

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

Case No: 23434/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
..... SIGNATURE	 DATE

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

SANDILE MADOLO

First Respondent

AGRINETH NOZIBUSISI MADOLO

Second Respondent

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to caselines. The date and time for hand-down is deemed to be 12h00 on 12 June 2024.

JUDGMENT

Osborne AJ:

1. In an opposed application for summary judgment, the Applicant (Plaintiff in the underlying matter) claims payment from the Respondents (Defendants in the underlying matter) of an outstanding mortgage-backed home loan, plus interest. The Applicant also seeks an order of special execution in terms of Rule 46A of the Uniform Rules of Court and proposes a reserve price in terms of Rule 46A(8)(e). (For the sake of simplicity, I refer to the parties throughout as *Applicant* and *Respondents*).

LEGAL PRINCIPLES

2. The Supreme Court of Appeal (“SCA”) has remarked that the purpose of the summary judgment procedure is to “Prevent sham defences from defeating the rights of parties by delay”.¹

3. The remedy provided by Rule 32 has been described as “*extraordinary*”.² It closes the doors of the Court to one of the parties, allowing civil judgment without a trial. That being said, the SCA has observed:

"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant of a triable issue or a sustainable defence of her/his day in Court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both at the first instance and at the appellate level, have rightly been trusted to ensure that a defendant with a triable issue is not shut out."³

4. Few would doubt the need to conserve judicial resources. This is a pragmatic rationale that has become all the more compelling in light of the deluge of litigation that threatens to overwhelm our understaffed and under-resourced court system - particularly in this division. Rule 32 envisages, in effect, a screening procedure to expeditiously clear the roll of matters in which a defendant has no triable case. This benefits all parties by saving costs where the outcome of a trial is a foregone conclusion on the pleadings. It also serves the administration of justice by helping to clear clogged rolls.

5. But summary judgment is not there for the taking. Rule 32 provides that the Applicant must verify the cause of action and the amount claimed, identify points of law relied upon, identify the facts upon which its claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

6. A Respondent opposing summary judgment must, in turn, satisfy the court that it has a *bona fide* defence to the action. Its affidavit must disclose:

“The material facts upon which the defence is based ... in a manner which is ‘sufficiently full’ and complete enough to persuade the court that, if what is alleged is proved at trial, it would constitute a defence to the claim. If the stated material facts are equivocal, ambiguous or contradictory or fail to canvas matters which are essential to the defence which has been raised, then the affidavit will

¹ Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA), para 31.

² Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) 423.

³ Joob Joob, para 32.

not comply with the rule and summary judgment will be granted.”⁴

BACKGROUND

7. The facts of the matter may be succinctly stated: Respondents admit their breach of the home loan agreement and their default, which leaves to be determined (1) the amount of the debt, (2) the Rule 46A issue (i.e. whether a warrant of special execution is warranted), and, if so, (3) the appropriate reserve price.

8. The parties concluded a home loan agreement on 28 May 2007. The debt was secured by a mortgage bond registered on 25 June 2008 in the Applicant’s favour. Initially, the Respondents complied with the terms of the loan agreement. Later, they fell into default.

9. On 16 July 2019, the Applicant served a summons; on 19 July 2022, the Respondents delivered their plea; on 8 August 2022, the Applicant delivered its application for summary judgment; and on 11 November 2022, the Respondents delivered their affidavit resisting summary judgment.

THE APPLICANT’S CASE

10. The particulars of claim contend that:

- 10.1. The Respondents are in breach of their obligation under the home loan agreement.
- 10.2. In consequence, the Applicant is contractually entitled to claim payment of the full balance under the acceleration clause in the agreement whereby, in the event that any instalment payment is defaulted upon, the amount secured by the bond would become immediately due and payable in full.
- 10.3. The Applicant complied with the provisions of sections 129 and 130 of the National Credit Act, 34 of 2005.
- 10.4. The Applicant is entitled to a Rule 46A order declaring the property executable.
- 10.5. The Court should set an appropriate reserve price for the sale in execution.

