



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NOS: 30443/2017

30147/2018

- (1) REPORTABLE: **YES**
 (2) OF INTEREST TO OTHER JUDGES: **YES**
 (3) REVISED. **YES**

14 November 2018

SIGNATURE

In the matters between:

CASE NO 30443/2017

CHANGING TIDES 17 (PTY) LTD N.O

Plaintiff

and

MABILETSA, BOKANG SOLOMON

First Defendant

MABILETSA, LERATO

Second Defendant

THE CITY OF JOHANNESBURG

Third Defendant

CASE NO 30147/2018

ABSA BANK

Plaintiff

and

BELEBESI, NTHABALENG MONTWETSANA

Defendant

JUDGMENT

SPILG, J:

INTRODUCTION

1. There were two cases on my unopposed roll dealing with payment of the outstanding balance on a home loan and foreclosing on the property bonded as security.

The first is *Changing Tides 17 (Pty) Ltd NO v B Mabiletsa, L Mabiletsa and the City of Johannesburg* under case no 30443/2017. The other is *Absa Bank Ltd v Belebesi* under case no 30147/2018.

2. Although the first case is for default judgment and the other for summary judgment in each case the considerations I am required to take into account are similar; namely whether the defendant's personal circumstances should preclude the creditor from taking a monetary judgment and foreclose on the mortgaged property. None of the defendants has a substantial defence to the merits, save for possibly a recalculation of the actual amount of indebtedness and in the case of *Changing Tides* the original cause of action appears incomplete but this has not been raised by the defendant.

Each defendant however contends that there are circumstances that should be taken into account to prevent foreclosure. It is now accepted that a court cannot grant a judgment for repayment of the loan prior to ordering a foreclosure of the property. See *Absa Bank Ltd v Mokebe and related cases* [2018] ZAGPJHC 487 (delivered on 12 September 2018) which is a binding full court decision.

GUIDING PRINCIPLES IN ADJUDICATING FORECLOSURE ISSUES

3. The general common law principle that a party is bound by the terms of his or her contract, including those terms dealing with the consequences of a breach, has been obliged to yield to remedial socio-economic legislation which finds its origins

in ss 9, 25 and 26 of the Constitution and the overarching right to dignity under s10.¹

4. Leaving aside the Consumer Protection Act and certain dedicated legislation, these statutes include the National Credit Act 34 of 2005 (*“the NCA”*) and The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (*“PIE”*).

This is apparent from the objects provisions of s3 of the NCA which includes promoting the development of a credit market that is accessible to all and in particular those who historically were unable to access credit under sustainable market conditions.² Pillay J in *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) at para 32 described the NCA as part of a *“raft of national legislation aimed specifically at consumers, to reverse historic socio-economic inequalities and adjust the imbalance”*.

In turn PIE is the national legislation enacted to give effect to s26 (3) of the Constitution. The section reads:

“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”(emphasis added)

5. Both the NCA and PIE have received considerable judicial attention since they became law. They remain an evolving part of our jurisprudence. Nonetheless a number of clear principles have emerged which are relevant to the present enquiry

¹ Section 9 is the equality provision.

The s 10 right to dignity is a foundational constitutional right. In the context of the present issues see *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at para 21 per Mokgoro J

Section 25 is the property provision which aside from protecting ownership rights also envisages proactive steps being taken to bring about equitable access to land and, in subsection (5) requires the State to *“take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”*.

Section 26 provides for the right of access to adequate housing.

² Section 3(a)

which concerns residential property subject to a bond held as security for a home loan:

- a. A home loan creditor cannot separate the monetary judgment from the order for foreclosure. Accordingly if the executability of the bond is postponed for any reason then the order for payment must also be postponed. The effect of this requirement was succinctly stated in *Mokebe* at para 29 :

*"Should the matter require postponement for whatever reason, the entire matter falls to be postponed and piecemeal adjudication is not competent";*³

- b. Judicial oversight is required in all cases of execution against immovable property. See the application of *Jaftha*⁴ and *Gundwana*⁵ in *Mkhize v Umvoti Municipality and Others* 2012 (1) SA 1 (SCA) at para 26.

In *Mkhize* at para 25 the court explained:

"It is clear from Gundwana that insisting on judicial scrutiny in every case should hold no terrors. The level of enquiry will vary from case to case and will always be dependent on the circumstances. As was pointed out in Gundwana the rule established in Jaftha 'caution[s] courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes'.

