**FREE STATE HIGH COURT, BLOEMFONTEIN**
**REPUBLIC OF SOUTH AFRICA**

Case No. : 3874/2012

In the matter between:-

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| **THAMSANQA JOSEPH MBEBE** | 1st Applicant |
| **MATSHABALALA LAVINA MBEBE** | 2nd Applicant |

and

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| **ABSA BANK LIMITED** | 1st Respondent |
| **WESSEL DU PLESSIS** | 2nd Respondent |
| **BAREND DU PLESSIS** | 3rd Respondent |
| **NEELOFAIR ISSA** | 4th Respondent |
| **JUNAID ISAA** | 5th Respondent |
| **THE SHERIFF FOR THE HIGH COURT, BLOEMFONTEIN** | 6th Respondent |
| **REGISTRAR OF DEEDS – FREE STATE** | 7th Respondent |

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**HEARD ON:** 28 AUGUST 2013

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**DELIVERED ON:** 19 SEPTEMBER 2013

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**JUDGMENT**

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**MOCUMIE, J**

[1] This is an application for a rescission of a default judgment granted on 7 September 2009. The judgment was granted by the Registrar of this High Court in terms of Rule 35(1)(b)

for payment of monies and a declaration of property as executable. The application is that this Court should declare that the declaration issued under case number 3965/2009 be set aside as invalid; the sale in execution of property held on 24 November 2011 together with all subsequent sales of the property be set aside as unlawful pending the finalisation of these proceedings; an order directing the Registrar of Deeds to transfer the property back to the applicants and an order directing Absa to restore the applicants' bond on the same terms and conditions; and an interdict preventing further transfer of the property.

The application was opposed by 1st, 4th and 5th respondents.

[2] On 24 January 2005 the 1st respondent ("Absa") granted the 1st and 2nd applicants ("the applicants") a loan to build a house on Erf No 1310, Bloemfontein, Free State. The loan was secured by a mortgage bond. On 24 July 2006, a second mortgage bond was registered over the same property. Two mortgage bonds were therefore registered in favour of Absa over the applicants' immovable property. The applicants undertook to repay the loan at a consolidated amount of R8300,00 monthly. During 2008, the applicants failed to pay Absa the instalments due in terms of the mortgage bonds and fell in arrears. On 7 August 2007 Absa issued summons against the applicants and sought default judgment, in terms of Rule 35(1)(b). The applicants failed to enter an appearance to defend by 8 September 2009. On the same day the Registrar granted judgment by default

including an order declaring Erf No 1310, Bloemfontein, executable.

[3] On 24 November 2010 after two sales in execution were postponed at the instance of the applicants pursuant to alternative arrangements by the applicants, to make further payments had failed, the property was sold for R545 000,00. As on 7 February 2011 the outstanding balance was R884 013, 40 plus interest at the rate of 11% p.a. from 2 July 2009 to date of final payment.

[4] In support of the relief sought the applicants relied on the following:

4.1 They made arrangements with Absa to pay it later than agreed upon in the loan agreement and Absa, despite such arrangements issued summons on 7 August 2009;

4.2 The property was declared executable by the Registrar and not by a competent court;

4.3 When the Registrar declared the property executable (s)he did not have the authority to do so and did not comply with the provisions of the Constitution;

4.4 That the sale did not comply with the provisions of section 66(i)(a) of the Magistrates Court Act and Rule 45 read with Rule 46 of this Court;

4.5 The applicants had and still have sufficient movable property or assets against which no attachment was made;

4.6 The amount for which the house was sold was far below its market value.

[5] The applicants further relied on two unreported judgments of this Court, Case no 1267/2010 **MG Keikekame and Another v Wilson Thombela and Others** delivered on 17 November 2011 and Case no 794/2012 **Madisebo Franscina Mokharumetso v First Rand Bank Ltd and Others** delivered on 11 October 2012.

[6] It was common cause between the parties that the applicants were in default of their payments when Absa issued summons; obtained a judgment in its favour as set out above and sold the property at a sale in execution in November 2010. It was also common cause that the writ of execution was granted by the Registrar of this Court and that when this writ was granted the applicants still owed Absa the amount as set out above.

[7] What was in dispute and had to be determined was whether the writ of execution and the subsequent sale of the applicants' property were irregular and null and void.