11. As to the amount owing, the mortgage bond was registered in favour of the Applicant in the amount of R1 140 000; there was an initiation fee in the amount of R5 560; and over and above the principal, the Respondents were indebted and bound to

⁴ Eclipse Systems and Another v He & She Investments (Pty) Ltd and a Related Matter 2020 (6) SA 497 (WCC), para 16.

pay an additional sum of R285 000 arising out of interest, including arrears interest.

12. The Applicant alleged that, as of the date of the particulars, the arrears amounted to R581 250.90. (As reflected in the Payment Profile as of 1 July 2022, attached as an annexure to the application for summary judgment.) The mortgage bond secured the full amount of the loan in the amount of R1 061 029.01 (excluding interest).

13. The following appears in the Applicant's affidavit in support of summary judgment dated 8 August 2022:

- 13.1. The Respondents' indebtedness as of 23 April 2019 amounted to R894 492, the balance of the total principal debt, together with finance charges, plus interest to the date of payment. The arrears as of that date amounted to R85 530.
- 13.2. While at one point in their plea, the Respondents alleged that the amount owed per the summons was less than R100 000 (against a property value of over R5 million), they admitted the allegation that the amount owed was R894 000.
- 13.3. The Respondents were in arrears in the amount of R581 000.
- 13.4. The full amount owed to the Applicant and secured by the bond was R1 061 029.

14. These updated figures appear in a Certificate of Balance ("CoB"), handed up at the hearing (and uploaded on *CaseLines*), purporting to reflect the status of the account as of 20 May 2024:

- 14.1. The amount in arrears had risen to some R882 753.
- 14.2. The total amount due is R908 823.
- 14.3. The overall indebtedness is R1 042 708.

Respondents' Submissions as to Amount of Debt

15. In their plea, the Respondents admit most of the allegations in the particulars, including, as we have seen, the amount outstanding. However, the Respondents demand that the balance of the mortgage bond be recalculated. (It is also stated that the property is the primary residence of the Respondents, who say they will soon be in a position to pay the arrears outstanding.)

16. In the Respondents' answering affidavit in the following figures appear:

- 16.1. The initial loan was R1 140 000.
- 16.2. The municipal valuation is R4.4 million. (No documentation evidencing that valuation is attached.)
- 16.3. The Respondents have paid over R1.8 million, some in bulk

payments in 2015, so the principal has hence been paid in full.

- 16.4. In addition, R660 000 has been paid over and above the principal debt. The R585 000 demanded by the Applicant is “interest on interest.” Hence, there was no “genuine monetary prejudice” to the Applicant.

17. Regarding their personal circumstances, the Respondents allege that the COVID-19 pandemic rendered them unable to find employment and meet their financial obligations. Moreover, the effect of the government measures taken in response to the pandemic had “recalibrated” the terms of the loan at issue. It is stated further that the First Respondent holds a Master’s degree and that the Second Respondent has a PhD in biochemistry.

18. In their short heads of argument (two pages), the Respondents allege that it is common cause that the property is valued in excess of R5 million.

EVALUATION – AMOUNT OF THE DEBT

19. In the absence of documentation submitted by the Respondents regarding the figures, the Court has no choice but to accept the Applicant’s well-documented figures as set forth in the Particulars of Claim, as updated in the CoB.⁵ It would not have been difficult for the Respondents — both highly educated and accomplished persons — to present statements, proof of payments, and other documentation to support their claims to have paid considerably more than the Applicant alleges.

20. Moreover, the Respondents did not contest the CoB. It may, hence, be treated as sufficient proof of the amount alleged by the Applicant to be due and owed.⁶

21. One notes that the Respondents state in their opposing affidavit that an effort will be made to have the interest on the loan calculated by a “qualified person”. But no such evidence has been forthcoming. Even had there been a procedural basis for the Respondents’ submissions that the amount due should be “recalculated”, the Respondents have failed to come forward with material that could form the basis of such an exercise.

⁵ See Senekal v Trust Bank Of Africa Ltd 1978 (3) SA 375 (A), 383 (*prima facie* evidence afforded by a certificate of debt can mature into sufficient proof if not challenged.)

⁶ Investec Bank Ltd v Fraser NO and Others 2020 (6) SA 211 (GJ), para 86 (Respondent had not alleged prejudice arising from certificate of balance, nor had she applied for leave to file a further affidavit in response.)

