

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 29241/2017

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) NOT REVISED

DATE: 22-07-2022

SIGNATURE:

In the matter between:

ABSA BANK LIMITED

APPLICANT

and

KUTALA PENELOPE THONDLANA
(ID NO: 6[...])

RESPONDENT

Heard 16 April 2024

Delivered 24 July 2024

JUDGMENT

VAN DER MERWE, AJ

INTRODUCTION

1. This is an application wherein the Applicant seeks an order in terms of the

provisions of rule 46A to declare the Respondent's immovable property specially executable.¹

2. Monetary judgment has already been granted against the Respondent on 1 July 2017.²

BACKGROUND AND SALIENT FACTS

3. The parties entered into a home loan agreement during 2014, after which a mortgage bond was registered in favour of the Applicant over the Respondent's property.

4. The Respondent breached the terms of her loan agreement and fell into arrears with her monthly repayments. On 25 April 2017 the Applicant issued summons against the Respondent.

5. After service of the summons, at the Respondent's chosen *domicilium* address, the Respondent failed to file a notice of intention to defend. As a result of the, the Applicant applied for default judgment. Default judgment was granted for a monetary amount on 1 June 2017.³

6. The Applicant caused a writ of execution to be issued and on 19 June 2017, the said writ of execution was served personally on the Respondent. The sheriff, as a result attached movables. The said movables were not in satisfaction of the Applicant's judgment.

7. Subsequent to the aforesaid, and during April 2019, the Applicant issued a rule 46A application.

8. The Applicant could not affect personal service on the Respondent and on 19

¹ CL008-61

² CL008-80

³ CL008-80

March 2020 an order for substituted service was obtained.⁴

9. The rule 46A application was set down for hearing on 27 August 2020. The Respondent filed a notice of intention to oppose the application on 3 August 2020.

10. On 7 August 2020 the rule 46A application was removed from the roll.

11. The Respondent failed to file an answering affidavit and the Applicant set the rule 46A application down for hearing on 26 February 2021.

12. The Respondent launched a rescission application shortly before the hearing of the rule 46A application. Therefore, the application was removed from the roll.

13. The Applicant opposed the rescission of judgment application. The application was dismissed on 3 March 2022.⁵

14. As a result of the aforementioned, the Respondent launched an application for leave to appeal. The application for leave to appeal was dismissed on 31 October 2022.⁶

15. The Applicant proceeded to serve the rule 46A application on the Respondent on 23 February 2023.⁷ The Respondent delivered her answering affidavit on 26 May 2023⁸. The Applicant filed its replying affidavit on 8 August 2023.⁹ The application was set down for hearing on 15 April 2024.

16. The Applicant filed an arrears affidavit on 18 April 2023.¹⁰

17. The Applicant filed its heads of argument on 13 November 2023.¹¹

⁴ CL020-1 and 020-2

⁵ CL02-6

⁶ CL030-1 to 030-9

⁷ CL009-1

⁸ CL038-1

⁹ CL039-37

¹⁰ CL12-1

¹¹ CL040

18. The parties filed a joint practice note on 11 April 2024.¹²

19. The Respondent filed heads of argument on 11 April 2024.¹³

THE APPLICANT'S CASE

20. The parties entered into a home loan agreement, in terms of which monies were lent and advanced to the Respondent, in order to acquire the immovable property. The Respondent's indebtedness was secured by way of registration of a mortgage bond registered over the property.

21. The Respondent failed to comply with her payment obligations, and on 1 June 2017 monetary judgment was obtained.

22. The immovable property is the primary residence of the Respondent.

23. The application was duly served on the Local Authority and the managing agent.

24. In considering a reasonable reserve price, the relevant factors in terms of rule 46A(9)(b) are:

- (i) Estimated market value: R2 350 000.00;
- (ii) Municipal valuation: R1 838 000.00;
- (iii) Outstanding rates and taxes: R169 482.31;
- (iv) Arrear levies: R174 004.51;
- (v) Outstanding balance on home loan account: R1 662 303.14.

¹² CL A18-A24

¹³ CL018-3

25. The bond was registered in 2014, a fact which should be taken into account in setting the reserve price and the court should consider there were any improvements to or investment in the property.