[8] During September 2009 when the default judgment was granted and the warrant of execution was issued Rule 45(1) was applicable. The Rule provides:

> "The party in whose favour any judgment of the court has been pronounced may, at his own risk, sue out of the office of the registrar one or more writs for execution thereof as near as may be in accordance with Form 18 of the First Schedule: Provided

> that, except where immovable property has been specifically declared executable by the court or, in the case of a judgment granted in terms of Rule 31(5), by the registrar, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may been issued against his movable property, and the registrar perceives there from that the said person has not sufficient movable property to satisfy the writ."

[9] On 24 November 2010 when the applicants' property was sold at a public auction, Rule 45(1) was already amended in its entirety and replaced with Rule 46(1) to prohibit the issue of warrants of execution against immovable property, being the primary residence of the debtor, until such time as a court had declared the property executable, after considering all relevant circumstances. The Rule has been in effect since its amendment on 19 November 2010. Respective High Court Divisions amended their practice rules accordingly.

[10] Rule 46(1)(a)(ii) provides:

> "No writ of execution against the immovable property of any judgment debtor shall issue until –
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> (a) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ: or
>
> (b) Such immovable property shall have been declared to be specifically executable by the court, or in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue

unless the court, having considered all the relevant circumstances, orders execution against such property."

[11] The Rule is read with section 26 of the Constitution which provides:

"11.1 Everyone has the right to have access to adequate housing;
11.2 The State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of this right;
11.3 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."

[12] Earlier in 1999/2000 the Constitutional Court challenged the sale of the debtors' primary residence without court supervision and stated so much in at least two main decisions, **Chief Lesapo v North West Agricultural Bank and Another** 2000 (1) SA 409 (CC) and **First National Bank v Land and Agricultural Bank of South Africa and Another** 2000 (3) SA 626 (CC).

[13] Finally ,in 2011 the Constitutional Court in **Gundwana v Steko Development and Others** 2011 (3) SA 608 (CC) considered the constitutionality of the Registrar's powers under Rule 45 to declare mortgaged property which was a debtor's primary residence executable. The Constitutional Court declared that Rule 45 was unconstitutional. The effect of the **Gundwana** decision was that the judgments in

**<u>Nedbank Ltd v Mortinson</u>** 2005 (6) SA 462 (W) [2006] 2 All SA 506 (W) and **<u>Standard Bank of SA v Saunderson and Others</u>** 2006 (2) SA 264 (SCA) 2006 9 BCLR 1022 [2006] 2 All SA 382 were overruled, to the extent that they held that a Registrar was constitutionally competent to make execution orders when granting default judgments in terms of Rule 35(1)(b). In respect of the validity of writs of execution against immovable property in the Magistrates court in terms of section 66(1) of the Magistrates Court Act, 32 of 1944, see **<u>Japhta v Schoeman & Others</u>** and **<u>Van Rooyen v Stoltz & Others</u>** 2005 (2) SA 140 (CC).

[14] In considering the prospective and retrospective implications of the decision the Constitutional Court held that going forward (prospectively) the amended Rule 46(1) will regulate the procedure for writs against immovable property and in respect of warrants authorised by the Registrar; and prior to this decision and the amendment to Rule 46(1), the declaration of unconstitutionality would apply retrospectively without any limitation.

[15] To dispel fears that the retrospectivity order would result in a flood of applications to set aside unlawful sales in execution, **Froneman** J stated the following in paragraph [58]:

> "[58] There may be a fear that the decision in this matter will lead to large-scale legal uncertainty about its effects on past matters, where homes were declared specially executable by the registrar, and sales in execution and transfers

followed. The experience following *Jaftha* may be an indication that this fear is overstated. It must be remembered that these orders were issued only where default judgments were granted by the registrar. In order to turn the clock back in these cases, aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule, under which the property was declared executable, is not sufficient to undo everything that followed. In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier, and they will have to set out a defence to the claim for judgment against them. It may be that in many cases those aggrieved may find these requirements difficult to fulfil." (Own underlining)

[16] Further at para [59] and [60] he stated:

"[59] From what has been stated above, in relation to the legitimacy of resorting to execution in order to obtain satisfaction of judgment debts sounding in money, and that only deserving cases would justify other means to satisfy the judgment debt, it follows that a just and equitable remedy, following upon the declaration of unconstitutionality, should seek to ensure that only deserving past cases benefit from the declaration. I consider that this balance may best be achieved by requiring that aggrieved debtors, who seek to set aside past default judgments and execution orders granted against them by the registrar, must also show, in addition to the normal requirements for rescission, that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home.(Own underlining)

[60] Once these hurdles have been cleared, and it is determined that special execution should not have been allowed, the question of the effect of invalid execution sales and subsequent transfers will have to be considered as a next step. It is not possible to lay down inflexible rules to deal with all the permutations that may arise in these cases. Existing legal principles and rules will be sufficient to deal with most cases in a just and equitable manner." (Own underlining)

