

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: **18696/2023**

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA
(Registration Number: 1962/000738/06

Plaintiff/Applicant

and

RAY GRAHAM VAN NELSON
(Identity Number: 8[...])

First Defendant/Respondent

CHANTEL VAN NELSON
(Identity Number: 8[...])

Second Defendant/Respondent

REASONS

GOLDEN AJ:

- [1] This application came before me in Third Division on 22 February 2024. I dismissed the application. The plaintiff, Standard Bank of South Africa ("*Standard Bank*") has requested reasons for the Order. These are my reasons.
- [2] Standard Bank applied for default judgment and an order in terms of Rule 46A to declare the respondents' immovable property described as Erf 1[...], Cape Town ("*the property*") executable, subject to a reserve price and to authorise the Registrar of the High Court to issue a Writ in Execution against the immovable property. It also sought costs on an attorney and client scale and condonation for non-compliance with Rule 46A(3)(d) that the Court accept service of the application on the respondents as proper service.
- [3] As is the practice with Rule 46A applications in Third Division, Standard Bank sought both the money judgment and an order to execute on the mortgaged property in one application. The special execution order is ought to satisfy the debt owed by the respondent debtors.
- [4] The facts are the following.
- [5] The mortgage bond was registered in favour of Standard Bank on 13 August 2013.
- [6] The monthly instalment on the bond was R5 137.68.
- [7] The respondents first fell into arrears under the loan agreement on or about July 2023.
- [8] They were three months in arrears as of 29 September 2023 in the amount of R16 064.32.
- [9] The full balance outstanding in terms of the mortgage loan agreement as at 29 September 2023, was R432 931.04.

- [10] According to Standard Bank, the respondents were in breach of the mortgage loan agreement since 29 September 2023.
- [11] On 3 October 2023, Standard Bank addressed a letter of default and Notice in Terms of Section 86(10) of the National Credit Act (“NCA”), to the respondents, the debt counsellor and the National Credit Regulator to inform the respondents *inter alia* that they were in breach of the loan agreement when they failed to make payment of the full monthly instalment due.
- [12] The arrears were hardly three months old, and the bank proceeded to issue summons on 18 October 2023 seeking a money judgment and an order in terms of Rule 46A to execute against the property for satisfaction of the accelerated debt.
- [13] I must determine the application in terms of Rule 31, Rule 46A and the Western Cape Practice Directive 33A.
- [14] Erasmus, in “*Superior Court Practice*”, recognises that Rule 31 makes provision not only for default judgment on a claim which is for a debt or liquidated demand where the defendant is in default of delivery of a Notice of Intention to Defend or a Plea, but also an Order by the Court declaring residential property specially executable where the claim is for a debt or liquidated demand and the defendant is in default of delivery of a Notice of Intention to Defend or a Plea.
- [15] There are common features in these applications. The respondents are mostly working class and/or indigent debtors, and where the mortgaged property is almost always in the poorer areas of the Western Cape. The debtors almost always have significant arrears and where they have been in arrears for some time prior to the application.
- [16] It does not mean that because the respondents did not oppose the application, that the application was there for the taking. I am required to approach these applications cautiously, given the more so given the potential

far-reaching consequences that will inevitably arise when a family loses their home and that the respondents and their minor children may be deprived of their rights in terms of Section 26 of the Constitution. Indeed, the Court's rigorous investigative function in Rule 46A applications was confirmed in *ABSA Bank Ltd v Njolomba & Another and Other Cases* 2018 (5) SA 548 (GJ).

- [17] A court shall not authorise execution against immovable property which is the primary residence unless the Court, having considered all the factors, considers that such an Order is warranted (*Williams and Another v Standard Bank of SA Ltd and Another* 2022 (6) SA 629 (WCC)).
- [18] The Court in *Standard Bank v Lamont* 2022 (3) SA 537 (GJ), held that a balance must be struck between the rights of the execution creditor to enforce its contractual rights and the protection of a debtor's right to housing.
- [19] It is perhaps necessary to state the obvious that the requirements for a default judgment application must be properly demonstrated.
- [20] The founding affidavit in the application alleged that personal service was effected by the Sheriff on the respondents at the residential address on 23 November 2023. The deponent avers that Standard Bank has instructed its attorney of record to inform the Court how the application was served on the respondents and any other party who may be affected by the relief sought in the application, since this information is not available to him at the time of commissioning the affidavit. He refers in this regard to the affidavit filed pursuant to Practice Directive 33A ("the 33A affidavit").
- [21] In the 33A affidavit deposed to by Ms Geesje Maria de Wet dated 14 February 2024, the bank's attorney of record, Ms de Wet confirms that the application was personally served by the Sheriff on both respondents on 6 December 2023. This is inconsistent with the returns of service attached to the papers

which reflect that the application was served on the respondents on 24 January 2024.

- [22] The founding affidavit also avers, as at the date of the application, that the bank is not aware of any other affected parties who require service of the application or other persons occupying the premises. The third return of service dated 26 January 2024 however records that the respondents have two minor children aged 9 and 12 years. No mention of this is made in the 33A affidavit, even if the bank itself did not have knowledge of this information prior to the service of the application. In fact, the founding affidavit pertinently alleges that there are no dependents and/or elderly persons and/or disabled persons occupying the property.
- [23] The affidavit also alleges that the bank does not know if the respondents are employed, has no further information relating to their financial position and that they have been invited to place any relevant circumstances before the Court since this information is not available to the bank. The 33A affidavit however avers that the respondents had, as at 14 February 2024, telephonically confirmed that they are employed full-time.
- [24] Standard Bank avers that the respondents were afforded the opportunity to remedy the breach in terms of the mortgage loan agreement and despite being in breach of the agreement since 29 September 2023, have failed to do so.
- [25] Standard Bank avers that the total amount owing by the respondents are substantial and that it will be prejudiced if it cannot recover a portion of the amount due to it by executing against the property. It also alleges, given the amount due to it, that it is unlikely that the respondents will be in a position to satisfy any judgment granted, either by way of payment by way of attachment and sale of movable property. It alleges that there is no reasonable possibility that the respondents' breach of the loan agreement will be cured within a reasonable period and that the bank therefore has no alternative but to execute against the immovable property.

- [26] It alleges that it took all reasonable steps to conclude a suitable arrangement with the respondents to settle their outstanding obligations to avoid foreclosure which included, *inter alia*, telephone calls to the respondents to investigate the possibility of entering into a reasonable arrangement to settle the total arrears on the mortgage loan account in monthly instalments.
- [27] The bank alleges that it allowed the respondents an indulgence of being in arrears with monthly instalments for a total period of three months before commencing legal proceedings. This is not entirely consistent with the facts which shows that the arrears amounted to 2.8 months.
- [28] The allegation is also made that further attempts by the bank's attorney were made to contact the respondents to enter into a suitable arrangement to settle the arrears. (This averment in paragraph 15.5 of the founding affidavit is unclear as it is also alleged that the bank could not confirm whether the respondents reside at the mortgaged property). However, no mention of this is made in the 33A affidavit. No information is placed before the Court, as to what payment arrangements, if any, were proposed to the respondents, and when. I do not know what steps were taken, when, and what transpired when a payment arrangement could not be concluded. The bank was also inconsistent as to whether the respondents resided at the property. The 33A affidavit alleges that the property is assumed to be the primary home of the respondents. In terms of the Particulars of Claim, it is alleged that to the bank's knowledge, the property is currently occupied by the respondents and is utilised for residential purposes.
- [29] The bank alleges that the respondents' latest arrears as at 19 December 2023, amounted to R14 477.36. Notwithstanding that the affidavit was deposed to on 16 January 2024, the affidavit does not at all acknowledge the payment of R6 000.00 which the respondents made on 2 January 2024, although the payment is mentioned in the practice note. This is an important factor which the Court must consider in the respondents' ability to settle the arrears in the form of a reasonable payment plan, given that the

arrears amounted to a default period of only 2.8 months. It is not unreasonable to infer that the respondents, having made a payment in January 2024, may have been able at least at this stage to conclude a payment arrangement to cure the arrears. Given the paucity of information in the application surrounding the efforts made and engagements with the respondents to conclude a reasonable payment plan, it was difficult to discern whether the engagements occurred before or after the payment was made.

[30] Aside from these deficiencies and discrepancies in the application, the application to declare the property specially executable in order to satisfy a debt arising from arrears of approximately 2.8 months, is, in my view, wholly disproportionate to the arrears. The proportionality of the remedy is an important factor in the exercise of the Court's discretion of a Rule 46A application.

[31] In *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC), the Constitutional Court held that the execution against a primary residence must be a proportionate response to the respondent's default. It held that execution itself is not an odious thing and that it is part and parcel of normal economic life. It is only when 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 alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.

[32] The proportionality factor was more recently applied in *ABSA v Gontsana* 2023 (3) SA 530 (GJ), where the Court held that the execution order must be evaluated on the facts as they stand. The Court recognised that courts regularly suspend execution orders to allow a debtor the chance to make good their arrears and held that a court need only be satisfied that suspension is in the interests of justice. This entails an examination as to whether the person against whom the order operates will suffer an injustice if the order is not suspended, and whether a suspension would be duly prejudicial to the

person in whose favour the order was granted (see also *Soja Ltd v Land Development Corp* 1981 (2) SA 407 (W) at 411E-F).

- [33] In Gontsana the Court held that what remains of the judgment debt has been calculated, it may be possible to explore the avenues available to enable Gontsana to pay it off, and whether the quantum remaining, and the Gontsanas' capacity to repay the amount, it would be proportionate to the outcome of the execution against them.
- [34] At the commencement of legal proceedings (which I assume was 22 October 2023) the respondents' arrears amounted to R16 064.32.
- [35] As at 19 December 2023 the arrears amounted to R14 477.36.
- [36] It is fair to assume that if the arrears were less in December 2023, that the respondents must have made a payment in the period between October and December 2023.
- [37] The arrears were never more than 2.8 months.
- [38] Certainly, by the time that the application served before me, the arrears amounted to 2.8 months.
- [39] It is incumbent upon the execution creditor to persuade the court, upon a consideration of all the facts, that execution against the property is warranted. (*Williams & Another v Standard Bank* 2022 (6) SA 629 (WCC))
- [40] Rule 46A confers a discretion on the Court to grant or refuse the application, which discretion must be judicially exercised. Judicial oversight permits the court to consider all the relevant factors of a case to determine whether there is good cause to order execution (*Japhta v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC) at paragraph [55]).

[41] The Court retains a general discretion in terms of Section 173 of the Constitution to regulate its own processes and that the exercise of this general discretion is subject to the interests of justice which entails a careful weighing up of factors (*United Democratic Movement and Another v Lebashe Investment Group (Pty)Ltd & Others* 2023 (1) SA 353 (CC)).

[42] In *Williams* the Court held that Rule 46A confers a discretion on the Court to determine whether or not it would be appropriate to authorise execution against a residential property, which discretion is to be exercised judicially, having regard to the factors set out in the rule. It held that the task of the Court is to ensure that execution against primary residence of the judgment debtor would not be disproportionate in all the circumstances of the case, hence the requirement that execution may only be authorised when there is no other satisfactory way to satisfy the judgment debt (see also *Japhta v Schoeman; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC)).

[43] The Full Bench of this division in *Standard Bank of South Africa Limited v Hendricks and Another* 2019 (2) SA 620 (WCC) took the view that the stated practice of the bank should be adhered to in providing a number of months to debtors to settle outstanding arrears, rather than sanctioning an approach to the Court for a “trifling debt” after a very limited period of time and without appropriate steps being taken to resolve the matter. The Court held:

“We consider it impossible to provide a benchmark for arrears justifying an approach to court. While we accept that there have been differing approaches by judges to the issue, this remains a unique enquiry undertaken in the exercise of a court’s judicial oversight. To lay down a standard approach will be contrary to the constitutional imperative of judicial oversight in foreclosure matters.”

