

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

Case Number: **37787/2018**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 20/03/2025

SIGNATURE

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

APPLICANT

and

SELBY LETSEMELO MOKGOTHO

FIRST RESPONDENT

PALISA FLORENCE MOKGOTHO

SECOND RESPONDENT

REASONS IN TERMS OF RULE 49

MOTHA, J

Introduction

[1] Following the order granted on 8 February 2024 by Kumalo J and in terms of prayer one, the first respondent was ordered to deliver his discovery affidavit within 10 days from the date on which the order was served by email on s[...], as agreed between the parties. Secondly, the order stated that should the first respondent fail to comply with the order set out in prayer one *supra*, the applicant was granted leave

to approach the court on the same papers, duly supplemented in so far as is necessary, to seek that the first respondent's defence be struck and that judgment be granted in favour of the applicant as prayed.

[2] Thirdly, a punitive cost order was awarded against the first respondent.

The parties

[3] The applicant is the Standard Bank of South Africa Limited is a limited liability company registered and incorporated in accordance with the company laws of the Republic of South Africa and a registered credit provider.

[4] The first respondent is Selby Lethsemelo Mokgotho an adult male.

[5] The second respondent is Palisa Florence Mokgotho an adult female.

Facts

[6] During April 1996 and 17 April 1997, the applicant and the first and second respondents entered into two written home loan agreements in terms of which the applicant lent and advanced an amount of R 76 200.00 and R 35 639.00. It was agreed that the loan agreements would endure for 240 months, and the respondents would pay monthly installments to the applicant, initially, in the cumulative amount of R 803.66.

[7] The respondents' indebtedness to the applicant was secured by the registration of mortgage bonds over the immovable property described as Erf 7[...], B[...] extension 2 township, registration division I. R., Gauteng Province, in extent 1 895 (one thousand eight hundred and ninety-five) square meters held under deed of transfer T21791/1998. The respondents failed to make payments of the full monthly installments under the loan agreement and consequently were in breach.

[8] On 16 March 2018, the applicant's attorneys addressed letters of default and statutory notices in terms of s129(1) of the National Credit Act (NCA) to the respondents. The letters required the respondents to remedy their breach by making payment of all the arrears and overdue amounts, failing which the applicant would

enforce its rights in terms of the agreement and recover the full balance outstanding under the loan agreements together with interests and costs. The letters were sent by way of registered mail and by the sheriff and elicited no response from the respondents.

[9] On 30 May 2018, a Combined Summons was issued and served on the respondents on 6 June 2018. The said summons was served on the second respondent. On 8 June 2018, the first respondent entered an appearance to defend. On 29 June 2018, the applicant delivered an application for summary judgment. This application preceded the amendment to Uniform Rule 32 which came into effect on 1 July 2019.

[10] On 19 July 2018, the first respondent filed his plea under the style “plea, exception, notice to strike out, with a counterclaim”. He also filed an application for condonation for the late filing of his answering affidavit. On 27 February 2019, the matter appeared before the honourable Madam Justice Kubushi J and an order postponing the application for summary judgment *sine die* was granted. The applicant was also granted leave to file a supplementary affidavit in compliance with the amended Rule 46A.

[11] In March 2019, the first respondent instituted an application for leave to appeal the order dated 27 February 2019. On 23 March 2020, the first respondent’s application for leave to appeal was dismissed with costs. The application for summary judgment appeared before the honourable Acting Justice Van Rooyen AJ who granted the first respondent leave to defend the action.

[12] On 20 January 2021, the applicant served its notice in terms of Rule 35(1), (6), (8) and (10) upon the first respondent by way of email, as agreed between the parties. In terms of the said subrules, the first respondent was called upon to, *inter alia*, discover on oath all documents in this matter, make available for inspection such documents, specify in writing the dates and parties to any documents intended for use at a trial and to produce at the hearing such documents.

[13] On 8 September 2022, the applicant delivered its discovery affidavit. On 7 November 2022, the first respondent was called upon to deliver his discovery affidavit within 15 days and he failed to do so. On 3 April 2023, the applicant instituted an application in terms of Rule 35(7), wherein the applicant sought to compel the first respondent to deliver his affidavit within 10 days from the order, failing which the applicant sought leave to approach the court, on duly supplemented papers, for an order striking out the first respondent's defence and that judgment be granted in favour of the applicant. This application was served upon the first respondent by way of email, as agreed between the parties.

[14] Having filed his notice of intention to oppose, the first respondent requested, by way of email correspondence, a two-month postponement to afford him time to file opposing papers. Accordingly, the matter which was supposed to be heard on 23 August 2023 did not proceed. The application was set down for 16 November 2023, and again it did not proceed at the first respondent's request. Following the first respondent's failure to deliver his discovery affidavit or opposing papers despite several indulgences afforded to him, the applicant proceeded and set the matter down for hearing on 8 February 2024.

