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

CASE NO: 010183/2022

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED:

DATE: 2/3/2025

SIGNATURE

In the matter between:

FIRST RAND BANK LIMITED

Plaintiff

And

MEYER ENGELBRECHT

First Defendant

(ID NO.: 8[...])

LORRAINE ENGELBRECHT

Second Defendant

(ID NO.: 8[...])

JUDGMENT

TOLMAY J

INTRODUCTION

1. The plaintiff issued summons against the defendants after they defaulted on the mortgage payment towards their home loan with the plaintiff. The

defendants entered appearance to defend and filed their plea. which included a special plea. The plaintiff filed a summary judgment application within the 15-day time period prescribed by Rule 32 of the Uniform Rules of Court. An affidavit opposing summary judgment was filed by the defendants. The plaintiff then filed an application in terms of Rule 46A, no response was received from the defendants in relation to the Rule 46A application.

2. The following issues to be determined by the Court:
 - a) The special plea raised by the defendants that the plaintiff failed to set out the requirements for Rule 46A in the particulars of claim.
 - b) Whether the alleged payment holiday the defendants insist was granted to them constitutes a *pactum de non petendo* and whether that would be a bar against plaintiff proceeding with the claim.
 - c) Whether the defendants' constitutional right to housing as envisaged by s26 of the Constitution will be affected should the order be granted.
 - d) Whether there was compliance with the provisions of s 129 of the National Credit Act as the defendants allege that they did not receive the s129 notice.

THE SPECIAL PLEA

3. The special plea is raised alleging that the plaintiff failed to comply with the provisions of Rule 46A in that the plaintiff failed, in the particulars of claim, to provide any evidence of the market value of the property, local authority valuation as well as the other information usually contained in the affidavit supporting the Rule 46A application. The simple question is whether the averments required in a Rule 46A application should be incorporated in the particulars of claim already.
4. The Full Court in *ABSA Bank Ltd v Mokebe and Related Cases*¹ (Mokebe), had to pronounce on the desirability of the practice of first granting a money judgment for the outstanding balance under a mortgage loan and then postponing the declaration of executability, held that the foreclosure

¹ (2018 (6) SA 492 (GJ).

application must be brought in conjunction with the monetary claim. Previously, the execution process formed part of the administrative process which was controlled by the judgment creditor with the assistance of the Sheriff and the Registrar². This led to abuse largely as financial institutions could sell debtor's residences for amounts far below their market level, a process that was prejudicial to homeowners. This led to the introduction of Rule 46A which contains provisions to enable oversight of the courts when exercising its discretion on whether an execution order should be granted and whether a reserve price should be set for the sale of execution. In *Mokebe*, it was said that the "*executionary relief has become an integral part of the lender's cause of action and is required to be set out when it makes its claim, or at least, it forms part of the relief when it makes a claim*³". *Mokebe* continues to say that "*..the money judgment is an intrinsic part of the cause of action and inextricably linked to the in rem claim for an order for execution, the latter which is non-existent without the money judgment. The default of the debtor and the money judgment are a precondition for the entitlement of the mortgagee to foreclose*⁴".

5. It was argued on behalf of the defendants that *Mokebe* provides support for the argument that the particulars of claim should contain information required by Rule 46A, if not, the summary judgment application should be dismissed.
6. I was also referred to the unreported judgment of *ABSA BANK Limited v Sawyer*⁵ where Van Eeden AJ said that "*a plaintiff is compelled pleading its cause of action in a combined summons, both circumstances entitling it to a cause of action to the monetary judgment and the circumstances entitling it to an order of executability*⁶". This conclusion is based on what was said in *Mokebe* in relation to the fact that the executionary relief forms an integral part of the order of executability. The learned Acting Judge proceeded to conclude

² Ibid at para 12.

³ Ibid.

⁴ Ibid at para 14.

⁵ Case no.: 2018/17056 Gauteng Local Division (Johannesburg).

⁶ Ibid at para 14.

that Rule 46 A does however not exclude a plaintiff's right to summary judgment, nor that a further application in terms of Rule 46A is required.

7. Reference was also made to another unreported decision *Munsami v Standard Bank and Others*⁷ where an application for the setting aside the sale in execution of an immovable property. The basis for the application was the alleged non-compliance of the bank with the provisions of Rule 46A prior to the sale and transfer. In that matter, the Rule 46A requirements and orders formed part of the particulars of claim. The Court in that case inter alia concluded that it was not necessary for the Bank to have launched a separate Rule 46A application as was contended for by the applicant⁸. The Court continued to say the following:

*"There is precedent in this division to the effect that, as long as appropriate steps are taken "by the lawyers drafting the pleadings in the matter effectively to marry the summary judgment procedure with that of rule 46", nothing in principle prevents a party seeking and obtaining orders in terms of Rule 46A in the course of a summary judgment application. As long as the relevant allegations are made in the particulars of claim and verified on oath in the summary judgment affidavit or in 36-32 36-32 another affidavit, there is no need for a separate Rule 46A application."*⁹

8. It is important to note that the purpose of particulars of claim is to set out a cause of action and to make out the averments which is necessary to sustain a cause of action. The particulars of claim does that. The Rule 46A application sets out the requirements to assist the court in exercising its discretion on whether an execution should follow. The summary judgment and Rule 46A are decided simultaneously as was held to be required in *Mokebe*. The defendant chose not to file an opposing affidavit in the Rule 46A application and therefore the Court should accept the content thereof. The special pleas must be dismissed.