26. In line with the decision in ***Absa Bank Ltd v Mokhebe and related cases 2018 (6) SA 492 (GJ) at 59:***

“What has been set out thus far, results in a court being placed in a position to determine the imposition of a reserve price that would not necessarily result in the debtor being left with no debt, but rather in a position resulting from a just and equitable process, and the application of the law. That may leave a debtor with or without a debt or even a balance in his or her favour. The capital growth of an investment such as a home is a factor that should be weighed- up with all other facts. The Full Court held in Firstrand Bank Ltd v Folscher and another and similar matters 2011 (4) SA 314 (GNP) at 39:

‘Bond finance is an important socio-economical tool, enabling individuals to acquire their own home, to make the most important investment of their lives, to build up a nest egg, and to eventually enjoy the fruits of capital growth, quite apart from acquiring an asset that may provide security for further access to capital’.

It is therefore necessary for a court to determine whether a reserve price should be set based on all the factors placed before it by both the creditor and the debtor, when granting an order declaring the property to be specially executable. If a debtor fails to place facts before the court despite the opportunity to do so, the court is bound to determine the matter without the benefit of the debtor’s input.”

27. The Respondent failed to advance any evidence in respect of the valuation of the property or any other factors in respect of setting a reserve price. Therefore, the court should rely on the figures presented by the Applicant.

28. The Applicant submits that the proposed reserve price in the amount of R1 304

513.00 will be fair and reasonable.

29. In setting a reserve price, the following should be kept in mind, as stated in paragraph 62 of the *Mokhebe* judgment *supra*:

“[62] We are of the view that setting a reserve price would depend on the facts of each case. Some facts may indicate that the debt is so hopelessly in excess of the value of the property that the reserve price would be irrelevant compared to the value of the property. Yet, if the debt is not satisfied by the proceeds of the sale of the property, a debtor still remains liable for any balance after realization of the property. In all the circumstances, a reserve price should be set in all matters where facts indicate it.”

30. The Applicant raised a point *in limine* in that there was no proper answering affidavit before the Honourable Court, but this point *in limine* was abandoned by Applicant’s counsel during argument.

THE RESPONDENT’S CASE

31. The Respondent’s opposition, as contained in her answering affidavit, are based on the following:

1. She is a pensioner and 63 years of age and earns her pension of R5 000.00 per month from the Department of Defence and Military Veterans.
2. The Respondent resides in the immovable property together with her 2 daughters and 4 grandchildren. One of her daughters are employed and earns R15 000.00 per month. This daughter’s salary will cover the rates and taxes in the amount of R3 000.00.
3. As of 1 June 2023, a tenant is renting the house and is paying an amount of R25 000.00 for the monthly rental of the property. This rental will be able to cover the instalment due to the Applicant.

4. The Respondent, together with her dependents, are all staying in the servant's quarters while the rest of the house is rented out. They cannot afford to be evicted as they would have no place to go and they have limited resources.

5. The Respondent has applied for a military veteran subsidy in the value of R320 000.00 which will be paid to the Applicant, to reduce some of the arrears.

6. The Respondent avers that there is an insurance policy assigned to the home loan agreement and mortgage bond, which entails that if she becomes unable to pay the instalments, that the insurance policy would be activated and would settle the arrear instalments.

7. The arrears of the account is disputed by the Respondent, on the basis that it is more than the judgment amount.

8. The Respondent avers that she is a pensioner heading the household, and the household has a right to housing as enshrined in section 26 of the Constitution. Therefore, executability should be the last resort to satisfy the judgment debt and she would like to be afforded an opportunity to settle the arrears.

9. The Respondent also denies the valuation, as claimed by the Applicant, as she never allowed anyone access to the property to do a proper valuation.

THE APPLICANT'S CASE IN REPLY

32. If it is accepted that the Respondent is giving an undertaking that the rental amount of R25 000.00 will be paid towards the instalment, which is currently R26 604.39, the payment in the amount of R25 000.00 per month will not cover the current instalment and will not be enough to extinguish the arrear amount owing.

33. Should the rental amount of R25 000.00 per month not be paid towards the home loan agreement, the Honourable Court should frown upon the way the

Respondent is conducting her affairs and her approach to this property.

34. The instalment of the home loan agreement was subject to a variable interest rate and for a fixed term, and as such, it follows that the instalment will vary with the fluctuation in the interest rate. Since the Respondent failed to make payments, the instalment will also increase as the loan needs to be paid back over a fixed period. The last payment made in respect of this home loan account was 28 July 2016 in the amount of R32 492.48.

35. The total amount outstanding on the rates and taxes are R169 482.31. The Respondent makes no mention as to how these arrears will be settled. If regard has to be had to annexure "D" to the founding affidavit, the arrear levies are R174 004.51. The Respondent further makes no mention as to how these arrears will be settled either.

36. Among the factors the court should consider is the arrear rates and taxes. It is the Applicant's case that the Respondent simply cannot afford this property and she refuses to sell same and find affordable accommodation.

37. The immovable property is the Applicant's only security for the monies lent and the Respondent to acquire the property. The Respondent has stopped making payment and wants to reside free of charge in this property.

38. Rule 46A provides for a fine balance to protect both parties, but with the reality of the arrears and payment history of this account, the Applicant's relief should be granted. The Respondent should seek more affordable accommodation.

39. The Respondent attached no proof of either the applications for a Military Veteran Subsidy or that it would be in the amount of R320 000.00. In the absence of any such evidence, the allegation as to a subsidy cannot be regarded as an alternative means to satisfy the judgment debt.

40. The only insurance policy assigned to the property, is homeowners' insurance. The Respondent, in her supplementary affidavit to her rescission application, alleged

that there was unemployment insurance cover included in the home loan agreement. The Applicant denies the existence of any such insurance.

41. In the judgment, dismissing the rescission application, the Honourable Court stated, amongst others, regarding the unemployment insurance, in paragraph 43:

“But – with respect – those stories have a ring of a fictional story. I fully agree with counsel for Absa when he labels the “insurance issue” a “made up story”: A fabrication devoid of any truth”.¹⁴

[Par 43 of judgment]

42. In the judgment dismissing the application for leave to appeal the Honourable Court stated the following, regarding unemployment insurance:

“I rejected the issue about the unemployment insurance as farfetched and made-up”.¹⁵

[Par 15 of the judgment]

43. The homeowners insurance was provided for in the home loan agreement, which was attached to the combined summons. There was no obligation to attach any form of insurance to the rule 46A application.

44. Despite two judgments that rejected the Respondent’s contention that she is relying on unemployment insurance of some sort, the Respondent is still steadfast in her reliance on same. It is interesting that neither in her rescission of judgment application nor in her supplementary affidavit nor in her answering affidavit to the rule 46A application, does the Respondent attach any documentary evidence to prove the existence of any insurance she relies upon.

45. The default judgment was granted as far back as 1 June 2017. The Respondent’s attempt to have same rescinded was unsuccessful, and therefore, the default judgment order stands and is enforceable.

46. The judgment debt was for R1 662 303.14, which represents the full balance

¹⁴ CL026-16

¹⁵ CL030-6

outstanding on the bond. The initial loan amount was the amount of R1 528 800.00. What the Respondent elects to ignore is the interest to be paid, insurance premium for the homeowners insurance and other ancillary fees applicable to the loan agreement. As the Respondent simply stopped making payment, the arrears at the time the founding affidavit was deposed to, was an amount of R521 122.57.

47. The Respondent has failed to provide alternative means to satisfy the judgment debt. The payment of the rental amount into the bond account would in no way satisfy the judgment debt or settle the arrears. There is unfortunately no other alternative available than to declare the property specially executable.

48. The Respondent's permission to value the property is not required. It would have been to the Respondent's advantage should she have provided her cooperation in assisting the appointed valuer. In terms of the valuation report the valuer states the following:

(i) The valuation was done on 17 November 2022;

(ii) An external evaluation had to be conducted as no internal access was granted after, three unsuccessful attempts to contact the Respondent.

49. In terms of the provisions of rule 46A, there is a duty on the Respondent should she not agree with the figures presented by the Applicant, to provide evidence as to the value of the property. The Respondent dismally failed in this regard, and as such, the Honourable Court is bound to accept the figures as presented by the Applicant.

50. The Respondent avers that she earns R5 000.00 pension per month. The option of negotiating a settlement cannot be considered, as the Respondent's income would not be sufficient to pay the instalment due together with an amount towards the arrears.

51. The constitutional right to housing in terms of section 26 of the Constitution caters for the right to adequate housing, and not the entitlement to remain in occupation of a property with a market value of more than R2 000 000.00. The rights

in section 26 of the Constitution are to protect the vulnerable and indigent.

THE FILING OF AFFIDAVITS

52. The Respondent in her heads of argument filed belatedly on 11 April 2024, raises a few preliminary points. They are the following:

52.1 The replying affidavit of the Applicant is out of time and therefore not properly before court.

52.2 The answering affidavit was filed on 6 June 2023 and the replying affidavit only served and filed on 8 August 2023. There is no condonation for the late filing of the replying affidavit.