Regard must now be had also to the comprehensive provisions introduced into Rule 46 and by Rule 46A which deal with the court's oversight functions in respect of levying execution on immovable property

- c. The sale of a property for a nominal amount results in the home-owner not only losing the house but also remaining indebted to the mortgagee for the

³ See also paras 11, 14, 15, 21 to 23 and the conclusion reached at para 31 of the judgment

⁴ *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC)

⁵ *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC)

outstanding sum of the indebtedness “even in cases where the on-sale of the property occurs to buyers at substantially higher prices than the price realised during the sale in execution”. See *Mokebe* at para 53;

- d. Rules 46 and 46A “require the consideration by the court of alternative means of satisfying the judgment debt”

The changes to these rules “impose an even more vigorous investigative function on a court faced with an application for a declaration of executability and require still more information to be forthcoming in relation to the debtor’s circumstances and the value of the property.”

These passages are from the judgment of Fisher J in *Absa Bank v Njolomba and another* [2018] ZAGPJHC 94 and were endorsed by the full court in *Mokebe* at para 58;

- e. Ultimately a court is obliged to “consider all the relevant factors when declaring a property specially executable at the behest of a bondholder. It is thus incumbent upon the bank or bondholder to place ‘all relevant circumstances’ before the court when it seeks an order for execution. This, in our view, includes a proper valuation of the property (under oath), the outstanding arrears, municipal accounts and the like information. This is not to thwart the mortgagee’s right to execution, to which it may be entitled, but to secure a just and equitable outcome. It is not a prohibition to realise a bank’s security as is suggested in the affidavit filed by Investec. The oversight duty is a far cry from such perceived prohibition. This is based on s 1 of the Constitution which places an obligation on all to promote the value of human dignity, the achievement of equality and the advancement of human rights and freedoms which would include the application of s 26 of the Constitution by a court, having regard to all the relevant circumstances, before sanctioning the process that may lead to the ultimate eviction from a

*home. This is not to hamper the ability of the mortgagee to execute but that very process requires oversight.*⁶

6. The courts have reiterated that one cannot be prescriptive as to how the oversight function is to be applied in any particular case. In *Absa Bank Limited v Lekuku* [2014] ZAGPJHC 274 at para 34 Victor J clarified that:

“A court will always have a discretion based on the facts before it as to what amount is proportional to the final effect and consequence of foreclosure. In carrying out this assessment, the court in each and every case carries out a unique enquiry in exercising its judicial oversight. To lay down a standard approach will be contrary to the constitutional imperative of judicial oversight in foreclosure matters.”

7. It may well be that the overriding consideration in practical terms come down to what *Adv. Wilson* submitted behalf of the *amicus* in *Lekuku*, namely; “*whether execution is proportionate, having regard to all the relevant circumstances*”⁷
8. One is driven to the conclusion that the application of the various decisions and considerations I have mentioned, in practice will require a court to effectively engage in what used to be a rule 45(12)(i) (or Section 65 enquiry in the Magistrates’ Court) financial enquiry albeit now at a pre-judgment stage because of the *ratio* in *Mokebe* that one cannot grant a monetary judgment if the order for foreclosure is to be stayed⁸. This is justified on an application of the equitable considerations which are expressly provided for in the NCA and s 26 (3) of the Constitution and which, in my respectful view, cannot be given effect to in any other rational manner.
9. I would add that relevant circumstances would not be based solely on quantitative criteria but also involve qualitative considerations. Regard may have to be given to the vicissitudes of life; for instance where the borrower has maintained the bond repayments for a considerable period but due to the prolonged economic recession

⁶ Uniform Rule 46(1)(a)(ii).

⁷ *Leluku* at para 36

⁸ Rule 45(12)(i) was deleted by GN R608 of 31 March 1989.

and rising costs of basic commodities and services that has engulfed the country the debtor has been retrenched or has now to support others or the like. This was considered to be a relevant factor in *Nkata v FirstRand Bank Limited and Others* 2016 (4) SA 257 (CC) where Moseneke DCJ said at para 94

“Yes, debtors must diligently and honestly meet their undertakings towards their creditors. If they do not, the credit market will not be sustainable. But the human condition suggests that it is not always possible – particularly in credit arrangements that run over many years or decades, as mortgage bonds over homes do. Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit givers ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our Constitution.

10. It is also necessary to revert to the enabling legislation which must be given effect to and which is remedial by nature. In particular, when considering relevant circumstances and weighing the competing interests involved in any enquiry where a proportionality test is invoked, one is driven back to the objects and interpretation provisions of the NCA and purpose of the NCA set out in s 3 as read with s 2 as well as s 26(3) of the Constitution.

Section 2(1) requires that the NCA must be interpreted in a manner that gives effect to s 3. Section 3 contains a number of important objectives. They include:

- a. Ensuring consistent treatment of different credit products and different credit providers (s3(a));

- b. Promoting responsibility in the credit market by *inter alia* encouraging the fulfilment of financial obligations by consumers (s 3(c)(i));
 - c. Addressing over-indebtedness of consumers and providing mechanisms for resolving over-indebtedness based on principles of satisfaction by the consumer of all responsible financial obligations (s 3(g)); and
 - d. Providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which prioritises the eventual satisfaction of all responsible consumer obligations under credit agreement (s 3(i)).
11. Put broadly, one of the aims of the NCA is to enable a credit receiver to retain and ultimately own the property purchased while fulfilling his contractual obligations under the agreement or if he falls into arrears to have determined in a fair manner whether he will be able to pay the debt by a reasonable restructuring of his payment obligations in a manner that bears "*the hallmarks of equity, good faith, reasonableness and equality*"⁹. This is sought to be achieved by being fair in the circumstances to the consumer and the credit provider while bearing in mind that depriving a person of property in respect of which significant payments have already been made may impact on the rights of access to housing and the other pro-active property right provisions of ss 25 and 26 of the Constitution.

It is therefore axiomatic that the court does not sit on review of the decision not to enter into any further settlement proposals with the defendant nor is debt review the only means of restructuring debt; a court is not precluding from effectively doing the same in respect of a single creditor even if there are others.

CHANGING TIDES v MABILETSA

12. Changing Tides applied for default judgment for R1 612 068.66 together with interest and sought an order to declare the mortgaged property specially executable.

⁹ *Nkata* at para 94

13. The plaintiff had instituted action after the defendants had fallen into arrears. The defendants entered an appearance to defend and the plaintiff then applied for summary judgment. The defendants then signed a document entitled "*Confession to Claim and Consent to Judgment* " and made arrangements to pay the plaintiff a once off amount of R50 000 by the end of October 2017 and to then pay from 1 December 2017 monthly amounts of R28 000. The defendants also acknowledged that the amount of the indebtedness was as stated in the previous paragraph.
14. The defendants paid the R50 000 on 7 November which was a week late and subsequently made only one further payment of R19 000 on 10 February 2018.
15. The plaintiff makes the standard allegation that there is no reasonable prospect of the defendants liability being liquidated within a reasonable period without having to execute against the property and that a delay in execution would be prejudicial bearing in mind that there are arrear municipal rates and other charges.
16. The arrears at the time the summons was issued was R138 392, 32. In other words the R50 000 payment shortly after the summons was issued would immediately have satisfied just over a third of the arrears which then totalled R115 020. By the time judgment was sought the arrears had risen to R212 453 which equated to just over 11 months of arrear instalments. The total monthly instalments were R19 381.79 with the last payment being made some 8 months ago.
17. The home loan was obtained in May 2013 and aside from the default to which the summons relates the defendants had also defaulted in October 2014. The defendants made another settlement proposal in October 2018. The plaintiff rejected the offer because it also assumed a growth in the defendant's business which did not materialise. The bank statements provided by the defendants for July to September 2018 of the business' turnover did not satisfy the plaintiff that there will be a sufficient cash flow to settle the arrears. The plaintiff was unconvinced that the settlement proposal was substantially different to the previous one.
18. The defendants however contend that the previous proposal was made in relation to an enterprise that did not produce the anticipated returns. They have however remodelled the nature of the business and the turnover is far better. They accept

that the December 2018 income will be negligible but are confident that on the current turnover and profit margins they can successfully restructure their debt.

19. A valuation of the property estimates the market value at R1.9 million with a forced sale value of R1.35 million. The local authority valued the property at R1.38 million.
20. The effect of foreclosure from the plaintiff's perspective is that on a sale in execution it may obtain on the formula adopted by it about R1.1 million while the total debt is now R1.6 million. Accordingly the plaintiff will have to look to the defendants to pay the shortfall of R500 000.