22. The Respondents allege in passing that the Applicant is charging "interest on interest." This is an apparent reference to the *in duplum* rule, under which arrears interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital.⁷ However, the Respondents have not properly pleaded any of this, failing even to specify the component of the claim that is attributable to interest. As to the Respondents' proposal that "monetary prejudice" factors into the equation, that is a concept alien to our jurisprudence.

23. The Respondents' claim that the terms of their bond were "recalibrated" in the Covid period is also not properly pleaded; no documentary foundation has been laid for that claim. Finally, an allegation that a debtor is willing – albeit not currently able – to settle a debt has never been considered a defence. Hence, it cannot be said that a *bona fide* defence has been disclosed.

24. I find, therefore, that the Respondents are indebted to the Applicant in the amount of R894 492.82 under the terms of their loan agreement entered into on 28 May 2007.

APPLICATION FOR WRIT OF EXECUTION

25. The Constitutional Court has imposed constraints upon the grant of an order of execution where the effect would be to evict an indigent litigant from his or her primary residence. Hence it is that a Court is obliged to consider certain factors before declaring residential property executable.

26. Rule 46A does not vitiate the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt. It goes no further than requiring that, before ordering execution against a primary residence, due regard must be had to the impact upon judgment debtors who are poor.⁸ The point bears emphasis given the facts presented *in casu*. The focus of Rule 46A is the protection, as put by the SCA, of "*vulnerable and poor beneficiaries who are occupying the immovable property owned by the judgment debtor.*"⁹

27. The Respondents here have not alleged on affidavit that they are either "vulnerable" or "poor". Nor have they alleged that they will be rendered homeless if the

⁷See Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd 2015 (3) SA 479 (CC), para 42 (Madlanga J (Jafta J et Nkabinde J concurring).)

⁸ Gundwana v Steko Development and Others 2011 (3) SA 608 (CC) para 53.

⁹ Petrus Johannes Bestbier and Others v Nedbank Limited (150/2021) [2022] ZASCA 88; 2023 (4) SA 25 (SCA) (13 June 2022), para 27, upheld by the Constitutional Court in April 2024. See Petrus Johannes Bestbier and Others v Nedbank 2024 JDR 1551 (CC).

property is sold in execution.

28. The onus is on the judgment debtor to provide the court with information concerning the circumstance warranting the protection embodied in Rule 46A. Unless the judgment debtor discloses material weighing against an eviction order, such an order should issue, because the relevant circumstances are invariably within the exclusive knowledge of the occupier.¹⁰ If a debtor's attention has been drawn to the provisions of s 26(1) of the Constitution and Rule 46(1)(a)(ii), and the debtor fails to avail himself of his rights, the obligation to exercise judicial oversight under Rule 46A is limited.¹¹

29. In the particulars of claim *in casu*, the Respondents were advised that it was incumbent upon them to place information supporting their claims before the Court. Also explained were the limits imposed upon execution of a residence by the Constitution - specifically that, where the property attached is the primary residence of the Respondents, no order shall issue until the Court considers the circumstances set out in Rule 46A.

30. The Applicant advances the following allegations in support of its prayer for a writ of execution:

- 30.1. Because the Respondents are not indigent, and could afford to lease a property elsewhere, there is no real risk of them being rendered homeless.
- 30.2. The Applicant attempted in good faith to assist the Respondents to regularise their position under the loan agreements.
- 30.3. The Respondents had shown themselves neither willing nor able to satisfy the judgment debt by paying the Applicant.
- 30.4. There are no alternative or less invasive means available for satisfying the judgment debt.

31. The Respondents do not seriously contest the above in their plea – save to say that they are willing (albeit currently unable) to satisfy the judgment debt for the reason that the First Respondent is currently unemployed. The First Respondent did say that he anticipated earning R40 000 a month in a new job. (One finds no update on this in the Respondents' answering affidavit to the application for summary judgment.) It is stated further that Second Respondent is employed in the real estate market, but that business conditions remain poor in the wake of the Covid pandemic. None of this is

¹⁰ Ndlovu v Ngcobo; Bekker v Jika 2003(1) SA 113 (SCA) para 19.