52.3 On 4 April 2024 the Applicant loaded a supplementary affidavit on Caselines. The supplementary affidavit was not served on the Respondent, and therefore the Respondent did not have sight of the affidavit, and was denied an opportunity to respond to the affidavit. The Respondent submitted that if the Applicant intends to rely on the supplementary affidavit, the Respondent should be given an opportunity to respond.

53. The purpose of the filing of the supplementary affidavit was to address the current amount owing to the municipality and body corporate and the updated arrears.

54. It was indicated by the Applicant's counsel that the supplementary affidavit was uploaded for the sole purpose to assist the court in determining a reserve price. The Respondent's legal representative submitted that the Respondent wanted to reply to the supplementary affidavit. On that score, the Applicant withdrew its supplementary affidavit and removed it from Caselines.

55. The matter stood down until the 16th of April 2024 for further argument.

56. These facts are common cause between the parties. The following is to be

noted in terms of the filing of the answering- and replying affidavits, and cannot be disputed by either party:

56.1 The Respondent filed its notice of intention to oppose ostensibly on 26 March 2023.

56.2 The Respondent filed its answering affidavit only on 26 May 2023. Therefore, the answering affidavit was served out of time. The Respondent failed to request the court's condonation in this regard.

56.3 The Applicant filed its replying affidavit on 8 August 2023.

57. Therefore, the Applicant's replying affidavit was also filed out of time, and the Applicant also did not request condonation in this regard. Therefore, neither the Applicant nor the Respondent requested the court's condonation for the late filing of their respective affidavits.

58. The court requested the Respondent's counsel to indicate what the prejudice would be if the replying affidavit was allowed. The Respondent's counsel indicated that only the Respondent's version should be before court, and if the replying affidavit is allowed, the Applicant's version will be before court.

59. The court enquired from the Respondent's counsel whether a rule 30 notice was filed to object against the late filing of the Applicant's replying affidavit. Both counsels confirmed that this was not done.

60. The court was referred by the Applicant's counsel to the matter of ***Pangbourne Properties Ltd v Pulse Moving CC and another 2013 (3) SA 140 (GSJ)***. This judgment had similar facts, in that both the answering affidavit of the Respondent and the replying affidavit of the Applicant was filed out of time. Paragraph 19 of the judgment states the following:

"[19] There is no allegation of prejudice to any party nor have I been referred to any such prejudice if the matter is to be disposed of on its merits despite the

late filing of the answering and replying affidavits. The failure of the Respondent to utilize the provisions of rule 30 regarding the setting aside of irregular proceedings strengthens my view that neither party was prejudiced by the late filing of the affidavit. It is in the interest of justice that the affidavits be taken into account and that the matter be finalised and unnecessary additional costs be avoided. Insofar as it may be necessary and within my discretion to allow the late filing of the answering affidavit and the late replying affidavit, I do so in order to decide the merits of a dispute between the parties unfettered by technicalities.”

61. I agree with the sentiments expressed in the *Pangborne Properties* matter. On the issue before me regarding the affidavits, I found that in the absence of any prejudice suffered by the parties, and since the court has already been seized with the matter, that the matter was properly before me and there was no need for either party to bring a condonation application in this regard.

62. It is also to be noted that the Respondent did not file a rule 30 notice in objection to the Applicant's late filing of its replying affidavit.

63. The matter therefore proceeded on the merits of the application.

64. The Respondent's counsel submitted that it wanted a postponement in the matter to place further evidence before court, as there were developments in the Respondent's case. The notice of set down in this matter was served 29 January 2024, some three months ago. I asked counsel why he did not take instructions earlier, whereafter he said he was just informed today of the further developments in the matter that he wanted to place before court. In the absence of any substantive application for postponement, I refused the Respondent's request and the matter proceeded on the merits.

RULE 46A APPLICATION

65. The Applicant's counsel abandoned the point *in limine* raised by the Applicant in respect of the Respondent's answering affidavit.

Defence raised by the Respondent in respect of an insurance policy and military subsidy

66. Paragraph 23 of the answering affidavit provides as follows:

“AD PARAGRAPH 3 THEREOF

This paragraph is denied, in that if the deponent had personal knowledge he would have noticed that, there was an insurance policy assigned in the said house. This clearly shows that the deponent does not have personal knowledge of the facts.”¹⁶

67. Paragraph 25 of the answering affidavit reads as follows:

“AD PARAGRAPH 6 THEREOF

This paragraph is denied. When I signed the mortgage bond I also signed an insurance policy to pay in the event I am unable to pay, but the Applicant deliberately failed to attach same to the papers though they admit the insurance policy they deny that it was for this purpose.”

68. Paragraph 26 of the answering affidavit reads as follows:

“AD PARAGRAPH 7 THEREOF

This paragraph is denied in that the insurance policy should have kicked in and paid for the bond.”

69. The Respondent further avers that she is a member of military veterans and entitled to a subsidy of R320 000.00, that was then R188 000.00. She avers that she is in the process of accessing that subsidy, as the Department of Defence and

¹⁶ CL038-9

Military Veterans is in the process of making payment.¹⁷ It would seem that the “insurance defence” raised by the Respondent was also raised in her application for rescission of judgment. In paragraph 16.5 of the Applicant’s supplementary affidavit to the rescission of judgment the following was alleged:

“16.5 That the Respondent required me to have insurance against any damage or loss of the property due to unforeseen events including natural disaster; and

16.6 That in addition to the above, I personally requested that the Respondent’s representative include insurance against death, disability and loss of employment, which was to be paid for a specified period which I cannot clearly recall”.

70. This issue was further elaborated on in the Respondent’s supplementary affidavit from paragraph 17 – 26, where the Respondent avers that she took out some or other insurance through the Applicant, that should she be unemployed the insurance fund would honour her monthly instalment due to the Applicant.

71. In the judgment of the rescission application, delivered on 3 March 2022, the Honourable Manamela AJ concluded in respect of the alleged unemployment insurance policy taken out by the Respondent, the following:

“Unemployment Insurance

[21] The so-called “employment insurance is denied by Absa. The only insurance cover that was included as part of its transaction with Absa was for damage or destruction of the property (the home loan insurance). The premium for the home loan insurance formed part of the costs of the loan. The applicant ought to have applied through her own broker for any unemployment insurance. The unemployment insurance does not form part of the home loan insurance but Absa points out that there is actually no record of a premium being demanded or paid by the applicant for the unemployment insurance. Absa finds

¹⁷ CL038-11 Answering affidavit, paras 29.3 and 29.4

it curious that the applicant did not mention the insurance in her affidavit for a postponed filed in related proceedings in October 2017. This proves that the “insurance” issue is a “made-up story”, a fabrication and therefore devoid of any truth”.

72. Therefore, this court already concluded that the insurance policy against unemployment, as alleged by the Respondent and utilized as a defence to this application, holds no merit, and that such insurance policy does not exist.

73. In the absence of any proof thereof in the current matter, I also find that the alleged insurance policy does not exist. If it existed, the insurance policy and the details thereof should have been attached to the Respondent's answering affidavit in this application. I agree with the Applicant's counsel's submission that this defence relating to the insurance policy should not have been raised as a defence in the rule 46A application, as the court already found that the insurance did not exist. That judgment stands, and therefore raising this issue again is *mala fide*.

IS EXECUTION AGAINST THE IMMOVABLE PROPERTY WARRANTED AND DOES THE RESPONDENT HAVE ALTERNATIVE MEANS TO SATISFY THE JUDGMENT DEBT

74. The Respondent makes the following averments in respect of alternative means to satisfy the amount owing to the Applicant:

74.1 The Respondent's daughter, Thando Nomvethe is working at Inter Africa Resources and earning R15 000.00 per month. She avers that her daughter shall cover the rates and taxes which is the vicinity of R3 000.00 per month.

74.2 The Respondent further averred that she has applied for a military veteran subsidy of R188 000.00 which has been increased to R320 000.00 which she intends to utilize towards the arrears.

74.3 The Respondent further avers that the property is being rented out for R25 000.00 per month which will be utilized towards the monthly instalment of

R24 972.00.

75. Further in consideration whether the execution of the property is warranted, the Respondent avers that she is a pensioner 63 years of age, that she lives in the house with her two daughters and her four granddaughters. They will be staying in the servant's quarters, and that they cannot afford to be evicted from the house as they would have no other place to stay.

76. The Respondent's counsel indicated that the Respondent has alternative means to make payments, and that there were several developments that happened since the filing of the answering affidavit. The Respondent wanted some time to make significant payment towards the arrears. The Respondent's counsel informed the court that the property is not being rented out and that the Respondent never proceeded with the lease agreement. He further indicated that the veteran's allowance is a slow process and it has not been finalized yet. It is to be noted that no proof of any veteran's allowance is attached to the Respondent's answering affidavit. The Respondent's counsel submitted that the rule 46A application should be suspended for 12 months for the Respondent to settle the arrear amounts.

77. It is therefore clear, following submissions on behalf of the Respondent that the R25 000.00 allegedly to be paid from the rental of the property is not objectively possible, as the property is not being rented out. Such payment is in any event, short payment of the instalment, let alone the arrears on the property. There are no allegations from the Respondent as to how she intends to settle the arrear rates and taxes or arrear levies, save for R3 000.00 of her daughter's salary to be utilized towards the current arrear rates and taxes. I therefore find it unfortunate that the Respondent has not demonstrated to this court that she has any alternative means to satisfy the judgment debt, the outstanding levies, or the arrear rates and taxes.

78. In arriving at an appropriate order, I had regard to rule 46A(5) to consider amongst other things, the market value of the property, the local authority valuation, the amount owing in respect of the mortgage bond, the amount owing to the local authority in rates and taxes, and amount owing to the body corporate as levies.

79. Save to dispute that the property was properly valued, as Respondent did not give the Applicant access to the property, the following averments made by the Applicant is ostensibly not disputed by the Respondent:

79.1 The property is the Respondent's primary residence and occupied by the Respondent;

79.2 The debt incurred was in order to acquire the immovable property sought to be declared specially executable. The arrears on the property, when the rule 46A application was issued, was R1 521 122.57, which amount to 60.91 instalments. In the replying affidavit the arrears escalated to R1 650 660.63. The last payment received in respect of the property was an amount of R17 447.27 either in March or April 2018;

79.3 The municipal valuation amounted to R1 838 000.00;

79.4 The market value of R2 350 000.00;

79.5 Outstanding rates and taxes amount to R159 482.41;

79.6 Arrear levies amount to R174 004.51; and

79.7 The outstanding balance on the bond R1 662 303.14.

80. The mortgaged property can be described as a residential property comprising of a lounge, a dining room, a kitchen, 3 bedrooms, 3 bathrooms, a separate toilet, a double garage, servant's quarters consisting of 1 bedroom and 1 bathroom. The property is situated in Strubensvalley located within A[...] V[...] Estate.

81. The mortgage bond registered over the property was to secure the indebtedness of the Respondent towards the Applicant under the home loan agreement. The property is the Applicant's only security for the indebtedness of the Respondent under the home loan agreement. It is not in dispute that the Respondent willingly put up the immovable property as security for the loan, and that the

Respondent was aware that in the event of a default, the Applicant would seek to realize the security and to execute against the property.

82. In terms of subrule 8(d) a court, in considering an application under rule 46A, may order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt. Objectively, it does not seem that there is any satisfactory means to the Respondent's disposal to satisfy the judgment debt. The Respondent has not made any payments towards the mortgage bond since 2018.

83. The Respondent is a pensioner seemingly not earning any income. The household seems to be dependent upon the Respondent's pension and her daughter for financial support. There were no facts placed before this court that would demonstrate that the Respondent's financial situation stands to be improved. It is not proven that the Respondent has any independent means to pay anything towards the arrears or the currently monthly instalment.

84. There seems to be no real substance in the Respondent's allegation that the Respondent would be able to satisfy the judgment debt within 12 months' time, or that she would somehow be able to repay the substantial arrears on the home loan account. It is also to be mentioned that the Respondent has failed to apply for debt review or to rely on any rights in terms of the provisions of the National Credit Act.

85. The Respondent alleges that her daughters and granddaughters are staying with her and that they will have no alternative accommodation as they have no independent means. It is an unfortunate situation, but a harsh reality that the Respondent has to face. It is also to be noted that judgment in this matter has already been granted as far back as 2017, and that the Respondent has used all available remedies to her disposal to delay execution in this matter. It is unfortunate, but it is time that the Respondent realizes that it is the end of the road, and that she needs to obtain alternative housing, as she can no longer stay in a property that she cannot afford and that she is not paying.

86. It is also to be remembered that it remains open to the Respondent to remedy

her default in terms of the home loan account by paying to the Applicant the arrear amount, overdue amounts and together with the Applicant's costs and charges as contemplated in terms of section 129(4) of the National Credit Act, and also as was decided in ***Nkata v Firststrand Bank Ltd and others 2016 (4) SA 257 (CC) at 131 and Duma v Absa Bank Ltd 2018 (4) SA 463 (GP) at 17.***

87. The Respondent has the right to remedy her default until the proceeds from a sale in execution have been realized. Therefore, the Respondent has a further opportunity to reinstate her account and to settle the arrear amount.

88. The application of section 26 of the Constitution and the implication of rule 46A was analysed and discussed in the matter of ***Bestbier and others NNO v Nedbank Ltd 2023 (4) SA 25 (SCA):***

*"It is trite that the Constitution of South Africa provides for justiciable socio-economic rights and this includes the right to have access to adequate housing which is enshrined in section 26 of the Constitution. The underlying rationale of rule 46A is to impose procedural rules to give effect to that fundamental right. Rule 46A must therefore be interpreted purposefully against the backdrop of section 26 of the Constitution which grants access to housing."*¹⁸

89. "...the construction and the order of *Jafhta*¹⁹ recognized that the sale in execution of a person's home limits the right to housing, and such limitation must be justifiable in terms of section 36 of the Constitution. Thus, judicial oversight was an essential element of the application for the sale in execution of a residential home."²⁰

90. Having considered all the circumstances in the matter, I am persuaded that no other reasonable alternative exists for the Applicant to enforce its rights.

91. A declaration of the immovable property as executable would, in the present matter, not constitute an abuse of process and would not infringe on the

¹⁸ Bestbier at par 8

¹⁹ *Jafhta v Schoeman and others; Van Rooyen v Stoltz and others 2005 (2) SA 140 (CC)*

²⁰ Bestbier at par 11

Respondent's fundamental right to access to adequate housing in terms of section 26 of the Constitution of the Republic of South Africa. There appears to be no disproportionality between execution against the property and the other possible means to exact payment of the judgment debt.²¹ No other possible means to satisfy the judgment debt exists, and no factors were placed before court by the Respondent, to her own detriment. I am therefore inclined to exercise my discretion in favour of the Applicant, and in my view, the execution against the immovable property is warranted.

RESERVE PRICE

92. The property is the Respondent's primary residence and therefore it is imperative that a reserve price be set, having considered the matter and having considered the factors set out in subrule 9(b).

93. It is contended by the Applicant's counsel at the hearing of the application that should a reserve price be set, that it be an amount of R1 301 513.00, which reserve price takes into consideration all the relevant factors.

94. The Respondent, in argument contended it should be R2 100 000.00 which is in line with the municipal valuation. In my view, the approach suggested by the Applicant seems to be more realistic in the prevailing circumstances.

95. It was lastly suggested, in argument on behalf of the Respondent, that the matter be kept in abeyance for 12 months in order for the Respondent to settle the arrears. I am not in agreement with this contention, and as mentioned previously, nothing prevents the Respondent from settling the arrears before the execution of the property has been realized.

In the circumstances, I grant judgment in favour of the Applicant against the Respondent for:

²¹ NPGS Protection & Security Services CC v Firstrand Bank Ltd 2020 (1) SA 494 (SCA) at 509E-G

1. An order declaring the Respondent's property:

PORTION 2[...] OF ERF 9[...], STRUBENSVALLEY, EXTENSION 10 TOWNSHIP, Registration Division IQ, province of Gauteng, held under deed of transfer **T21843/2014 (SITUATED AT DOOR 2[...], A[...] V[...] ESTATE, B[...] AVENUE, STRUBENSVALLEY, EXTENSION 10)** mortgaged under mortgage bond **B[...]** and held under Deed of Transfer T21843/2014 ("the property") to be specially executable for the sum of R1 662 303.14 plus interest thereon at the rate of 11.25% per annum, from 28 March 2017 to date of payment;

2. The registrar is authorized to issue a warrant of execution for the attachment of the property.
3. The sheriff is authorized to execute a warrant of execution for the attachment of the property.
4. The property is be sold at a sale in execution with a reserve price of R1 301 513.00.
5. The Respondent is ordered to pay the costs of the application, on an attorney and client scale, including costs of counsel on Scale B.

VAN DER MERWE AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION
PRETORIA

For the Applicant: Adv J Minnaar

Instructed by: Hammond Pole Majola Inc.

For the Respondent: Mr T Faku

Instructed by: T Faku Inc.