[17] To avoid large scale legal uncertainty and achieve a balance between the interests of creditors on the one hand and defaulting debtors on the other hand, **Froneman, J** at paras [58]-[60] of the judgment as set out above directed that in order for aggrieved debtors to succeed in setting aside past default judgments and execution orders granted against them by the Registrar the following requirements must be met:

17.1 The aggrieved debtor must apply for rescission of the default judgment which resulted in the offending warrant of execution;

17.2 The aggrieved debtor will have to explain why the rescission was not sought earlier;

17.3 The aggrieved debtor will have to set out a defence;

17.4 The aggrieved debtor will also have to show that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would have refused leave to execute against specially hypothecated property.

17.5 As I understand the **<u>Gundwane</u>** decision, in addition to the obvious requirements set out above the aggrieved defaulter must also show that to set aside the writ of execution will be 'a just and equitable remedy, [and that (s)he] is a deserving past case which should benefit from the [unconstitutionality] declaration.'

[18] There are three ways in which a judgment taken in the absence of one of the parties may be set aside:

(i) In terms of Rule 31(2)(b);

(ii) In terms of Rule 42(1)(a); or

(iii) In terms of the common law.

(See **Erasmus, Superior Court Practice** B1-200).

[19] Rule 31(2)(b) provides:

> "(b) A defendant may within 20 days after he has knowledge of such judgment apply to Court upon notice to the plaintiff to set aside such judgment and the Court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

(See **<u>Grant v Plumbers (Pty) Ltd</u>** 1949 (2) SA 470 (O))

[20] Rule 42(1)(a) provides:

> "(1)(a) The Court may, in addition to any other powers it may have, *mero moto* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

[21] At common law judgment may be set aside on the following grounds:

(a) fraud;

(b) Justus error;

(c) when new documents have been discovered;

(d) where judgment has been granted by default;

(e) In the absence between the parties of a valid agreement to support the judgment;

(f) On the ground of *justa causa*.

(See **Erasmus, <u>Superior Court Practice</u>**, B1-307, **<u>Chetty v Law Society, Transvaal</u>** 1985 (2) SA 756 (A).)

[22] As indicated already on 7 August 2007 when Absa issued summons against the applicants and sought default judgment, in terms of Rule 35(1)(b) the applicants failed to enter an appearance to defend by 8 September 2009. On the same day the Registrar granted judgment by default including an order declaring the property executable.

[23] The applicants have up to date failed to give any reason why they failed to enter an appearance to defend the original judgment as prescribed by the practice rules of this Court.

The applicants have not disclosed a *bona fide* defence to Absa's claim, i.e. what made them fail to pay Absa as they undertook to do or put in another way what justified them from withholding payment due to Absa. All that was submitted on their behalf was that they had sufficient assets to satisfy the claim which assets where still available.

[24] This cannot be correct because those assets except one do not belong to the applicants but a close corporation, Nzuzo Trading 509. The applicants have not explained how this property could have been realised to satisfy Absa's claim in 2009. The properties identified are old and valued as when they were bought not as on the date on which Absa took action against the applicants or in 2013 when this matter came before the court. No valuation certificate has been attached to indicate the real value of the properties. The properties in any event belong to the Nzuzo Trading 509 and can never be regarded as those of the directors unless indicated so specifically. Which means, contrary to the argument raised on their behalf that the Sherriff did not look for assets which could be sold off first and did not return a *nulla bona* return, it was clear that such exercise would have been in futility. Nzuzo Trading 509 was never a party to the loan agreement between Absa and the applicants. Moreover this defence was raised when the applicants had all the opportunity to do so within the prescribed days set out in Rule 31.

[25] In his affidavit Mr Mbebe explained that after their house was sold on auction, they went to different attorneys for advice. At least two attorneys could not help them until the current attorney came on board. Mr Khang, on behalf of the applicants, could not explain how seeking legal advice or assistance could take three years and about eleven months before the applicants approached this Court. Suffice to submit that, as far as he knew there was no obligation on the applicants to explain each and every day of the delay in approaching the Court as prescribed in R31. This delay is clearly inordinate and unjustified because the applicants have not once indicated that they did not have money to pay for legal representation so that they should challenge the default judgment within the prescribed period or at least in the same year the default judgment was granted. They had by conduct acquiesced with the judgment granted in 2009. To that extent the applicants have failed to satisfy the first requirement for an application for rescission of the default judgment.