The obvious question that comes to mind is why the plaintiff is effectively prepared to forfeit R500 000 when the defendants seek a period of time to prove that their turnover will cover current bond repayments and part of the arrears. They also claim that they need to continue occupying the property as they have converted the garage into an office from where four staff members work. If they are forced to leave the premises their business will of necessity decline.

21. Ordinarily the borrower is an existing customer of the bank with whom a personal relationship has developed at branch level. The relationship between Changing Tides and its customers is far more impersonal. In *Changing Tides 17 (Pty) Ltd NO v Congwane* [2016] ZAGPHC 128 it was necessary to investigate the basis of the relationship between the parties. The structuring of the transaction in that case is similar to the present one. .

22. In *Congwane* I analysed the transactions and found at paras 2 to 5 that:

"2. As with most, if not all Changing Tides applications of this nature, it is not based on a standard home loan agreement concluded by a financial institution as plaintiff directly with a defendant credit receiver.

3. To simplify the nature of the transactions involved I will refer to the credit provider as the lender and the credit receiver as the borrower.

4. *Changing Tides is not the lender. The lender is Blue Banner Securitisation Vehicle RC1 Proprietary Ltd, its successors in title and assigns ("Blue Banner). The South African Home Loans Guarantee Trust (formerly known as the Guarantee Trust) and which will be referred to as "The Trust" stands as guarantor to Blue Banner for the liability of the borrower, i.e. the defendant, under the loan. In turn the defendant indemnifies the Trust and provides his or her immovable property as security for due performance of its indemnity.*

The defendant accordingly continues to repay the monthly instalment under the loan to Blue Banner. Changing Tides features as the plaintiff because it is the trustee "for the time being" of the Trust.

The suite of agreements required to implement the immediate transaction for the loan comprise the loan agreement between Blue Banner and the defendant, a guarantee given to Blue Banner by the Trust in respect of the specific loan to the debtor on terms which are contained in a main or umbrella agreement, an indemnity given by the defendant to the Trust and an indemnity bond provided by the defendant over her residential property. In all the agreements Changing Tides acts as trustee for the Trust. It is evident therefore that each agreement is dependent on the other and forms an integral part of a larger transaction.

5. *The particulars of claim allege that both the Trust and Blue Banner are credit providers under sections 40 and 45 of the National Credit Act 34 of 2005 ("the NCA"). Changing Tides is not alleged to be a credit provider. I leave open whether Changing Tides is a credit provider or whether it is necessary for Changing Tides to allege sufficient facts to show that it is not. I did not raise the issue and will assume that it is not obliged to register as a credit provider."*

23. I also found in Congwane (at paras 28 to 31) that:

28. *The transaction is one where Blue Banner appears to have either factored its debtors' book to the Trust and the Trust holds the bond, or*

the Trust is used as a special purpose vehicle (SPV) to pool together or bundle the value of the loans into tradable securities which are then on-sold to institutional investors in the capital markets.

29. *In consequence the amount that the Trust will be obliged to pay Blue Banner under the guarantee will either be less than the amount under the loan agreement or the Trust will be procuring a profit in trading the loan as part of a package, thereby reducing its own liability under the guarantee, which may or may not be taken into account in the overall set-offs between Blue Banner and the Trust under the main or umbrella guarantee agreement.*
30. *In short the court is left in the dark in a case where at face value the original loan may have been traded and therefore cannot be produced. The court is also asked to be satisfied with a deeming provision and a certificate relating to the actual liability owed by the Trust to the lender in circumstances where there remains a full right of recourse by the original lender against the borrower (even after the bonded property is sold) for any difference between the amount that the Trust is obliged to pay under its guarantee to the lender on the one hand and the borrower's liability to the lender on the other.*

Nowhere do any of the agreements provided to the court indicate that a payment by the Trust under the guarantee will discharge the separate debt owed by the borrower to the lender. This also appears unlikely if regard is had to the way the transactions would have to be structured in order to facilitate securitisation.