[44] The Court held that a loan agreement secured by a mortgage bond over the primary residence of the judgment debtor has the potential to impact the Section 26 right of access to housing, with the money order causally connected to and intrinsically linked to the order of special execution given the

existence of the mortgage bond over the primary residence of the debtor. The Court recognised that in the vast majority of cases the satisfaction of the money judgment will not be possible other than through a sale in execution of the immovable property, with a clear distinction therefore existing between a loan agreement secured by a mortgage bond registered over the debtor's immovable property and a loan agreement which does not. Where the immovable property is the primary residence of the debtor, this puts the nature of the entire transaction into a different category, one which, when the application for both orders is considered simultaneously in the manner supported by the banks, engages Section 26 of the Constitution. As a result, so the Court held, having regard to the debtor's Section 26 right, the money judgment may be postponed together with the order for special execution where a court, on a proper consideration of the facts before it, considers this to be in the interests of justice. In paragraph [49] of the judgment, the Court held that:

“The practice in this division has developed in which certain banks proceed to court to seek both the money judgment and an order of special execution when the debtor is only two months in arrears with payments on his/her loan account. Granting an order in circumstances of trifling arrears does not strike the balance between the interests of the parties in the manner contemplated by the National Credit Act.”

[45] The Court then held that, having regard to the competing interests of the parties and given the relationship between both the money order and the order of special execution, Section 26 of the Constitution is engaged even in the application for the money order before the Court given that the application for such Order is intertwined with the order for special execution. The view that the Court took on the matter is that the Court holds a discretion to postpone the application for a money order in appropriate circumstances having regard to Section 172(1)(b) of the Constitution.

[46] The Concourt in *Gundwana* held that an evaluation of the facts of each case is necessary in order to determine whether a declaration that hypothecated

property constituting a person's home is declared specially executable. Mokgoro J in *Japhta v Schoeman; Van Rooyen v Scholtz* (2005) 2 SA 141 (CC) warned in relation to judicial oversight, that it would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. The Court in *Japhta* also held that if there are other reasonable ways in which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable.

[47] The Concourt in *Japhta* held that *"it would be unwise to set out all the relevant facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided. If the procedure prescribed by the Rules is not complied with, a sale in execution cannot be authorised. If there are other reasonable ways in which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the Rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless. It is for this reason that the size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor. However, this will depend on the circumstances of the case. As has been pointed out above, it may often be difficult to conclude that a debt is insignificant. In this regard, it is important too to bear in mind that there is a widely recognised legal and social value that must be acknowledged in debtors meeting the debts that they incur."* (at paragraphs [56] and [57]).

[48] There were no significant arrears in the present matter.

- [49] The facts show that the respondents did not significantly fall into arrears and have no history of arrears other than the immediate 2.8 months arrears upon which the application is predicated.
- [50] It will lead to an iniquitous result should I have granted the application given the negligible arrears of 2.8 months and where the facts suggest that the respondents may have been in a position to settle the arrears.
- [51] An execution order against the primary residence of the debtor should be the last resort and only when all other avenues to satisfy the arrears have been meaningfully exhausted. This was not the case on the facts before me. This should not be construed to mean that debtors who have put up their immovable property as security for the mortgaged loan agreement is absolved from their contractual obligations under the loan agreement. To order otherwise would be inconsistent with the legal position that contracts voluntarily concluded should be enforced if they and/or their enforcement is not contrary to public policy. However, this approach, in my view, strikes a balance between the contractual rights of the bank and the Section 26 rights of the debtors.
- [52] The court has a discretion to postpone the application which is a more common occurrence in these applications where the debtor is given the opportunity to settle the arrears, and which often has the effect that the bank is afforded the opportunity to also augment its application in one way or another. The execution orders are also often granted but suspended to all the debtor to make good the arrears.
- [53] I elected not to postpone the application. I exercised my discretion and dismissed the application in terms of Rule 46A(8) which provides that a court considering an application under the rule may refuse the application if it has no merit.
- [54] Standard Bank's contractual rights in terms of the mortgage loan agreement to seek satisfaction of the debt by way of an execution order remain

undisturbed. Although it has not succeeded by way of default judgment, it can still proceed to achieve the same result by way of the action which it has instituted (*ABSA Bank Ltd v Van Rensburg & another* 2014(4) SA 626 (SCA); *ABSA Bank v Mkhize & Two Similar Cases* 2014 (5) SA 16 (SCA)).

[55] I ultimately dismissed the application in the interests of justice.

[56] These are my reasons.

T J GOLDEN
Acting Judge of the High Court
04 November 2024