¹¹ See NPGS Protection & Security Services CC v FirstRand Bank Ltd 2020 (1) SA 494 (SCA) at paras 63–67.

documented.

32. This does not avail the Respondents. As we have seen, it is not alleged that they are indigent, nor that a sale in execution will render them homeless.¹²

33. Their unelaborated allegations regarding the effects of the pandemic add nothing; vague open-ended allegations do not stand in the way of summary judgment.¹³

34. In the premises I find that is fair and equitable for an order of special execution to issue. This will necessarily occasion distress for those subject to that remedy - even if they are not among the vulnerable and poor, with whom Rule 46A is primarily concerned. This disruption may be mitigated by suspending the execution order for a reasonable period to permit the Respondents to make the necessary arrangements.

RESERVE PRICE

35. Rule 46A(8)(e) empowers the court to set a reserve price, the purpose of which is to protect debtors by ensuring that homes are not sold in execution for prices well below market, potentially bequeathing them a crushing debt after they have already lost their homes. While Rule 46A(8) provides only that a court “may” set a reserve price, a court should ordinarily set such a price, save where special considerations suggest otherwise.¹⁴

36. Determining a reserve price is no exact science. The court must strike a balance between protecting the interests of the judgment creditor in recovering a substantial amount of what it is owed, on the one hand, and the aforementioned interests of the judgment debtor, on the other hand. The price should not be set so high as to hamper the expeditious realisation of the property's value - which is plainly in the interests of both debtor and creditor - nor so low as to operate unfairly to the debtor, who stands to see her or his accumulated equity built up over years evaporate in a forced sale.

37. According to the sworn independent valuation attached to the Applicant's

¹² Gundwana v Steko Development and Others 2011 (3) SA 608 (CC) para 53 (the principles embodied in Rule 46A enjoin courts, in ordering execution against immovable property, to have due regard to the impact upon judgment debtors “*who are poor and at risk of losing their homes.*”) (Emphasis added).

¹³ NPGS, supra para_67 (“A vague and unspecified mention of a personal residence without more does not suffice as a defence”.) The Court suggested also that excessive constraints upon execution may have an adverse unintended consequence, causing damage to the efficient provision of credit in the economy.

¹⁴ Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another [2018] ZAGPJHC 487 (12 September 2018), para 66.

supplemental affidavit, as of 5 October 2023 the market value of the property was R5 million. (A figure consistent with the Respondents' undocumented market value estimate in their plea). The Applicant's sworn independent valuation estimates the forced sale value of R4 million. Then, the Applicant's supplemental affidavit shows that the municipality lists R262 175.12 as owing in rates and taxes, while the homeowner's association reports outstanding levies of R160 951.93. Flowing from these figures, the Applicant proposes a reserve price of R3 576 872.95. I find this an appropriate figure, given the material that has served before this court and in the absence of opposition to that figure from the Respondents.

ORDER

38. It is ordered that:

38.1. The Respondents pay the Applicant the sum of R894 492.82 with interest thereon at the rate of 8.5% per annum calculated from 29 April 2019 to date of payment, both days inclusive.

38.2. The immovable property, properly described as:

Erf 1[...] S[...] Township

Registration division JR.

Gauteng

In extent, 1,966 metres squared.

Held under deed of transfer number T[...]

Subject to the conditions contained therein and further subject to the conditions imposed by the Home Owners Association. (The "Property"))

be declared executable for the foregoing amount, subject to suspension, this component of the present order being suspended for six months from the date hereof.

38.3. The Registrar of this Court is authorised and instructed to issue a warrant of execution against the immovable property and that it be sold by the Sheriff of the above Honourable Court at a duly constituted sale in execution, subject to a reserve price of R3 576 872.95.

38.4. The Respondents shall pay the Applicant's party-and-party costs at a scale prescribed in Scale A of Rule 69(7) of the Rules of Court with respect to costs incurred from 12 April 2024 and under the costs regime prevailing before that date with respect to costs incurred prior thereto.

SO ORDERED

OSBORNE AJ
Acting Judge of the High Court