31. *The indemnity agreement attempts to shore up the discrepancy by reference to a deeming provision. I accept that this position tries to distil the commercial rational for the elaborate loan structure and number of parties. Nonetheless a court would be ignoring the purpose of section 3 of the NCA if it turned a blind eye to the risks inherent to the consumer where the actual terms of the guarantee and the actual liability of the Trust to the lender are not disclosed, but where the borrower remains potentially exposed to the lender directly."*

24. There are also significant difficulties in accepting the certificate since it does not emanate from the principal creditor but from its managing agent. In *Congwane* I said at para 43 :

"It is difficult to appreciate how anyone could have a record of the conduct of the defendant's account with Changing Tides, since the defendant conducted its account with Blue Banner. Moreover the defendant's liability to Changing Tides is dependent on the amount which the Trust reflects as owed by the defendant to it under the guarantee."

And later at para 50:

"In my view the defendant when contracting could not have envisaged anyone employed by the managing company (whatever that might mean in the present context) or firm of accountants being able to sign the certificate. If that were so then a typist who might have access to the account on her screen or even an office cleaner can sign the certificate if employed at the time by the management company or firm of accountants."

It could never have been the common intention of the parties that in cases such as this, where the loan has obviously been securitised, a person can sign a certificate when he or she does not have a sufficient understanding of the transaction to know which files or transactional records are relevant. The reliability of the person scrutinising the records in order to sign a certificate is the underlying consideration for the clause, and the only qualifier found in the clause is that the individual signing is someone who holds the position of manager, trustee or accountant. At the least, the clause is ambiguous and the contra proferentem rule supported by an interpretation that gives effect to the underlying protection that the NCA is intended to afford consumers ought to prevail."

25. Two issues arise. The first is that the plaintiff appears to have acquired the "debtors' book" of Blue Banner and that there has been securitisation. This impacts on the relationship between the plaintiff and defendant. The plaintiff's interest lies in

collecting sufficient of its book in any one month. The individual borrower is simply part of a statistic. Hence I would suggest the lack of concern about the shortfall between the price the property is expected to fetch and the outstanding debt. It also impacts on the considerations to be taken into account when applying the provisions of s 3 of the NCA.

The other concern is that not much store can be placed on the certificate of indebtedness.

26. In this regard in *Congwane* I expressed a number of concerns which were set out in paras 35-39:

“35. The facts of Vitex also suggest the potentially opaque nature of the transactions since only the loan agreement and the indemnity are provided although, on the allegations made, the Trust itself appeared to be the borrower’s first point of contact before the suite of agreements were structured to facilitate both the loan and its securitisation.

Vitex also brings into focus whether Changing Tides is an associated company for the purposes of sections 40(1) to (3) of the NCA.

36. Another potential disadvantage is that the borrower remains exposed to the lender since the indemnity agreement is a “separate and independent primary obligation” (see earlier) with no comfort being given to the borrower that payment to Changing Tides under the indemnity agreement will extinguish the borrowers debt to the lender .

37. This puts the borrower in jeopardy should Changing Tides or the Trust be placed under winding up or business rescue. Moreover the Trust may replace Changing Tides as the trustee if regard is had to the wording of the Guarantee.

38. Accordingly while there may be sound commercial advantages to securitise and its features may promote the broader availability of loans, which is one of the objectives of the NCA, it raises concerns in respect of the deeming provision contained in the Indemnity. In particular it appears to manifest an imbalance in negotiating power (see section 3(e) of the NCA), it may adversely impact on one of the other objects of the NCA (see section 90(2)(a)(i)), it may have the effect of waiving or defeating the borrower's rights under the NCA or the common law (under sections 90(2)(b) and (c)) and, in light of the facts in Vitex, the deeming provision may have the effect of limiting the liability of both credit providers' for any representation made on their behalf under section 90(2)(g).
39. In the present case it would be remiss of the court to ignore these issues, especially if regard is had to the duty imposed on it under section 90(4) of the NCA.
27. In that case I concluded at paras 40-41 that
40. *It is therefore necessary that the relevant terms of the Common Terms Agreement and its variations are pleaded and attached. The deeming provision cannot act as the palliative. Aside from appearing to run counter to the basic tenets of the NCA it may also offend sections 48(1) (c) (i), (2) (a) (b) and (d) of the Consumer Protection Act 68 of 2008*
41. *For the same reason it is necessary that the actual liability incurred by the Trust to Blue Banner is suitably alleged and demonstrated."*
27. In the present case the parties subsequently concluded a consent to judgment. It would therefore be inappropriate for the court to consider re-adjusting rights: it

should be left to the defendants to take these issues further in a properly motivated manner if so advised.