[26] Furthermore after the loan was granted in 2005, and the bond was registered over the property in 2006, the applicants made regular payments until in 2008 when they started to default. On 7 July 2009 their arrears were already running at R68 696,68. On 15 April 2009 the applicants paid R8 500, 00. On 18 November 2009 to avoid the first sale in execution of their house the applicants paid R10 000,00. The applicants thereafter failed to pay any amount. Between 7 July 2009 and 18 November 2009 the applicants had paid

Absa R18 500, 00 only out of the R68 696.68 that they owed Absa as on 7 July 2009.

[27] On the day of the sale of execution, 24 November 2010, the applicants approached Absa to stop the sale pending them paying Absa what was due to it. But by the time agreed upon, 10h30, the applicants had failed to raise the money and the sale went through. The message was clear that they could not raise such a huge amount which had accumulated over a year and about five months, within a few hours. Even after, as they alleged, they were awarded a tender of R7 million during 2010, they did not put aside any money to pay Absa. They have not stated during these proceedings that they have money set aside to liquidate this claim, if given an opportunity to do so apart from tendering Nzuzo Trading 509's property for liquidation of Absa's claim.

[28] This background and dearth of facts clearly showed that armed with the same facts a Court would not have refused to grant leave to execute against the applicants' property. To the contrary, a Court faced with these facts would have done just that because it would have considered what other reasonable options were left for Absa before taking such a drastic step and would have come to the conclusion that Absa had no other alternative. In addition the applicants have failed to place any facts before this Court to justify protection under section 26 of the Constitution. I say so because there was no averments made that the property in issue was the applicants' primary residence. Neither were there any

averments made of how many children or elders were affected by Absa's action. Instead subsequent to the sale in execution the applicants moved somewhere else where they have been staying to date.

[29] The applicants' reliance on the two unreported judgment of the Free State cannot be correct. **Keikekame and Another v Wilson Thombela and Others** was delivered on 17 November 2011 prior to the **Gundwane** decision which gave courts vast room not to adhere to the strict requirements set out by **Froneman J** in order to avoid all defaulters from coming to courts years later after the default judgment had been granted.

[30] **Madisebo Franscina Mokharumetso v First Rand Bank Ltd and Others** delivered on 11 October 2012 came after the **Gundwane** decision. The facts of this case are distinguishable from the facts of this one. The Court considered what **Froneman J** stated but relied on the unreported judgments of Case no: 1195/06 **Menqa & Another v Markom & Others** (CPD) and **Keikekame** to come to the conclusion that

> "It is clear from the papers and applicants' uncontested statements that she had sufficient movable property as the time of judicial attachment whereupon First respondent could attach for settlement or utilise as further security for the debt. In paragraphs 4.12 and 4.16 of the founding affidavit, she mentions amounts of R900 000, 00 and R201 101.81 being progress payment due to her for services rendered. Such payments had

> not as yet realised…The surplus on payment would according to her be used to settle the debt. I am therefore of the view that, a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would have refused leave to execute."

These facts are clearly distinguishable from the current ones as set out in paras [25]-[28] of this judgment.

[31] I have already indicated that Absa had no other alternative back in 2009 or 2010.As **Mokgoro J** stated in **<u>Japhta</u>**

> "[O]nly where there is disproportionality between the means used In the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose that alarms bells should start ringing…
>
> <u>If there are no other proportionate means to attain the same end, execution may not be avoided"</u>(Own underlining)

In the overall, the applicants have not shown that to set aside the writ in execution in these circumstances is 'a just and equitable remedy' and that they are 'deserving past case(s) which should benefit from the [unconstitutionality] declaration.'

[32] Having come to the conclusion as set out in the above paragraphs it was unnecessary to consider the issues raised and addressed in Case no:1195/06 **<u>Menqa & Another v Markom & Others</u>** (CPD) and **<u>Menqwa & Another v Markom & Others</u>** 2008 (2) 120 (SCA) i.e. The fact that the 2nd and 3rd respondent had already taken transfer of the

property; and whether it would be appropriate for this Court to order the Registrar of Deeds to re-register the property in the applicants name taking into account what the 2nd and 3rd respondent had already paid for the property after obtaining a loan from Standard Bank and whether Standard Bank would be reimbursed and by whom as well as the applicants' unjust enrichment.

[33] In the result, the following order is granted.

**ORDER**

1. The application is dismissed
2. The applicants to pay the costs of this application.

**B. C. MOCUMIE, J**

On behalf of the applicants: Attorney M. Khang
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On behalf of the 1st Respondent: Adv. J. Els
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