[15] The matter appeared before the Honourable Justice Khumalo J, who granted the application. These are the circumstances under which this matter appeared before this court on the unopposed motion roll. Despite having received the order, the first respondent refused or failed to comply with the court order. It is trite that court orders are binding and must be obeyed until formally set aside by a competent jurisdiction, regardless of whether a party believes the order is valid or not. Having failed to comply with the order and instead of obeying the court order, the first respondent asked for the reasons for the order of 8 February 2024. On 24 July 2024, the reasons were delivered. To date, the first respondent has not taken any further steps. To my mind, the first respondent is on a campaign to abuse the court process. In *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others*¹, the court held at paragraph 40:

¹ *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (1) SA 327 (CC).

“Abuse of process concerns are motivated by the need to protect ‘the integrity of the adjudicative functions of court’, doing so ensures that procedures permitted by the rules of the court are not used for a purpose extraneous to the truth-seeking objective inherent to the judicial process”

[16] The first respondent was served with the notice of set down for today’s matter and he chose not to attend court. Now that the order is made, he wants the reasons for the order. Sadly, he fails to realise that he is saddling the second respondent with unnecessary expenses. The reason for the striking out of the first respondent’s defence is his failure to comply with the court order of 8 February 2024. Consequently, before this court, there is no opposition to the Combined Summons issued, in May 2018, for the arrears in the sum of R22 951.18. The arrears were R82 580.07 when the supplementary affidavit in support of summary judgment was filed. As of 13 January 2025, the respondents were in arrears in the amount of R225 204.64 in terms of the certificate of value.

[17] When dealing with default judgment in terms of 46A, the court examines a number of factors such as, *inter alia*:

- Whether the mortgaged property is the debtor’s primary residence
- The circumstances under which the debt was incurred
- The arrears outstanding under the bond
- The arrears on the date of default judgment
- The total amount owing in terms of which execution is sought
- The debtor’s payment history
- Whether any possibilities that the debtor’s liabilities to the creditor may be liquidated within a reasonable period without having to execute against the debtor’s residence
- The proportionality of prejudice the creditor might suffer if the execution were to be refused compared to the prejudice the debtor would suffer if the execution proceeded and the debtor lost his/her home
- The debtor’s reaction to notices such as section 129 of the NCA
- Whether the property is in fact occupied by the debtor

[18] In the matter of **Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others**², the court said the following:

“Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.”

[19] Furthermore, the court is mindful of the dictates of section 26(1) of the Constitution. Dealing with this section, the court in the matter of **Standard Bank of South Africa Limited v Saunderson and Others**³, said

“Even accepting for present purposes that execution against mortgaged property could conflict with section 26(1) such cases are likely to be rare. It is particularly hard to conceive of instances where a mortgagee’s right to reclaim the debt from the property will be denied altogether; and it is therefore not surprising that the Constitutional Court noted in **Jaftha** that in the absence of abuse of court procedure – and none is alleged here – a sale in execution should ordinarily be permitted against a home bonded for the debt sought to be reclaimed. Nor can the approach differ depending on the reasons the property owner might have had for bonding the property, or the objects on which the loan was expended.”

[20] The arrears have increased exponentially. This is an indication that the first respondent is not honouring his obligation of repayment. In the matter of **Changing Tides 17 (Pty) Ltd NO v Frasenbourg**, the court said;

“[51] In making the rule 46A assessment, the prospect of the judgment debt being satisfied without recourse to the mortgaged property has to be investigated. If a debtor is substantially in arrears and fails to place information before court pointing to the existence of other assets from which the

² 2005 (2) SA 140 (CC) at 162 para [58]

³ [2006] 2 All SA 382 (SCA) at 389 para [19]

indebtedness might be satisfied, a court would generally be justified in proceeding on the basis that execution against the mortgaged property is the only means of satisfying the mortgagee's claim."

[21] I am satisfied that a proper case has been made out for the order for default judgment.

Reserved price

[22] I considered that the local authority valuation of immovable property from the rates and taxes is one million rands. The applicant seeks a default judgment against the first respondent in the amount of R97 477.78. I deducted that amount and arrived at a reserved price of nine hundred thousand rands. To afford the first respondent another opportunity to settle the arrears, I suspended the operation of the order for 6 months.

M P MOTHIA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicant:

ADV M RAKGOALE instructed by Vezi
De Beer Inc.

No appearance

For the Respondent:

Date of hearing: 14 March 2025

Date of reasons: 20 March 2025