28. The defendants have set out the amounts they claim they are able to pay and by when. They rely on a projected income stream based on significantly improved and objectively demonstrable turnover figures which the defendants explain are attributable to a revised business model that is proving to be successful.

29. Weighing all the relevant circumstances as I am obliged to, I am satisfied that;

- a. an order foreclosing on the security of the bond should not be granted at this stage with the consequence that, in terms of *Mokebe*, the monetary judgment sought must be stayed at this stage; and
- b. the defendants must demonstrate their ability to meet their financial obligations going forward by being afforded some degree of debt relief at this through a three month partial moratorium. This period of time will also allow them to initiate any competent challenge to the certificate or the consent agreement if so advised. The order I made appears at the end of this judgment.

ABSA v BELEBESI

30. In this case there is a more traditional banker-client relationship between the parties.

31. The defendant took out a home loan of R1million in April 2012. The monthly instalments at the time of issue of summons were R11 591.60. At that time the arrears were R98 722.91. Due to her default the full amount outstanding is R1 231 678.26. At face value it is difficult to see how that amount is arrived at, but I have not done any calculations which might indicate that it is incorrect.

32. The plaintiff alleges that the market value of the property is R1.86 million. The most recent municipal valuation, which was in July 2018, is for R1.7 million. There is a substantial amount owing to the local authorities of R90 205.55.
33. The plaintiff has not committed itself to indicate what the property is likely to fetch on a forced sale nor has it supplied objective evidence that is readily available from a Windeed Property Report or a LightStone Erf Valuation Report. I am reluctant to accept the latest municipal valuation roll figures, even in cases where there is no objection, due to glaring anomalies in the valuations of properties that appear to exist, in other cases I have dealt with, between market prices fetched in certain areas which are considerably below the municipal.
34. I will however assume that if the property is sold at a reserve price of even 30% below the claimed market value that the shortfall is relatively small.
35. The issue is therefore somewhat different to the previous case. Here it is really about the proportionality of execution where the personal circumstances of the defendant and the interests involved take centre stage and how one is supposed to balance them against the plaintiff's right to execute and the broader issue of the overall impact on the cost of credit to others.
36. Ms Belebesi had been paying regularly until her husband left the matrimonial home. This was in 2015 and she was obliged to carry all the household costs including paying for her 6 year old son's schooling. She bore the entire cost of his maintenance.

The divorce was acrimonious as her husband claimed that he had effected major improvements to the home and had paid for household necessities while she was paying off the bond. The divorce became a fight over property and child maintenance which went as far as a contested court hearing. After about a year the parties eventually resolved the divorce on the basis that the defendant would retain the property in return for which her husband would be absolved from any maintenance obligations towards their child including his schooling.

The defendant has placed her son in a nearby school and it is evident that if the property is sold she will have to find a new school. The difficulties of finding suitable schooling at a late stage in the year, particularly when this will be the child's first year at a primary school are self-evident. There is therefore potential prejudice to the child's nurturing at a critical stage of his development. This is a qualitative issue which, involving children's rights as it does, is to be put on the scale.

37. The facts reveal that the defendant has had to bear the costs of an acrimonious divorce which could not have been foreshadowed when she purchased the house. She also had to bear all the household costs and those of her child.
38. Much of this may be the plight of many others and one cannot expect a mortgagee to extend a credit moratorium to all. In my view the tipping point in the present case is that, not only did she forfeit maintenance in order to retain a house that would preserve some stability for her child in a familiar environment conducive to his growth at a time when the child would already be affected by the separation from his father, but throughout the period she maintained a consistent level of payment to the bank albeit that it was only a quarter of the monthly bond instalments.
39. Her payments throughout very trying times both emotionally and financially demonstrate a commitment to persevere and not give up on the house she had fought for in the divorce settlement. This also takes her out of the usual profile of a defaulting debtor. If regard is had to her surplus income there is very little she can obtain by way of reasonable accommodation for herself and the child. She certainly would struggle to again become a homeowner. Yet her prospects are good for recovery from the impact of the divorce and its aftermath.
40. In my view the defendant comfortably fits the profile mentioned by Moseneke DCJ in *Nkata* of a person who, as I have quoted earlier, "*honestly runs into financial distress that precipitates repayment defaults.*" The Constitutional Court impressed that in such cases: "*The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality.*"

41. In this case I believe that it is appropriate when considering the respective interests involved to place greater weight on the provisions of ss 25 and 26 of the Constitution and its impact on a single mother and her child. This does not mean that there is any permanent relief. I am only considering a short moratorium which, having regard to the lengthy period of the bond, should be reasonably insignificant to the bank provided the arrears can be built into future instalments.

Although not argued by the bank, I considered the possibility of the defendant paying interest only while the capital portion was deferred by extending the existing period of the bond. This may be an appropriate consideration in cases where the bond has been in existence for a considerable time. However in the present case, it is evident that the defendant at this stage does not have the surplus income to meet the interest portion which, considering the relatively short period the bond has already run, is still likely to comprise the most significant part of the monthly instalments.

I believe that where a plaintiff contends in an affidavit that it has explored all reasonable avenues short of foreclosure, as it is obliged to, instead of reciting the standard mantra, it should indicate why the payment of only the interest portion of the current instalment for a short period (while possibly extending the bond period) is not a consideration that the court should take into account, particularly if the bond has been in existence for a significant time and the interest portion no longer accounts for the major part of the monthly repayment.

42. The defendant seeks effectively another year to rehabilitate herself. I am also aware that there is a large debt owed to the municipality. However they too are not averse to arrangements.

43. I intend holding the defendant to her undertaking which is recorded in the order I make.

VAULTION OF PROERTY

44. Recently in *Nedbank Ltd v Moeketsi and another* (GLD) (unrep: case no 16720/2018 of 31 October 2018) I suggested a more objective method of valuation

which is readily available and which is based on actual market sales in the area where the property in issue is located. In the present cases, save for the municipality's valuation the mortgagee relies exclusively on its own internal valuation. I would be reluctant to base a reserve price on these figures alone when much better evidence is readily available in the form of the Windeed or LightStone reports mentioned earlier.

ORDER IN CHANGING TIDES v MABILETSA:

45. On 7 November I made the following order:

1. *The defendants shall pay to the applicant the following amounts::*
 - a. *R26 000 on or before 1 December 2018;*
 - b. *R13 000 on or before 1 January 2019;*
 - c. *R26 000 on or before 1 February 2019;*
2. *The application for judgment is postponed to be heard before Spilg J on Friday 15 February 2019 in court 6D unless the defendants fail to pay any of the above amounts on due date, in which event the plaintiff may apply before Spilg J on ten days' notice to the defendant for judgment as claimed in its application in terms of rule 31(1) dated 15 April 2018.*
3. *In the event that the defendants contest the amount of the debt they shall present a schedule of all amounts allegedly paid which were not taken into account by the plaintiff or any other error in the account and furnish proof that the alleged amount was in fact paid.*

This shall be done by no later than 15 December 2018 by delivery to the plaintiff and to the court of such schedule with the copies of the necessary

proof attached. A failure to do so shall debar the defendant from contending for any error in the amount claimed by the plaintiff.

4. *The defendant shall pay the costs of the application incurred to date on the attorney and client scale, such costs not to be executed upon pending the finalisation of the application*

ORDER IN ABSA BANK LTD v BELEBESI

46. I accordingly order that:

1. *The defendant shall pay to the plaintiff the following amounts::*
 - a. *R3 000 per month as from 1 December 2018 to 1 March 2019 inclusive;*
 - b. *R6 000 per month as from 1 April 2019 to 1 June 2019 inclusive;*
 - c. *R8 000 per month as from 1 July 2019 to 1 September 2019 inclusive;*
 - d. *R11 591.60 per month as from 1 October 2019 to 1 December 2019;*
2. *The application for judgment is postponed to be heard before Spilg J on Friday 6 December 2019 in court 6D unless the defendant fails to pay any of the above amounts on due date, in which event the plaintiff may apply before Spilg J on ten days' notice to the defendant for judgment as claimed in its application in summary judgment.*
3. *The respondents shall pay the costs of the application incurred to date on the attorney and client scale, such costs not to be executed upon pending the finalisation of the application.*

4.


SPILG J

DATE OF JUDGMENT: 14 November 2018

DATE OF REVISION: 19 November 2018

CHANGING TIDES v MABILETSA:

FOR PLAINTIFF: Adv V Fine
Moodie and Robertson

FOR DEFENDANTS: In person

ABSA BANK v BELEBESI

FOR PLAINTIFF: Adv M Msomi
(Heads drawn by Adv L Morland)

FOR DEFENDANT: Lowndes Dlamini Attorneys
In person