prima facie* evidence of such amounts.

[8] In the meantime Mr T instituted divorce proceedings against Ms T in this Court under Case Number 328/2016 on 17 February 2016 which is still pending. During September 2016 he again approached this Court seeking relief in terms of Rule 43 (1) of the Uniform Rules of Court[1]. Pursuant to this application Mamosebo J granted the following order on 16 September 2016:

'IT IS ORDERED (BY AGREEMENT):

1. That the parties will jointly have the responsibility to care for the minor children but that the children will permanently reside with the respondent [Ms T];
2. That the applicant [Mr T] will have the right to take the children with him every alternative weekend from 12h30 on a Friday until Monday morning when he will deliver the children [at] school and the youngest child by 8:00 am at the residence of the respondent and the respondent will fetch the children after school;

[1] Rule 43 (1) provides: 'This rule shall apply whenever a spouse seeks relief from the court in respect of one of the following matters: (a) Maintenance *pendete lite*; (b) a contribution towards the costs of a pending matrimonial action; (c) interim custody of any child; (d) interim access to any child.

3. That the applicant will have the right to take the children with him for half of every long school holiday and every alternative short holiday per year;
4. That the December holiday shall be regarded as two holidays starting from the date on which school closes until 12h00 on the 31st of December, being the first part of the December holiday; and the second part to start from 12h00 on the 31st day of December until school reopens. The two periods as aforesaid shall alternate between [the] applicant and the respondent who will have the minor children spend with each alternative Christmas and New Year with each party;
5. That the applicant will pay maintenance to the respondent [with] regards to the minor children in the amount of R3000-00 per month per child;
6. That the applicant shall keep the minor children on his hospital plan and that the applicant will be responsible for 50% of all reasonable medical expenses incurred on behalf of the minor children, and 50% of any medication prescribed by a medical practitioner.
7. That the applicant shall pay 50% of the children's school fees and costs relating to their extra-mural activities.

8. That the applicant [Mr T] *pendete lite* will pay the following expenses:

8.1 The municipal account in respect of the immovable properties, [….];

8.2 The bond instalments in respect of the immovable properties, [….];

8.3 The salary of the domestic worker;

8.4 The monthly instalment, insurance and maintenance in respect of the Subaru Outback motor vehicle (Reg no. [….])

8.5 That the applicant [Mr T] will pay *pendete lite* the alarm system in respect of the home.

3. That costs will be costs in the main action.'

[9] Regarding the bank loan Mr T failed to pay monthly instalments timeously in terms and conditions of the agreement and the covering mortgage bonds on 18 February 2018 and the account fell into arrears. On 14 March 2018 Absa Bank issued summons against the Ts for payment of R2 507 177-21, interest at 09, 55 % per annum, capitalised monthly from 19 February 2018 to date of payment, both days included, and that the properties mentioned at paragraph 4 above together with [….], in the city of Cape Town, in the Western Cape Province held by deed of transfer [….], be declared executable and costs on the scale as between attorney and client.

[10] During March 2018 Ms T approached this Court seeking relief against Mr T who had failed to comply with the Court order dated 16 September 2016 (paragraph 5 *supra*).

[11] On 24 April 2018 the bank filed an application for judgment against the Ts jointly and severally, the one paying the other to be absolved, in terms of Rule 31 (5) (a) of the Uniform Rules of Court for the payment of the amount of R2 507 177-21, interests at the rate 9, 55% per annum capitalised monthly from 19 February 2018 to date of final payment, both dates inclusive and a further application to declared the immovable properties mortgaged by mortgage bonds mentioned in paragraph 8 *supra,* executable. On 07 May 2018 the Registrar of this Court granted judgment by default as prayed for.

[12] Ms T alleges that towards the end of 2017 she became suspicious that Mr T was falling behind with his payments. She then addressed an email (Annexure "ST 5") dated 18 January 2018 to the bank for the attention of Mr Marc Adamson requesting an update of the account. On 19 January 2018 Mr Adamson responded and stated that he was unable to divulge such information to her due to the banks' obligation to confidential customer information because the loan account was not in her name but Mr T's, unless a signed court order accompanied her request. She alleges that Mr T had removed her signing authority on his accounts. He also did not make her aware of the state of the loan account. According to her Mr T defaulted on his payments for the first time around February 2018 though she would not say that with certainty.

[13] Ms T's attorneys of record, Elliot Maris Wilmans & Hay, forwarded to the bank's attorneys of record, Van De Waal Incorporated, a letter dated 11 June 2018 requesting it to pursue the action against the Ts until and after the divorce proceedings were finalised, which was

turned down. On 12 July 2018 Ms T sent an urgent letter to the bank informing them that she and the children live in the double property and that it would not be in the best interest of the children to move out until the divorce was finalised. She stated further that the house in Bellville, Cape Town, had two potential buyers which meant that the bank loan would be settled using the purchase price rather that creating instability to the children. She urged the bank to keep her informed of the developments around the double houses by forwarding another email dated 26 July 2018.

[14] Notwithstanding the correspondence that Ms T forwarded to the bank she was served with the notice of sale in execution of the H and D properties on 15 August 2018 and the sale was also advertised in the Diamond Fields Advertiser dated 24 August 2018. The sale was scheduled to take place on 11 September 2018.

[15] On 30 August 2018 Ms T filed a notice of motion seeking an order interdicting the bank from proceeding with the sale of the properties on 11 September 2018 pending the finalisation of the divorce proceedings. In the meantime Mr T approached this Court during September 2018 seeking an application in terms of Rule 43 (6) of the Uniform Rules of Court[2] pending finalisation of the divorce action due to a change in his financial circumstances. This application was removed from the roll by O'Brien AJ on 31 August 2018.

[16] The bank filed its opposing papers on 04 September 2018 and Mr T on 05 September 2018. The bank states that Ms T should have used the rental income received from the lease concluded orally with the third respondent, Ms A thereby reducing the debt. It also alleges that it obtained an order against the Ts which was, at no stage

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[2] Rule 43 (6) of the Uniform Rules of Court provides that the court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.

disputed. According to the bank the divorce proceedings have not been finalised for more than two years now therefore it is uncertain when it would be finalised in the near future especially taking into account the various applications and counter-applications that had already taken place between the T. It further claims that it validly obtained judgment against the T. It denies that Ms T was unaware of what the status of the account was especially taking into account the correspondence by her attorneys to its attorneys of record. According to the bank as per Annexure "AB1" the last payment was an amount of R19 571-00 made by a debit order on 01 August 2017 from Mr T's cheque account number 40-8013-1485.

[17] The bank also disputes that H and D immovable properties are combined. It alleges that they are two separate properties with different title deeds. It states further that the application by Ms T is a delaying tactic as no arrangements have been made as to how she would pay the debt. Ms T has failed to establish a *prima facie* right to the relief sought, the argument goes.

[18] Mr T, on the other hand, supports the sale of the properties on auction by the bank. He alleges that the applicant is delaying the process to frustrate the divorce proceedings. He states that he has financial difficulties and is not in a position to service the bonds. Notably, his application in terms of Rule 43 (6) was removed from the roll.

[19] The second respondent clearly has no interest in the properties because he has filed for divorce on 17 February 2016. He was ordered to continue paying for the bonds in the order dated 16 September 2016. He has failed to do so hence the sale of the immovable properties on auction. The letter from the bank dated 19 January 2018 (see para [13] *supra*) shows that Mr T approached the same bank and told it to refuse the applicant information

claiming that the loan account was in his name. He also removed her from all signing authority on his accounts. At that stage already she was willing to come to the second respondent's rescue but was prevented from doing so by the bank together with the second respondent. The bank could not even tell her whether there was compliance with the order granted on 16 September 2016. She was left in the dark. Although she could not be informed of the progress of the account she was served with the warrant of execution on 18 July 2018. The question is why the bank and the second respondent kept the information from Ms T, who at the end was going to be affected with the minor children. This makes no sense.

[20] On 12 July 2018 the applicant again begged the bank to give her information about the account. Despite such pleas by the applicant that the four minor children she has with the second respondent would be affected by the move causing them instability they still refused and proceeded with the execution of the warrant. It is clear that the applicant did not sit back and do nothing.

[21] Section 28 of the Constitution states that a child's best interests are of paramount importance in every matter concerning the child. In my view neither the bank nor the second respondent would be prejudiced if the sale of the property was stayed until 06 March 2019. If there is any prejudice that they would suffer it is outweighed by the interests of the minor children hence I granted the following order on 07 September 2018:

'IT IS ORDERED BY AGREEMENT THAT:

1. That the Applicant's non-compliance with the provisions of the Uniform Rules of Court pertaining to the form and service of this application be condoned and that this application be heard as an urgent application in terms of the provisions of Rules (12) of the said Rules;
2. That, the 1st Respondent is interdicted from proceeding with the scheduled sale in execution, situated in the Sol Plaatje Municipality, District of Kimberley, Province of the Northern Cape (held by Deed of Transfer [….] also known as [….], Kimberley, up and until 06 March 2019;

3. That the 1st Respondent is interdicted from proceeding with the scheduled sale in execution on 11 September 2018 of the property known as Erf 2565, Kimberley, situated in the Sol Plaatje Municipality, District of Kimberley, Province of the Northern Cape (held by Deed of transfer [….]) also known as [….], Kimberley, up and until 06 March 2019;

4. That the 1st Respondent is to pay the costs of this application, unless this application is opposed by the 2nd and/ or 3rd Respondent also in which case the costs of this application be borne by such Respondent(s) that does oppose the application jointly and severely, the one paying the others to be absolved.'

[22] These are basically the reasons why I granted the order above.

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BM PAKATI
JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the Applicant:	*Adv D Olivier*
Instructed by:	*ELLIOTT MARIS & HAY*

On behalf of the Respondent:	*Adv A Van Tonder*
Instructed by:	*VAN DE WAAL INC*