⁷ Case no.: 2018/47106 Gauteng Local Division (Johannesburg)

⁸ Ibid at para 15.

⁹ Ibid at para 16. See also *Standard Bank of South Africa Ltd. V Lamont* 2022 (3) SA 537(GJ) paras 3-10.

THE PACTUM DE NON PETENDO

9. The defendants allege that a valid *pactum de non petendo* exists. The defendants rely for this on a payment holiday of 12 months allegedly granted during the Covid 19 epidemic. No details are provided regarding this agreement. What is evident from the papers is that the arrears as at date of summons was the amount of R134 761.18. In terms of the founding affidavit in support of the Rule 46A-application, the last payment on the account was made on 29 August 2022 in the amount of R20 000.00. The arrears in increased to R186 981.42. It is trite that sufficient details must be provided to assist the court in determining whether a *bona fide* defence exist. This defence is the epitome of bald, vague and sketchy and cannot be accepted by the Court.

NON-COMPLIANCE WITH SECTION 129

10. It is further alleged that the plaintiff failed to comply with the provisions of section 129 of the National Credit Act, 34 of 2005 ("the Act") as the defendants never received the section 129 notice and as such the Defendants were unable to respond to, or act in terms of, such notice.
11. The defendants chose as their chosen address 3[...] G[...] S[...] Crescent, Glen Erasmia, Extension The section 129 notice was dispatched to the nominated address. It is trite that there is no obligation on the plaintiff to ensure actual receipt or service of the section 129 notice, what is needed is that same be dispatched to the nominated address and be received at the correct Post Office and these requirements were met. The defendants importantly fail to state what steps they would have taken had they received the notice, what their financial position was at that stage and whether they would have been eligible to exercise their rights in terms of the National Credit Act.

12. The plaintiff duly complied with the provisions of section 129 of the Act as dictated in *Sebola and Another v Standard Bank of South Africa Ltd and Another*¹⁰ and further elaborated in *Kubiyana v Standard Bank of SA Ltd*¹¹.

THE RIGHT TO HOUSING

13. I agree with the argument on behalf of the plaintiff that section 26 of the Constitution provides for the right to adequate housing, it could never have been the intention of the Constitution that such right would include the right to remain in occupation of a mortgage property where there is a breach.

CONCLUSION

14. The defendants did not raise any *bona fide* defence. The plaintiff met all the requirements for a summary judgment and complies with Rule 46A. I am satisfied that the proposed reserve price is fair and reasonable.

The following order is made:

1. Payment in the sum of R 2 840 266.90 (TWO MILLION EIGHT HUNDRED AND FOURTY THOUSAND TWO HUNDRED AND SIXTY-SIX RANDS AND NINETY CENTS).
2. Payment of interest on the above amount at the rate of 8.5% (EIGHT POINT FIVE PERCENT) per annum calculated and capitalised monthly in advance from 03/07/2022 to date of payment.
3. An order declaring the defendants' immovable property:
ERF 1[...] G[...] E[...] 1[...] TOWNSHIP
Registration Division: I.R
Province of Gauteng
Measuring 672 (SIX HUNDRED AND SEVENTY TWO) square meters
Held by Deed of Transfer No. T55179/2016

Subject to the condition herein contained and more especially subject to the condition imposed in favour of Gleneagles Estate Home Owners Association NPC Registration Number 2006/008247/08 (situated at 3[...] G[...] S[...])

¹⁰ 2012 (5) SA 142 (CC).

¹¹ 2014 (3) SA 56 (CC).

Cresent, Glen Erasmia ext 14) mortgaged under Mortgage Bond No. B[...] to be specifically executable for the said sum plus costs.

4. Authorising the Registrar to issue a warrant of execution for the attachment of the Defendants' immovable property.
5. Authorising the Sheriff of the Court to execute the warrant of attachment.
6. A reserve price in the sum of R 2 658 001.00 is set.
7. Attorney and client costs as provided for in the mortgage bond.

R TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

For Applicant: Adv J Minnaar

For Respondent: Adv V C Viljoen

Date of hearing: 4 February 2025

Date of judgment: